

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 16 of 1987
Lobatse Case No. L 232 of 1986
High Court Case No. CA 368/86

In the matter of:

EDITH SELEBOGO

Appellant

vs

THE STATE

Respondent

Mr. D. Effah for the Appellant
Mrs. I. Dambe for the State

J U D G M E N T

Coram: I. A. MAISELS, QC, JP.
A.N.E. AMISSAH, JA.
G. BIZOS, JA.

MAISELS, JP.

The Appellant was charged in the Magistrate's Court of a contravention of Section 251 of the Penal Code, the allegation being that she assaulted the complainant by choking her.

The Magistrate was asked at the end of the Prosecution case to acquit the Appellant. The argument advanced was that it was only the complainant who had said that the Appellant had choked her. The other persons who were present in the room said they did not see the complainant being choked by the Appellant. The Magistrate decided at the end of the Prosecution case that there was insufficient evidence upon which he might convict the Appellant of a contravention of assault under Section 5(a) of the Penal Code which reads:

"Assault means -

- (a) the intentional application of force to the person of another directly or indirectly."

However, the Magistrate came to the conclusion that there was a case to meet under Section 5(b) of the Penal Code namely "the making of any gesture towards another in such a manner as to give him reasonable grounds to believe that the person making the gesture is about to apply such force to his person."

At the end of the trial the Magistrate came to the conclusion that the Appellant was guilty of contravening Section 5(b).

The witnesses who saw what happened say they got hold of and grabbed the Appellant away from the room where the event complained of took place so that she could not carry out what was an obvious intention to assault the complainant because of some insult which the complainant was said to have levelled against her. The Appellant had to be removed from the room before she could assault the complainant.

Counsel for the Appellant has argued in this Court that it is the complainant herself who has to have reasonable grounds to believe that the person making the gesture was about to apply such force to her. The complainant herself said the Appellant approached her in such a manner that she thought the Appellant was about to assault her. It is quite clear that that was the inference that was drawn by other persons who were in the room at the same time.

There is no real ground for contending that the Magistrate was incorrect in convicting the Appellant.

There are certain cases where particulars are given to a charge when the Accused may be prejudiced in his defence when a defence is directed towards the charge as particularised, and it is sought by the prosecution to rely on different particulars.

In this case however at the end of the Prosecution case the Magistrate made it clear to the Appellant that there was a case for her to meet under Section 5(b) of the Penal Code to which I have referred. There are no merits in my opinion in this appeal as far as the conviction is concerned. In so far as the sentence however it appears the Appellant has already sustained certain loss according to a letter which was handed in to us by consent, which was not placed before the Magistrate nor before the High Court. This letter shows that on 1st September, 1986 she was suspended on half pay as from that day because of the offence she was alleged to have committed under Section 251 of the Penal Code to which I have referred. There is a suggestion in the Heads of Argument that if the Appellant's conviction for assault is upheld she may be dismissed from Public service and also lose her pension benefits.

Mrs. Dambe who appears for the State says that this is not strictly accurate and probably there might be an enquiry pending and that she may be subject to further penalty if the conviction stands. If however this Court comes to the conclusion that this is an appropriate case in which Section 310 of the Criminal Procedure and Evidence Act should be utilised then it is clear that the Appellant would be acquitted for all practical purposes.

That Section reads:

"Whenever a person is convicted before the High Court or any subordinate Court of any offence other than an offence specified in the Second Schedule, the Court may in its discretion discharge the offender with a caution or reprimand, and such discharge shall have the effect of an acquittal, except for the purpose of proving and recording previous convictions."

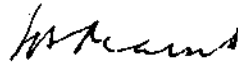
In my opinion justice will be met in this case by setting aside the sentence of P100 or in default 2 months' imprisonment imposed by the Magistrate.

Counsel for the Appellant informed us that he was quite unaware until recently of the penalty the Appellant has already sustained and might be subject to in the future and that is why this was not referred to in the High Court or before the Magistrate, and I have no hesitation in accepting what he says. Mrs. Dambe who has listened to the discussion between Counsel for the Appellant and this Court has come to the conclusion, in my opinion, correctly, that she will not object to the application in this appeal of Section 310.

In the result therefore although the appeal against conviction fails the sentence is set aside and in terms of Section 310 the Appellant is cautioned and discharged.

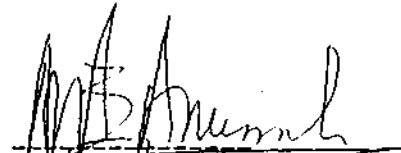
I hope it will be made clear to the Appellant that although this means that she has been acquitted by reason of the provisions of Section 310 if she is found guilty of some other offence in the future then the present matter may be brought up against her.

In the result therefore the Appellant is cautioned and discharged.



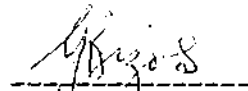
I. A. MAISELS
Judge President

I agree



A.N.E. AMISSAH
Judge of Appeal

I agree



G. BIZOS
Judge of Appeal

GIVEN at Lobatse this 30th day of November, 1987.