

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

CRIMINAL APPEAL NO. 28 OF 1993
HIGH COURT CRIMINAL TRIAL NO. 61 OF 1992

In the matter between:

BAKER LEBALLO

Appellant

and

THE STATE

Respondent

Mr. O. Moupo for the Appellant
Mrs. L.I. Dambe for the Respondent

J U D G M E N T

CORAM: AMISSAH J.P.
LORD WYLIE J.A.
STEYN J.A.

AMISSAH J.P.:

The appellant was convicted in the High Court on four out of ten counts with which he was charged. The six counts on which he was acquitted and discharged were counts of robbery. Of the four counts on which he was convicted, one related to unlawful possession of an arm of war; the second, to unlawful possession of ammunition of war; the third was on entering Botswana through an ungazetted point of entry and the fourth and final conviction was on making a document without lawful authority.

Upon conviction, the sentence imposed for the two counts of unlawful possession of the arm and ammunition of war was 5 years imprisonment on each count; five years imprisonment being the minimum sentence prescribed by law for each of these offences. On the charge of entering Botswana through an ungazetted point, the learned Chief Justice took into account the fact that the appellant pleaded guilty and therefore declined to impose a sentence, but merely gave the appellant a warning "in the hope that in future, [the appellant] would obtain a proper passport and enter through the normal

channels". With regard to the making of a document without lawful authority, the learned Chief Justice imposed a sentence of six years imprisonment. The severity of the sentence was because the document in question was a Botswana passport, and the Chief Justice took "a very serious view" of the offence.

There was an appeal against the conviction on unlawful possession of arms and ammunition on the ground of self-misdirection by the learned Chief Justice in that he unduly relied on the evidence of the expert called on the nature of the arms and ammunition. The point made was that unlawful possession of arms and ammunition of war by law attracts much more severe punishment than possession of arms and ammunition which do not qualify as such. And, the prosecution had set out to prove that these arms and ammunition in this particular case were arms and ammunition of war. Counsel contended that previous authority of this Court obliged trial Judges to go beyond the statement of expert witnesses to inquire into the intended use of the weapon by the person charged with possession of it before deciding that it was an arm of war. Indeed, there are occasions when such inquiry may be necessary. Those occasions are indicated in the definition of arms and ammunition of war in the Arms and Ammunition Act [Cap 24:01]. The definitions which appear are as follows:

"'Arms of war' means artillery of all kinds, apparatus for the discharge of all kinds of projectiles, explosive or gas-diffusing, flame-throwers, bombs, grenades, machine-guns and rifled small-bore breach-loading weapons, or such arms as may be prescribed but does not include sporting rifles, or personal or other weapons or apparatus not intended for war like purposes;

'munitions of war' means ammunition for use with arms of war."

Thus, the only time the intention of the person found in possession of an arm becomes a matter for investigation is met when the weapon falls outside any of the categories specifically designated as an arms of war by the

definition, and is not a sporting rifle, but comes within the residual category of "personal or other weapons or apparatus not intended for warlike purposes." In that case, if such personal weapon or apparatus is shown to be intended for a warlike purpose, it is an arm of war but, if the intention is the contrary, then the weapon is not an arm of war.

In this case, the expert called by the prosecution expressly stated that the weapon in question was a rifle small-bore breach loading weapon. That is one of the weapons specifically designated by the Act as an arm of war. That evidence was neither contradicted nor challenged. The question of the intended use of the weapon therefore, did not arise. In our view, the appeal against conviction on this ground was misconceived and we accordingly dismiss it.

The appellant also appealed against sentence on the conviction for making the passport without authority. The case made on his behalf in this respect was that however serious that offence was, it was not as serious as the possession of arms and ammunition of war because while the latter might pose a threat to the security of the State or a threat to the safety of its citizens, the former, namely, forging a passport, did not. On the conviction for possession of an arm and ammunition of war which is apparently the more serious charge, the learned Chief Justice had imposed the sentence of five years imprisonment, the minimum penalty prescribed by law for such offences. In the case of the conviction for the forgery of the passport, by comparison the less serious charge, the sentence was heavier. It is on this basis that Counsel for the appellant prayed that we consider a reduction in the sentence in respect of the making of the document without lawful authority.

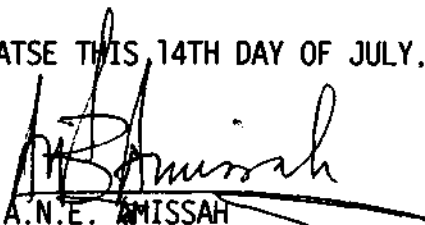
We agree with the learned Chief Justice that making a passport without lawful authority is a serious offence which ought to be dealt with by an appropriate sentence. But we find ourselves having some sympathy with the

argument of the appellant in this case. Having regard to the relative seriousness of the offences of which the appellant was convicted, and the fact that the offences of possession of an arm and ammunition of war were punished by the minimum sentence open to the Court a quo to impose, we are inclined to the view that the sentence of six years for the making of a passport without lawful authority was unduly severe.

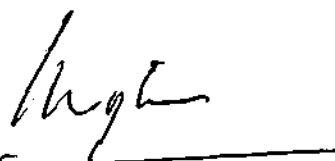
In the circumstances we set aside the sentence of six years for that offence and substitute a sentence of three years imprisonment, to run concurrently with the sentence of five years each on the conviction for unlawful possession of an arm and ammunition of war, from the date the appellant was taken into custody.

Save as aforesaid the appeal is dismissed and the convictions and sentences confirmed.

DELIVERED IN OPEN COURT AT LOBATSE THIS 14TH DAY OF JULY, 1994.


A.N.E. AMISSAH
JUDGE PRESIDENT

I agree


RT. LORD N. WYLIE
JUDGE OF APPEAL

I agree


J. H. STEYN
JUDGE OF APPEAL