

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 11 of 1985
High Court Criminal Trial No. 43 of 1984

In the matter between:

RAMATHE LOSANG

Appellant

and

THE STATE

Mr. S. Ebrahim for the Appellant

Mr. S. A. Afful for the State

JUDGMENT

CORAM: Maisels, JP
Amissah, JA
Van Winsen, JA

MAISELS, JP

The appellant was undoubtedly rightly convicted in the High Court of the murder of his wife. The learned trial judge found there were no extenuating circumstances and consequently imposed the mandatory death sentence. This appeal is only against sentence. It is contended that the learned trial judge erred in his approach to the question of extenuating circumstances, and that he should have found that there were sufficient extenuating circumstances to justify the Court in the exercise of its discretion under the Penal Code not to impose the sentence of death.

What seems to have started off as a comparatively normal domestic quarrel between the appellant and his wife ended up in an almost inconceivably brutal assault by the appellant on his wife resulting in her death. During the course of the struggle the deceased probably in defending herself struck the appellant with a piece of firewood and grabbed his testicles.

The learned trial judge following what was said in S v Gofhamodimo (Criminal Appeal No. 4 of 1984 not yet reported) Romone v R Swaziland L.R. 1963-69 at 249 (C.A.), R v Tshabalala 1966 (2) S.A. 297 (A.D.), S v Felix and Another 1980 (4) S.A. 604 (A.D.) and S v Shoba 1982 (1) S.A. 36 (A.D.) correctly decided to deal with the question of extenuating circumstances as a separate issue.

This procedure ought to be followed in all cases of murder where the question arises as to whether the death sentence ought to be imposed or not. In some cases extenuating circumstances may become apparent in the course of the trial. In all others where there is a verdict of guilty to murder, the accused should be permitted to lead evidence and to address the Court in extenuation or merely if he so desires, to address the Court in extenuation.

I thought it desirable to set out fully the proper procedure to be adopted by the trial court because in the present case just as in William Mosarwana (Criminal Appeal No. 7 of 1985) the learned judge has fallen into the same error as he did in that case. In considering the question as to whether there are or are not extenuating circumstances he took into

account a serious previous conviction of the appellant. This he can only do, as pointed out in Mosarwana supra, after a finding that extenuating circumstances exist, in determining what is an appropriate punishment.

This then is a case where, because of a misdirection by the trial judge, this Court is at large to consider the question of sentence afresh. The proper approach to the question as to whether there are extenuating circumstances is set out in the oft cited decisions in Fundakubi 1948 (3) S.A. 840 (A.D.) and Letsholo 1970 (3) S.A. 476 (A.D.) which have been unquestionably followed in the Courts of Botswana. After considerable hesitation, I have come to the conclusion that a finding of extenuating circumstances is justified and the Court should exercise its discretion not to impose the death sentence. I wish however, to state quite emphatically, as did the learned judge a quo, that the law does not and will not recognize what is alleged to be an accepted custom in Botswana, that a husband may physically assault his wife if she incurs his discipline. I mention this because Counsel for the State, of all people appears to have thought that there was nothing wrong in this alleged custom.

It is, I consider, fair to say that the appellant was quite reasonably frustrated by his wife's failure to answer questions which he legitimately put to her and which concerned her failure to meet him as arranged. In addition, he seems to have laboured under the impression, which might have been quite unjustified, that the deceased wanted to sleep at a different

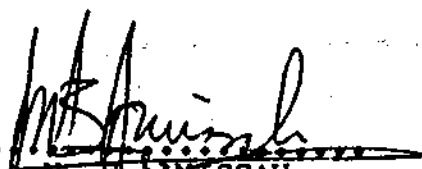
home every evening. The learned trial judge accepted that the appellant was, in the course of his attack on his wife, hit by her quite severely with a piece of firewood and that when she grabbed his testicles, the appellant suffered great pain. The trial judge, quite correctly, in my opinion, held that the actions by the wife were in legitimate self-defence. However, the position that seems to me to emerge is that what started off as what started off as what one may call an ordinary assault by the appellant on his wife (albeit a quite unlawful one) the assault grew in intensity during the course of the struggle that ensued to such an extent that he completely lost control of himself and committed the brutal assault on her, such as striking her head against the wall, and in the end leaving her to die. A factor which seems to me, to operate to some extent in the appellant's favour is that, there seems to have been no premeditation on his part to commit a serious assault.

This is indeed a border line case, but I consider that on the whole, the Court would be justified in finding extenuating circumstances and exercising its discretion not to impose the death sentence.

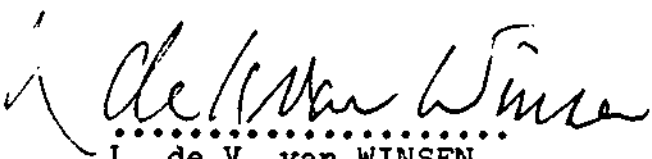
It is clear that the appellant must be imprisoned for a long period of time. I would set aside the sentence of death and substitute a term of 15 years' imprisonment to date from today.

I. A. Maisels
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I. A. MAISELS
JUDGE PRESIDENT

I agree:


A. N. E. AMISSAH
JUDGE OF APPEAL

I agree:


L. de V. van WINSSEN
JUDGE OF APPEAL

LOBATSE
6th June 1985