

IN THE COURT OF APPEAL OF THE
REPUBLIC OF BOTSWANA

Criminal Appeal No. 18 of 1989
High Court Crim. Trial No. 44 of 1988

In the matter of:

CLEMENT MOTHELESI

Appellant

vs

THE STATE

Respondent

Advocate Bregman (instructed by Michin & Kelly)
for the Appellant
Advocate S. A. Afful for the Respondent

J U D G M E N T

Coram: F. A. AGUDA, JA.
B. A. DOYLE, JA.
G. BIZOS, JA.

DOYLE, JA.:

The Appellant was charged with the murder of his wife. He pleaded guilty to this charge in unequivocal terms and added that he wished to adduce evidence of extenuating circumstances. The learned trial judge, before accepting this plea, sought confirmation from Appellant's Counsel that this plea reflected Appellant's true intention and was in line with his attorney's instructions. Assured that this was so, he accepted the plea of guilty and convicted the Appellant of murder as charged.

The learned judge then heard the various extenuating circumstances put forward by defence counsel and agreed by the State. He found that there were extenuating circumstances and that they were sufficient to enable him not to impose the death sentence. He sentenced Appellant to eight years' imprisonment.

In the course of pronouncing sentence in which he had turned down a plea from Counsel for a suspended sentence, the learned judge said

"In fact, had these provisions (here referring to Section 304(1) of the Criminal Procedure & Evidence Act) even not existed, I would have passed custodial sentence. That sentence would have been a long term of imprisonment. This is because murder is one of the heinous crimes. No one has a right to take another person's life except where he does so under the Constitution and laws of this land."

The relevant facts of the case accepted by the judge were that Appellant had been under great stress and strain caused by numerous incidents of marital disharmony. Divorce proceedings by the deceased, Appellant's wife, were pending. This had led to Appellant's excessive drinking. On the day of the killing Appellant had received a letter from his wife's Attorney intimating that 50% of the proceeds of the sale of the matrimonial home had been paid to his wife. This had occurred without Appellant's knowledge and to his mind was contrary to anything that had been agreed.

This greatly upset Appellant's already disturbed state and he determined to see his wife and discuss matters. He went to her office where he found her reluctant to discuss anything. He remembered that he had a gun in a truck which he had used the previous day. He decided that this would be a useful instrument to persuade his his wife to talk to him. He went for the gun and with it went back to his wife's office. He found her seated in a chair and told her he wanted to discuss why she had left their home. He demanded that she tell the truth and gave some reasons why he previously disbelieved her, including that she had bought

a new van from money she had been smuggling to her father. She denied this. He then loaded the gun and pointed it at her. He said "OK until death do us part if you don't want to tell the truth." She jumped up and grasped the gun barrel. On a sudden impulse Appellant fired a shot that killed her.

In view of the plea of guilty to murder there could be no question of this shot having gone off accidentally by reason of an outside agency such as his wife jerking the gun.

Counsel for Appellant submitted that the case was only barely murder and was akin to manslaughter. He submitted that the judge had misdirected himself -

- (a) in that he had not given due consideration to all the factors of the extenuating circumstances and the circumstances of the offence itself.
- (b) in relation to the reference to a heinous crime.
- (c) in imposing a sentence which was grossly excessive.

As to the first of these I have no doubt at all that the learned judge did not err. His long and careful consideration of the factors which amounted to extenuating circumstances must have been in his mind. He clearly also had in his mind the circumstances of the killing.

If the reference to a heinous crime means that the learned judge considered that there was no case of murder which did not merit a long custodial sentence, this would amount to a misdirection. However this may be, it is plain enough that the learned trial judge thought that this was itself a case which merited a long custodial sentence.

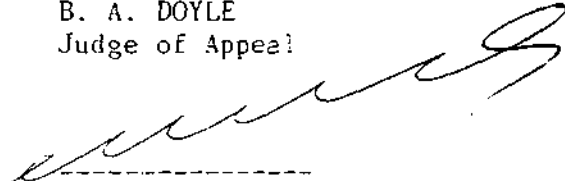
No suspended sentence could be imposed on a conviction for murder. If this case can be akin to manslaughter, it would be a very bad case of manslaughter. It was a grave case of murder though there were circumstances which elicit feelings of pity for the offender. Had I been the trial judge I do not think I would have imposed a sentence of eight years' imprisonment. I am, however, unable to say, particularly bearing in mind the level of sentences generally in Botswana, that eight years' imprisonment in this case is a sentence which could not reasonably be imposed by the judge.

I would, therefore, dismiss this appeal.



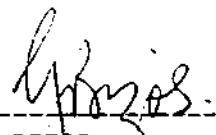
B. A. DOYLE
Judge of Appeal

I agree



T. A. AGUDA
Judge of Appeal

I agree



G. BIZOS
Judge of Appeal

GIVEN AT LOBATSE THIS 4TH DAY OF JULY, 1989.