

Rapporteur:

- 29th Session: Commissioner Andrew R. Chigovera
- 30th Session: Commissioner Andrew R. Chigovera
- 31st Session: Commissioner Andrew R. Chigovera
- 32nd Session: Commissioner Andrew R. Chigovera
- 33rd Session: Commissioner Andrew R. Chigovera
- 34th Session: Commissioner Andrew R. Chigovera

Summary of Facts:

1. The communication is submitted by Edward Luke II of Luke and Associates, Saul Lehrfreund of Simons Muirhead and Burton (practising advocates based in the United Kingdom and Botswana) and Interights, a human rights NGO based in the United Kingdom on behalf of Mariette Sonjaleen Bosch who is of South African nationality.
2. Mrs. Bosch was convicted of the murder of Maria Magdalena Wolmarans by the High Court of Botswana on 13th December 1999 and sentenced to death. She appealed to the Court of Appeal of Botswana, which dismissed her appeal on 30th January 2001.
3. The Complainant alleges that the judge who convicted Mrs. Bosch wrongly directed himself that the burden of proof was on the accused "*to prove on a balance of probabilities*" that someone else was responsible for the killing and thereby reversing the presumption of innocence. That the Court of Appeal wrongly upheld the conviction despite recognising the fact that the judge had fundamentally erred by reversing the onus of proof.
4. The Complainant further alleges that her right to life has been violated by the imposition of the death penalty for what was alleged to be a crime of passion, in circumstances where there were clearly extenuating circumstances.
5. It is also alleged that Mrs. Bosch is likely to suffer inhuman treatment and punishment because the execution will be carried out by the cruel method of death by hanging, which exposes the victim to unnecessary suffering, degradation and humiliation.

Complaint

6. The Complainant alleges a violation of **Articles 1, 4, 5 and 7(1)** of the African Charter on Human and Peoples' Rights.

Procedure

7. The communication was received at the Secretariat of the Commission 7th March 2001 by fax.

8. On 12th March 2001, the Secretariat of the African Commission wrote to Interights requesting for complete copies of the judgements of the High Court and Court of Appeal of Botswana.
9. On 26th March 2001, the Secretariat of the Commission received by courier the full text of the judgement of the Court of Appeal of Botswana delivered on 30th January 2001 and expert affidavits relating to the manner and speed in which a person executed by hanging would meet their death.
10. On 27th March 2001, the Chairman of the Commission wrote to the President of Botswana appealing for a stay of execution pending consideration of the communication by the Commission.
11. The President of Botswana did not respond to the appeal but information received at the Commission indicates that Mrs. Bosch was executed by hanging on **31st March 2001**.
12. At its 29th ordinary session, the Commission decided to be seized of the Complaint and the parties to the communication were informed of this decision.
13. At its 30th ordinary session held in Banjul, The Gambia, the Commission heard oral submissions from the Complainants and declared the communication admissible.
14. On 9th November 2001, the Secretariat informed the parties of the decision of the African Commission and requested them to transmit their written submissions on admissibility and on the merits to the Secretariat.
15. The African Commission continued the process of exchanging information between the parties.
16. At its 34th Ordinary Session, held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission considered the communication and delivered its decision on the merits.

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Admissibility

17. The admissibility of communications brought pursuant to Article 55 of the Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a Complainant for a communication to be declared admissible.
18. The Complainants submit that they have fulfilled all the conditions of Article 56 of the African Charter. They argue that Mrs Bosch was convicted of the murder of Maria Magdalena Wolmarans by the High Court of Botswana on 13th December 1999 and sentenced to death. She appealed to the Court of Appeal of Botswana, which dismissed her appeal on 30th January 2001. On 7th March 2001, 35 days after the Court of Appeal of Botswana had handed down its decision dismissing Mrs Bosch's appeal, the Complainant filed this communication with the African Commission. They submit that this matter has not been submitted for examination under any other procedure of international investigation or settlement. The Complainants also

state that all local remedies were exhausted and the complaint was filed with the African Commission within a reasonable time from the time local remedies were exhausted. Therefore the African Commission should declare the communication admissible.

19. In their response, the Respondent State concedes that all local remedies in this matter were exhausted, as the Court of Appeal is the last and final court in Botswana.
20. The Commission notes that the Respondent State and the Complainants agree that all domestic remedies were exhausted and thus declares the communication admissible.

Merits

21. Three issues relating to alleged violations of the African Charter were originally raised on behalf of the applicant. A fourth issue, namely whether or not there was a violation of Articles 1,4, and 7(1) in declining to respect the indication of provisional measures was added when consolidated submissions were made. Two further issues were added in the document entitled “Note of Applicant’s Submissions” circulated at the 31st Session bringing the total number of issues to six. One of the six issues namely “whether the methods of execution in Botswana, by hanging, breached Article 5 of the African Charter” was abandoned during the hearing of the matter at the African Commission’s 31st Ordinary Session. Each of the remaining issues will be dealt with in turn.

