

IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA

Criminal Appeal No. 7 of 1981

In the matter between:

BAETI NTSIMANYANA

Appellant

and

THE STATE

Respondent

Appellant in Person

J. M. Bogatsu for the Respondent

JUDGMENT

Coram:

Maisels, P

Dendy-Young, J A

Aguda, J A

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The appellant was convicted of the murder of his wife by Dyke, C.J. on November 9, 1976. However, having found that there existed sufficient extenuating circumstances warranting that course of action, the learned Chief Justice, instead of passing a sentence of death, passed a sentence of life imprisonment on the appellant. It is against that sentence that he has filed this appeal. The appellant is unrepresented in this Court although he was represented by Counsel at the trial. The only ground of appeal filed is contained in the Criminal Form 1 filed by the appellant and it is that "Sentence is too severe".

The principles upon which this Court will act in regard to appeals in respect of sentences have now become so well

known that I do not consider it necessary to go into them here, safe to mention them. To begin with it should be remembered that the determination of the appropriate sentence to pass at the conclusion of a trial is pre-eminently a matter of discretion for the trial judge; therefore the circumstances in which this Court will interfere in a sentence passed by a trial Court must be, and indeed are, restricted. In other words in an appeal against sentence it is for the appellant to show that his case satisfies one or the other of the conditions worked out over a period of time by our Courts.

I wish to emphasise the point that it is not the duty of an appeal court to interfere in a sentence passed by a trial court merely because the appeal court would itself have imposed a different sentence.

This court will only interfere where the sentence passed by the trial court is based upon a misdirection; or where it is based upon a wrong or none evaluation of relevant facts touching upon the matter of sentence; or where the sentence is so disproportionate to the gravity of the offence either in its severity or leniency that it can be said that a proper judicial discretion has not been exercised; or where the trial court has proceeded upon wrong principles. See Ntsonpe Shoto and Others v R 1960 T.C.M.R.1; Visser v The State 1974-75 B.L.R. 68 (1974).

The facts as found by the learned trial Judge which are relevant to this appeal were as follows. Both the appellant and the deceased were husband and wife.

The appellant took up employment in South Africa and came home periodically. On August 4, 1976 he came home to find that his wife, the deceased, was not in. He, in company of another, then went to the farm where she was working and found her there. He asked her to follow him home but she refused. She, however, went back home to him on the 7th. Then there was some altercation between them during which the appellant took out his knife and stabbed the deceased three times inflicting injuries on her as a result of which she died. The three stab wounds, according to medical evidence, were each about 2 cm. wide, the deepest measuring 15 cm. The accused did not deny the stabbing; on the contrary he made a clean breast of the whole thing. The appellant gave evidence at his trial and the only explanation which he gave for his action was this: "I was annoyed for not finding her at our home. We had not fought before I stabbed her We did not understand each other, since she was going away without my permission. We were quarreling about it I was still in love with her. I don't know why I stabbed her."

It is upon all these facts that the appellant was found guilty of murder, and rightly so. However, the learned Chief Justice found extenuating circumstances as follows:

- (1) The artificial conditions under which the accused would be working in South Africa (in respect of which there was no evidence);
- (2) that the marriage was an unhappy one;
- (3) that the deceased was working outside the home thus making herself independent of the appellant;
- (4) that the killing must have occurred on the spur of the moment and that the appellant immediately afterwards realised what he had done, and went himself to the police station and gave himself up.

I take the view that in accepting these circumstances as sufficient to warrant the imposition of a sentence of imprisonment instead of one of death the trial Chief Judge showed extreme clemency towards the appellant; and it is not surprising therefore that the assessors who sat with him at the trial disagreed with him on this point.

It is my view that the appellant was extremely lucky not to have been sentenced to death and therefore a sentence of life imprisonment cannot be said to be too severe. In The State v Nkani 1979-80 B.L.R. IGS, at page 202(1979) this court said that "A sentence of life imprisonment should be confined to the more serious convictions of murder with extenuating circumstances". The case of this appellant is an example of such a conviction.

In arriving at his conclusion, the learned trial judge did not proceed on wrong principles; he properly evaluated all available evidence in favour of the appellant; the sentence, I believe is not disproportionate to the offence nor is it too severe bearing in mind the nature of the offence and the conditions of the appellant. In all these circumstances therefore the only conclusion is that the appeal lacks merit and is accordingly dismissed.

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T. A. Aguda
Judge of Appeal

I concur:

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I. A. Maisels
President of Court of Appeal