

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 16 of 1984
High Court Criminal Appeal No. 201 of 1983

In the matter between:

LEABITSA SEOMILE

Applicant

and

THE STATE

The applicant in person
Mr. W. G. Manchwe for the State

JUDGMENT

CORAM: MAISELS JP
KENTRIDGE JA
HANNAH JA

MAISELS JP

This is an application for leave to appeal against the judgment of the High Court dismissing appeal by the applicant against conviction by the Magistrate of breaking into a workshop at the Selebi Phikwe Secondary School and stealing therefrom various items set out in the list attached to the Charge Sheet. When the High Court dismissed the applicant's appeal summarily and when the matter came before Hannah J acting as a Single Judge of Appeal for leave to appeal against conviction and sentence he read a statement made by the applicant in the Magistrates' Court in mitigation

after he, the applicant, had been convicted by the Magistrate. I should say that the sentence imposed by the Magistrate in convicting the applicant was one of 3 years' imprisonment. This sentence was ordered to run consecutively to any sentence being served, at Selebi Phikwe, on a charge of workshop breaking and theft. In addition there was a suspended sentence which was brought into force by the Magistrate. In his statement in mitigation before the Magistrate, the applicant is recorded as having said:

"I am already serving one year and
3 months for other property I stole
with the tools."

This is obviously an error and for the words "and three months" there should be substituted "three strokes".

It was because of this statement by the applicant that my brother Hannah referred the application for leave to appeal to this Court. In doing so he directed the Registrar to provide the Court with details of the conviction and sentence to which reference has been made. The Registrar informed the Court that he was unable to find any record to substantiate the applicant's complaint. Today the applicant repeated his statement and amplified it. He told the Court that there was one theft from the workshop named in the present case and in the course of that theft clothing and sheets in addition to the tools the subject matter of the present case were stolen. He also stated that the sentence of one year and three strokes had been imposed in a Customary

Court, and had been carried into effect. If this were indeed the case there would be an improper splitting of charges. I should perhaps add in parenthesis that but for this question there is nothing that can be said in the applicant's favour.

Hannah J who has had considerable experience of what apparently, not infrequently happens suggested that enquiries be made at the local prison. The Court adjourned to enable this to be done. Within a short period of time the prison file of the applicant was produced. A perusal of a warrant of committal issued out of the Customary Court showed that on the 21st October 1982 the applicant had been convicted of theft common and had been sentenced by that court to receive the punishment to which he had referred. The date 21st October 1982 is of some importance. He was first arraigned before the Magistrate in this case on the 20th October 1982 when the trial was postponed to the 22nd October 1982. It is also not irrelevant to consider certain questions put by the applicant and answers given by the witness Detective Sergeant Karihindi:

"Q. After my arrest I was first on trial.

A. Yes, but for an unrelated case. I was investigating that case, I was present at the trial. I cannot remember what the Court said in that case.

Rxd: The accused has not been tried before on a case involving these properties.

The property involved in the other case was clothing and sheets."

It seemed to the Court that the applicant may well be telling the truth when he said that there was one theft and only one when clothing and sheets as well as tools were stolen at the same time.

Mr. Manchwe for the State, suggested in view of the confusion which had arisen that the Court might adjourn for a while in order to allow him to discuss the matter with the applicant. To this request the Court acceded. On resumption Mr. Manchwe informed the Court that he saw no reason to disbelieve the applicant on the complaint he had made, and that there had been an improper splitting of charges. It is a matter for regret that this matter was not investigated a long time ago. It may well have been investigated by the Magistrate in October 1982 before the applicant was convicted and sentenced by him. It seems to me that the only thing the Court can now do is to adopt the very fair suggestion by Mr. Manchwe, which I should say was a matter the Court had considered prior to Mr. Manchwe making the suggestion, and that is to grant leave to appeal and to set aside the conviction and sentence imposed by the Magistrate. The appeal is upheld and the conviction and sentence imposed by the Magistrate on the 29th October 1982 are set aside.

GIVEN at the Court of Appeal, Lobatse, this 3rd day of December 1984.

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I. A. MAISELS
JUDGE PRESIDENT

I agree:

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S. W. KENTRIDGE
JUDGE OF APPEAL

I agree:

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N. R. HANNAH
JUDGE OF APPEAL