

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Criminal Application No. 1 of 1994
(High Court Criminal Review No. 282 of 1993)

In the matter between:

MPHO RAMARUMO
JERRY SEMELE

1st Appellant
2nd Appellant

versus

THE STATE

Mr. S. T. Pilane for the Appellants
Mr. J. Moutswi for the State

J U D G M E N T

Delivered on the 31st day of January, 1994

CORAM: T. A. AGUDA, J. A.
W. H. R. SCHREINER, J. A.
J. J. TRENGOVE, J. A.

AGUDA, J.A.:

It would appear that the two appellants and a third person were on December 18, 1992, arraigned before a Magistrate's Court on a single charge of rape contrary to section 141 of the Penal Code. Their pleas were not taken on that day, and they were released on bail. On a second adjournment thereafter, on January 19, 1993 each of the accused persons pleaded guilty to the charge. Convictions could not be recorded against them on that day because the prosecutor informed the Court that he was not ready with the statement of the facts. The case was subsequently adjourned on a number of occasions for the prosecutor to be able to get the statement produced to the court. However when on January 29, 1993 the prosecutor was ready with the statements, the accused were not present in court. A warrant of

arrest was issued against each of them, and the case was adjourned to February 12, 1993. On the last mentioned date the State applied for and obtained, with the consent of the accused persons, leave to withdraw the charge of rape and to substitute one of attempted rape. This charge was then read and explained to them. Accused Nos 1 and 2, now appellants 1 and 2 pleaded guilty to the charge. The third accused pleaded not guilty. Apparently the prosecutor then read the statement of facts to the court and they were asked if the facts as stated were correct. Each of the two appellants told the Court that they were correct. The learned trial magistrate thereupon found them guilty on their plea.

The statement was handed in to the court and it revealed, inter alia, the facts that whilst each of the three men made efforts to have sexual intercourse with the complainant without her consent the other two held her down and covered her mouth. It did not appear from that statement that any of them succeeded to have sexual intercourse with her. In the statement it was said:

"The accused persons attempted to have sexual intercourse with the complainant each one and separately. They were doing this one after the other. They did attempt to have sex with her without her consent."

It was on those facts that the learned trial magistrate convicted the two appellants and subsequently sentenced each of them to three years imprisonment of which 18 months was suspended for a period of three years. That was on February 2, 1993. Thereafter the learned trial magistrate proceeded as he was bound to do, to try accused No. 3.

At that trial four witnesses gave evidence including the complainant and appellant No. 1 who gave evidence as PW3. After, Accused No. 3 also gave evidence. After a thorough review of the whole evidence the learned trial magistrate came to the following conclusion:

"It is my considered view therefore that a charge of rape has been sufficiently proved against the accused(i.e. Accused No. 3). However, in view of the fact that he has only been charged with attempted rape which is in itself a lesser offence than the original rape charge, it would be wrong to convict him of a greater offence though it be the one proved."

The learned trial magistrate then found the accused No. 3 guilty as charged and sentenced him to four years' imprisonment plus four strokes of the cane.

None of the three accused persons filed an appeal against his conviction or sentence but in the normal process of the administration of justice in this country (see the Magistrates' Court Act, Section 62 and 63) the record of the proceedings in this case was transmitted to the High Court. The case thereupon came before Barrington-Jones, J., on review. In the purported exercise of his power the learned Judge a quo said:

"Once the trial magistrate in this case had heard the evidence of the complainant he should have stopped the case and sought appropriate amendment of the charge!"

According to the learned judge a quo, the trial magistrate was in error not to have taken this course of action. For this proposition he said that he had derived support from what he said that Cotran, J., said in Oliver Ramphateng & Anor. v. The State (Criminal Appeal No. F28 of 1993).

