

IN THE COURT OF APPEAL OF THE  
REPUBLIC OF BOTSWANA

Criminal Appeal No. 18 of 1981

In the matter between:

KEBALEPILE MARAPE

Appellant

and

THE STATE

Respondent

Ceram: MAISELS P,  
KENTRIDGE JA  
AMISSAH JA

Appellant in Person  
Mr. P. T. C. Skelemani for the State

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J U D G M E N T

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KENTRIDGE, J.A.

As long ago as November 1978, the Appellant in this case was convicted by Edwards, J. on a charge of having murdered Kekgathege Mojuta. This man had been stabbed to death at Botshabele on 4th February, 1978. At the trial before Edwards, J. the Appellant was identified by two eye witnesses as the man who had stabbed the deceased. The learned judge further found that there had been extenuating circumstances and

consequently instead of imposing a death sentence, he imposed a sentence of 9 years imprisonment to run from the 30th August, 1978. The appellant was represented at this trial. Further, he did not appeal against this conviction or sentence and it was only in September of this year that he applied for leave to appeal explaining that he had not previously had any money to pay the appeal fee. Leave to appeal was given by Cerduff, J. on the 19th October. I shall later refer to the ruling of Cerduff, J. and the reasons for the ruling which he gave. Today the appellant has appeared in this court in person and he has submitted to us that his identification as the person who did the stabbing had not been proved and he says that for various reasons he should not have been found guilty. In the alternative, he is asking for the reduction of his sentence. Unfortunately because of the time which has passed since the first hearing, the full record of the trial has been lost, and all that we have before us is the judgment of Edwards, J. Although the absence of the full record is unfortunate, it so happened that Edwards, J. in his judgment has given what appears to be an extensive summary of the evidence given by the witnesses for the prosecution as well as

by the one witness who was called for the defence. As appears from the judgment the stabbing took place at night and there was little or no moonlight. There were also certain discrepancies in the evidence given by the two identifying witnesses. The learned judge appears to have taken full account of these factors and nonetheless to have accepted the two identifying witnesses as reliable and worthy of belief. He pointed out in particular that both of the witnesses had seen the appellant previous to the stabbing; to one of them he was well known. That, in particular, substantially reduces the possibility of a mistake in identification. Having carefully considered the learned judge's judgment, I cannot find any indication that he misdirected himself or that he failed to appreciate any possible difficulties in the evidence given. The defence witness to whom I have referred was called in order to establish an alibi that, is, that the accused was somewhere else at the time of the stabbing. The judge did not find this witness to be satisfactory and, according to the judgment, counsel for the appellant at the trial agreed that the defence witness had not been satisfactory. Further, even if the evidence of that defence witness had been accepted that

would have not established the alibi. It remains to say that the appellant did not give evidence at his own trial. So that the evidence of the two identifying witnesses was uncontradicted. In all these circumstances, I can find no reason for interfering with the verdict given by Edwards, J. With regard to sentence, the learned judge took into account three extenuating circumstances. The first was that the appellant had not planned in advance to kill the deceased. The second that the appellant did not really wish the deceased to die, and the third was that the appellant was intoxicated at the time. It seems to me that in taking these circumstances into account the learned judge gave as full a weight as was reasonably possible to the mitigating factors in the case. Far from creating a sense of shock, the sentence of 9 years imprisonment for murder even with extenuating circumstances, would appear

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if anything to be on the lenient side. Consequently, I would propose that the appeal against both conviction and sentence be dismissed. I should just like to say a word about the judgment of Cerduff, J. granting leave to appeal. In a murder case it is natural for a judge to lean in favour of granting leave to appeal. The learned judge also correctly pointed out that it would be unfortunate if a man were to lose his right to appeal simply because he did not have an appeal fee of P10.00. It was for this reasons that Cerduff, J. granted leave to appeal, notwithstanding his finding that the appellants had no prospect of success in the appeal either against conviction or against sentence. I consider it necessary to say that although it is correct to lean in favour of granting leave

to appeal particularly in serious cases the test that should be applied is still whether the appellant has reasonable prospects of success in the higher court. If this test had been applied, leave would not have been given. The appeal is dismissed.

Signed

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S. W. Kentridge  
Judge of Appeal

I agree

Signed

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I. A. Maisels  
President of the  
Court of Appeal

I agree

Signed

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A. N. E. Amisshah  
Judge of Appeal

Lobatse  
8th December, 1981.