

IN THE COURT OF APPEAL

OF THE REPUBLIC OF BOTSWANA

Criminal Appeal No. 10 of 1981

In the matter of

MOSELENYE RANTHOGO BENHUTSHWANE

Appellant

vs.

THE STATE

Respondent

Coram:

Maisels P

Dendy Young JA

Aguda JA

Dr. H. Lever for the Appellant

Mr. L. M. Mothobi for the State

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J U D G M E N T

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Maisels P

The appellant was tried and convicted in the High Court, despite his plea of not guilty, of the murder of a young girl Kemmonyeh Khonana Tebogo. No extenuating circumstances having been found he was sentenced to death. Before he was called upon to plead, as a result of certain representations made by Mr. Matthews who appeared pro deo for him in the court a quo, the learned trial judge, Corduff J. acting pursuant to the provisions of Sec. 157 of Criminal Procedure and Evidence Act, made the following order.

1. That the accused person shall be transferred in custody to the Mental Hospital at Lobatse for psychiatric observation with particular reference to his mental state at the time when the offence charged is alleged to have been committed.
2. That Counsel for the Defence of the accused person shall arrange for the relevant documentation and evidence to be available for the examining psychiatrist.
3. That the report on the mental condition of the accused person shall be furnished to this Court in time for the adjourned trial to be heard on Friday 28th November 1980 at Lobatse.

A report was duly submitted to the Court by Dr. D. I. Ben-Tovim, a Psychiatrist Specialist at the Lobatse Mental Hospital. It is not necessary to set out in full the terms of this report. Suffice it to say that Dr. Ben-Tovim came to the conclusion that when he interviewed the appellant there were no signs of mental abnormality and there was nothing to indicate that he was not entirely aware of his actions at the time that the offence was said to have been committed.

Not surprisingly nothing further was heard of the appellant's alleged insanity. When the trial was resumed he pleaded, as I have already stated, not guilty. The State adduced its evidence and the appellant himself gave evidence. I might perhaps interpose here that the onus of

proving insanity was of course on the appellant, a proof on a balance of probabilities sufficing Cf Burchell and Hunt South African Criminal Law and Procedure Vol. 1 p. 217 and the numerous authorities there cited especially R. v. Kennedy 1951 (4) S.A. 431 (AD) at 435.

When the matter came before us on Appeal, the conviction was correctly not challenged, but Dr. Lever on behalf of the appellant argued that the learned judge a quo should have found that there were extenuating circumstances.

At the conclusion of the argument the Court dismissed the appeal intimating that its reasons would be given later.

These are the reasons

The State evidence clearly established beyond any reasonable doubt that the appellant had followed the deceased, (whose age was said by her father to be ten years but was estimated as being + thirteen years) who had been sent by her father to gather in his goats on the late afternoon of Friday the 17th July 1980. For some reason never satisfactorily explained by the appellant he caught hold of this little girl and strangled her until she was dead. After she was dead he took out his knife and cut out her private parts. He later removed the body to another place, where he buried it. I have mentioned that the appellant never satisfactorily explained why he had on his own admission murdered this child. My reason for saying this is that he made some attempt to show that he and the deceased

were lovers, and that he had discovered the night before she had been unfaithful to him. He had however in the voluntary statement made by him to the Magistrate, so far from alleging that he had found this young girl with another lover, stated that he himself had had intercourse with the deceased the night before.

His evidence was found by the learned judge a quo to be a mass of contradictions and untruths and I am bound to say that a reading of his evidence fully justified the trial judge's views.

Dr. Lever argued that extenuating circumstances should have been found because the murder, so he argued, was an act of sudden impulse or alternatively that the murder was committed when the appellant was in a rage as a result of his having been humiliated by this young girl having taken unto herself another lover. The onus of proving extenuating circumstances lay on the appellant. It is quite impossible in my opinion to find either of these alleged extenuating circumstances in the evidence of the appellant. It was completely untrustworthy and devoid of any credence. Corduff J, if I may be permitted so to say, examined with great and thorough care every aspect of the case to discover whether he would find any extenuating circumstances. As stated above he found none and a reading of his judgment convinces me that he was undoubtedly correct. It was for these

