

IN THE COURT OF APPEAL FOR BOTSWANA
HELD AT LOBATSE

Criminal Appeal No. 26/2000
High Court Criminal Trial No. F2/97

In the matter between:

ROBERT MTHULUSI MOYO
CLEVER MOYO @ SIBANDA

1st Appellant
2nd Appellant

And

THE STATE

Respondent

Mr. I. Bahuma for the Appellants
Mrs R.S. Segokgo for the Respondent

J U D G M E N T

CORAM: AMISSAH P.
KUMLEBEN J.A.
ZIETSMAN J.A.

KUMLEBEN J.A.

The first and second appellants were convicted in the High Court of murder with extenuating circumstances and robbery. For the murder they were sentenced to 15 and 10 years of imprisonment respectively and for the robbery in each case a sentence of 10 years imprisonment was imposed. An appeal was noted to this court against both the convictions and the sentences.

During argument it was conceded that the convictions on the robbery charge were unassailable; that the sentences for this offence could not be challenged; and that in the case of first appellant the conviction of murder was correct. These concessions on the part of Mr. Bahuma, who appeared for the appellants, were correctly made. In the result the sole issue on appeal is whether the second appellant was also guilty of murder. (I shall for convenience refer to the first appellant as "Moyo" and the second appellant as "the appellant".) In as much as he was not the one who inflicted the fatal stab wound, his conviction was based on the application of the doctrine of common purpose.

The background facts and those pertinent to the question of common purpose are the following. On the night in question the appellant and Moyo left a shebeen in the company with two others, who featured as state witnesses. As they proceeded along a road the deceased approached from the opposite direction. When he was about to pass Moyo he grabbed the deceased, tripped him and pinned him to the ground. In the course of assaulting him Moyo produced a knife and stabbed him once. Whilst he was thus engaged, the appellant searched the deceased and P5.00 was taken off him. He managed to break free and run away. Moyo chased after him but the appellant did not take part in the pursuit. Instead he rejoined the other two and remarked to them that he did not know why Moyo had "persisted in trying to follow him [the deceased]" After a while Moyo caught up with the other three who had continued on their way. He had a pair of shoes taken from the deceased. On the following day the body of the deceased was found some distance from the

scene of the robbery in which the appellant had been involved. It was lying in a pool of blood. Two stab wounds had been inflicted.

There can be no doubt that the appellant's participation in the robbery ceased at the stage when he rejoined the state witnesses. He had no part in what must be regarded as a second act of robbery. He was in fact perplexed that Moyo had gone after the deceased. The appellant thought the robbery was over. The loot, such as it was, had been procured.

In these circumstances counsel for the respondent quite correctly accepted that a conviction of murder on the basis of common purpose could only be sustained if the fatal wound was inflicted during the course of the first robbery. In this regard the evidence of Dr. Kombe, who conducted the post mortem examination is critical. His report was admitted in evidence. The doctor was not called as a witness to amplify it or to be questioned on it. It must therefore be taken at face value. It reflected two stab wounds: one superficial and one lethal. It is unnecessary to refer to them in any detail. The crucial and decisive statement in the report is that the fatal stab wound would have resulted in instant death: "the deceased was stabbed on the back and died on the spot." Even apart from the evidence of the blood found where the deceased ultimately came to rest, the inference is inescapable that he met his death in the course of what I have termed the second robbery. Accepting the assertion that he died "on the spot," as one must though it is no more than an inference based on primary facts not disclosed,

it would not have been possible for the deceased, if fatally stabbed during the joint robbery, to reach the place where his body and blood was found.

On the evidence one must therefore conclude that the appellant in no way identified himself with the murder and that the appellant's common objective to rob ceased before the fatal stabbing took place. Thus the evidence did not prove the guilt of the appellant on the murder charge.

I must revert to the sentences. Counsel for the respondent very fairly conceded that the imposition of the sentences, mandatory as regards the robbery convictions, should be antedated to the date of the arrest of the appellants as this period of incarceration was not taken into account when the sentences were passed. The appellants have been in custody since their arrests in the case of Moyo on 25 June 1995 and the appellant on 5 August 1996.

In the result:

1. The appeal of first appellant (Robert Moyo) against his conviction on both counts is dismissed.
2. The appeal of second appellant (Clever Moyo) against the conviction of murder (count 1) is upheld but the conviction on (count 2) and the sentence imposed are confirmed.
3. The sentences on counts 1 and 2 in reference to first appellant (Robert Moyo) and count 2 in reference to second appellant (Clever Moyo) are

confirmed but they are to be antedated respectively to 25 June 1995 and 5 August 1996.

The Registrar is requested to ensure that the antedating of these sentences is brought to the attention of the appropriate prison authority.

Delivered in open court at Lobatse on July 2000


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M. KUMLEBEN
[JUDGE OF APPEAL]

I agree:


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A.N.E. AMISSAH
[PRESIDENT]

I agree:


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N. ZIETSMAN
[JUDGE OF APPEAL]