

IN THE HIGH COURT OF BOTSWANA HELD AT LOBATSE

COURT OF APPEAL CR. APP. NO. 34/91

HIGH COURT CRIMINAL APPEAL NO. 71 OF 91

In the matter between:

KGOMOTSO MASAKGONA - Appellant

and

THE STATE - Respondent

Appellant In Person
Mr. O. Moupo for The State

J U D G M E N T

Coram: Doyle, J.A.
Bizos, J.A.
Puckrin, J.A.

DOYLE, J.A.

The Appellant was convicted in the Kanye Magistrate's Court on two counts:-

1. Shop-Breaking contrary to section 302 of the Penal Code.
2. Stealing contrary to section 274 as read with section 264 of the Penal Code.

On 20th March, 1991 he was sentenced on the first count to 4 years imprisonment and four strokes and on the second count to two years imprisonment.

His appeal to the High Court was summarily dismissed. He was granted leave to appeal to the Court of Appeal by Aguda JA on Friday 22nd November, 1991.

The evidence briefly was as follows:

The owner of the Mpepi Bar in the Sebako Ward, Kanye, locked up his bar on the night of 15th June, 1991. Next morning he found the door open. A radio, some spirits, cigarettes and cassette tapes were missing.

On the same day a herdsman, Kgobane Wakgomo, was at Tsoang Cattle Post which is near Legonyane Village between Lotlhakane and Kanye. He saw two men coming carrying some goods in an overall. They asked where the shop was and he gave them directions. One of the two men was the Appellant. They had a conversation. In cross-examination he said he had time to observe the men because "they stayed for a longer time as we had sent for the police so we delayed them."

When the police came, the men saw them coming and ran away leaving the goods behind which Kgobane saw to be a radio, bottles of spirits and some cigarettes.

On the morning of the 16th a report was received at Kanye Police station of the store breaking and theft. Later that morning another report was received that two men had been seen at Legonyane Village carrying suspected stolen goods. In consequence Odumetse, Sgt. Sikalesele and several other police officers went to investigate. When the police reached near the cattle post, the two men ran away. Sergeants Odumetse and Sikalesele gave chase of one of the men, Odumetse being in the lead. He had almost caught up with the man when the latter 'drew a knife and charged at him' Odumetse hid behind a tree and the man made his escape. Odumetse identified the man as being the Appellant.

Sikalesele gave corroborative evidence of the chase. He must have been left considerably behind as he said that he was 500 metres away when he saw the knife incident. He went back to the scene where he found

a radio, two and a half bottles of spirits and some cigarettes which were later identified as being part of the stolen property.

On the same day Constable Montsho a member of the Botswana Local, i.e. Tribal Police, stationed at Lotlhakane received information of an offence at Kanye. In the afternoon of that day she received information that a man was selling cassette tapes at Lotlhakane. She investigated and recovered a tape or tapes from a person to whom the tapes had allegedly been sold. In consequence she called the Appellant to her office and questioned him. She then arrested the appellant and later handed him over to Kanye police officers "with the tapes in his pocket."

Mmoloki Nabala a C.I.D. officer stationed at Kanye gave evidence that he took part in the investigations at the Mpepi Bar. On that day the exhibits were brought to Kanye by Sergeant Odumetse and other police officers. Constable Montsho later that day brought the applicant with the cassette tapes to Kanye. The record shows that Nabala said all this happened on 18th but it is evident that this was either an error in the transcript or a slip on Nabala's part.

On 18th June Nabala invited the complainant and his wife to come and see the exhibits. In the presence of the Appellant they identified the property as being theirs. Thereupon Nabala warned and cautioned the appellant in respect of the offences of Bar-breaking and theft. In response the appellant said the property belonged to Peter.

The case for the State closed and the appellant gave evidence. He denied that he had had anything to do with the housebreaking and theft. He had spent the night in Lobatse. Next morning he had gone to visit his girlfriend in hospital at Lobatse but met her on the way. He was walking with her when a police van drew up and a police officer got out and said

he was wanted by the Selebi/Phikwe Police. He got into the vehicle and was brought to Kanye where he encountered the C.I.D. policeman Nabala.

In cross-examination he denied that he was arrested at Lotlhakane but insisted that he was arrested in Lobatse. He agreed that he was not taken to Lobatse Police station but was taken to Kanye Police station where he saw the local police, presumably Constable Montshioa.

The presentation of the State case was hardly a model one. When the herdsman stated that the two men "stayed a longer time as we had sent for the police" no questions were asked as to how or why the message was sent. It did not appear from the evidence that any other persons were present. It is obvious however, that a message was sent because that is why the police came.

Again what happened to the Applicant's companion is left to the imagination. Presumably he made his escape, pursued or unpursued.

It is not clear from the evidence of Constable Montsho whether she found any cassette tapes in the actual possession of the Appellant or whether she obtained them all from the person to whom tapes were allegedly sold by the Appellant. That person was not called as a witness. This of course does not affect the evidence that Constable Montsho arrested the Appellant at Lotlhakane Village.

The learned Magistrate rightly considered that the question was one of identity. He was satisfied with the identification of the Appellant by the various witnesses and that he was arrested at Lotlhakane. In dismissing the evidence of the Appellant as a complete fabrication he said that the Appellant, when asked why he never put to Montsho that it was not she who arrested him, had replied that he forgot to do so. The Magistrate asked himself how Appellant could have forgotten the core of

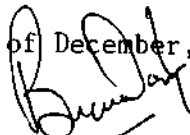
his defence. The record does not show that any such question was put to the Appellant.

The Appellant's defence was only disclosed at the last moment. Nothing in the evidence discloses why a van load of Kanye police officers should be crusing around Lobatse.

Despite the matters to which I have referred, I consider that the evidence against the Appellant is overwhelming. He was identified at the cattle post in possession of the stolen goods. He was arrested at Lotlhakane and when charged at Kanye his reply to the C.I.D. man was that the goods belonged to Peter. There is no reason why the sentences should be reduced in view of the nature of the offences and his previous convictions for offences involving both dishonesty and violence.

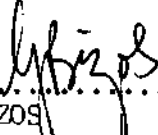
I would dismiss the appeal. The conviction and sentence are confirmed.

Delivered in open court this 5th day of December, 1991.




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B.A. DOYLE
JUDGE OF APPEAL

I agree.



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G. BIZOS
JUDGE OF APPEAL

I agree.



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G. E. DUCKRIN
JUDGE OF APPEAL