

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Criminal Appeal No 4 of 2000
High Court Criminal Trial No [F]8 of 1999

In the matter between

GODIRWANG OSENTSE

APPELLANT

Versus

THE STATE

RESPONDENT

Mr Attorney M Kaang for the Appellant
Mr Attorney K Sebotho for the Respondent

J U D G M E N T

CORAM: Amissah P.
Korsah J.A
Friedman J.A.

FRIEDMAN J.A.

Appellant was charged in the High Court before Gaelele J with the murder of his brother Osetse Osentse. He pleaded not guilty but was found guilty of murder with extenuating circumstances and sentenced to 12 years imprisonment. He now appeals against his conviction and sentence.

At the trial, after appellant had pleaded , his counsel informed the court that he was prepared to admit all the evidence of the prospective state witnesses as set out

in the summary which the state had prepared, with one exception: appellant was not prepared to admit the summary of the evidence of P.W.3. In regard to that witness, counsel for the State informed the court that she had not been found and there was no hope of finding her. However, in the light of the admissions made by appellant, the state closed its case without calling any witnesses.

Appellant testified in his defence. His evidence may be summarized as follows. On the day in question [29th July 1991] he, his wife, the deceased and certain other persons were at the house of one Odirreleng Ponatshego where they all drank traditional beer throughout the day. While they were drinking the deceased referred to appellant's wife as his [the deceased's] wife. This was apparently not the first time that deceased had referred to appellant's wife in this manner. This angered appellant as he had once caught deceased sleeping under the same blanket as appellant's wife and appellant suspected that the deceased was having an affair with his wife. An argument developed between appellant and his wife. The deceased intervened in the argument. He snatched the stick appellant was holding and ran away with it. Appellant chased him and retrieved the stick. Appellant returned to his wife and suggested that they should leave which they did.

While appellant and his wife were walking away, the deceased came up behind them and overtook them. As he did so he kicked appellant causing appellant to fall down onto a shovel. Appellant picked up the shovel and hit the deceased with it once on the head. The wound which appellant inflicted caused the deceased's death.

The so-called eye witnesses, the summaries of whose evidence was admitted by appellant, did not advance the State's case. According to the admitted summaries, none of the witnesses saw what had happened. One of them [P.W.4] is alleged to have seen "a man" hitting "another man" on the head with a spade, but she does not identify either of these men.

In his judgment the trial judge relied heavily on the "evidence" of P.W.3 whom he described as the only witness who saw appellant hitting the deceased. The learned judge then proceeded to set out what P.W.3 is alleged to have seen and rejected appellant's version as being in conflict with that of P.W.1, P.W.2 and P.W.3. This is a serious misdirection. There is no conflict between appellant's evidence and the admitted summaries of P.W.1 and P.W.2's evidence. The summary of P.W.3's evidence did not form part of record and the court was clearly not entitled to have regard to it.

In argument before us counsel for the State quite correctly conceded that the trial judge had misdirected himself in taking into account what P.W.3 is alleged to have said. He argued, further, that as no viva voce evidence had been placed before the court, section 178[1] of the Criminal Procedure and Evidence Act, CAP 08:02, had not been complied with. He accordingly submitted that this court should, because of these irregularities, declare the proceedings to have been a nullity.

The relevant portion of section 178 [1] reads as follows:

“Every criminal trial shall take place, and the witnesses shall, except where otherwise provided by this Act or any other law, give their evidence viva voce, in open court in the presence of the accused.....”
[Emphasis supplied.]

An exception to this section is contained in section 273[1] which deals with admissions. Section 273[1] provides that –

“In any criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue, and such admission shall be sufficient evidence of that fact.”

It is clear from sections 178[1] and 273[1] that the admissions made by appellant constituted evidence in the trial, despite the fact that the witnesses were not called to give viva voce evidence. The trial court was entitled to have regard to these admissions. As there was admissible evidence before the trial court which it was obliged to consider, the fact that no viva voce evidence was led does not vitiate the proceedings. There is thus no basis for declaring the proceedings to have been a nullity.

The irregularity on the part of the trial judge in having regard to the “evidence” of PW3 and relying upon it as a basis for the rejection of appellant’s evidence, vitiates his credibility findings. The consequence of this is that this court has to deal with the appeal without the benefit of such credibility findings. Save therefore to the

extent that the probabilities indicate otherwise, this appeal must be decided on the basis of appellant's own version of the events which led to the death of the deceased.

There is one aspect of appellant's evidence which is so improbable that it falls to be rejected. Appellant testified that he picked up the shovel with the intention of scaring the deceased and that he accidentally hit him with it. If by this evidence appellant intended to convey that he did not intend to hit the deceased with the shovel, that suggestion cannot be accepted. Firstly, it is contrary to what he said in his confession which was admitted in evidence. There he said:

"I fell on my back. When I got up I took a small old shovel with a blunt blade and chopped him with it above the nose....".

Although appellant attempted to resile from his confession, stating that he had been nervous when he made it, it was signed by him very shortly after the event and it is a factor that cannot be overlooked in assessing his evidence.

Secondly, in the report of the medical officer who performed the post mortem on the deceased, the cause of death is described as "intercranial haemorrhage and brain damage". The skull and its contents are described as follows in the report:

"Haematoma and echymosis of tissues under the scalp in the frontal area. Fracture frontal bone, right parietal and temporal bone. Frontal bone fracture going up to base of skull. Massive subdural haemorrhage all over the brain...."

This description of the injury sustained by the deceased leads to only one conclusion, namely that this cannot be described as an accident; it points to a deliberate blow to the deceased's head with the application of a considerable amount of force.

The question which thus arises is: what offence is appellant guilty of? He testified that he did not intend to kill his brother. His contrition when he saw the deceased lying on the ground badly injured, supports appellant's evidence in this regard.

Having regard to all the circumstances, namely the fact appellant and the deceased had obviously consumed a fair amount of alcohol, that the deceased had irritated appellant by his references to appellant's wife which must have strengthened appellant's suspicion that there was a relationship between his wife and the deceased, and the fact that the deceased had attacked appellant by kicking him causing him to fall down, appellant's striking of his brother with the shovel was, in my judgment, an overreaction on his part to the kick that he had received.

I am accordingly of the view that appellant was not guilty of murder but was guilty of manslaughter and in argument counsel for the State correctly conceded that if his submission on the nullity of the proceedings failed, this was the correct verdict. The finding will accordingly have to be changed to one of manslaughter and the

