

IN THE COURT OF APPEAL OF BOTSWANACRIMINAL APPEAL NO. 8 OF 1986CRIMINAL TRIAL NO. CAF. 51 OF 1985

In the matter between:

AUGUSTINE KEITUMELE MOSWEUNYANE

- Appellant

and

THE STATE

Mr. P.M. Phumaphi for the Appellant
Mrs. Malakaila for the State

J U D G M E N T

CORAM: T. A. Aguda JA
A.N.E. Amisshah JA
L. Van Winsen JAL. VAN WINSEN, JA:

Appellant was convicted in the Magistrate Court, Serowe of driving a motor vehicle when the alcohol level in his blood exceeded the prescribed limit laid down in section 46 (1) of the Road Traffic Act and he was sentenced to a fine of P75.00 and disqualified from driving for one year. He appealed to the High Court (Barrington-Jones) against this decision. The grounds on which the appeal was based were that the Magistrate:-

- i. Relied upon an analysis of the appellant's blood on unproven facts.
- ii. Rejected appellant's evidence on the possible contamination of the blood specimen. and

- iii. Assumed that the blood extracting process of the sample from appellant was properly done.

The Court a quo, invoking the provisions of Section 9 (1) (c) of the High Court Act, remitted the matter to the Magistrate to allow further cross-examination by the defence on the disputed issues referred to above, as well as to allow further evidence to be called on such disputed issues. Although the Court's order does not say so, the inference is unavoidable that the result of the order is that the conviction is set aside.

Appellant sought leave from Barrington-Jones J. to appeal against his order but this was refused. Subsequently leave was granted to bring this appeal by an order of O'Brien Quinn C.J. sitting as a single judge judge of the Court of Appeal.

The only issue presently before this Court is whether this is a matter where it was appropriate for the Court a quo to invoke the provision of section 9 (1) (c) of the High Court Act. Mr. Phumaphi, representing the appellant, laboured under the impression that not only was this Court seized of that issue but that it was further open to it to act as a Court of Appeal on the merits of the Magistrate's decision to convict and sentence appellant as he did. This is a misconception on counsel's part.

The Court of Appeal is constituted under Act 04:01 and its jurisdiction is determined under the provisions of Section 19 of that act. This Court acts as a court of appeal from a decision of the High Court. There is no appeal to it directly from a magistrate's court. It would only have jurisdiction to deal with the merits of the conviction

and sentence in this case by way of an appeal from the High Court where such appeal is allowed to be brought with the provisions of section 11 of that Act. Thus, should the appeal with which this Court is presently dealing be allowed and the conviction and sentence imposed by the magistrate at Serowe be revived, then only will it be open to appellant to pursue his appeal with the High Court.

Returning then to the question before this Court, it is necessary to consider whether in the circumstances prevailing in this case it was appropriate for the High Court to have resorted to the powers of remittal in terms of section 9 (i) (c) of the High Court Act. The motivation for the invocation of these powers as it appears from the judgement of Barrington-Jones J. was in order to allow cross-examination by the defence relative to the possible contamination of the blood sample by methylated spirits when it was being drawn and by the condition of the chemicals in the test tube containing the blood sample.

Now the defence is under no obligation to cross-examine on these issues. The onus rests squarely on the State to prove the absence of such contamination. If it has failed to do so, this enures to the detriment of the State and not to that of the accused. The absence of such evidence in the record is no ground for allowing the re-opening of the case which if it were done could hardly avoid affording the opportunity to the State to remedy the existing deficiencies in their case. To remit the case to the magistrate enabling this to be done would be in direct conflict with this Court's judgement in the case of GODFREY MOLAPISI vs. STATE Court of Appeal case No. 27 of 1985. In that case it was held, INTER ALIA, that:

"A retrial will not be ordered simply for

for the purpose of enabling a prosecution to adduce, as against the appellant, evidence which must convict him when his success at the appeal is based upon the absence of such evidence."

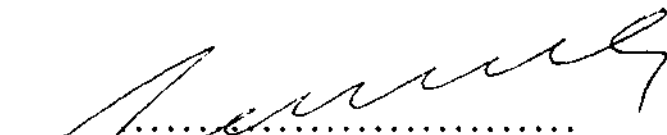
The judgement then proceeds to lay down that!

"It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in the case against the defendant."

See too S. v. Sivi 1951 (3) SALR 703.

In the event therefore the appeal is allowed, the magistrate's judgement is restored and this matter referred back to the High Court presided over by a different judge to consider and deal with the appeal against such judgement.


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L. de Van Winsen JA

I agree : 
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T. A. Aguda JA

I agree : 
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A.N.E. Amisshah JA

17TH JULY 1986