

Criminal Appeal No. 717/52 BC

Hearing held on the morning of Wednesday 31 May 2006 (Corresponding to 4 Jumada Al-Awwal), at the Supreme Court of Libya, at its headquarters in Tripoli.

Before: Justice ABDULHAFIDH ABDUDAİM SHERIF, *President of the Chamber,*

And Justices: SALEM HASSAN ISMAIL

TWATI HAMAD ABU-SHAH

BUSIF ISSA FERJANI

TAHER SADEK YUSUF, *Members of the Chamber,*

Attended by:

ABDURRAHMAN ABDUSSALAM ABDURRAHMAN, *Public Defender at the Appeals Chamber's Prosecution Office,*

And KHAYRI MUSTAPHA ABU-AISHA, *Chamber Registrar*

Judgment

In the criminal appeal no. 717/52 of the Appeals Court of Mistrata's Judgment, Chamber of Assizes, of 27 February 2005 in case number 594/2004 Misrata – 992/31

After examination of filings, reading the case summary, hearing the oral argument, the opinion of the appeals chamber's prosecution office, and legal deliberation.

Factual background

On 6 May 2004, the office of the public prosecutor (...) at the Ras Touba Martyrs precinct charged the first appellee's son and the two appellants (...) and (...), along with others, with:

- The first: (...) – willfully injuring the victim (...), whom he did not intend to kill, but who died as a consequence nevertheless. This was by stabbing his thigh, which caused the injuries outlined in the autopsy report and led to severe bleeding which caused his death, being a 14 year old juvenile who has not yet reached 18, as shown in filings.
- The second defendant/1) was involved with the first defendant as an abettor. After turning up to support, he encouraged him to stab the victim using a knife. The crime was carried in such circumstances and in the manner set forth in filings.
- 2) Caused minor physical harm to the aforementioned victim by hitting him on his head with a thick stick (“Zgueya”), causing abrasions around his eye, in addition to bruising and soreness on his scalp, as established in the autopsy report, the harm as such was inflicted with a weapon.
- All defendants/ possessed and drank intoxicating beverages.

The prosecution requested the indictment chamber to refer them to the court of assizes for sentencing pursuant to articles 81/1, 100, 103, 374, 379, and 382 of the penal code, and articles 1, 1 *bis*, 2, and 4/1 of Law number 4/1423 on the prohibition of intoxicating beverages amended by Law number 20/1425. The chamber granted the referral. The Appeals Court of Misrata, chamber of assizes, examined the criminal case and the civil case lodged by the victim’s parents and siblings against the father of the first defendant, since the former is legally responsible for the latter’s actions, and against the second defendant. The court ruled as follows:

- The first defendant, sentenced *in presentia* to five years’ imprisonment on the first count;
- The second defendant, sentenced *in presentia* to three years’ imprisonment on one count of abetting, and 4 months on one count of minor harm;
- The third defendant (female), sentenced *in absentia* to one year of imprisonment and labour, and a fine of one thousand Dinars on one count of

drinking intoxicating beverages, suspended for five years; all the other defendants were acquitted on the count of drinking and possessing intoxicating beverages;

- In the civil case, the first defendant, being the guardian of his son, and the first defendant, were ordered to jointly pay 30.000 Dinars to the plaintiffs, plus costs, with all other requests dismissed.

This is the impugned judgment

Proceedings

The impugned judgment was rendered on 27 February 2005. On 1 March 2005, the convict decided to appeal the judgment by a motion filed from prison. On 28 April 2005, his attorney signed and filed a motion containing the grounds of appeal, at the registry of the court that issued the sentence. On 26 April 2005, the plaintiffs' attorney decided to appeal the judgment to have it reversed on their behalf on the basis of the power-of-attorney rights duly vested in him. This was submitted to the same registry. Their signed grounds of appeal were filed on 27 April 2005 with the same registry, with the registry's endorsement indicating appeal fees paid by receipt number 5804998.

On 28 April 2005, the female convict's attorney (...) decided to appeal the judgment to have it reversed by means of a notice filed with the same registry and by virtue of the power-of-attorney rights granted by her, explicitly authorizing him to appeal on her behalf. The grounds of appeal, signed by the attorney, were filed on the same day and at the same registry.

