

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

CRIMINAL APPEAL NO 30 OF 2001
HIGH COURT CRIMINAL APPEAL NO F20 OF 2001

IN THE MATTER OF:

GAKELETSHEPE OTHIBETSWE

APPELLANT

VS

THE STATE

RESPONDENT

MR D. MOROTSI FOR THE APPELLANT
MR D.B. MOLOMO FOR THE RESPONDENT

REASONS FOR JUDGMENT

CORAM: P.H. TEBBUTT Ag.JP
NW ZIETSMAN JA
C. PLEWMAN JA

ZIETSMAN JA:

The appellant was convicted of murder in the Circuit Court held at Palapye. After a finding of extenuating circumstances the trial judge sentenced the appellant to 10 years imprisonment. The appellant noted an appeal against his sentence and after considering the submissions advanced by his counsel we, on 14 January 2002, dismissed the appeal. These are the reasons for our decision.

The facts of the matter were not in dispute. The appellant was found guilty of the murder of Itseng Maitse Rabosutha (the deceased). It was common cause that a love relationship had existed between the appellant and the deceased since 1993 and that two children had been born of this relationship. The deceased lived with her parents in Palapye. The appellant was employed at Makoro Bricks where he was also given accommodation. During the weekend prior to 13 June 1998 the deceased visited the appellant and the appellant told her that he would visit her at her parents' home the following weekend. On 13 June the appellant went to the deceased's parents' home and was told by the deceased's sister that the deceased had gone to the Hunters Inn Bar. The appellant went to look for her there but did not find her. He returned to her parents' home at 1 a.m. on the 14th. He knocked on the door but no one answered and he spent the rest of the night sleeping outside in a shed. Later that morning he saw a man emerge from a nearby house and shortly thereafter the deceased emerged from the same house. The appellant asked her where she had spent the night. She responded by slapping him on his cheek. He thereupon seized hold of her and throttled her. They both fell to the ground. He then seized a heavy object, referred to as a pole or a log of wood, and struck her four times with it. He left her lying unconscious on the ground.

It is clear from the evidence that the deceased died as a result of the very severe blows struck by the appellant. Her skull was fractured in several places and the doctor who carried out a post mortem examination on the body of the deceased

stated in his report, which was handed in by consent, that her brain "was in pulp." Blood found on her clothing and also on the appellant's clothing is a further indication of the severity of the appellant's assault upon the deceased.

The appellant was convinced that the deceased had spent the night sleeping with the man he had seen emerging from the house. He stated that the deceased had previously been, as he put it, "an unfaithful person to me."

The appellant was not married to the deceased. The man whom the appellant had seen emerging from the nearby house was the witness Jabulani Ndibi. The deceased had in fact spent the night immediately prior to the murder with him. He stated that the deceased had been his girlfriend since May 1998.

In his judgment on the question of extenuating circumstances the trial judge took into account the five year relationship between the deceased and the appellant, the agreement that the appellant would spend the night with the deceased, the fact that she spent that night with another man, her response in slapping the appellant in the face when he questioned her, and the fact that the deceased had previously been unfaithful to the appellant. He came to the conclusion that these facts, taken together, constituted extenuating circumstances.

Mr. Morotsi, who appeared for the appellant, submitted that the Judge, when sentencing the appellant, misdirected himself. A passage in his judgment on the merits referred to by Mr. Morotsi reads as follows:

“There is no indication that the deceased made any promise of marriage to the accused; neither is there any indication that she was not entitled to find another boyfriend. I would venture to say that the deceased was still “on the open market” and was entitled to find another boyfriend, if she so wished, and the fact that she had children with the accused would not alter that position.”

In his judgment on sentence the trial judge refers to the frequent number of cases involving the killing of girlfriends and the need for stiffer sentences to deter prospective offenders, and he states:

“The best way to have a trusted friend, in my view, is to get married not to keep girlfriends. These girls need men to marry them not boyfriends to kill them.”

In his supplementary grounds of appeal the appellant submits that the trial Judge was influenced by his personal views of love relationships and that this caused him to impose an unduly severe sentence upon the appellant.

The trial judge’s judgments when read as a whole do not, in my opinion, contain any misdirection. He appreciated the fact that the appellant, although not married to the deceased, had a long-standing relationship with her and felt that she had betrayed him and had been unfaithful to him. It was largely on these facts that he

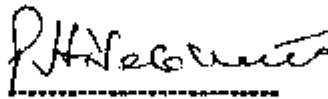
found extenuating circumstances to be present. He cannot be faulted for stating that the deceased was not legally bound in marriage to the appellant, and his view that the best way to have a trusted friend is to get married rather than to keep girlfriends, if it is a misdirection, is not a misdirection which would have affected the severity of the sentence.

It was our conclusion that the trial judge did not misdirect himself. The assault by the appellant upon the deceased was correctly described by the trial judge as being a merciless and savage assault and in the circumstances the sentence passed upon the appellant was not unduly severe. For this reason we dismissed the appeal.



 N.W. ZIETSMAN
 JUDGE OF APPEAL

I AGREE:



 P.H. TEBBUTT
 ACTING PRESIDENT

I AGREE:



 C. PLEWMAN
 JUDGE OF APPEAL

DELIVERED IN OPEN COURT THIS 30th DAY OF JANUARY 2002.