Alleged Violation of the Right to Fair Trial

22. With regard to the alleged violation of the right to fair trial under Article 7 (1)(b) of the African Charter, the issue is whether the misdirection by the trial judge in regard to the onus of proof was so fatal as to negate the right to fair trial in the circumstances of this case. Simply put, does a misdirection per se vitiate the holding of a fair trial in violation of Article 7 of the African Charter and of necessity leads to the quashing of a conviction with capital consequences.
23. In this regard, it was submitted that the placing of the burden of proof on the applicant was a violation of a fundamental right such as would negate the holding of a fair trial and that the court of appeal wrongly held that this did not result in a miscarriage of justice.
24. In dealing with this issue it is important to recognise that there is no general rule or international norm stating that any misdirection per se vitiates a verdict of guilt. As pointed out by the State Party, what is generally accepted in several countries particularly common law countries is the rule that a misdirection will vitiate a verdict of guilt only where such misdirection either on its own or “cumulatively is or are of such a nature as to result in a failure of justice.” The legal position is aptly stated in Archbold, Criminal Pleading and Practice ¹⁰ as follows”.

“The very basic and fundamental function of the courts of justice is to ensure that no substantial miscarriage of justice is allowed through the operation of the judicial process. The courts cannot

¹⁰ 200 Ed at page 18

be seen to undermine the very foundation for the existence of the judiciary, namely justice, unaffected by technicalities and sophistry of the legal profession”.

In other words, where a court is satisfied that despite any misdirection or irregularity in the conduct of the trial the conviction was safe, the court would uphold such conviction.

25. The Court of Appeal thoroughly examined the evidence led at the trial and the effect of the misdirection and came to the conclusion that there was a massive body of evidence against the Applicant which would lead to no other conclusion than that it was the applicant and no one else who murdered the victim and that the quality of the evidence was such that no miscarriage of justice was occasioned.
26. A breach of Article 7 (1) of the African Charter would only arise if the conviction had resulted from such misdirection. As pointed out by the Court of Appeal at page 47 of the judgement, the trial judge “meticulously evaluated the evidence and came to the only conclusion possible on the evidence”.
27. A number of decisions have been taken in the European Court of Justice on Article 6 (2) of the European Convention on Human Rights which also provides for the presumption of innocence. In discussing Article 6(2), R. Clayton and H. Tomilson observe¹¹ that the Article does not prohibit presumption of facts and law and citing *Salabiaku v France* (1988) 13 EHRR 379 paragraph 28 states that the State must however,
*“Confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”*¹².

A more appropriate discussion of Article 6(2) can be found in the Digest of Case-Law Relating to the European Convention on Human Rights (1955-1967)¹³ where it is stated that,

*“If the lower court has not respected the principle of presumption of innocence, but the higher court in its decision has eliminated the consequences of this vice in the previous proceedings, there has been no breach of Article 6 (2)”*¹⁴

28. As already discussed above, the Court of Appeal ‘meticulously evaluated the evidence’ between pages 11-20, 62-74 and 77-111 of the judgement and was satisfied that despite the misdirection, there was adequate evidence to convict the Applicant of murder.
29. It should be noted here that it is for the courts of State Parties and not for the Commission to evaluate the facts in a particular case and unless it is shown that the courts’ evaluation of the facts were manifestly arbitrary or amounted to a denial of justice, the Commission cannot substitute the decision of the courts with that of its own. It has not been shown that the courts evaluation of the evidence was in any way arbitrary or erroneous as to result in a failure of justice. The Commission therefore finds that there is no basis for finding that the State Party violated its obligations under Articles 4 and 7 (1).

¹¹ Page 114, paragraph 11.238.

¹² See also *Hoang v France* (1992) 16 EHRR 53.

