IN THE SUPREME COURT OF NAMIBIA

THE STATE VS POSTRICK MWINGA & 4 OTHER SA 1/95

Mohamed CJ; Leon AJA;
Silungwe AJA; Frank AJA

Heard on 1995/07/12

Delivered on 1995/10/11

CRIMINAL LAW - Jurisdiction - Transnational crime - Deceased shot. at from Namibia but struck and killed in Zambia - no need to attempt to confine crime to a specific locality - fact that countries may have concurrent jurisdiction not. necessarily a bar to assuming jurisdiction - must move away from definitional obsessions and technical formulations - distinction between result crimes and cont.inuing crimes and concepts such as harmful effect and essential requisite no longer apt - sufficient if significant, portion of the activities constituting offence took place in Namibia and no reasonable objection to jurisdiction can. be raised in international comity.

CASE NO.: SA 1/95

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE STATE APPELLANT

and

E
S
P
O
N
D
E
N
T

F
I
F
T
H

R
E
S
P
O
N
D
E
N
T

NKAJA: This is an appeal from the judgment of Tek, J. in the High Court. The five respondents were the accused

The four charges that the accused faced were the following:

a) Murder;

b) Attempted murder, alternatively the negligent handling of a firearm (contravening s. 39(i)(j) of Act 75 of 1969); and

c) Two charges of assault.

As far as the murder charge was concerned the Court a quo held that it did not have jurisdiction to determine it. On the attempted murder charge the accused were acquitted and the Court a quo found that it was established that the accuseds' action fell within the parameters of section 49 of the Criminal Procedure Act, No. 51 of 1977 (The Act) . The accused were convicted on the two assault charges. The State now appeals against the finding that the Court a quo did not have jurisdiction and against the acquittal in respect of the attempted murder charge and its alternative.

When the accused were asked to plead to the charges put to them they pleaded that the Court had no jurisdiction to try them in respect of the murder charge. To enable the Court to adjudicate on this dispute the following facts were placed before the Court by agreement between the parties:

"(a) that the shot that struck the deceased was fired from the Namibian side of the river;

b) the bullet may have struck the deceased on the Zambian side of the border or on the Namibian side of the border; and

c) there is a possibility that the deceased died on the Zambian side of the border".

I pause here to mention that the river in question is the Zambezi river which forms the border between Namibia and Zambia.

The court a. quo declined to assume jurisdiction. The reasons for this decision were essentially threefold and were, briefly, the following. The court did not have jurisdiction in respect of crimes commenced in Namibia but completed outside Namibia (R v Moshesh, 1948(1) SA 681 (0) and S v Maseki. 1981(4) SA 374 (T)) . Murder is a "result crime" and as such the resultant death did not occur in Namibia (S v Prins en 'n Ander, 1977(3) SA 807 (A) and S v Mampa, 1985(4) SA 807 (A)). Even if jurisdiction could be assumed on the basis of the "harmful effect" principle this would not avail the State as it was not proved beyond reasonable doubt that either the injury that caused the death or the death itself occurred in Namibia (S v Mhrapara, 1986(1) SA 556 (ZSC), S v Vanqa. 1991(1) SACR 280 (Ck) and S v Kapururira, 1992(2) SACR 385 (ZS)).

The first question that comes to mind from the reasoning of the court a quo is whether it was correct to hold that crimes commenced in Namibia but completed outside Namibia were not, in general, subject to the jurisdiction of the Namibian courts. In the Maseki case, supra at 377 it is stated as a general principle in the following terms: (My translation)

> "To sum up
>
> (i) Our courts do not have jurisdiction to adjudicate over offences wholly committed in other countries.
>
> (ii) Equally do our courts not have jurisdiction to adjudicate over offences commenced within the Republic but completed outside it.
>
> What is stated above are the general principles. They are subject to exceptions or quasi-exceptions, e.g. treason and a continuous crime like theft. Apart from this the legislator may grant jurisdiction in respect of offences committed outside the borders of the Republic."

As the appellant in the Maseki case received and possessed the stolen property only outside South Africa the first principle enunciated above was applicable and it was thus not necessary for the court to deal with the second matter raised by it. To this extent the second principle enunciated was obiter dictum.

In the Moshesh case, supra the crime involved was one of falsitas. The appellant wrote and posted a letter in the Orange Free State to a station master in the then Basutoland (Lesotho) wherein he made a fraudulent claim for goods

allegedly lost by the railways. Here the majority of the court with reference to South African and English decisions determined that the "essential requisite" of the crime took place in Lesotho and that therefor the court could not assume jurisdiction. In this case it may be said that the crime was commenced in the Orange Free State and only completed in Lesotho.

