

IN THE COURT OF APPEAL

OF BOTSWANA

Criminal Appeal No. 40 of  
1983  
(High Court Case No. Cr.T. 4 of  
1981)

In the matter between:

BAATOGETSE SETSUMPA MAHUHUMELA Appellant

vs.

THE STATE

Appellant in person (unrepresented)  
Mr. R. J. Chakalisa for the State

Coram: J.A. O'Brien-Quinn C.J.  
J.R. Dendy-Young J.A.  
N.R. Hannah J.A.

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J U D G M E N T

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O'BRIEN-QUINN, CJ:

This is an application for leave to appeal out of time against the conviction and sentence of fifteen years' imprisonment on a charge of murder passed by the High Court sitting at Serowe on 2nd March 1981.

This Court decided to treat the application for leave to appeal as the appeal itself and heard the Appellant at length as to his reasons for not filing his appeal in time, as to his grounds of appeal against conviction and his grounds of appeal against sentence.

Having heard his grounds of appeal against conviction we did not wish to hear the State on the matter.

On the question of sentence, however, the main argument of any substance advanced by the Appellant was that the sentence was excessive in view of the fact that the deceased had insulted him by making a derogatory remark as to the size of his testicles which remark caused him to lose control of himself and he found himself kicking the deceased. There is no doubt, as the State argued, that the only evidence of any insult having been given by the deceased to the Appellant is that referred to by the Appellant in his unsworn statement in the High Court. The suggestion that such an insult had been offered to the Accused was made to witnesses but it was denied. The main witness said that he never heard any insult being offered but that such an insult may have been offered during his absence or before he arrived on the scene.

The cardinal principle to be followed by a Court of Appeal is that stated in State v. Fazzie and Others 1964(4) S.A. 673 (A.D.) at page 684 -

"..... this court will not readily differ from the court a quo in its assessment either of the factors to be had regard to or as to the value to be attached to them".

However in Fazzie's case the Appellate Division went on to say:-

"Where, however, the dictates of justice are such as clearly to make it appear to this Court that the trial court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors

differently from what it did, then such action by the trial court will be regarded as a misdirection entitling this court to consider the sentence afresh".

Now, in the instant case the learned trial judge made no reference whatever to the question of the insult referred to by the Appellant and, while it did not affect the conviction, it was, I consider, a point which definitely should have been alluded to on the question of sentence, and by not doing so, has left the matter open to this court to consider the sentence afresh. If, therefore, the learned trial judge had given consideration to the point I consider that he would have looked differently at the question of sentence and could well have given one somewhat less severe than that actually passed.

However, if account is to be taken of the insult offered and its effect on the Appellant a certain reduction in the sentence would be necessary, but, in so doing, account must be taken of the decisions of the Appellate Division in South Africa in State v. Berliner 1967(2) S.A. 193 A.D. where it was stated at page 200 G that:-

"In the absence of any irregularity or misdirection, this court will, on a question of severity, only interfere if it considers that there is a striking disparity between the sentence passed and that which the Court of Appeal would have passed" and in

State v. Masala 1968(3) S.A. 212 A.D. where that decision

was followed and it was stated at page 215:-

"The first question to be determined is what would, in the opinion of this Court, have been an appropriate sentence having regard to all the circumstances of the case."

In the instant case I consider that, while a sentence of fifteen years' imprisonment was, in the absence of any reference to any insult offered of the nature alleged, a suitable punishment any reduction on account of the insult must also keep within the normal range of sentences for offences of a like nature bearing in mind the words of Schreiner JA in R. v. Karg 1961(1) S.A. 231 (A.D.) at page 236:

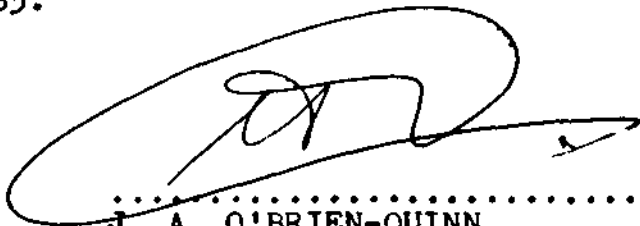
"Each case should be dealt with upon its own facts, connected with the crime and the criminal, and no countenance should be given to any suggestion that a rule may be built up out of a series of sentences which it would be irregular for a court to depart from."

Having therefore, carefully considered the entire facts of the case and the sentence that would normally be passed for like offences, I consider that, taking account of the insult and its effect on the Appellant, the sentence that should have been passed was one of twelve years' imprisonment back-dated to the date upon which the Appellant was first arrested, namely 5th August, 1980.

The sentence of fifteen years' imprisonment passed at Serowe on 2nd March 1981 is set aside and a sentence of TWELVE YEARS' IMPRISONMENT back-dated to 5th August, 1980 is substituted therefor.

*Leave granted; appeal allowed in part & set aside.*

GIVEN at the COURT OF APPEAL, LOBATSE, this 8<sup>th</sup> day of December, 1983.



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J. A. O'BRIEN-QUINN  
CHIEF JUSTICE

I agree

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J. R. DENDY-YOUNG  
JUDGE OF APPEAL

I agree

.....  
N. R. HANNAH  
JUDGE OF APPEAL.

/Ints.