IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 51 of 1986

In the matter between:

PITSO MOTIKI Appellant

versus

THE STATE

Mr. D. Morotsi for the Appellant
Mr. P. T. C. Skelemani for the State

CORAM: T. A. AGUDA, J.A.
L. VAN WINSEN, J.A.
G. BIZOS, J.A.

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J U D G M E N T

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BIZOS, J.A.:

The appellant is a fifty-two year old practitioner of traditional medicine. He was charged with Murder but was convicted of Manslaughter contrary to the provisions of section 205 of the Penal Code. He was sentenced to ten (10) years Imprisonment.

His conviction arises as a result of the death of a young mwoman Gacha Nkomoiyahlaba living in the same area as the appellant. The deceased died as a result of haemorrhage caused by a rupture of the spleen. It was common cause at the trial that this rupture was caused as a result of pressure on the deceased's abdomen by the appellant who placed both his hands and his knee on her abdomen with sufficient pressure to rupture the spleen.

The circumstances of the commission of the offence are correctly summarised by the court a quo and I will not set out them in any great detail. It would appear that another traditional medicine practitioner was unable to diagnose the ailment from which the young woman was suffering. The appellant was called in presumably, being considered a

more experienced, and more competent practitioner. After throwing his bones the appellant told the deceased that she had committed an abortion on herself when pregnant for approximately a month and that the placenta had remained in her womb. The appellant denied this version and said that his diagnosis was somewhat different he diagnosed that there was blood in the womb. It was common cause that the appellant then started treating the deceased by pressing very heavily on her stomach with his hands and knee. According to the evidence of some of the witnesses at one stage the deceased screamed. The appellant admitted this but he did not describe the action of the deceased as a scream but as a groan. The young woman became worse instead of better. The appellant was called in again. He must have been very concerned about her condition because according to the evidence he spent the night with the deceased trying to restore her health. The relatives of the deceased were very concerned about her health and called a further traditional doctor but that did not help.

The cause of death was given as haemorrhage due to the rupture of the spleen. The doctor who performed the post mortem examination indicated that a considerable degree of pressure was required in order to rupture the spleen. In a demonstration before the trial Court to which a Court Orderly had consented, for the appellant to show how much force he had used, it is recorded that what the apellant described as moderate force he asked him to desist because the appellant was hurting him.

The appellant in his defence admitted that he did not have the necessary expertise to remove a placenta from a woman and would not attempt to do so. The Court a quo believed the evidence of the State witnesses and there is no reason why that finding should not stand.

The denial by the appellant was probably an attempt to try and avoid criminal responsibility for his action having admitted that he was not qualified to do what he tried to do. He said that he had been a traditional doctor for fifteen years and that the amount of pressure he used was not hard but he said "I did it soft". He said that it was unfortunate or bad luck that his action had caused death and he was remorseful about that. He further denied that the State witnesses' evidence that the deceased said 'why are you killing me' as at that time the deceased herself could not speak.

There was a tentative attempt to argue the merits. There can be no doubt that on the evidence the appellant was correctly convicted of Manslaughter. His Counsel did not attempt to persuade us to the contrary. In any event the appeal was only against sentence. Even if an application were made for a late filing of the appeal on the merits that would have been refused on the grounds that there was no possible prospect of success of the conviction being set aside. The difficult question of sentence has to be considered.

The principles on which the Court of Appeal may interfere with a sentence imposed by a trial Court are too well-known for me to repeat them. One of them is that the sentence may be interferred with if it induces a sense of shock. I am fortified in that conclusion by the very fair and proper attitude of Mr. Skelemani representing the State who said in his helpful heads of argument filed before us that the sentence of ten years imprisonment was disproportionate to the nature of the act committed by the appellant, that this Court was at large to substitute another sentence. Finding ourselves in that position we must examine the facts and circumstances and decide what would be a proper sentence. Medical negligence is not confined to practitioners of traditional medicine.

No member of this court has heard of a term of ten years imprisonment on anyone, for negligent conduct even though death may have ensued. Some guidance may be obtained from the provisions of section 244 of the Penal Code headed "Criminal Recklessness and Negligence" which provides -

> "Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any person -
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> (e) gives medical or surgical treatment to any person whom he has undertaken to treat;
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> is guilty of an offence."

In terms of section 245 the punishment is six months imprisonment.

An offence created by section 244 and section 245 presupposes that there has been no death. In the present case there was a most unfortunate and all probability unnecessary death of a young woman. That factor takes this case out of the maximum sentence imposed by these two sections but it will be wrong to ignore them altogether.

The practice of traditional medicine is accepted or tolerated in Botswana. Provisions of section 220 of the Penal Code are that

> "It is the duty of every person who, except in the case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty."

The Penal Code does not provide that it has to be a qualified or licensed practitioner that owes that duty but that duty is owed by everyone.

On the facts there can be no doubt that this was a negligent and indeed what may be described as a reckless act. This does not, however, mean that a fifty-two year old man should be sent to prison for a

period of ten years for his negligence.

The Courts should, try and find other ways of punishing people who behave in the way the appellant has done.

We were informed, and it appeared to be common cause that the appellant received remuneration for what he did. Far from curing the deceased he negligently killed her; the death of the deceased has probably lowered his reputation in the area in which he lives and his practise is most likely to be affected by her death.

Nevetheless, we believe that a sentence should be imposed which will serve as a deterrent to the appellant and others who undertake similar work so that unnecessary deaths do not occur. A term of imprisonment was called for in view of the gross negligence of the appellant. We were told that the appellant has been in prison since some day in June, 1985. He has been in prison for more than one year both as awaiting his trial and as a convicted prisoner. I am of the view that keeping him in prison for any longer period would not serve any useful purpose. On the other hand the sentence to be imposed should bring home to him that he must desist from trying to do what he is not qualified to do.

We enquired whether or not the appellant is a man of means. We were told that he was not because of his incaceration for almost 18 months. It would appear from the record, however, that the appellant has some assets and there is nothing in my view as to why he should not be fined for the reckless act he committed.

I would confirm the conviction of Manslaughter. I would delete the sentence of ten years imprisonment and substitute therefor the following - The accused is sentenced to one year's imprisonment to run from the date of his arrest in June, 1985. He is further sentenced to a fine of P200,00 or in default of payment to a further period of imprisonment of six months

The fine is to be paid on or before 31st December, 1986. The appellant may produce a surety to the Registrar's satisfaction to gain his release before the payment of the fine.

GIVEN at the Court of Appeal, LOBATSE, this 4th day of December, 1986

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G. BIZOS

JUDGE OF APPEAL

I agree .....

T. A. AGUDA,

JUDGE OF APPEAL

I agree .....

L. VAN WINSEN

JUDGE OF APPEAL.