

IN THE COURT OF APPEAL OF  
THE REPUBLIC OF BOTSWANA

Criminal Appeal No. 15 of 1982  
High Court Cr. App. No. 209 of 1981  
Francistown Cr. Case No. F. 284 of 1981

In the matter of:

NDLELENI DUBE

Appellant

vs.

THE STATE

Appellant in person

Mr. S. A. Afful for the State

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J U D G M E N T

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CORAM: Maisels JP  
O'Brien Quinn CJ  
Kentrige JA

KENTRIDGE JA:

The appellant in this case was convicted in a Magistrate Court on a charge of Shop Breaking & Theft. He was tried together with a co-accused who had been found in possession of goods stolen from the shop. In the case of the present appellant, however, the only admissible evidence against him was evidence given by a Detective Constable of a palm-print, which had been found, he said, on the door of the shop on the morning after it had been broken into. The Detective took a photograph of this print, so he said, and sent it to Police

Headquarters for comparison with the finger and palm-print of the accused. Evidence was given by a finger-print expert to the effect that the palm-print on the photograph was the palm-print of the present appellant.

On the basis of this evidence the appellant was convicted and sentenced. An appeal to the High Court was dismissed by Mr. Justice Hannah, and leave to appeal to this Court was in due course granted.

In the Magistrate's Court the present appellant did not dispute that the palm-print on the photograph was his own palm-print. But he maintained that he had at no time been at the shop in question and that the photograph before the Court was in fact a portion torn out of another photograph taken of his palm-print at some time previous to the crime. In this connection, it must be said that the appellant had an extensive criminal record and had been in the hands of the Police on several previous occasions. It has often been said that when the only evidence against an accused is finger-print or palm-print evidence then that evidence must be very critically scrutinized by the Court and in particular any explanation given by the accused in respect of the print should be carefully considered.

There are two well-known South African decisions to this effect. One is the case of Rex v Du Plessis 1944 AD 314; the other is the case of R v Nksatlala 1960 Vol. 3 SALR 543 AD. These cases have more than once been referred to and followed

in the High Court of Botswana. See for example State v Mathame 1973 BLR 74, a judgment of Aguda CJ, and Mogotsi v The State, a judgment given by Corduff J, on the 20th May, 1981.

The explanation given by the present appellant was summarily rejected both in the Magistrate's Court and in the High Court. However, it is necessary for this Court to scrutinize the evidence concerning the photograph with some care as this is the crux of the case against the appellant. The photograph which was placed before the Magistrate's Court as exhibit "B", does indeed have two torn edges. When cross-examined by the present appellant, the Detective said this:-

"This photograph I tore with my hand because the photo was too large, I cut the photograph with my own hands cutting off the surrounding portion. There is no other copy of the photo."

There are a number of things to be said about this evidence.

First, it is clearly wrong for any witness to tamper in any way with an important original exhibit in a criminal case.

Second, the photograph, in the form in which it came before the Court, appears to be incomplete and unsatisfactory. It is not easy to identify what is shown in the photograph as the door of a shop.

The third thing that I would say is that particularly as


the accused was unrepresented, the judicial officer would have been well advised to question the police witness in some detail about what was shown on the photograph, as well as about his own conduct in tearing off portions of the photograph.

As it is, the photograph in its present state leaves room for some suspicion that the part of the photograph which was torn off might have contained something to bear out the assertions of the appellant. There is another thing to be said about this photograph. Although it appears to an un-instructed eye to contain a palm-print, it is difficult to believe that a satisfactory comparison with the appellant's palm-print could have been made simply on the basis of this unenlarged photograph. It is therefore unfortunate that the finger-print expert was not asked to explain to the Court more fully what the points of comparison were. When in the course of this appeal the photograph was put before Mr. Aful, who is appearing for the State, Mr. Aful, with that fairness which the Court has come to expect from him, conceded that neither the photograph nor the explanation given of its present state were satisfactory.


I am far from saying that the tearing of the photograph was necessarily sinister. Nonetheless if important evidence, indeed crucial evidence, is put before the Court in this way, it must inevitably follow that a doubt is raised; and the accused must have the benefit of that doubt. It follows in my opinion that there was no adequate proof to connect the

appellant with the shop breaking. Accordingly the appeal against conviction must succeed and the verdict of the guilty must be set aside.


GIVEN at the Court of Appeal, Lobatse, this 7th day of December, 1982.

  
S. W. KENTRIDGE  
Judge of Appeal

I agree.

  
I. A. MAISELS  
Judge President

I agree.

  
J. A. O'BRIEN QUINN  
Chief Justice