Counsel for the accused in this court conceded that the court a quo should have assumed jurisdiction. According to Mr. Maritz both the Moshesh and Maseko cases dealt with the jurisdiction of magistrates courts and were thus not authoritative in respect of the position relating to the High Court. This is so because the magistrates courts are creatures of statute and do not have jurisdiction other than that expressly conferred by statute. As the relevant statute does not confer or purport to confer jurisdiction in respect of trans-national offences but only deals with offences committed within the country (albeit in different magisterial districts) the principles applicable to magistrates courts are not necessarily the same as those applied to the High Court. Mr. Maritz further submitted that the second principle enunciated in the Maseki case, set out above, was an obiter dictum if it was intended to apply to the High Court and that in terms of the common law the High Court did have jurisdiction. (I interpose here to mention that the South African equivalent of the Namibian High Court is called the Supreme Court and the South African equivalent of the Namibian . Supreme Court is called the Appellate Court or Division.)

An exposition of the common law is found in R v Holm, R v Pienaar. 1948(1) SA 925 (A) where Watermeyer, CJ, says the following at 93 3 with regard to the common law (Roman-Dutch Law) jurisdiction of the Supreme Court in South Africa:

> ". . . the question of what offences were 'triable[1] must be decided according to the principles of Roman-Dutch Law. On the subject of criminal jurisdiction of Court of Law there is in Roman-Dutch Law a vast sea of authority, studded with islands of controversy: it originates in the provisions of Code (3-15-1) to the effect that criminal proceedings against an offender must be instituted where the offence was committed or begun or where the offender is found."

Watermeyer, CJ, referred, inter alia, also to Voet 5-1-67 to 69 as authority. According to Gane's translation what Voet said was:

> "An accused person finds a competent forum in respect of wrongdoing indeed in the place in which the crime was committed or at least commenced, whether he is found there or not."

According to Sampson"s translation:

> "A defendant obtains a competent forum by reason of delict, in the place in which the crime (crimen) was committed, or at any rate was commenced, whether he was apprehended there or not..."

From a cursory reading of the authorities referred to above where the court a quo's reasoning is set out it is clear that the common law with regard to jurisdiction was hardly referred to and that the English law was to a large extent followed and applied. Thus differentiation is sought between result crimes and continuing crimes. Concepts such as

"harmful effect" and "essential requisite" are mentioned in an attempt to place crimes in certain localities so as to decide which courts will have jurisdiction. Thus in the Moshesh case, supra the court relied on English decisions and especially R v Ellis [1899] 1 QB 230 which suggested that an offence was committed where its gist or gravamen occurred. Thus the court's concern about the "essential requisite" of falsitas because this would show where the offence was completed. As was pointed out by La Forest, J in Libman v R, (1986) LRC (Crim) 86 at 93 the English law of that time, generally speaking, had "the effect of limiting the court's jurisdiction in criminal matters to a single location, namely, where the essential element of the offence occurred or where it was completed".

The attempts by the early English decisions to confine offences to a specific locality was probably based on the restrictive approach to territoriality by the the English courts. That the primary basis of criminal jurisdiction is territorial is widely accepted. (R v Holm; R v Pienaar, supra. R v Martin and Others [1956] 2 All ER 86 and Libman v R, supra). Thus States normally have little interest to prohibit activities that occur outside their borders and furthermore do not wish to encroach upon the corresponding rights of other States or to incur the displeasure of other States by attempts to control activities that take place in such other States. The degree to which States are prepared to extend their jurisdiction varies from State to State.

This was made clear by Watermeyer, CJ in R v Holm; R

---

y

Pienaar, supra where he states at 930:

> "Apparently England (in common with France and the United States) makes the smallest claim to punish its own subjects or others for extra-territorial offences, ... Other countries make much wider claims. Some ... go so far as to divest their criminal law of all territorial limit so far as their subjects are concerned. Others go even further and give their courts jurisdiction to punish crimes committed by foreigners in a foreign jurisdiction ... . So it seems that the general principle that a state will only punish crimes committed within its own territory or by its own subjects is not universally admitted."

In England the courts moved away from the restrictive approach based on the gist of the offence test or the completion of the offence test. The development of the English Law in this regard is admirably set out by La Forest, J. in the Libman case, supra and I need not dwell on this aspect. Suffice to quote the present position of the English Law as succinctly set out by La Forest, J at p. 99:

> "..., the English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single situs of a crime by locating where the gist of a crime appeared or where it was completed. Rather they now appear to seek by an examination of relevant policies to apply the English law where a substantial measure of the activities constituting a crime take place in England and restrict its application in such circumstances solely in cases where it can be argued on a reasonable view that these activities should on the basis of international comity, be dealt with by another country."

