

IN THE COURT OF APPEAL OF BOTSWANA

Court of Appeal No. 17 of 1986
High Court NO. F4 of 1985

In the matter between:

MASUNGA MAFOKATE

Appellant

vs.

THE STATE

Respondent

M. S. Gaongalelwe for the Appellant
S. A. Afful for the State

J U D G M E N T

Coram: Maisels, JP
Aguda, JA
Amissah, JA

MAISELS, JP:

The appellant was convicted in the High Court of the murder of his mother in law and his wife. The Court (Barrington-Jones J) found no extenuating circumstances with the consequence that the appellant was sentenced to death. This is an appeal against sentence only, there being no doubt that the appellant killed the deceased and intended to do so by shooting them with his gun. His conviction for murder was undoubtedly correct.

It is contended that the trial judge erred in not finding extenuating circumstances. It is argued that in

coming to this conclusion the trial judge misdirected himself and in addition that he failed to give due weight to what it was submitted were extenuating circumstances.

Before dealing with the facts of this case and the submissions made I regret to have to mention the manner in which the victims are described not merely in the record of the evidence but also in the judgment of the Court *a quo*. They are referred to as "D1 and D2" respectively. This is quite improper and unacceptable. There is no reason why the deceased mother in law and the deceased wife of the appellant should not have been referred to as such. Neither my Brethren nor I have ever seen victims of a crime as described in this case. There is no reason for doing so and I express the hope that there will be no repetition of this distasteful manner of referring to victims.

There is really no dispute as to the facts of this case. The matrimonial history of the appellant and his wife was indeed an unhappy one although there ^{were} a number of children of the marriage. There have been many customary Court proceedings in which the appellant claimed that his wife had wrongfully left him. These proceedings apparently ended by the wife being required to return to her husband, the appellant, in the hope of a reconciliation being effected. The wife did return but after living together for a while she left the appellant and went back to her mother. The last occasion upon which she did this seems to have been in December 1984. She and her mother were killed by the

appellant on the 3rd January 1985. The evidence given by one of the appellant's children was that he told her late in December 1984 that he would kill her mother for refusing to come back home and added that he would kill her grandmother because "she is the one who influences your mother not to come back home". This witness stated as well that her parents used to fight and quarrel and that the appellant used to beat her mother. A son of the appellant also gave evidence that in December 1984 he, the appellant, told him he was going to ask his mother to come back and that if she did not he was going to kill her. The witness stated that on the 3rd January 1985 (which turned out to be the day of the killing) he was at a cattle post with the appellant who told him that he was leaving to go and kill the boy's mother and grandmother. This is what the appellant did in fact do. He left the cattle post on his bicycle carrying a rucksack and gun and after arrival at his mother in law's home he killed her and his wife. The trial judge believed the evidence of these children despite the appellant's statement that they were lying. I can see no reason to differ from the learned judge's finding. I do so because the evidence is probable and not because of the demeanour of the witnesses which impressed the learned judge. I should perhaps add in parenthesis, that speaking for myself I have always had difficulty and found it unsatisfactory to base one's finding as to credibility on the demeanour of witnesses especially when their evidence is

given through an interpreter. On the appellant's own version of what led up to the killing he apparently asked his wife to come home to her children but after talking to her mother the latter told him that her daughter (the appellant's wife) was not going anywhere "it could be another case again". The appellant accused his mother in law of influencing his wife and blamed her for her deserting him. The mother in law according to the appellant replied "If I say she is not going I mean she is not going". Thereupon, and I again quote from the appellant's own evidence "this is when I picked up the gun and shot her". His wife then retreated into a hut from which she eventually emerged and attempted to run away. The appellant shot at her, missed the first time, and then shot at her again, succeeding on this occasion in hitting his target. Both his mother in law and his wife died as a result of the wounds they received from the shots fired by the appellant. Taking all the facts together it seems to me to be clear that the present is a case not merely of murder but of premeditated murder.

I turn now to consider the alleged misdirection by the trial judge of which the appellant's Attorney complains. After setting out certain well-known cases on the question of extenuating circumstances and considering in the result that the moral blameworthiness of the appellant was of such a nature as not to justify a finding of extenuating circumstances the trial judge said:

"In arriving at these conclusions I have carefully considered the cases which have been cited to me, but I consider that the intention of the accused was to kill both the deceased, and not merely to cause either of them grievous harm"

The next sentence in the next paragraph reads:

"I therefore find that there are, in fact no extenuating circumstances in this trial."

(the underlining is mine). The applicant's Attorney read this sentence as meaning that because there was an intention to kill which was a necessary finding before the verdict of murder could be returned the trial judge found there were no extenuating circumstances and this he submitted was a misdirection. In my opinion however the judge in making this finding and using the word "therefore" was referring to all the factors which he had taken into account on the question as to whether there were grounds for finding extenuating circumstances. It seems to me also to be probable that in the sentence in which the word "therefore" appears to which I have referred the trial judge was drawing a distinction between a case of *dolus directus* of which the present is an example as opposed to a case of *dolus eventualis*. In some instances (not necessarily correctly) a finding of *dolus eventualis* is taken as an extenuating circumstance. It follows from what I have said that in my opinion there was no misdirection.

In dealing with the question of extenuating circumstances the learned judge referred to S v. Letsholo 1970 (3) SA 476 (AD) and to R. v. Fundakubi 1948 (3) SA 801 (AD) cases which have been fully accepted in many cases in Botswana as stating

correctly the approach to this subject. The earlier South African cases referred to by the trial judge namely R v. Mfoni 1939 OPD 191 and R v. Biyana 1938 EDL are nowadays rarely cited. Fundakubi is accepted as the locus classicus, Letsholo being merely an amplification of what was decided in Fundakubi. The trial judge then referred to the factors operating in favour of reducing the moral blameworthiness of the appellant and those which he considered to aggravate his moral blameworthiness. He accepted the appellant's frustration in not ever having been successful in getting his wife to return home and that looking at the picture as a whole his failure to do so had a bearing on the appellant's state of mind in committing this dreadful crime. Nevertheless he came to the conclusion that in the final analysis this was not sufficiently appreciable to abate the appellant's moral blameworthiness in doing what he did. I am unable to differ from this finding. Even if I add to the facts found by the trial judge that the appellant's frustration was aggravated by the attitude of his mother in law and by the fact of the appellant having to look after the children of his marriage without the help of his wife, points which were urged by the appellant's Attorney I am still by no means satisfied that there are sufficient grounds which would justify this Court sitting as a Court of Appeal in making a finding of extenuating circumstances.

In my judgment the appeal fails and it is dismissed.

I. A. Maisels

I. A. MAISELS
JUDGE PRESIDENT

T. A. Aguda

T. A. AGUDA
JUDGE OF APPEAL

I agree

A. N. E. Amissh

A. N. E. AMISSAH
JUDGE OF APPEAL

I agree

Given this ...^{16th}... day of July, 1986.