

IN THE COURT OF APPEAL OF BOTSWANA  
HELD AT LOBATSE

COURT OF APPEAL CRIMINAL NO. 19 OF 1999  
HIGH COURT CRIMINAL APPEAL NO. 166 OF 1997

In the matter between

THUSO MOKGADI

APPELLANT

Versus

THE STATE

RESPONDENT

Appellant in Person

Mr. K. P. Leinaeng for the State

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**J U D G M E N T**

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CORAM: A.N.E. AMISSAH, P.  
P.H. TEBBUTT, J.A.  
LORD WEIR, J.A.

LORD WEIR J.A.

The Appellant was convicted of the crime of attempted rape and was sentenced to imprisonment for eight years. He then appealed to the High Court. The appeal was dismissed but leave to appeal to this Court was granted against sentence only.

Leave to appeal was sought on the ground that the sentencing Magistrate had allegedly failed to take into account the fact that the Appellant was a first offender. Dibotelo J, who heard the appeal in the High Court, expressed the view that the Magistrate had indeed taken this fact into account and that the sentence could not be criticised as excessive. However, upon reconsideration of the matter

subsequently, in granting leave to appeal, Dibotelo J held that the record did not show that the Magistrate took into account the Appellant's clean record in passing sentence.

Before this Court, it was conceded on behalf of the State that because the Magistrate in sentencing him failed to refer to the fact that the Appellant was a first offender, she must be presumed to have failed to give consideration to that important factor. In this situation, it was accepted that the Court of Appeal could review the sentence as if it was at large.

Having studied the record of the proceedings before the Magistrate, I have some doubt as to whether this concession is well founded. The Appellant in making his plea in mitigation, laid stress on the fact that he appeared as a first offender, and while it is true that the Magistrate in passing sentence did not refer to that fact in terms, it is difficult to believe that she could have proceeded to pass sentence on any other basis. Nevertheless, in view of the respondent's concession, with some hesitation, I consider that this Court can and should review the information relevant to sentencing and reach its own judgment thereon.

The Appellant addressed us briefly and also furnished us with an eloquent and well composed statement in supplement of his grounds of appeal. The burden of his submission was that the Court should either suspend the whole or part of the

remainder of his sentence, or alternatively, reduce the length of the sentence which was passed on him.

The power conferred upon the Court to suspend a sentence is contained in section 308 (1) of the Criminal Procedure and Evidence Act (Cap 08:02). This power does not extend to offences specified in the second schedule to the Act. One of the offences stipulated in the schedule is that of attempted rape. In these circumstances, it is not open to this Court to suspend any part of the Appellant's sentence even if it were minded to do so.


The remaining question is whether the sentence of eight years imprisonment is excessive. The points made by the Appellant may be summarized as follows. At the time of the offence he was aged 19 years. He was a first offender. He was drunk at that time. He felt great remorse at what he did and remains ashamed of himself not least on account of the disgrace which this conviction has brought on his family. The Appellant claimed to have reformed his attitude to life while in prison and wishes on release to prove himself a useful member of society. He considered that the sentence had served already its purpose of punishment, deterrence and reformation.

All these points were put forward by the Appellant who appeared as a modest and presentable young man, and they must be given due weight when considering the length of sentence. Against these mitigating factors must be set the circumstances

of the crime. The Appellant had been drinking through the afternoon and evening of the day in question. He had been at a braai. The victim of the crime, a little girl of only six years of age was in the vicinity along with her mother. She became detached from the mother's company and came to be looked after by the Appellant. The Appellant took the child behind a house. He removed the child's clothing as well as his own. He then proceeded to attempt to have sexual intercourse with her but was unable to penetrate her vagina. The girl subsequently returned to the house where her mother was, complaining that she had been hurt by the Appellant and gave her a description of what had happened.

This bald description of what happened demonstrates all too clearly the repulsive conduct of the Appellant. Seen, as it must be, as an atrocious abuse of trust, a lengthy sentence of imprisonment was inevitable and but for the factors advanced by the Appellant in mitigation, a longer sentence than that passed by the Magistrate would have been well merited.

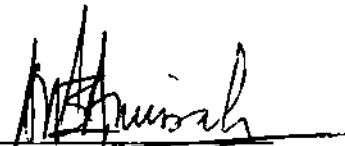
In the result, in my judgment, there are no grounds for interfering with the sentence, and the appeal is dismissed.



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LORD WEIR  
JUDGE OF APPEAL

I AGREE:

  
A. N. E. AMISSAH  
PRESIDENT

I AGREE:

  
P. H. TEBBUTT  
JUDGE OF APPEAL

DELIVERED IN OPEN COURT AT LOBATSE THIS ... DAY OF ... 2000