

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

NOZABALESE 'MOSO

v

REX

HELD AT:

MASERU

CORAM:

STEYN JA,  
LEON JA,  
v.d. HEEVER A.J.A.

JUDGMENT

STEYN JA:

Appellant was convicted in the High Court on a charge of murder. The Court imposed upon her a sentence which reads as follows:

"The sentence of the Court is that the accused is sentenced to detention in juvenile training

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centre subject to *Prisons Proclamation 30 of 1957.*"

She appeals only against the sentence. Counsel for the Crown had in his heads of argument supported the sentence imposed, but when questioned by the Court conceded that a custodial sentence was inappropriate in all the circumstances. This certainly is also our view for the reasons set out below.

Appellant was 14 years old when she fell pregnant. She killed her child a day after her 16th birthday. Appellant had a series of traumatic experiences. Apart from the fact that she had an unwanted pregnancy at the age of 14 years, she was abandoned by her lover who declined to support her or the child. Members of the community interviewed by the probation officer, confirmed that appellant was abused, both physically and mentally by her grandmother in whose care she was. He goes on to say:

"She was at times even denied food for herself and her baby. They further reported that the client was pushed to commit this offence because of her grandmother's unforgiving attitude towards her and the baby. They also reported

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that the client is not a delinquent although she has committed a serious offence."

In his remarks the Probation Officer summarised his findings as follows:

- "1. The client is not regarded as a delinquent by all the interviewees but her grandmother.
2. From what some of the interviewees and the client said it is clear that the client who is of tender age, lived under very stressful conditions of which the incident that led to the offence was the last straw.
3. The client lacked parental protection against her grandmother's aggression towards her and the baby.
4. She is sorry and upset about what she has done.
5. The client is aware of how she has upset her mother, the community and how she has

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violated the law.

6. Her mother has returned back home and she will live with her at Ha - Lekete, Quthing."

He then recommends as follows:

"In accordance with the above information it is clear that the client is not a delinquent. She is still of very tender age and needs to be given a second chance to build up her life and start afresh in the community. She is not a difficult person to deal with and she could benefit from community based treatment.

Her mother is capable of controlling her. This is the first offence she has committed. This family is acceptable in the community.

I would therefore recommend that the client be placed under Probation Order with supervision by the Probation Officer for a specified period."

In his judgment on extenuating circumstances and

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preceding sentence, the Judge *a quo* says the following:

"In view of accused's age and hence her immaturity and her unhappy upbringing there are, in this case, extenuating circumstances and counsel was spared the trouble of addressing the court on this question.

The court is much indebted especially to the Probation Officer who presented a well prepared and reasoned document regarding circumstances of the accused and what might be best for her. The invaluable arguments in mitigation of sentence by both counsel were also seriously considered but nothing said has changed this court's mind that the accused, circumstanced as she is, requires strong, effective and hopefully enlightened supervision to place her on course to take her rightful place in society as a responsible and caring mother."

It is, of course, perfectly proper for a Judge to depart from the recommendations of a Probation Officer. In view, however, of the carefully reasoned approach and well motivated recommendations we have here, one would have expected the trial Judge to have recorded why he felt that a custodial rather than a non-custodial form of punishment was necessary. It must always be borne in mind that a non-custodial sentence can contain punitive elements. Moreover, in the present case it would be possible to structure the sentence in such a manner that deterrent elements can be built into it, and that can give evidence of the Court's strong disapproval of her conduct

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whilst avoiding the risk of a non-delinquent being criminalised by her exposure to genuine juvenile delinquents.

Whilst the Judge not only mentions but praises the Probation Officer's report, his failure to give a single reason in motivation of his departure from its cogent and *prima facie* sensible recommendations, suggests that the sentence was arbitrary. We were informed by Counsel for the Appellant that the Appellant had been released and we were also given the assurance in Court by the Probation Officer that regular supervision of the Appellant would take place.

With reliance on the report of the Probation Officer and on the assumption that the supervision of the Appellant will be conscientiously implemented, we conclude that an appropriate sentence would be the following:

The sentence in this case is postponed for 3 years from the date of her conviction i.e. the 7th August, 1995, on the following conditions:

1. That she subjects herself to the supervision and control of a duly appointed probation officer.

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2. That she complies fully with all reasonable instructions given by the said probation officer, and
3. that she does not commit any offence involving violence during the period of the postponement.

The Respondent's right to indict the appellant before the High Court for purposes of the imposition of sentence is specifically reserved. However, should it fail to do so either during the period of three years aforesaid, or immediately thereafter, the appellant will be discharged from sentence for this offence.

The conviction is confirmed. The appeal against sentence succeeds. The sentence imposed by the Court *a quo* is set aside. In place thereof, the sentence set out above is imposed.

I agree

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J.H. STEYN  
JUDGE OF APPEAL

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R. LEON  
JUDGE OF APPEAL

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I agree

*Bo. v. d. Heever*  
.....  
van den HEEVER  
ACTING JUDGE OF APPEAL

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Delivered this *19th* ..... day of January, 1996.