

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 52 of 1983

Criminal Trial No. 36 of 1983

In the matter of:

THAMAE TSHABUE

Appellant

vs.

THE STATE

Appellant in person

Mr. W. G. Manchwe 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

ISAACS, AJA:

The appellant in this matter was charged with the crime of murder of one XIXHAWE HANSE on or about the 28th July, 1982.

He had pleaded not guilty and had in his evidence attempted to prove that another person had killed the deceased. He was, however, found guilty of murder with extenuating circumstances and was sentenced to 20 years imprisonment by the learned Chief Justice.

According to the medical evidence as shown by the Post-Mortem the cause of death of the deceased was internal haemorrhage

and laceration of the lung tissue. Several ribs had been broken by a very severe blow to the chest. There were three stab wounds but these were not penetrating. The liver was lacerated and the doctor said this was caused by a severe blow.

The appellant is appealing against the severity of the sentence. In his notice of appeal the appellant stated inter alia that the deceased was his cousin and that he has suffered a loss by her death "due to my unforeseen results of the possible consequences."

According to the evidence, the deceased was his reputed wife or girlfriend and he had thought she had been having an affair with another person.

In passing sentence the learned Chief Justice said inter alia:-

"I have seriously considered passing the death sentence, but having regard to the fact that there was some element of provocation, however small, and the fact that you are illiterate and come from a primitive section of society as well as the fact that you are very young, I consider that there are extenuating circumstances and that a person like you must be put away for a long time."

In his evidence the appellant stated that he did not know how old he was because he was illiterate. In his grounds of appeal he stated that "I am still a young man who has always been a very loyal citizen."

Also in his grounds of appeal he asks for a reduction of sentence "so I can be given an opportunity to re-organise

myself as a loyal citizen."

The learned Chief Justice found extenuating circumstances because "there was some element of provocation, however small."

Counsel for the State contended that as the determination of an appropriate sentence is a matter for the trial Court.. The interference of the Appeal Court is restricted and that the mere fact that the Appeal Court might have given a different sentence is not sufficient ground for interference. He refers to several cases in support of this contention including the cases of State v Berliner 1967 (2) S.A. 193 at 200 and Visser v State 1974 - 75 B.L.R. 68.

Of course the State Counsel is correct on this question in general. However, there are some cases in which an Appeal Court is entitled to interfere with the sentence of a trial Court. In the case of Ntsompe Shoto and others v R 1960 H.C.T.L.R. 1 Roper J.A. said:-

"It is inadvisable for this Court to attempt to lay down a general rule or test as to the circumstances in which its favour to reduce the sentence of the trial Court should be exercised ..... We are not entitled to substitute our own discretion for that of the trial Judge and to alter the sentence imposed on the main ground that we would have passed a different sentence."

Sometimes, however, it is necessary to interfere for example that the sentence is substantially different from what the Appeal Court would have imposed.

I think the circumstances in this case, the sentence was

substantially different from what the Appeal Court would have imposed. Apart from the provocation there seems to have been no premeditation. I would reduce the sentence to imprisonment for a period of 12 years to begin from 28th July, 1982.

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

*I. Isaacs* AGH

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I. ISAACS  
Acting Judge of Appeal

I agree

*I. A. Maisels*

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I. A. MAISELS  
Judge President

I agree

*L. de van Winsen*

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L. DE VAN WINSEN  
Judge of Appeal