

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

CRIMINAL APPEAL CASE NO. 47 OF 1994
HIGH COURT CRIMINAL TRIAL NO. 46/92

In the matter between:

SADI MOTSHEGWA

Appellant

vs.

THE STATE

Respondent

E.W.F. Luke II for the Appellant

J.M. Moutswi for the Respondent

J U D G M E N T

CORAM: T AGUDA J.A.
W.H.R. SCHREINER J.A.
LORD W.L.K. COWIE J.A.

SCHREINER J.A.;

The Appellant was charged with the murder of one Piet Thebekile Mfengu whom she stabbed with a knife which she had taken from the kitchen of the house where they had been staying.

She was found guilty of the offence but not sentenced to death, because the trial Court found extenuating circumstances. The sentence was 6 years imprisonment to be calculated from the 20th March, 1992, the day of her arrest and the day after the murder.

Counsel appearing for the Appellant raised only one question on the appeal, namely, whether on the facts of the case the offence upon which she had been found guilty should not have been reduced to manslaughter, because of the element of provocation present in the situation at the time of the killing.

Section 205 of the Penal Code provides:

"[1] When a person who unlawfully kills another under the circumstances which, but for the provision of this section, would constitute murder, does the act

which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool, he is guilty of manslaughter.

[2] The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation."

[1] The definition of provocation is contained in section 206 viz:

[1] The term 'provocation' means, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation, or in the relation of master and servant, to deprive him of the power of self-control and to induce him, to assault the person by whom the act or insult is done or offered."

By subsection [6] of section 206 it is declared that the expression "an ordinary person" means "an ordinary person of the class of the community to which the accused belongs."

The factual basis to which the above provisions relating to provocation are to be applied is not particularly difficult to gather from the record. The evidence given by the Appellant herself is more detailed than the three State witnesses who deposed to the events of the evening of the 19th March, 1993.

It seems that the Appellant and the deceased had formed some kind of relationship and were living together in a room at Mogoditshane Village at the time of the death of the deceased. The relationship was not always a peaceful one. On the day of the killing there was quarrelling in the room which they shared with a friend of the deceased and his companion. The Appellant complained about the conduct of the deceased in refusing to permit her to change her clothes which she had been wearing for

nearly a week. She asked him for permission to go to her sister's house in order to get fresh clothes. He refused to give permission, but she nevertheless went there and when she returned there was a very serious quarrel. However, the important complaint of the Appellant was that the deceased seems to have become tired of her and wanted her to leave the room and the yard where they were staying. She, on the other hand, wanted the relationship to continue and was, it would seem, fiercely attracted to him sexually and was very reluctant to leave him.

At the end of the quarrel about the clothing the deceased packed the Appellant's things into a plastic bag and started pushing her out of the room. She resisted. The deceased was assisted by the State witness, Philip Ntseane, who poked her forehead with his finger and encouraged the deceased "to get the bitch out of the house." It was at this stage that the Appellant went to the kitchen and took a knife which she and another woman had been using earlier to cut up meat which they had bought earlier. She hid the knife between her dress and her hip. She says that she did this because she wished to be in a position to defend herself. It would appear then that she was prepared to leave the premises, but the deceased and Ntseane were expediting this process by pushing her towards the gate. When they arrived at the gate the Appellant says that the deceased flung the gate at her and she turned around and stabbed him with the knife concealed under her dress.

In dealing with the question of provocation Gyke-Dako J. in a very careful judgment stated that there was an intention

to inflict harm upon the deceased when she thrust the knife into the chest of the deceased. He continues:-

"This is even more so since the fatal blow was struck at a time when whatever quarrel there was between the deceased and her was over"

Counsel for the Appellant submits that this finding was wrong because the quarrel continued up to the moment of the stabbing because flinging the gate at the Appellant was a continuation and an aggravation of the on-going quarrel which did not die down until the deceased was stabbed. We consider that this point has substance. It is not clear how long the Appellant and the deceased and the other inhabitants of the area were sitting drinking chibuku in the yard in front of the room from which the Appellant had been quarrelling with the deceased and I am prepared to assume that there was sufficient time after the initial quarrel for any "heat of passion" to have cooled sufficiently to mean that there could be no provocation which could operate to reduce the stabbing at the gate to manslaughter. If my understanding of "flinging the gate" at the Appellant is not incorrect, this event could be highly provoking but, perhaps, not sufficiently inflammatory of the passions engendered by the earlier quarrel or by itself to justify a finding of provocation.

Be that as it may, the problem is, in my view, cleared up by the evidence of the Appellant herself. She does not in her statement or her evidence rely for a partial justification of her conduct upon the fact that she was provoked by being called a bitch and being ejected unceremoniously from her partner's room and, perhaps, being threatened with bodily harm. She says very simply and directly that she killed the deceased because she

"did not want to lose him to anyone". She said that she did not want to leave the deceased because he was sexually good in bed.

Provocation is essentially a subjective concept. The enquiry is always to attempt to ascertain the state of mind of the accused person and the extent to which in fact the heat of passion was the cause of the killing. It therefore is hardly open to argue that provocation played a part in the killing when the killer says she killed the deceased because she did not want to lose him to anyone. Provocation is therefore in the present case excluded because of the evidence given by the Appellant herself as to her reason for killing the deceased.

I would therefore dismiss the appeal.

DELIVERED IN OPEN COURT AT LOBATSE THIS 30TH DAY OF JANUARY, 1995

W.H.R. Schreiner

W.H.R. SCHREINER
JUDGE OF APPEAL

I agree

T. Aguda

T AGUDA
JUDGE OF APPEAL

I agree

Lord W.L.K. Cowie

LORD W.L.K. COWIE
JUDGE OF APPEAL