

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Criminal Appeal No. 23 of 1993
(High Court Criminal Appeal No. 52 of 1992)

In the matter between:

JOSEPH MARTLOUW

Appellant

versus

THE STATE

Respondent

Mr. E. W. F. Luke for the Appellant

Mr. K. Kapinga for the Respondent

J U D G M E N T

Delivered on the 31st day of January, 1994

CORAM: A. N. E. AMISSAH, J.P.
W. H. R. SCHREINER, J.A.
J. J. TRENGOVE, J. A.

TRENGOVE, J.A.:

The appellant was convicted by the Gaborone Magistrate Court of the offence of being in unlawful possession of Habit Forming Drugs contrary to Section 3(1) of the Habit Forming Drugs Act Cap.63:04, as read with Regulation 2(1) of the Statutory Instrument No. 85/87, and punishable under section 32 of the said Act. He was sentenced to the prescribed minimum term of imprisonment, namely 10 years, and to payment of a fine of P15 000.00 or in default of payment, to imprisonment for 3 years.

The appellant appealed to the High Court, but was unsuccessful. He was subsequently granted leave to appeal to this Court. The appeal was heard on 18 January 1994. At the conclusion of the hearing, this Court dismissed the appeal and stated that reasons for the dismissal would be given later. The reasons are as follows:

The central issue in this appeal was whether a statement by the appellant to two police officers that certain tablets found in his car were mandrax tablets, amounted to a confession. Counsel for the parties were agreed that if the statement indeed amounted to a confession, it was inadmissible in evidence against the appellant by reason of non-compliance with the provisions of section 228 of the Criminal Procedure and Evidence Act, and the appeal would then be upheld.

Counsel for the appellant argued very forcefully that appellant's statement constituted a confession if taken in conjunction with the circumstances in which it was made. The two police officers to whom the statement was made, Detective Assistant Superintendent Kebonyemodisa and Detective Superintendent Inspector Moitoi, testified as to how it happened. At that time they were both members of the Diamond and Narcotic Squad. Their evidence on this issue can be summed up as follows. On 8 September, 1991, the witness Moitoi saw a motor vehicle, driven by the appellant, entering Botswana from Zambia through the border gate at Kazungula. Appellant was the driver of the vehicle. He was accompanied by his brother (Accused 2 at the trial) and another person later identified as one Swikidish Kiofa (initially Accused 3 and later a witness for the prosecution). After they had presented themselves to the Immigration and Custom Officers, Moitoi approached them, he identified himself, and then informed them that he suspected them of conveying illegal drugs and that they would be thoroughly searched. Thereafter, they went with Moitoi to the Local Charge Office. He drove the appellant's car and was accompanied by him.

At the Charge Office, appellant and his passengers were confronted by the witness Kebonyemodisa. He also identified himself as a police officer. He told them that he suspected they were carrying illegal drugs in the vehicle and that he would search their person, their property and the vehicle. He also told them that they were not obliged to say anything unless they elected to do so, and that whatever they said could be used in evidence against them. Kebonyemodisa then started searching the vehicle. In the right boot panel, he found plastic packets containing tablets. He asked the appellant and the others what they were. The appellant said it was mandrax. His brother and Kiofa said they knew nothing about the packets. Kebonyemodisa continued with the search. After he had removed 15 packets containing tablets from the rear boot panel on the right side, he asked whether there were any more tablets in the car. The appellant first pointed to the left boot panel and then to the rear door boot panel, and said there. Kebonyemodisa opened these panels and found a further 37 packets of tablets. He then enquired whether there were any more tablets hidden in the car. The appellant said no and although the witness continued with his search no further tablets were found.

Counsel for the appellant submitted that in these circumstances appellant's statement that the tablets were mandrax tablets amounted to a confession. He conceded that the statement by itself did not amount to a confession, but submitted that it should in conjunction with the following factors, namely, (a) appellant was the owner and driver of the vehicle, (b) he was aware that there police officers suspected him of being in illegal possession of drugs, (c) the mandrax tablets were hidden away in different places in the

vehicle that were indicative of secrecy and illicit dealing and (d) he actually pointed out the places where the tablets were hidden to the police. This line of argument has been considered and rejected by the courts on a number of occasions. See, for example, R v. Xulu 1956(2) SA 288(A.D.) and the cases referred to therein.

In R v. Xulu the facts were briefly as follows. The police found a quantity of dagga in a hut. Attached to the hut was a garage in which a car belonging to the appellant was standing. They took the appellant to the car and let him unlock the luggage compartment. They saw dagga leaves and dagga dust in it. One of the police officers then asked the appellant who lived in the hut. The appellant said that it was his mother-in-law. He asked the police not to arrest her, saying that she knew nothing about the dagga, he stored it in the hut and he was responsible for it.

The question was whether this statement amounted to a confession. Counsel for the appellant submitted that the statement should be regarded as a confession if taken in conjunction with the circumstances in which it was made. In rejecting this argument, Fagan, J.A. said at pp. 293-294:


"Here we may assume ... that the accused knew what charge the police intended to bring against him and that his statement was directed to the charge. The point is that his statement was not an unequivocal admission of guilt on that charge. It was still open to him to try to prove that he had a permit or other right to possess dagga or, as he actually did at the trial, to allege that the dagga had been put there without his authority by someone else who had used his car. The fact that such defences would be hopeless in the light of circumstances to which the police would testify does not provide the missing elements in the statement so as to make it a confession. And I may in this regard again quote from the judgment in R. v. Bekker :

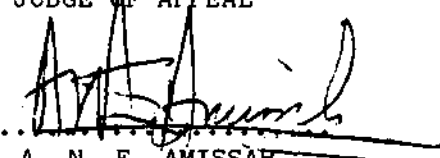
"The admission by the accused of facts which, when carefully scrutinised and laborously pieced together, may lead to an inference of guilt on the part of the accused, however consonant that may be with the meaning of the term "confession" in the abstract, is not a confession within the meaning of the Act. To look upon such a statement as equivalent to a plea of guilty would be most dangerous."

Applying the reasoning of the learned judge, with which I respectfully agree, to the facts and circumstances of the instant case, I have no doubt that appellant's statement was not a confession within the meaning of section 228 of the Criminal Procedure and Evidence Act. It was no more than an admission. On the evidence, it was made freely and voluntarily and as such it was admissible in evidence against the appellant. Counsel for the Appellant conceded, quite properly, albeit somewhat reluctantly, that if we were to come to this conclusion, the appeal could not succeed.

In the circumstances, we were of the opinion that there were no valid grounds for setting aside the conviction and the appeal was accordingly dismissed.

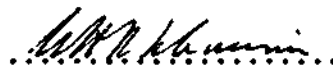
DELIVERED AT THE COURT OF APPEAL, LOBATSE, this 31st day of January, 1994.


 J. TRENGOVE
 JUDGE OF APPEAL


 A. N. E. AMISSAH,
 JUDGE PRESIDENT

I agree,

I agree,


 W. H. R. SCHREINER
 JUDGE OF APPEAL