

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Criminal Appeal No. 8 of 1991

In the matter between:

MMUSO RANNATSHE	Appellant
versus	
THE STATE	Respondent

CORAM: A. N. E. AMISSAH, J.P.,
T. A. AGUDA, J.A.,
W. H. R. SCHREINER, J.A.

Miss P. P. S. Chibanda for the Appellant
Mr. S. A. Afful for the Respondent

J U D G M E N T

AGUDA, J.A.:

On May 7, 1990, the appellant appeared before the High Court sitting in Lobatse on a charge of murdering one William Funyana Moyo in Gaborone on or about September 30, 1989, contrary to section 202 of the Penal Code, Cap. 08:01. He pleaded not guilty. The prosecution called five witnesses in addition to the admitted evidence of some other witnesses and then closed its case. The appellant gave evidence on his own behalf and closed his own case. After addresses by counsel for the appellant as well as for the State on May 5, 1990, the learned trial Judge, Gyeke-Dako, J., adjourned for judgment. In the written judgment delivered on November 2, 1990, the learned trial Judge convicted the appellant of murder with extenuating circumstances. He thereafter sentenced the appellant to imprisonment for seven years to take effect from September 30, 1989, the day he was apprehended and kept in

custody. Twenty days later on November 22, 1990, the appellant gave notice of appeal against his conviction.

The facts as to how the appellant came to kill the deceased as accepted by the learned trial Judge are as follows. The deceased on the night of September 29/30, 1989, went to attend a discotheque at the Kariba Bar in Gaborone. The discotheque hall which was on the first floor of the building was full of merry-makers, being the night of the celebration of independence. As would be expected many of those present in the hall consumed varying quantities of alcohol. As the dancing and merry-making came to an end between 3 and 4 a.m., the merry-makers came down the staircase to the entrance to the bar. In so far as the deceased was concerned, he came down with his friends Nicholas Tony, Lovemore Tony and Michael Dube. He was in front followed by these friends in the order stated here. When they got into the open just in front of the entrance they saw the accused come straight at the deceased. After some altercations between the deceased and the appellant a fight ensued between the two of them. It was in the course of that fight that the appellant drew out a knife which he had been carrying and stabbed the deceased, who was unarmed, with it. The deceased fell and started bleeding. He was immediately taken to hospital where he subsequently died. According to the medical report, the deceased suffered 13 injuries including one which the doctor described as a stab injury 1.3cm x 2.8cm x cavity deep on the left side of the chest obliquely placed 1cm from the midline on the 4th and 5th costal cartillages, the direction being inwards and slightly upwards, and which the

doctor said was the cause of death. On the evidence, the learned trial Judge found, rightly in my view, that the identity of the appellant was not in doubt nor was it even in doubt that it was he who inflicted the fatal blow on the deceased. Indeed the appellant admitted that it was he who inflicted the blow but he did so because he was under attack by a mob and he had to wrest the knife from the deceased. The learned trial Judge rejected his evidence, and I have no reasons to hold that the learned Judge *a quo* was in error in so doing.

In arguing the appeal before this court counsel on behalf of the appellant submitted that the learned trial Judge misdirected himself when he held that it must be inferred from the harm caused by the appellant to the deceased, that is, the stab wound described earlier in this judgment, that the appellant must be deemed to have intended to kill the deceased or at least to do him grievous bodily harm. According to learned counsel, such inference smacks of constructive malice, and constructive malice is not, in the submission of counsel, part of our law. In support of this learned counsel sought refuge in the English case of Hyam v. DPP [1955] AC 55; [1974] 2 All ER 41.

I would like to state here what has become trite, namely, that the paramount duty of the courts of this country when confronted with the interpretation of any statutory provision is to utilise the techniques of interpretation of which the courts are learned to interpret the provision as it is. The court has no business to call in aid the decisions of courts of any other jurisdictions except where the statute of the other jurisdiction is in *pari materia* with the provision of our statute which

calls for interpretation. Even where this is so, our courts can only do so in the cases in which there have not been any binding interpretation of the provision by our courts.

Our courts may of course call in aid judicial decisions of other jurisdictions in other circumstances as a means of aiding them in their primary duty of interpreting the provision of our statute.

The decision in the cause Hyan v. DPP [1955] AC 55, [1974] 2 All ER 41 cited by Counsel was based upon an interpretation of the English Criminal Justice Act, 1967, section 8 which says that -

"A court or jury, in determining whether a person has committed an offence,

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable result of those actions ..."

Now on the other hand section 202 of our Code says that "any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder", and section 204 defines "malice aforethought" as including -

"an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not."

It is obvious that under our law when a person intends to and does grievous harm to another person which results in death, he is guilty of murder. The prosecution need not prove that he intended to kill the victim; it is sufficient if it is proved

that he intended to do grievous harm to the victim. Under our law, a court when determining whether a person has committed the offence of murder is bound in law to infer that he intended to cause the death of the victim if it is proved that he intended to do grievous harm to him. The intention to do grievous harm can, and sometimes has to be inferred from the consequence of the act of the accused. The Code, Section 2, defines "grievous harm" as -

"any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense."

The Criminal Codes of other Commonwealth countries contain provisions which are similar if not entirely in *pari materia* with those of our Penal Code quoted above. For example, the Nigerian Criminal Code, in its section 316, says that -

"a person who unlawfully kills another under any of the following circumstances, that is to say -

- (1) if the offender intends to cause the death of the person killed, or that of some other person;
- (2) if the offender intends to do to the person killed or some other person some grievous harm; ...

is guilty of murder."

The definition of "grievous harm" in that Code, section 1, is in similar terms as "grievous harm" under our Code. The West African Court of Appeal in numerous cases decided under that Code interpreted the provisions as to the definition of murder which as can be seen are similar to ours. In the case of R. v. Maye Nungu (1953) 14 WACA 379, the appellant struck his brother

with an axe. In striking him, he turned away the cutting edge. From this it was argued that he could have had no intention to kill. However the West African Court of Appeal rejected that argument and held that the appellant was rightly convicted since he must have intended to cause the deceased at least grievous harm bearing in mind that the haft of the axe which was used was heavily weighted as it was with an iron head, and that it inflicted severe wound on the deceased. In R. v. Adi (1955) 15 WACA 6, the appellant had pleaded that he stabbed the victim in the abdomen "to make him feel pain". The same court held that this brought the case within the provision of Section 316 (2) of the Code quoted above. In R. v. Aliechem (1956) 1 FSC 64, the appellant pleaded that the deceased was a thief caught in the night and that he had dealt him a severe blow in the abdomen with a machet not intending to kill him, but "so that everyone would know him as a thief". The Nigerian Federal Supreme Court held that the appellant was guilty of murder for indeed he must be held to have intended to cause the deceased grievous harm.

With all due respect, I am in agreement with these decisions and I believe they represent the correct statements of the law also under our Penal Code. I therefore have no doubt that the Judge *a quo* was right when he held that by thrusting the knife into the most vulnerable part of the deceased so as to penetrate deeply into the body to cause extensive damage to the pericardium and the right ventricle of the deceased, the appellant must be deemed to have intended to kill the deceased or at least to do him grievous bodily harm.

