

According to the evidence of a boy aged 9 years who was also sleeping in the hut, a person entered the hut and the deceased asked who he was. The stranger did not reply. The boy heard the old woman struggling whereupon the boy left the hut and went to report the matter. By the time assistance arrived the old woman was dead and the stranger gone. Other evidence indentified the stranger as the appellant and there is no appeal on that score.

A post mortem examination of the deceased revealed that, she had died from asphyxia probably due to some mechanical obstruction at neck level. Five to six small contusions on the right side of the neck were found. There was congestion of the brain and internal signs of anoxia. Appellant did not give evidence. As I have already stated he was convicted of manslaughter.

In mitigation appellant **said** he was drunk and this was accepted by the Court and taken in account in mitigation of sentence. Appellant had previous convictions:

" One for rape in 1973 when he was sentenced to $2\frac{1}{2}$ years' imprisonment, and for common assault in 1977 when he was sentenced to 4 strokes. "

It can be inferred then that the appellant has a **tendency to violence**.

The question in this appeal is whether a sentence of 15 years' imprisonment was justified. The trial court's finding was that malice aforethought was not proved. That implied that there was no intention to kill nor even any intention to do grievous bodily harm.

The wrongful killing must then have been by negligence. On this analysis of the crime, a sentence of 15 years strikes one as excessive. Sentence is primarily related to the wickedness of the person's mind. Here the wickedness consisted in wrongfully entering the deceased's hut at night and assaulting her.

Of course, the fact that the woman died is an aggravating feature, because taking human life is always regarded as a serious matter.

It is argued for the state that punishment is in the discretion of the trial court and that in the absence of misdirection on sentence or unjustifiable severity, a Court of Appeal should not intervene even if its members, sitting as trial judges, would have imposed a lesser sentence.

There is misdirection in law, if the trial judge fails to take account a factor which he should have taken into account and conversely.

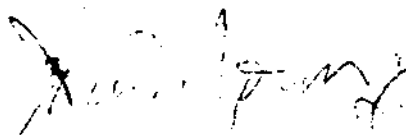
It is also a misdirection in law, if the trial judge's evaluation of a relevant factor is at **fault**.

Here the all-important factor was the mens rea of the appellant. Apart from the reference to the possible effect of drink, I can find in the judgment of the High Court no or adequate evaluation of the appellant's state of mind.

Furthermore, in the field of punishment, the courts will always **strive** for comparative uniformity in a broad way.

I doubt whether a sentence of 15 years can be justified on a comparative basis where the wickedness of the **culprit's mind** consists in wrongful invasion of a person's home by night, committing common assault on the house holder and thereby negligently causing his death - even granted a propensity to violence.

I would allow the appeal to the extent of reducing the sentence to 10 years' imprisonment.



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J. R. Dendy-Young
Judge of Appeal

Lobatse
16th June, 1981.