¹³ 1970, UGA Huele, Belgium

¹⁴ Digest of Case-Law Relating to the European Convention on Human Rights 1955-1967 U.G.A Huele, Belgium paragraph 153 on page 140

Alleged Violation of Article 5

30. The second issue relates to the allegation that the sentence of death in this case was a disproportionate penalty in the circumstances of this case and hence a violation of Article 5 of the Charter.
31. While it is accepted that the death penalty should be imposed after full consideration of not only the circumstances of the individual offence but also the circumstances of the individual offender, (Inter-American Commission of Human Rights in *Downer and Tracey v. Jamaica* (41/2000) 14 April 2000), there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed. It should be pointed out here that apart from stating the trend in other jurisdictions and decisions of other Human Rights bodies governed by specific statutes, it has not been established that the courts in this case did not consider the full circumstances before imposing the death penalty. If anything, the courts fully considered all the circumstances in this case (See pages 48 to 55 of the judgement of the Court of Appeal). It is clear that the submission that the imposition of the death penalty was disproportionate to the gravity of the crime in this case is based on an erroneous assumption of what amounts to extenuating circumstances.
32. Extenuating circumstances are facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused as distinct from his/her legal culpability. First, the facts or circumstances must be directly related to or connected with the criminal conduct in question. The court is only concerned with facts which lessen the seriousness or culpability of that particular criminal conduct.
33. Second, extenuation relates to moral blameworthiness. It is the state of mind of the offender at the time of the commission of the offence that is a relevant consideration otherwise offenders would use any personal circumstance totally unrelated to the conduct complained of to escape punishment.
34. In considering whether or not extenuating circumstances exist, the inquiry is:
 - a) Whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation
 - b) Whether such facts or circumstances, in their cumulative effect, probably did influence the accused's state of mind in doing what s/he did; and
 - c) Whether this influence was of such a nature as to reduce what he did.
35. The claimed capacity for redemption or reformation and or good character is certainly not connected with the commission of the particular murder and therefore not relevant considerations to this finding of extenuating circumstances.
36. In deciding on the proportionality of a sentence one would have to fully weigh the seriousness of the offence against the sentence. It is quite evident from the Court of Appeal records that the murder committed by Mrs Bosch involved considerable effort and careful planning.
37. Thus while the African Commission acknowledges that the seriousness or gruesome nature of an offence does not necessarily exclude the possibility of extenuation, it

cannot be disputed that the nature of the offence cannot be disregarded when determining the extenuating circumstances. As such, the African Commission finds no basis for faulting the findings of both the trial court and Court of Appeal as it relates to this issue.

Issue of reasonable notice

38. It was submitted that failure to give reasonable notice of the date and time of execution amounts to cruel, inhuman and degrading punishment and treatment in breach of Article 5 of the African Charter and that execution under such circumstances violates the protection of law provisions under Article 3 as it deprives an individual the right to consult a lawyer and obtain such relief from the courts as may be open to him or her.
39. It should be noted that this issue was not addressed by the Respondent State in its written submissions primarily because it had not been communicated to it. The issue was not even raised in the Authors' consolidated submissions of the record of their oral submissions on admissibility made at the 30th Session and submitted to the African Commission's Secretariat on 18th March 2002.
40. The issue only surfaced with the Author's written submissions distributed shortly before the hearing of the matter at the 31st Session of the African Commission. It was therefore not surprising that no useful submissions or submissions at all were made on behalf of the Respondent State on the issue. Neither was there any debate on the issue at the instance of the Commissioners, as they had not had an opportunity to consider those submissions.
41. In the circumstances it would be fundamentally unfair to the Respondent State to deal with the substance of this issue save to observe that a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to "arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best he can, to face his ultimate ordeal"¹⁵.

Alleged violation of Article 4: Clemency Procedure was unfair

42. This is one of the two issues raised rather belatedly and the approach in issue 3 above applies and the comments made hereunder are for future guidance in matters of this nature it being pointed out that the communication procedure is an attempt to achieve or address failed justice at the domestic level which follows the rules of natural justice and would not permit any springing of surprises.
43. Applicant alleges that in exercising his clemency, the President acts "arbitrarily". The main issue is whether or not the Presidential clemency is what is envisaged in Article 4 of the Charter. Article 4 proscribes the arbitrary deprivation of the right to life. A process is put in all jurisdiction to ensure that due process is had in ensuring that the right to life is not violated. This process includes the holding of a trial so that an accused is given an opportunity to defend his cause. It is that process that can be challenged to be arbitrary. The intervention of the President does not in any way affect the non-arbitrariness of the process. The due process in Botswana was

¹⁵ Guerra v Baptiste [1996] AC 397 at P.418

followed with the Applicant's case following the process that has been established to guarantee Applicant's rights. Her matter was heard in both the High Court and the Appeal Court.

44. It should also be noted that the exercise of clemency unlike the process described above, is discretionary in most jurisdictions and are for the most part discretionary; they are given to him to be exercised in his own judgement and discretion¹⁶. Whilst the Constitution of Botswana provides for the constitution of an Advisory Committee on Prerogative of Mercy, the President is only required to request and get advice from that committee if he so wishes. However, he can only exercise his power of clemency after presentation of a written report of the case from the trial judge together with any other information that he may require.

