

IN THE COURT OF APPEAL OF THE
REPUBLIC OF BOTSWANA

Criminal Appeal No. 5 of 1988
High Court CA 133 of 1985

THE ATTORNEY GENERAL

vs.

ABRAHAM MALAN

L. I. Dambe for the Attorney General
K. Solo for the Accused

J U D G M E N T

CORAM: T. A. AGUDA, JA
L de VAN WINSEN, JA
G BIZOS, JA

AGUDA, J.A.:

The judgment of my learned brother, Bizos, JA, which I have had the privilege of reading in draft set down succinctly the facts and circumstances which led the Attorney-General to submit to this Court the determination of two questions, namely,

- (a) Does the High Court have power to make an order for costs upon an application by a party in criminal proceedings without any statutory provision conferring such powers; and
- (b) If the answer to the above question is in the negative does the High Court have an inherent power to make an order for costs where it is of the view that such a course is the most equitable one to take in the circumstances.

After giving very careful consideration to the questions, I have with very great reluctance come to the conclusion that I am unable to concur in the answers given by my brother Bizos, J.A., and agreed to by my brother Van Winsen, J.A.

To the first question the answer given in the majority judgment

in this case is that:

"There is no statutory provision save in the instances referred to in sections 12(5), 25(1), 24(2) and 312(3) of the Criminal Procedure and Evidence Act (Cap 08:02) enabling the High Court to make an Order for costs against a party (including the Attorney-General) in dismissed proceedings."

With the greatest respect to my brothers, Bizos and Van Winsen, JJA., I find that I cannot subscribe to this answer. I wish to express the opinion that I would rather answer the question as posed by the Attorney-General without putting any glosses on it. To the question whether the High Court has power to make an order for costs upon an application by a party in criminal proceedings without any statutory provision conferring such powers, my answer is that the High Court has not got any such power.

It is true that the High Court of Botswana is given unlimited original jurisdiction by the Constitution, Section 95(1), but in exercising that unlimited jurisdiction it must follow the procedure laid down by Statute. It must also be noted that the High Court is a superior court of record, and save as otherwise provided, has all the powers of such a court (section 95(3)). In my view, however, such powers do not include the power to order any party to pay costs in criminal proceedings. Such power must be sought in an enabling statute in that regard.

It is a fundamental principle of the Common Law that the Crown neither paid nor received costs. In the Australian case of R. v. Jackson (1962) W.A.R. 130, it was held that there was no power to award costs against the Crown ex officio indictment. The ordinary rule that the Crown neither receives nor pays costs applied. In the Canadian case of R. v. Johnson (No. 2) (1972) 7 C. CC (2d) 214, it was also held that at Common Law the Crown neither paid nor received

costs, but that under the Criminal Code, section 768, which sets out the powers of the Courts on appeal by way of case stated, the Court could make an award of costs. In the same way costs could not be awarded in criminal cases in England, but the position has been altered by Statute since the Costs in Criminal Cases Act, 1908. That Act was replaced by the Costs in Criminal Cases Act, 1952, and later by another Act of the same title in 1973, and now the Court has power to award costs in criminal cases. In the Republic of South Africa, an accused person cannot recover costs from the State. See W.A. Joubert, The Law of South Africa, (1978) Vol. 5, para. 500.

I have not been persuaded that there is anything in the Common Law as applicable in this country which confers jurisdiction on the Courts to award costs in favour of or against the State in any criminal proceedings that it may institute against any private person.

For all the reasons which I have herein before advanced I would, as said earlier, answer the first question in the negative.

Having arrived at the conclusion that the answer to the first question must be answered in the negative, I now have to consider the further question whether the High Court has an inherent power to make an order of costs where it is of the view that such a course is the most equitable one to take in the circumstances. In answering this question it is clear that what is under contemplation is still the award of costs in criminal proceedings initiated by the Attorney-General on behalf of the State.

Speaking for myself I cannot see how the question of what is equitable comes for consideration. The High Court is a creature of Statute (in which term must be included the Constitution), and can only exercise power as is given to it by the enabling Statute (and

the Constitution).

As a Court of record, it must have some powers without which it cannot function properly as court of justice. One such power which easily comes to mind is the power to commit for contempt. The power to make award of costs in criminal proceedings is not, in my view, one of such powers. Therefore for the High Court to be able to make award of costs it must be able to point out under what Statute or Statutory Instrument it is exercising such power.

In contrast to prosecutions for criminal offences initiated by the Attorney-General, it will be rewarding to examine the position of prosecutions for criminal offences by private persons permitted by our law. The Criminal Procedure and Evidence Act (Cap 08:02), Section 24 says -

- "(1) Where a person prosecuted at the instance of a private prosecutor is acquitted, the court in which the prosecution was brought may order the prosecutor to pay to the person prosecuted the whole or any part of the expenses which may have been occasioned to him by the prosecution.
- (2) Where the court, upon hearing the charge or complaint on a private prosecution, pronounces the same unfounded and vexatious, it shall award to the accused on this request such costs as it may think fit."

And again the same Act, Section 312(3) provides as follows:

"The court may order a person convicted upon a private prosecution to pay the costs and expenses of such prosecution in addition to the sum (if any) awarded under subsection (1):

Provided that if such private prosecution was instituted after a certificate by the Attorney-General that he declined to prosecute, the court may order the costs thereof to be paid by the State."

Finally, on this point reference must be made to Section 275 of the

same Act. Subsection (1) of the Section says that -

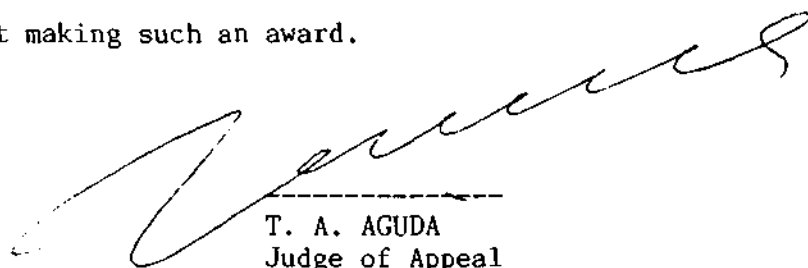
"If the prosecutor (whether public or private) in the case of a trial in the High Court, having given notice of trial, does not appear to prosecute the accused may move the court to discharge him"

However Subsection (2) then goes on to say -

"Where the indictment is at the instance of a private party the accused may move the court that the private prosecutor and his sureties shall be called on their recognizance The accused may also apply for an order directing that the private prosecutor pay the costs incurred by the accused in preparing his defence."

I take the view applying the usual canons of Statutory interpretation, that by reason of these Statutory provisions, it must be presumed that the legislature does not intend that the Attorney-General in any circumstances whatsoever pay costs to any person prosecuted where he has carried out such prosecutions on behalf of the State.

The answer I would give to the second question therefore is that the High Court has no inherent power to make an order for costs against the Attorney-General during or in respect of any criminal proceedings instituted by him in the exercise of his Constitutional powers; and that no equitable circumstances of any type will justify a High Court making such an award.



T. A. AGUDA
Judge of Appeal

GIVEN AT LOBATSE THIS 4th DAY OF JULY, 1988.