

IN THE COURT OF APPEAL OF THE
REPUBLIC OF BOTSWANA

Criminal Appeal No. 11 of 1989

In the matter between:

XWII XIXAE Appellant

vs.

THE STATE Respondent

L. Z. Ngcongco for the Appellant
N. Chadwick for the Respondent

J U D G M E N T

Coram: A. N. E. AMISSAH, JP.
B. A. DOYLE, JA.
W.H.R. SCHREIENER, JA.

SCHREINER, JA:

The Appellant and two other Namibians, Xixai Kgao and his brother Kgao Xwii came from Namibia to Xaixai in Botswana in early August 1988 to buy sugar. (Because of the similarity in the names of some of the witnesses I will refer to them by their number in the record. Xixai Kgao is PW4 and Kgao Xwii is PW5). Having done then business they returned on the following day to Namibia. Shortly thereafter reports were made to the authorities about the disappearance of a woman, Xwae Xuma, whose body was later found in the bush near the path which leads to the Namibian border. The only external injuries or wounds found by a Medical Officer at the Maun Government Hospital who examined the body and conducted a post-mortem investigation were superficial scratches which covered the body. No internal injuries were found apart from a broken neck. The possibility of the neck having been

broken by a blow from a club was excluded because there was no visible abrasion in the area of the neck. The doctor said that it is very doubtful whether hitting the neck with a blunt stick could have caused the neck to break without an abrasion. The neck could have been broken by a fall in which the movement was "on the back with the head touching the ground." The doctor stated that, as far as bruises were concerned, they would be difficult to see if the body had been exposed to the heat for days. No mention of bruises is to be found in the post-mortem report.

The Appellant, PW4 and PW5 were suspected of the offence and arrested. Later the two brothers were held in terms of the Immigration Act and gave evidence for the State. PW4 gave two versions. His first statement under oath was to the effect that on the return to Namibia nothing untoward happened. The deceased was not even there. The prosecutor then asked for an adjournment because he was "having some difficulty" with the witness. On his return to the witness box on the following day he explained that he had been assaulted by the Appellant during the time when he was in prison and told by him to exculpate the Appellant. He then told a story of the Appellant assaulting the deceased with his fists and then taking PW5's club from him and hitting the deceased with it on her forehead and "the back of her waist." After the blow to the forehead the deceased fell down on her left side and the witness ran away.

PW5 told a not entirely dissimilar story. He claims to have been very drunk. The Appellant, so he said, grabbed the club from him and hit the deceased. She fell on her stomach and the Appellant hit her on the back and she died there. This version would seem to exclude the possibility that the cause of the broken neck was a backward fall

in which the head hit the ground first, a matter raised by the doctor in his evidence.

It seems to me therefore that, though it is very likely that the Appellant, PW4 and PW5 were present when the deceased met her death, the medical evidence renders it unlikely that it occurred in the way deposed to by the two brothers and something more was required to identify the Appellant as being the person responsible.

Mr. Chadwick who argued the appeal for the State sought to rely on other facts which tended to show that it was the Appellant who must have been responsible. He pointed to the fact that there were blood stains on the trousers of the Appellant, a fact which the Appellant had at first denied. He relied heavily on the statement by the Appellant to the Investigating Officer that some person whom he did not identify had attacked the deceased and pulled her aside and killed her. At that stage he made no allegations against PW4 or PW5. This story was inconsistent with what he had told the District Commissioner. I think that it is a fair conclusion from this and other evidence that the Appellant lied and his statements cannot be given any weight. The fact that he lied may be taken into account in certain circumstances, but it must always be borne in mind that it is for the State at the least to establish some secure basis in fact before untruths by an accused person become relevant.

It seems therefore that the factual matrix in the present case is so unstable that it would be dangerous to convict.

An approach which leads to the same conclusion involves a consideration of whether the necessary facts to prove the crime of murder have been established. By Section 207 of the Penal Code "a person who of malice aforethought causes the death of another person by

an unlawful act or omission is guilty of murder." "Malice aforethought" is deemed to be established by evidence proving, inter alia, an intention to cause death of or do grievous harm to any person (Section 209 (a). The offence of doing grievous harm is provided for in Section 235. "Grievous harm" means any harm which amounts to a maim or dangerous harm or which is likely to injure health, or which extends to permanent disfigurement or serious injury to any external or internal organ, membrane or sense.

The evidence regarding the injury to the forehead of the deceased which is the only possible wound which, on the evidence, could have caused the deceased to fall backward and break her neck is conflicting and unsatisfactory. The doctor did not notice it at all and he reports that there were no internal injuries which presumably would include the inside of the head. Police Officer Sheleng refers to a wound which was not a cut but which "was swollen and there was blood coming out of it." It was a wound and not only a swelling. Dr. Serg. Seiphethheng saw a "brown blow" (bruise) on the forehead. Indeed, the Sergeant observed that the whole body was covered with bruises and he was talking about the position at a time when he, the Sergeant, was with the Doctor. For what it is worth PW5 said that the injuries to the deceased which he noticed on the day after her death were on the legs and on the body. Under cross-examination he was asked whether there was a bruise on the forehead of the deceased and he replied "There was a swelling." He said that the blood on the club came from wounds on the deceased which "were on her sides" and that no blood came out of the swelling on the forehead which was "just a swelling."

On this evidence it would be a bold thing to find beyond reasonable doubt that the Appellant had an intention to do grievous

harm. The blow to the forehead, if indeed there was one, may have been a relatively light one in which case it would not have constituted "grievous harm" as defined in the Penal Code and it must be assumed that the blow is a manifestation of the state of mind of the person inflicting it.

On this approach too the conviction cannot stand.


A matter which was raised in the heads of argument for the Appellant but which, because of the prima facie view of the members of the Court on the merits of the appeal, was not dealt with in argument concerned the Interpreter, one Simon Tuvare. He was the employer of the husband who was a witness in the case and the brother of one Maria Tuvare who was also a witness. His name crops up in the evidence in circumstances which would indicate that he probably played some part in assisting in the investigation of the case. He gave a statement to the police but it was decided not to call him.

The reason given for using Simon Tuvare as an interpreter was that there was no Court interpreter who could speak Sesarwa available and that it was difficult to find such a person. The attorney for the Appellant apparently agreed to using Tuvare as the interpreter.


The Court has not heard argument and not considered whether the appointment of Tuvare vitiates the proceedings and what the effect of the consent by the Appellant's representative might be. However it must be stressed that the State should make every effort to avoid using as an interpreter a person who by reason of relationship with a witness, involvement in investigating the offence charged or any other cause might not be suitable as an interpreter. The role of the interpreter is of vital importance and often the presiding officer and

counsel are not in a position to form any view concerning the manner in which he is carrying out his duties.

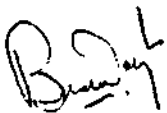
The appeal succeeds and the conviction and sentence are set aside.
GIVEN AT LOBATSE this ^{4th}..... day of July, 1989.


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W. H. R. SHCREINER
Judge of Appeal

I agree


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A. N. E. AMISSAH
Judge President

I agree


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B. A. DOYLE
Judge of Appeal