The appeals chamber's prosecution office filed a motion where it concluded that, while procedurally admissible, the appeals should be dismissed on the merits.

The appeal hearing was scheduled for 30 April 2006. The justice-rapporteur read out his report. The appeals prosecution office maintained the same view. The court

examined the case as shown in the transcript, and listed it for judgment during the day's session.

Grounds

The appeal meets the legal pre-conditions and is thus procedurally admissible.

I. The plaintiffs' grounds of appeal:

The appellants contend that the impugned judgment contravenes and misinterprets the law, and undermines the rights of defence. They argue that the court dismissed the claim for material damages on grounds that it lacked any supporting elements, although determining damages is entirely at the court's discretion. They also argue that the compensation awarded for moral damage was unsatisfactorily modest, and incommensurate with the damage incurred. In the light of the foregoing, the judgment should be reversed.

The following statement is from the part of the impugned judgment where the court reaches a decision: (given that the grounds for compensable civil responsibility are established, the plaintiffs' claim for moral damages must be granted, pursuant to articles 166 and 167 (Civil). The plaintiffs have exaggerated the amount of compensation however, and the court has ruled as set forth in the operative part of the judgment. The court dismisses the motion for compensation for material damage as the plaintiffs failed to provide any substance).

It is established that determining damages is a matter for the judge, who determines the compensation commensurately with the damage incurred by the aggrieved party in the crime. Such determination depends on the factors on a case-by-case basis, for there are no pre-established factors that serve as the sole determinants for compensation, nor is it valid to argue that compensation should match losses or missed gains. The determination is for the judge, who decides in accordance with the requirements of fairness, the circumstances of the case, the gravity and causes of the

damage, the age of the aggrieved party, and the connection to the victim in the crime giving rise to the said compensable damage. In the filings, the plaintiffs submit that the actions of the two defendants caused them material and moral damage, consisting in losing the victim who was co-providing for them. His loss hence caused them great sorrow and grief. In the light of that, the court that issued the impugned judgment should have examined the elements of moral damage identified from case findings and the circumstances which, if established, require the party (ies) that so merit, to be awarded compensation. The judgment, however, awarded compensation only for moral damage, on the grounds that the claim for material damage was baseless. The court's ruling as such is faulty and should be reversed, and the case re-examined.

It is established that the object of compensable moral damage consists of emotion, feeling and empathy, all of which are intangible objects where damage is unmeasurable. In any case, a judgment is deemed valid if damages are reasonably determined, i.e. without exaggeration or understatement. The impugned judgment awarded compensation of 30.000 Dinars to moral damage, and dismissed the claim for more as an exaggeration. As such, the court that issued the judgment duly exercised its subject matter discretion, and the Supreme Court need not reconsider the judgment. This ground of appeal is therefore immaterial.

II. The convict's grounds of appeal

The appellant contends that the impugned judgment contravenes the law and is based on flawed argumentation and faulty evidence, and that it undermines the rights of the defence. The impugned judgment relies on statements made by the first defendant against the appellant, and on the testimony of lieutenant (...). The said evidence is flawed because the defendant in question backed away from his original assertions when the case was re-investigated, his statements contradict the statements of all others present at the scene, and such statements are made by one

defendant against another. In addition, the testimony of (...) contradicts the statements of all other witnesses who heard no utterances suggesting abetment. Such exculpatory witness testimonies were disregarded by the court without giving reasons. He was convicted on one count of minor harm, though he was acting in self-defence, which the court failed to examine. The court's ruling as such is faulty and should be reversed.

In its conclusion, the impugned judgment refers to the case findings and to statements by the defendants and witnesses and convicts the appellant on the charges brought against him based on the following evidence: (The charge brought against the second defendant, which is involvement by abetting the assault on the victim, meets the standard of proof of beyond reasonable doubt (ثبوت الجرم واليقين) literal translation: absolute certainty), given the assertion by the first defendant before this court that the second defendant abetted him to stab the victim .. The second charge likewise meets the standard of proof, given the statement of the female defendant (...) that she saw the second defendant hitting the victim with an object he was carrying, and also given the testimony of lieutenant (...) before the prosecution that on the day of the crime he heard voices and saw the second defendant hitting the defendant with a "Zgueya", two blows, one of them on the head).