45. The question then is whether or not the President arbitrarily deprived the Applicant of her right to life. The word "arbitrarily" is defined in Black's Dictionary¹⁷

"as fixed or done capriciously or at pleasure, without adequate determining principle, not founded, not done or acting according to reason or judgement, depending on the will alone, absolute in power, capriciously tyrannical, despotic, without fair solid and substantial cause, that is without cause based on law.....Ordinarily "arbitrary" is synonymous with bad faith or failure to exercise honest judgement and an arbitrary act would be one performed without adequate determination of principle and one not founded in nature of things..."

A similar definition is provided in Stround's Judicial Dictionary¹⁸ and Classen's Dictionary of Legal Words and Phrases¹⁹

46. The other factor that needs to be considered is the time factor. On 30 January 2001, the court of Appeal dismissed the Applicant's case. On 5 February 2001 a memo from the Gaborone Women's Prison to the divisional Commander states that applicant was advised of her right to petition the President. On 7 February 2001 the Attorney General of Botswana wrote to the Applicant's Lawyers on the issue. The Lawyers wrote to the Clemency Committee on 26 February 2001 requesting for more time to prepare a clemency petition. The preliminary submissions were only submitted on 15 March 2001, one and half months after the Appeal was dismissed. It is acknowledged that on 6 March the lawyers wrote to the President requesting for information as to when the clemency hearing was to be held. Attendance of the Applicant or her lawyers at the hearing is clearly impractical. One can envisage the President now sitting as a court to hear oral submissions from petitioners. Not only is the suggestion misconceived and implications thereof impractical, but the implications will also result in undermining the office and dignity of the President.

47. In any event, the right to be heard does not entail entitlement to the benefit of all the facilities which are allowed to a litigant in a judicial trial. Thus the 'right to be heard' in appropriate circumstances may be confined to the submission of written representations. These are clearly appropriate circumstances for written representations.

¹⁶ Executive independence and the Courts Presidentialism in commonwealth Africa B.O Nwabueze at Page 33

¹⁷ 5th Ed, West Publishing Company, 1979.

¹⁸ 5th Sweet and Maxwell Limited, 1986

¹⁹ Volume 1. Butterworths, 1975.

48. However, it should be noted that a person must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations (See also Baxter op cit at p 552.)

Alleged Violation of Articles 1, 4 and 7(1): Execution of Applicant pending consideration of Applicant's Communication by the African Commission

49. The last argument is that Article 1 of the African Charter obliges a State Party to comply with the requests of the African Commission. The Complainants base this argument on the letter written by the Chairperson of the African Commission to the President of Botswana on 27th March 2001 seeking a stay of execution. The letter was communicated by fax.

50. In its oral submissions during the 31st Ordinary Session, the Respondent State argued that the fax was never received by the President. However, in this particular case, the African Commission is not in possession of any proof that the fax was indeed received by the President of Botswana.

51. Article 1 obliges State Parties to observe the rights in the African Charter and to 'adopt legislative or other measures to give effect to them.' The only instance that a State Party can be said to have violated Article 1 is where the State does not enact the necessary legislative enactment²⁰.

52. However, it would be remiss for the African Commission to deliver its decision on this matter without acknowledging the evolution of international law and the trend towards abolition of the death penalty. This is illustrated by the UN General Assembly's adoption of the 2nd Optional Protocol to the ICCPR and the general reluctance by those States that have retained capital punishment on their Statute books to exercise it in practice. The African Commission has also encouraged this trend by adopting a "*Resolution Urging States to envisage a Moratorium on the Death Penalty*²¹" and therefore encourages all States party to the African Charter on Human and Peoples' Rights to take all measures to refrain from exercising the death penalty.

For the above reasons, the African Commission,

Finds that the Republic of Botswana is not in violation of Articles 1, 4, 5 and 7(1) of the African Charter on Human and Peoples' Rights;²²

Strongly urges the Republic of Botswana to take all measures to comply with the Resolution urging States to envisage a Moratorium on the Death Penalty;

Requests the Republic of Botswana to report back to the African Commission when it submits its report in terms of Article 62 of the African Charter on measures taken to comply with this recommendation.

*Done at the 34th Ordinary Session held in Banjul, The Gambia
from 6th to 20th November 2003*

²⁰ See the Case of Young, James and Webster which discusses Article 1 of the European convention which is similar to Article 1 of the Charter

²¹ Adopted at the 26th Ordinary Session of the African Commission held from 1st to 15th November 1999, Kigali, Rwanda

²² Commissioner N Barney Pitso asked to be recused from participating in consideration of this communication at the 29th Ordinary Session of the African Commission and as such did not take part in all discussions relating to this matter