

IN THE COURT OF APPEAL OF THE
REPUBLIC OF BOTSWANA

Criminal Appeal No. 6 of 1981

KEBATENNE SEGOTSO

Appellant

vs

THE STATE

Respondent

Appellant in Person
M. L. Mothobi for the Respondent

J U D G M E N T

Conc.

Maisels, P

Dendy-Young, J.A.

Aguda, J.A.

MAISELS, P

I agree that the appeal must be dismissed. I cannot agree however that merely because the learned trial judge rejected the evidence of the appellant, this Court as is suggested by Young J.A. relying on the case of R. v Lucas (London Times 19th May, 1981), is bound by that finding. It is the duty of the Court of Appeal in every case to examine the findings of the trial court and if in any particular case it is of the opinion that those findings are incorrect, it is the right and duty of the Appeal Court to correct them. In the present case, however, I see no ground for interfering with the judgment and findings of the learned trial judge.

In addition in my opinion my brother Young J.A. has permitted himself to indulge in some speculation with regard to the boy not having told the whole story and the possibility that the wife's conduct was not that of an innocent person. This speculation is not based upon any evidence and in my judgment is unwarranted.

With regard to the appellant's statement before us as to his illness no doubt this will receive the attention of the prison authorities.

(signed)

I. A. Maisels

President of the Court of Appeal

I agree:

(signed)

T. A. Aguda

Judge of Appeal

Dendy Young JA.

The appellant a man of 49 years was convicted in the High Court on a charge of murder contrary to Section 207 of the Penal Code the allegation being that on or about 29 November 1975 he with malice afore-thought murdered POITSHEGO MOSWEU. The appellant's defence was that he

had found the deceased in bed with his wife.

The evidence of the appellant was rejected by the trial court so that it must be ignored: (R. v. LUCAS, London Times 19/5/61).

That leaves the evidence for the State. This does not explain fully what happened. The dead body of the deceased was found outside the appellant's hut shelter.

The medical evidence was that the frontal bone of the skull had been bashed into the brain, and nose and mouth beaten to pulp nearly beyond recognition. According to the State case the appellant and the deceased attended a beer drink that day. The appellant was not very sociable generally but there was no suggestion of a quarrel between the appellant and the deceased. They left the beer drink together going in the direction of Appellant's home. The story is taken up by the appellant's young son who testified that the appellant arrived home at dusk; about 300 yards behind him came the deceased. The boy continued:

"The accused entered the hut and put his skipper there. He went out and lay down. We had been eating. The deceased said 'give me some food'. My mother said we had finished eating. We were just inside the shelter. I had a piece of meat in my hand. He said 'Can you cut me a piece of meat?' I cut him a small piece because it had almost finished. My mother was there. When he was eating that meat the accused hit him. The deceased was

"sitting down. The accused was standing then. He struck the deceased with a piece of wood on the forehead and we (the mother and children) ran away. I knew the piece of wood before. It was in the hut. It was to be used as a rafter".

Later the boy said:

"The deceased was not saying anything when the accused struck him. The accused said nothing. The accused and the deceased had no conversation. I and my mother and my young sisters (3) ran away".

And further on:

"We ran away because we were afraid. He did not threaten us. My mother was also frightened. The accused does not normally beat up people. He did it out of the blue".

The appellant sustained no injury.

On that evidence the trial court found malice aforethought for the purposes of the charge under Section 207.

There is no appeal against conviction. It is doubtful that the boy told the whole story. Why should the mother run away and refuse to return? There was no threat to her. That is hardly the conduct of an innocent wife. The appellant was unrepresented at the hearing of the appeal. He could, of course, not traverse the facts found at his trial but he was allowed to give an account of his state of health at the time. He said he suffered from some affliction of the stomach which caused him to lose consciousness on occasions. However he did not have an

attack at the time of the killing.

On the matter of sentence the trial court had difficulty in finding extenuating circumstances.

The learned judge said:

"There is no history of violence in respect of the accused. This was clearly not a premeditated murder and was committed on the spur of the moment. What sparked the accused off we don't know, but I think that sufficient benefit of the doubt should be given to the accused, taken together with the drink he had consumed, for the court to take into account in passing sentence".

The appellant was sentenced to life imprisonment.

I am unable to find ground for interfering with the exercise of the trial court's discretion. The sentence must stand.

The appeal is dismissed but I would recommend that the appellant be kept under observation for any signs of epilepsy.

(signed)

Dendy Young

Judge of Appeal

18/6/81

LOBATSE