

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No 3 of 1980

KHEFI MOTLHATLEGO

Appellant

v.

THE STATE

Respondent

Mr J Mbeki for the Appellant

Mr P T C Skelemani for The State

J U D G M E N T

Coram : MAISELS, P
AGUDA, JA
HANNAH, JA

AGUDA, JA

The Appellant was charged with the murder of her newly delivered baby on or about March 20, 1979. At her trial before Corduff J, six witnesses gave evidence for the prosecution. After a submission of no case on her behalf had been over-ruled by the Court, learned Defence Counsel chose not to call evidence, a right which clearly belonged to the Defence. In a reserved judgment delivered on December 7, 1979, the learned Trial Judge found her guilty and convicted her accordingly. She was sentenced to a term of imprisonment for five years. Three days later on December 10, 1979, she noted an appeal against conviction and sentence.

During the hearing of the appeal on December 3, 1980, learned Counsel for the Appellant had to abandon the appeal against conviction in view of the facts of the case. He

however went on to argue strenuously that the term of five years imprisonment imposed by the Trial Judge was too severe and that this Court should order a reduction of that sentence.

In considering whether the sentence imposed in this case is excessive or not it is necessary to set down in brief the facts which were found by the Trial Judge. The Appellant was 19 years of age at the time of the offence and was a Form V student in a secondary school and she was living in the boarding house. Some time towards the end of February or early in March 1979 a teacher in her school called her and asked if she was pregnant. The Appellant replied that she had not had her menstruation for five months but that it had come again. The teacher suggested that she should go and see a doctor. Meanwhile she had, in October 1978, told a junior friend of hers, a girl in the same school, that she had not menstruated since September, the previous month. Then in March 1979 she told the same friend that she was pregnant. On March 21, 1979, the Appellant asked another much younger girl in the same school to accompany her to throw away her old panites. The Appellant then brought out a parcel from the box room, wrapped in brown paper. The young girl accompanied the Appellant to a place near a river a short distance from their dormitory. There the Appellant buried the parcel in the sand at the side of the river. The young girl did not know what the contents of the brown paper were. On the next day a report was made to the police and the police commenced investigations. On March 26, the police took 19 Form V girls of the school to the hospital for examination. The Appellant was picked out of the girls as having recently within the past one week of the date of the examination, delivered a baby.

Thereafter she made a statement to the police, which she later confirmed before the District Officer.

The essential parts of her story were that upon the suggestion of the Principal of the School she went to the hospital where she was given some pills. On Tuesday March 20, 1979, she started menstruating again, and the menstruation increased on Wednesday. After the other students in her own dormitory had gone to classes she left for the toilet. There she delivered the baby although according to her she only felt like passing out faeces. She was surprised to note that she had delivered a baby. She said -

" I started to think of ways of flushing the body, I thought of cutting the body so that it can be easily flushed. After I had cut the hand, the school bell started to ring. I did not tell anybody what happened because we were all children. "

However, this is not the story as to how the baby died. According to the doctor who performed a post mortem examination on the baby, the baby had died as a result of someone cutting its throat. The baby had been born alive, but had died of respiratory failure caused by cutting of the trachea, that is, the wind pipe. The umbilical cord was left untied. A point which remained a mystery is that according to the Appellant she used a pair of scissors to cut the baby but the doctor was clearly of the opinion that it was not that instrument that the Appellant used. Whatever instrument she might have used there was no evidence, not even a suggestion, that the Appellant went out of the lavatory after delivery to procure it. On the contrary it is an irresistible inference from her statement

that she never left the lavatory until she had dealt with the baby. Therefore whatever instrument she must have used was with her when she went to the lavatory to deliver the baby.

After rightly convicting the Appellant of murder, the Trial Judge then found extenuating circumstances in her favour. The circumstances taken into account in so finding are the probability of some psychological stress stemming from the pregnancy; and the age of the Appellant. In proceeding further to consider the level of punishment to which the Appellant should be made to suffer the learned Trial Judge said -

" Pregnancy of the accused might well indeed have put paid to her ambitions in the educational field but that was the risk she took when she indulged in sexual activities while unmarried. It was this ambition which provided the motivation for her deed, a deed that was carried out with great determination and fixity of purpose. "

He thereafter sentenced her as previously stated.

In all the circumstances of this case as set down before including in particular that the Appellant was convicted of murder, we see no justification in interfering with the sentence imposed upon the Appellant.

There is, however, another aspect of this matter which must be touched upon. The Appellant was arrested on March 26, 1979, and kept in custody. She made her first appearance before the Magistrate on April 5, 1979, and asked to be released on bail. This was refused. Thereafter she was brought before the Magistrate on June 5, June 14, July 12, July 25 and August 8, 1979. On the last mentioned date bail was granted on the

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application of Counsel. Her freedom, if she ever in fact gained it, was short lived, for, when she appeared in Court again on August 23, she was ordered to be remanded in custody for trial in the High Court. She was so remanded, and continued to be so remanded, until she was convicted on December 7, 1979, and a sentence pronounced upon her. We think that in the circumstances of this case the period the Appellant was in custody pending trial should be put into consideration.

For all above reasons the appeals against conviction and sentence are dismissed save that the sentence imposed in this case shall be deemed to have commenced from April 1, 1979.

(Sgd.) T A AGUDA Judge of Appeal

I agree. (Sgd.) I A MAISELS President

I agree. (Sgd.) N R HANNAH Judge of Appeal.

Lobatse

16th December 1980