Upon the facts of this particular case this proposition is startling as going against the very foundation of our judicial process. Here a magistrate had convicted two accused persons of the offence of attempted rape. Subsequently when the trial of the third accused is being proceeded with, the learned trial magistrate was then to stop the proceeding, set aside the conviction which he had recorded against the two accused persons and seek an amendment of the charge in respect of which he had become functus officio. From whom he was to have sought the appropriate amendment is not clear.

Now the learned Judge a quo then proceeded to conclude his review judgment thus:

"...in all the circumstances I therefore order that the convictions of the 1st and 2nd accused be quashed as being unsafe and unsatisfactory, and their sentences be set aside; and further order that the 1st and 2nd accused be re-arraigned before another magistrate as soon as possible.

Although the learned judge a quo did not say so in terms, what he ordered was that the accused persons should be arrested and charged with the offence of rape and tried before another magistrate.

It is against this Order that the appellants, through their counsel, Pilane, Esq., sought and obtained leave to file an appeal out of time. The Attorney-General represented by State Counsel Moutswi both in a written submission as well as in an oral presentation found himself unable to support the procedure which the learned judge had adopted in this case, and the order which he had made.

With the greatest respect to the learned judge he was grossly in error in many ways and for many reasons. The order which he made was in contravention of the elementary rule of fairness and justice mentioned by Counsel for both sides that an accused person shall not be put in double jeopardy of prosecution as regards a single offence.

A more fundamental error which the learned judge committed was to have not adverted his mind to the fact that under our Constitution the officer given the general power to prosecute offences is the Attorney General. Section 51(3) of the Constitution is quite clear on the point, and it is never part of the functions of a Judicial Officer to stop a prosecution being carried on by the Attorney-General either in person or through any of his officers, and to order him to prefer a charge other than that which the Attorney-General in his wisdom has decided to prefer. Sub-section (7) of Section 51 of the Constitution goes on to put the matter beyond any doubts when it says:

"In the exercise of the functions vested in him by sub-section (3) of this section, the Attorney-General shall not be subject to the direction or control of any other person or authority."

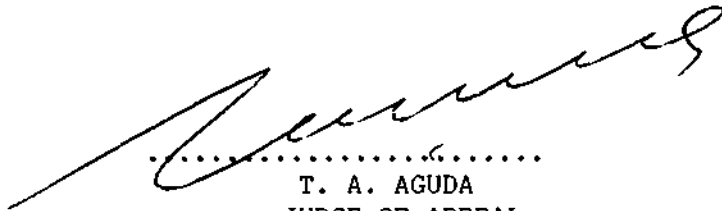
Counsel for the appellants has also submitted that the order made by the learned judge a quo was **ultra vires** the powers granted to him by law. According to Counsel the notice for review sent to the appellants on August 20, 1993 under Rules of the High Court, Order 61, rule 8 was as to the possible variation of sentence passed by the Magistrate's Court. The appellants were never informed

1994.


that the learned judge a quo was considering setting aside their convictions and ordering them to be re-tried under a different charge. They were never given an opportunity of engaging Counsel to appear for them at the Review. State Counsel was also in agreement in this regard. I have no doubt that he was also in error in this regard.

In conclusion therefore it is quite clear that the Order of Barrington-Jones, J., made in this case is null and void and of no effect. We were told that the appellants who have been discharged from the Prison following upon the said order have now taken up appointments and that we should not send them back to prison. I regret to say that I do not think that we have any power to reduce the sentences passed on the appellants in this case. However it seems to me that since their release from prison was not as a result of any application from them, their sentences must be presumed to be continuous from the day the magistrate pronounced the sentences on them.

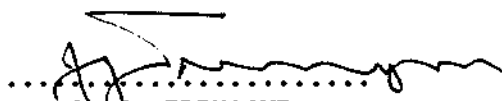
DELIVERED AT THE COURT OF APPEAL, LOBATSE, this 31st day of January, 1994.


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T. A. AGUDA
JUDGE OF APPEAL

I agree


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W. H. R. SCHREINER
JUDGE OF APPEAL

I agree


.....
J. TRENGOVE
JUDGE OF APPEAL