

IN THE COURT OF APPEAL OF THE  
REPUBLIC OF BOTSWANA

Court of Appeal No. 3 of 1989  
High Court Cr. App. No. 187/88

In the matter between:

MOSIMANEGAPE KGOSI

Appellant

vs.

THE STATE

Respondent

Appellant in person  
Miss P. Solomon for the Respondent

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J U D G M E N T

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Coram: A. N. E. AMISSAH, JP.  
B. A. DOYLE, JA.  
W. H R. SCHREINER, JA.

DOYLE, JA:

In this case the Applicant was convicted by the Magistrates' Court sitting at Jwaneng of the offence of Robbery contrary to section 296 as read with section 297 (1) of the Penal Code and Escaping from Lawful Custody contrary to section 125 of the Penal code. He was sentenced on the Robbery count to 4 years imprisonment plus five strokes and on the Escape count to one year's imprisonment.

The Applicant appealed to the High Court against conviction and sentence on both counts. His appeal was dismissed and leave to appeal to this Court was refused.

He applies to this Court for leave to appeal. In respect of Count 2 it is plain that his application has no merits and it is refused.

As regards the first count it seems to us to deserve

consideration.

On this count the complainant was a man named Bathusi Bagwasi. His evidence was that on 21/4/88 at about 8 pm he was in a restaurant in Jwaneng counting some coins in his hand. He had a P20 note in his left hand trouser pocket. He felt a hand in his pocket and when he looked up he saw the Applicant putting his hand into his own pocket. He felt in his pocket and found no P20 note. He asked the Applicant what he was doing and the Applicant in reply asked what he meant. Complainant then demanded the return of his money. The Applicant walked away backwards and left the restaurant. Complainant then called a boy named Moses to help. They ran after Applicant and chased him for a distance estimated at about 50 metres. Then the Applicant produced a knife and turned towards them. Complainant then ran back to the restaurant and the Applicant, having followed for a short distance, resumed his flight down a passage.

Complainant and Moses were joined by a policeman, Shabane, and restarted the chase. Shabane eventually caught the Applicant and took him to the police station together with the Complainant. At the police station the Applicant was searched and was found to have some South African money in a purse and a P20 note in his pocket.

Complainant also said that at some stage stones were thrown at them by the Complainant and that the Applicant struck Shabane with his fist.

According to Moses, he met Complainant in the restaurant where Complainant told him that he had been pick-pocketed and asked him to help in chasing the Applicant. They chased the Applicant who was eventually caught by Shabane. His evidence was somewhat confused in that he said he met the Complainant when he was being chased by the

Applicant with a knife. Later he said he never saw a knife but had merely been told about it by Complainant.

Shabane's evidence was that he saw the Applicant running out of the restaraunt chased by some people who were calling out for help as the Applicant had "searched" them. He joined in the chase and, when they reached the Community Hall, the Applicant stopped and took out a knife from his pocket. They retreated. The Applicant resumed his flight and they resumed the pursuit. When they were about to pass the Catholic Church Shabane saw the Applicant throw the knife into the church premises, shortly thereafter he arrested the Applicant. A complaint was made at some time about an alleged missing P20 note. He searched for the knife but could not find it as it was dark. Next day he went back with the Applicant and made a further search of the scene and found a knife. He charged the Applicant with robbery

He said that when the Applicant produced the knife he was some 5.7 metres away and the others a further 5.7 metres away. He did not mention any stone throwing incident.

The Applicant gave evidence in defence. He said he was in the restaurant. As he was leaving it, a man came running and told him to return his money. He said that he did not know what Complainant was talking about. He did not have any knife. He merely walked around. A crowd of people came and arrested him. He eventually saw the police officer who asked him about a knife and money. He replied that he had no knife and that the money in his possession was his. It consisted of R14 in South African currency, P4 in local currency and a P20 note. He denied running away or stealing any money.

The learned magistrate considered the evidence. He substantially accepted the evidence of the prosecution witnesses and rejected that

of the Applicant.

I have no doubt that he was fully justified in so doing.

The learned magistrate referred to the definition of robbery and stated that the prosecution had to establish first that there was a theft and second that at or immediately before or after such theft there was actual violence or a threat to use violence. He found, *inter alia*, that the Applicant decided to run away to conceal his identity as the perpetrator of the offence and that this clearly established his intention to permanently deprive the complainant of his money. He found that the Complainant followed the Applicant with a view to recover his money and that the production of the knife was a direct and immediate threat to stop him claiming his money. He later referred to it as "calculated at retaining the money he had stolen from the Complainant." He convicted the Applicant as charged.

I may pause to say that the magistrate tried this case very well and expressed himself clearly and lucidly. In many respects this was a model trial. But the question remains - did the magistrate arrive at the correct verdict.

The definition of robbery is as follows -

"296. Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the offence termed robbery."

As is stated at paragraph 18 - 41 of Archibold's Criminal Practice & Pleading 41st Edition - "Force used only to get away after committing does not seem naturally to be regarded as robbery though it could be charged as a separate offence in addition to stealing."

Robbery in Botswana is wider than the common law offence of

robbery and the English statutory offence as it includes force used immediately after the taking and also force used for retaining the property. One must look at all the circumstances of the offence to ascertain if the immediacy and intent existed.

Here the actual taking had been completed without violence and the Applicant had left the scene. Some time, however short, elapsed while the Complainant explained the matter to Moses and enlisted his help. Then there was the pursuit of the Applicant in the course of which the incident of the knife occurred. Can one really say that this was sufficiently close to transform the offence of pickpocketing into the vastly more serious offence of robbery. Indeed can one reasonably find that Applicant's intention when he brandished the knife was to protect his possession the stolen money of which then reposed in his pocket. No doubt if the Applicant had failed to escape, a consequence of the failure would have been the recovery of the money. I have no doubt that what was in the Applicant's mind was a desire to escape and that it was for this purpose that he used the violence. I think it stretching the language of the Act to say that it refers to violence used for the purpose of escape because this would entail retaining the money.

I may use a further illustration. Suppose that Applicant had in his flight run into the arms of the policeman, Shabane, and had struggled violently to escape, would this have made him guilty of robbery. I think this would be absurd.

In my opinion the offence committed in this case was stealing from the person contrary to section 280 (a) of the Penal Code and was not robbery contrary to section 297.

I would give leave to appeal on count 1 and on the appeal I would

quash the conviction and sentence for the offence of robbery and would substitute a conviction for stealing from the person contrary to section 280 (a) of the Penal Code.


Appellant has a number of offences including three of theft and one of stealing the person. He has been sentenced on each occasion to strokes and once to imprisonment. The amount stolen in this case was not great. I would impose a sentence of 18 months imprisonment. I do not think that in the circumstances an addition of strokes would serve any useful purpose.

GIVEN AT LOBATSE this ..<sup>3</sup>..... day of July, 1989



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B. A. DOYLE  
Judge of Appeal

I agree

  
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A. N. E. MISOAH  
Judge of Appeal

I agree

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W. H. R. SCHREINER  
Judge of Appeal