

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CRIMINAL APPEAL NO 36 OF 2000
HIGH COURT CRIMINAL TRIAL NO (F) 31 OF 1999

In the matter between:

GORDON GONTSE

Appellant

vs

THE STATE

Respondent

Mr. L T Mothusi for the Appellant

Mr. C. Tlaga for the Respondent

J U D G M E N T

CORAM: AGUDA Ag.J.P
KUMLEBEN J.A.
LORD WEIR J.A.

KUMLEBEN J.A.

The appellant was convicted in the High Court of murder with extenuating circumstances. The sentence was one of 15 years' imprisonment. Only the correctness of the sentence is challenged on appeal.

The deceased was stabbed to death by the appellant soon after midnight at a club, called Club 33. He was stabbed six times. Two of the wounds were fatal ones according to the doctor who conducted the post-mortem examination. Three

prosecution witnesses described the events leading up to the stabbing. Their evidence is comprehensively summarised in the judgment of the trial court. In this judgment I shall do no more than recite the main facts, with some comment in parenthesis.

At about midnight the appellant was found seated on a toilet seat in the lavatory of the club. His trousers were down and he was fast asleep. (He had passed out presumably after he had relieved himself, indicating that he had been drinking excessively.) At his feet there were two empty wallets. (In his unsworn statement he said that his money had been taken from him – he must have been either pick-pocketed or robbed.) He was woken up with difficulty by two nightclub attendants. As they were about to remove him from the toilet and the club building, the deceased entered the toilet room. The appellant accused him of having taken his money. (According to the appellant he was one of three men who did so.) This the deceased denied. The appellant proceeded to search the deceased but found no money on him. By this stage the deceased was angry. (Understandably if he was innocent, unjustifiably if he was not.) He had to be at least twice restrained from attacking the appellant as the latter was being removed from the building. Outside, the appellant was told to go home because he was drunk. The deceased followed him outside (rather than remain in the building). It was at this stage that the accused produced the knife and stabbed him. (Other evidence indicates that the deceased was also to an unknown extent under the influence of liquor.)

The unsworn statement of the appellant is substantially along the same lines up to the point where he found himself outside the club. There at a certain stage, according to the appellant, the deceased with six of his friends attacked him and he stabbed the deceased in order to escape. This is refuted by the evidence of the State witnesses, in contrast to an unsworn statement. This version of how the stabbing took place was correctly rejected.

In his judgment on the merits the learned judge (Letsididi Ag.) thus dealt with the question of provocation in the context of whether it ought to warrant a conviction of manslaughter rather than murder.

“I have considered these actions by the deceased and find that he behaved in a reprehensible and aggressive manner that:

- (a) he took part in stealing money from the accused, which fact I find in favour of the accused;
- (b) on two occasions, he threatened to assault the accused but was prevented from so doing; and
- (c) he took PW3’s beer and spilt it with no apparent reason.

These actions by the deceased were such that they could cause; and did cause, the accused to be so provoked as to cause him lose his power of self-control.”

As to (a), one notes that it was very fairly assumed in favour of the appellant that the deceased had in fact taken the appellant’s money (according to the appellant the amount was P370). As to (c), one notes that this was proof of the deceased’s aggressive mood, and perhaps his drunken condition, but this conduct was not

directed at the deceased and could not have played any part in provoking him. The court quite correctly held that this provocation did not warrant the lesser verdict.

The difficulty that presents itself in this appeal before us is that in finding that there were extenuating circumstances there is no mention of provocation. The other factors taken into account were the drunken condition of the appellant, the absence of premeditation and the loss of his money. Similarly, in the judgment on sentence there is no mention of provocation. His personal circumstances are referred to and are weighed against features of aggravation. It would seem that once provocation had been considered in reference to the verdict, it was thereafter left out of account. This is the inference to be drawn from the record and to be accepted in favour of the appellant. As such it amounts to a material misdirection on sentence. This court is therefore entitled, indeed obliged, to consider the question of sentence afresh. See, for instance, S v FAZZIE 1964(4) 673 (A) 685 D-E.

The aggravating circumstances are manifest. It was a brutal, sustained and largely unwarranted attack. He did have one serious previous conviction: arson, for which he received in 1989 to a suspended sentence and an order for reparation. On the other hand, the appellant genuinely, and let it be assumed correctly, believed that the deceased was involved in taking all his money. The deceased was a persistent would-be aggressor at least until the appellant left the building.

Weighing up these opposing considerations - the aggravating features and those which are mitigatory - and taking into account the deterrent requirement of punishment, I consider that a period of 12 years' imprisonment is the appropriate sentence.

The appeal on sentence succeeds to the extent that it is altered to a period of 12 years' imprisonment antedated to 13 September 1997.

Delivered in open court at Lobatse this ^{31st}..... day of January 2001.

M Kumleben
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M KUMLEBEN
(JUSTICE OF APPEAL)

I AGREE

[Signature]
.....
AGUDA
(ACTING JUDGE PRESIDENT)

I AGREE

D Weir
.....
LORD WEIR
(JUSTICE OF APPEAL)