The evolution of the Canadian law on this aspect is also of some interest. Canada, being a colony of Great Britain, initially followed the English position rigidly but also came to adopt a more flexible approach. Thus the current position in Canada as formulated in the Libman case appears from two extracts at pp. 106 and 107:

(a) "... we must, in my view, take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence. One must then consider whether there is anything in those facts that offends international comity."

(b) "As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a 'real and substantial link[1] between an offence and this country, a test well-known in public and private international law:"

It is clear from the Libman case that both the current English and Canadian position leaves open the possibility of concurrent jurisdiction. The fact that a person may be prosecuted for the same offence in- more than one country however has been no bar to the acceptance of the wider test as injustices could be avoided by resort to pleas of autretois aquit and autrefois convict.

Mr. Miller who appeared for the State also referred us to a decision in Hong Kong where there was a move away from the earlier English approach. Thus the relevant portion of the head note in Attorney-General v Yeung and Another, 1987 LRC (Crim) 94 reads as follows:

"Recent cases in the Commonwealth indicate that the territorial basis for jurisdiction is becoming outmoded and suggest that, in a case where a conspiracy is formed abroad to commit an offence in Hong Kong, but no acts in furtherance of the conspiracy are committed in Hong Kong, the Hong Kong courts nevertheless have jurisdiction on the basis that: (a) the conspiracy is aimed at Hong Kong and intended to bring about a breach of peace there, (b)

> since the conspiracy is not directed at the residents of the country where it is entered into, the courts of that country could raise no reasonable objection to this course on the ground of comity."

Moreover the wider approach to jurisdiction is also supported and accords with the principles of International law as was pointed out by L A Forest, J. in the Libman case. Thus a passage by Shaw: International Law, 3rd ed. at p. 401 appears to be to the point in respect of the factual matrix before this court:

> "However, the territorial concept is more extensive than at first appears since it encompasses not only crimes committed on the territory of a state, but also crimes in which only part of the offence has occurred in the State, for example where a person fires a weapon across a frontier killing somebody. Both the state where the gun was fired and the state where the injury actually took place have jurisdiction to try the offender, ..."

The question now arises as to where all this leaves Namibia. On the basis of the common law and R v Holm; R v Pienaar. supra the court a quo should have assumed jurisdiction as the offence at least commenced within Namibia. Even if the law as espoused in R v Holm; R v Pienaar was superseded by the adoption in South Africa of the English law the developments in the English law should have been considered and in view of what is set out above been followed by the court a quo. Thus on this basis also the court a quo should have assumed jurisdiction.

In my view Namibian Courts, faced with an "International Law friendly" Constitution (Art. 144) and with its already "extensive" jurisdiction in common law, should not base its

jurisdiction on "definitional obsessions and technical formulations" but should stay in step with the other common law Commonwealth countries such as England and Canada. Thus in order to determine whether the High Court has jurisdiction in a trans-national crime or offence all that is necessary is that a significant portion of the activities constituting that offence took place in Namibia and that no reasonable objection thereto can be raised in international comity.

In casu a significant portion of such activities did indeed take place in Namibia. As. Mr. Maritz pointed out at least the actus reus took place in Namibia. This was sufficient for the court a quo to assume jurisdiction.

It follows that the appeal against the court a quo's decision to decline jurisdiction must succeed.

I now turn to deal with the appeal against the acquittal of the accused in respect of the attempted murder count. Shots were fired one of which killed a person in a canoe. This would have been the subject matter of the murder count had the court a quo assumed jurisdiction. The attempted murder count relates to the second person in the canoe who was not hit during the shooting. Only four of the five accused had firearms on the day of the incident and on the evidence they were the people who opened fire that day. Mr. Miller thus abandoned his appeal against the acquittal of accused no. 1 who did not have a firearm and did not fire any shots at the

time of the incident. When I therefore henceforth refer to the accused it relates only to the four accused who fired shots on the day of the incident.

The facts can be briefly stated as follows. The accused were officers of a crime prevention unit. They were on duty at the time of the incident. It was their duty and they were under orders to arrest people who were illegally crossing the border. According to their standing orders they could fire shots to arrest culprits. If the persons sought to be arrested were not deterred by the shots when crossing the river there was nothing more they could do about it. In other words it was clear that they could not apprehend these people on the other side of the river. The river involved is the Zambezi and the border between Namibia and Zambia is the middle of the river. The complainant, the deceased and two others crossed the river in a canoe to the Namibian side. Two persons alighted from the canoe and the deceased and the complainant proceeded to return to Zambia. The accused shouted loudly for them to return which shouts according to the complainant they heard. This shouting continued for a while before shots rang out. All the accused fired shots. A shot hit the canoe and also the deceased. (It is not clear whether this was the same shot.) These shots were fired when the canoe was already on the Zambian side of the border. The complainant was not hit. When the accused were at a later occasion confronted with the incident they initially denied any knowledge thereof but subsequently informed their commanding officer. that they

intended to arrest the persons in the canoe and did not intend to kill them.