It is established that deciding on evidence, determining its admissibility, and ensuring a fair balance when handling the evidence is a matter for the court, and requires no reconsideration by another body, provided the court's rulings are based on the evidence contained in the case. The court is not required to respond in explicit language to exculpatory evidence, regarding which it is sufficient for the judgment to give implicit answers when addressing inculpatory evidence. It is also established that the court may admit one defendant's statements against another where it trusts the accuracy and truthfulness of such statements. Therefore, the court that issued the judgment cannot be faulted for admitting only the statements provided by the

witness (...), and not the other witnesses, or for admitting the first defendant's statements delivered in court and dismissing the rest of the evidence it did not trust. The court considered the admissible evidence sufficient to convict the appellant on the charge brought against him. To contend otherwise means that the challenge concerns the merits of the suit on which the previous court had already established its case, and thus cannot be brought before this court.

The impugned judgment responds to the appellant's claim that he was acting in self-defence with the following: (.. The defence's claim that he was defending himself and his apartment is immaterial because the lieutenant, in his aforementioned testimony, says that he saw the second defendant beating the victim at some distance from his apartment. The defence's motion is therefore immaterial). This quote from the impugned judgment shows that the court did consider the claim of self-defence but rightly dismissed it. To claim otherwise in this regard is therefore irrelevant.

In the light of the above, the challenge brought by the second defendant as such has no basis in either fact or law, and thus should be dismissed.

III. The female appellant's grounds of appeal

The appellant contends that the impugned judgment contravenes the law and is based on flawed argumentation and faulty evidence. Determining whether a ruling was *in presentia* or *in absentia* depends on how it was actually rendered and not on how it was designated by the court. Given that the appellant appeared before court at the hearing of 9 January 2005, the judgment was issued *in presentia*, and not *in absentia* as in the text of the judgment. The judgment thus can be appealed with the objective of having it reversed. The chamber that rendered the judgment included a judge (Mr, ...) who did not hear the oral argument. The judgment convicts the defendant without sufficiently laying down and interpreting the evidence, but

merely through a general indeterminate reference. The appellant concludes by requesting the judgment be reversed and a retrial ordered.

The impugned judgment, in reference to the female appellant's case, states in the operative part that it was issued *in absentia*. However, the transcript of the hearing of 12 December 2004 shows that she was present. At the said hearing, the court heard the defence's oral argument. The defence believes that in the light of that, the charge cannot be laid against her. The judgment was as such effectively *in presentia*, and hence, the court finds her appeal procedurally admissible.

In the preamble, the judgment presents the statement by the bench composed of Judges Messrs (...), (...) and (...), the same bench convened at the hearing of 1 September 2005 where the oral argument was heard and the case listed for judgment, as shown in the hearing's transcript. The authenticity of the transcript may only be challenged through appeal on grounds of forgery. The contention in this regard is therefore immaterial.

The impugned judgment convicts the appellant as follows: (.. The charge of drinking intoxicating beverages brought against the third defendant meets the standard of proof of beyond reasonable doubt (ثبوت الجرم واليقين literal translation: absolute certainty), given that she so admitted, as in the findings and in the prosecution's investigation. In fact, she admitted to having drunk intoxicating beverages. This was corroborated by technical report 346/2004 showing that her blood test reveals a 0,10 % level of alcohol in the blood sample. These elements warrant her conviction). In the light of that, the court that issued the judgment sufficiently laid down the evidence on which it relied in convicting the appellant. Its conclusion was thus unambiguous and unequivocal. Therefore, the claim of faulty evidence is immaterial.

In the light of the foregoing, the appeal is baseless and should be dismissed.

For the foregoing reasons

The Court Rules That

- I. The plaintiffs' civil appeals are procedurally admissible. On the merits, the impugned judgment is reversed in its provision on material damage, and the case is referred back to the Court of Assizes of Misrata for reconsideration by a new bench. The remaining elements are dismissed.
- II. The appeals lodged by appellants (...) and (...), while procedurally admissible, are dismissed on the merits.