

IN THE COURT OF APPEAL FOR BOTSWANA HELD  
AT LOBATSE

CRIMINAL APPEAL NO. 10 OF 1994

In the matter of:

**MOTHUSI METSEYABENG**

**APPELLANT**

vs

**THE STATE**

**RESPONDENT**

**MR. ATTORNEY EDWARD FASHOLE LUKE II FOR THE APPELLANT  
MR. ATTORNEY M. K. ACHIUME FOR THE RESPONDENT**

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**J U D G M E N T**

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**CORAM: T. A. AGUDA, J.A.  
J.H. STEYN, J.A.  
LORD N. WYLIE, J.A.**

**LORD N. WYLIE J.A.:**

The Appellant was convicted of murder by the High Court sitting in Francistown on 14 February 1994, and sentenced to eight years (8) imprisonment. He has now appealed against conviction and sentence.

Mr. Luke, Counsel for the Appellant, began his submissions by conceding that this was "a very bad case" in respect that the Appellant had lied and had changed his evidence in the course of the trial. This is indeed the case, as is fully canvassed in the careful judgment of the trial judge. The initial account of the incident given by the Appellant was that as he was passing the deceased he was slapped by the deceased, who advanced towards him with clenched fists. He became frightened, took out a knife from his trouser pocket and opened it to frighten him away. With the

knife in his hand he tried to push the deceased away and was unaware that he had stabbed the deceased. It was only when the deceased turned round that he noticed that he was bleeding from around the neck and shoulder. On this version the Appellant was in effect saying that the stabbing was accidental. In cross examination however he maintained that the deceased was holding a loaded catapult which he was pulling and about to discharge as he was walking towards him. When asked in re-examination why he had made no reference to the catapult in his evidence-in-chief he said that he had simply forgotten about it. It is also to be noted that in his statement to the judicial officer, when the events were fresh in his mind, no mention was made of this either. His account of events in the statement was as follows:

"He came. I took out a knife from the pocket. He just came. I opened it. When I lifted it up, he jumped. I think he wanted to catch me. I found myself having stabbed him .... I was not intending to do that."

It is hardly surprising therefore that the trial judge was unable to hold that the Appellant was a credible witness.

Accepting that the Appellant had given untruthful evidence Mr. Luke nevertheless challenged the conclusion of the trial judge that "none of his stories can be believed". The main thrust of his argument was to the effect that the one piece of evidence that the Appellant maintained throughout the different accounts of events which he gave was that he did not intend to kill or cause grievous harm to the deceased. As in the concluding passage of the statement which I have quoted above the Appellant had repeatedly asserted that he had never intended to stab the deceased, and it was argued that this was a fact which

the trial judge had failed to take into consideration and evaluate.

It is of course recognised that an accused person may give false evidence in an attempt to bolster his contention of innocence, and much will depend on the extent to which the issue on which he has lied is critical to his evidence. In this instance the trial judge clearly took the view that the issue on which the Appellant lied went to the root of his evidence and as a result rejected that evidence in toto. For my part I am unable to hold that in the circumstances of this case the trial judge was not entitled to do so. The Appellant was so unworthy of credit that the trial judge was fully entitled, in my view, to reject the whole of his evidence, including his assertion that the stabbing was unintentional.

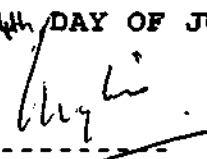
That of course would not be the end of the matter because a conviction could not be sustained simply on the basis of a denial which was held to be false. In this case there was a witness **DIANAH MPHITHAN**, who gave direct evidence of the stabbing. She was in close proximity and said that she saw the Appellant strike the deceased on the shoulder with his right hand, after which he bled from the shoulder, although she did not actually see what the Appellant had in his hand at the time. In cross-examination she was quite emphatic that this was not a case of accident and denied defence Counsel's suggestion to that effect. She likewise mentioned that at no time did the deceased attack the Appellant. On the contrary she saw the Appellant strike the deceased with one hand as the latter was trying to back away. This evidence was accepted as wholly credible and

reliable by the trial judge and in my view that being the state of the evidence the appeal against conviction must be refused.

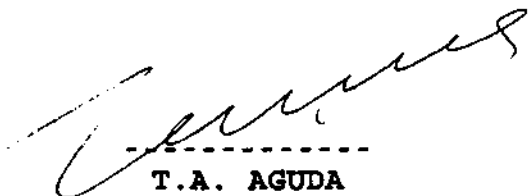
The Appellant was sentenced to eight years imprisonment (8) on 14 February 1994. He had been in custody since 2 January 1992 and it was submitted that in passing sentence the learned judge failed to take account of this fact. Although there is no rule of law to the effect that a sentence of imprisonment must be back-dated to the date when an accused person was taken into custody it was submitted that this has become a practice in these Courts which should have been followed in this case. It was submitted that in the exercise of his discretion the sentencing judge must have regard to all the relevant circumstances and it was clear that in this instance the learned judge did not avert his mind to this significant factor. Under reference to the decision of the Court of Appeal in the case of **SETHULU vs THE STATE (1986) BLR 272**, recently affirmed by the Court of Appeal in the case of **MOSIMANEGAPE GABATLHOJWE vs THE STATE**, in which judgment was delivered on 5th July 1994, I am satisfied that there is force in this contention. I understood Counsel for the State in effect to concur in this submission.

In the circumstance the appeal against sentence will be allowed in the extent of back-dating the sentence of eight years imprisonment to 2nd January 1992.

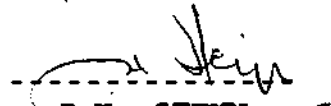
DELIVERED IN OPEN COURT THIS <sup>14th</sup> DAY OF JULY 1994

  
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LORD N. WYLIE  
JUDGE OF APPEAL

I AGREE:

  
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T.A. AGUDA  
JUDGE OF APPEAL

I AGREE:

  
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J.H. STEYN  
JUDGE OF APPEAL