The question which now arises is whether the accuseds conduct is covered by the provisions of s. 49 of the Act which reads as follows:

> "1. If any person authorised under this Act to arrest or assist in arresting another, attempts to arrest such person and such persons -
>
> a) resists the attempt and cannot be arrested without the use of force; or
>
> b) flees when it is clear that an attempt to arrest him is being made, or resists such an attempt and flees,
>
> The person so authorised may, in order to effect the arrest, use such force as may, in the circumstances, be reasonably necessary to overcome the resistance or to prevent the person from fleeing.
>
> 2. Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorised under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide."

Before I deal with the section and its application or non-application to the present matter it is necessary to deal briefly with the reasons the accused gave for the shooting. These reasons are apparent from what they told some of the prosecution witnesses as they themselves chose not to give evidence. As already indicated they initially denied having been involved in the incident when questioned. This is corroborated by their immediate superior Sgt. Smit, their

Station Commander, Insp. Kahundu * and the investigating officer W/0. Mulimino. However, the next day they informed the Station Commander that they intended to arrest the persons in the canoe and did not intend to kill them. They also told the investigating officer that "they just shot on the sides of the canoe" but told Insp. Kahundu that they fired shots in the air. This latter version is contrary to the evidence of shots making the water "jump" and also with their instructions which were to fire in the water.

In my view the onus is decisive for the resolution of this case. If the State had the onus to prove beyond a reasonable doubt that the accuseds' conduct did not fall within the ambit of the section this was not done. Conversely if it was for the accused to prove on a balance of probabilities that their conduct did fall within the ambit of the section they did not succeed in doing this. On this question the law is quite clear and Mr. Maritz conceded the point. It was for the accused to prove on a balance of probabilities that their conduct fell within the ambit of the section (Macu v Du Toit, 1983(4) SA 429(A) and S v Barnard, 1986(3) SA (A).

The reasons why I say the accused did not discharge the onus are as follows. The uncontested evidence is that the shooting started when the canoe was already in Zambia. The accused were thus not entitled to arrest the persons in the
canoe as the Act does not operate extra-territorially (S

---

y
Ebrahim, 1991(2) SA 553(A)). Whether they thought they could

arrest is not clear. Their instructions were unambiguous. They could not follow persons to Zambia to arrest as it was made clear to them that if the escapee did not react to the shots there was nothing more that they could do. Furthermore why did they initially deny being involved in the incident and why did they say they fired in the air if they thought that they acted lawfully? There may be an acceptable explanation for their conduct but they declined to put their version before court and thus did not discharge the onus resting on them. It is clear from the evidence that the accused fired into the water in the vicinity of the canoe. It is also clear that the canoe was struck as well as a person in the canoe. The accused elected not to tell the court where each of them directed their fire or whether they initially fired warning shots and later fired closer to the canoe. This lack of evidence on their part makes it impossible to ascertain, on a balance of probabilities, whether they took measures which were "reasonably necessary" or whether they from the word go directed their fire at or recklessly near the canoe. The evidence necessary to discharge the onus resting upon them was solely in their knowledge and they should have tendered it if it would have supported their contention that they acted within the ambit of the section or that they thought they acted within the ambit of the section.

Mr. Maritz submitted that in the event of a conviction being entered for attempted murder the matter be referred back to the court a quo for sentence.- This must be done as none of the accused gave evidence or called witnesses in mitigation

in the court a quo as they were only convicted of common assaults. Had they been convicted of attempted murder they probably would have placed more information before court as the potential consequences would have been so much more severe. I agree with Mr. Maritz as to disallow the accused this opportunity may prejudice them.

In the result:

1. The appeal against the court a. quo's refusal to assume jurisdiction is upheld and it is declared that the court had jurisdiction to adjudicate the murder charge.

2. The second to fifth respondents' acquittal on the attempted murder charge is set aside and substituted with a conviction on that charge.

3. The matter is referred back to the court a quo for the purposes of sentencing on the attempted murder charge in respect of the four appellants convicted of attempted murder by this Court.

FRANK, A.J.A.

I agree.

MAHOMED, C.J.

I agree.

LEON, A.J.A

I agree.

SILUNGWE, A.J.A

/mv

ADV. FOR THE APPELLANT: K. Miller
(Prosecutor-General)

ADV. FOR THE RESPONDENT: J.D.G. Maritz et R. Heathcote
(Government-Attorney)