

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 2 of 1984

Criminal Trial No. 24 of 1983

In the matter of:

BERNARD LOWANI

Appellant

vs.

THE STATE

Appellant in person

Mrs. L. I. Damba for the State

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J U D G M E N T

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CORAM: I. A. Maisels, JP  
L. de van Winsen, JA  
I. Isaacs, AJA

VAN WINSEN, JA:

Appellant was convicted of the murder of his wife by Corduff J, who found extenuating circumstances to be present. He was sentenced to 15 years imprisonment. Appellant appeals against his sentence on the grounds that it is too severe.

At the trial the medical officer who conducted the post-mortem examination gave evidence that he found a number of injuries on the deceased, appellant's wife, who at the time of her death was seven months pregnant.

The upper and lower jaws were fractured, she had a fractured skull and a large area of subdural haemorrhage

extending on either side of the brain. Externally three lacerated wounds, a contusion and abrasions were visible on the head. It is not in dispute that the injuries could have been inflicted by means of a stick or pole applied to the head with moderate force. That appellant hit his wife with a fencing pole is similarly undisputed. He was seen/by a neighbour who also spoke of him having hit his wife with his fist.

Appellant made an extensive statement before a Magistrate in which he admitted that he had hit his wife twice on her head with a pole. In the course of the statement he advanced a number of reasons for his conduct which took the form of alleged acts of provocation of him by his wife. Briefly stated they were to the following effect. She had bought dresses before she could pay for them and claimed that she had bought them on account and had borrowed part of their purchase price.

His wife was employed at a butchery and it appears that appellant had a strong suspicion that his wife had some sort of relationship with her employer although in his statement to the Magistrate he does not go so far as to accuse her of infidelity. His suspicions in this regard were fanned by the fact that she refused to have intercourse with him and that on one occasion she went out of their house in her night-dress in the early hours of the morning to talk to her employer who had arrived by car and that she had remained outside for some time to talk to him. Appellant had other problems with her

employment which he eventually persuaded her employer to terminate. Later she was re-employed<sup>at</sup>/the same butchery. The final straw in his mind came almost immediately before his assault upon her when, while they were quarrelling, she described him as a "Kalanga", which is probably in the nature of a term of abuse. As was pointed out by the trial Judge, however, there was no evidence before the Court as to its exact meaning or its significance,

Appellant did not chose to give evidence at his trial but relied upon what he had said to the Magistrate as affording justification for his conduct. He relied on these matters to establish a defence in law that by reason of the provocation afforded him by his wife's conduct the offence with which he was charged should be reduced from murder to manslaughter.

The Court quo took this view at the trial that the onus of proving the provocation required to reduce the offence from murder to manslaughter rested upon appellant. It found that appellant had not established on a balance of probabilities that the deceased had offered him sufficient provocation to reduce the killing to manslaughter and accordingly found him guilty as indicated earlier in the judgment.

In dealing with sentence, the trial Court concluded that the only extenuating circumstances present in this case were his youth, his clean record and the fact that the offence had been committed in the heat of an argument.

I find it unnecessary to pursue the subject as to where, in relation to the merits of the matter as opposed to extenuation, the onus of proof in regard to provocation lies. Counsel for the State before this Court, Mrs. Dambe, prepared a very thorough and well-researched argument on this matter which would have been most helpful to the Court had it been necessary to decide the matter.

In this appeal, however, we are only concerned with provocation as a matter of extenuation and there can be no doubt that the onus of proving provocation in this context lies with appellant.

I find myself unable to agree with the trial Court that appellant's statement to the Magistrate dealing with provocation ought to be ignored. Agreed that the absence of an opportunity to cross-examine the appellant is a factor which may rightly be regarded as detracting from the value or weight to be attached to the statement, that, however, is no reason for affording it no weight at all. I do not find appellant's statement as to the nature of his complaints about his wife so unreasonable and so lacking in credibility that they afford no evidence of provocation.

Mindful of the fact that an accused would in the circumstances in which appellant found himself seek to put as favourable/<sup>a</sup>construction on his relationship with his wife as possible, I, nevertheless, consider that some credence ought to have been afforded to the contents of his statement.

If that is done the effect of such circumstances warrants a substantial reduction in the sentence. It is for these reasons that the appeal was allowed and the sentence reduced from 15 to 10 years.

GIVEN at the Court of Appeal, Lobatse, this 22nd day of May, 1984.

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L. DE VAN WINSSEN  
Judge of Appeal

I agree

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I. A. MAISELS  
Judge President

I agree

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I. ISAACS  
Acting Judge of Appeal