

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 50 of 1994  
High Court Cr. App. No. 342 of 1993  
Gaborone Cr. Case No. G(V) 355 of 1991

In the matter of:

FINE TLHOGO Applicant

vs

THE STATE Respondent

Applicant in person  
Miss P. Solomon for the State

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J U D G M E N T

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Coram: Amissah, J.P.:  
Wylie, J.A.:  
Steyn, J.A.:

STEYN, J.A.:

This is an application to the Court of Appeal against refusal of an application for leave to appeal to this Court by the High Court dated the 24th August, 1994.

The applicant had been convicted by the Magistrate in Gaborone on the 8th July, 1993 on two counts of burglary contrary to Section 300(1)(a)(2) and theft contrary to Section 264(1) as read with Section 271 of the Penal Code (Cap 08:01).

The applicant's appeal to the High Court was summarily dismissed on the 3rd December, 1993.

The application insofar as it is directed against the conviction is without merit and cannot be entertained.

The sentences imposed cannot be described as unduly severe especially in the light of the applicant's record of previous convictions and there are no grounds for interference.

However the following appears on the record at the hearing

of applicant's appeal in the High Court:

"IT IS ORDERED THAT:

The corporal punishment of 4 strokes be deleted.

The suspended sentence of 36 months' imprisonment flowing from conviction for burglary and theft on 24th August, 1990 (CR. G789/89) be reactivated."

Section 311 of the Criminal Procedure and Evidence Act (Cap 08:02) provides as follows:

"(1) If the conditions of any order made, or recognizance entered into, under the provisions of section 308 or section 310 are alleged not to have been fulfilled, the local public prosecutor may, without notice to the offender, apply to any magistrate's court within the local limits of whose jurisdiction the offender is known or suspected to be, for a warrant for the arrest of the offender for the purpose of bringing him before the court to show cause why such offender shall not undergo the sentence which has been, or may be, lawfully imposed.

(2) Any application made under subsection (1) shall be supported by evidence in the form of an affidavit or on oath, that the order or recognizance is still binding upon the offender and that such offender has failed, in a manner to be specified, to observe the conditions thereof.

(3) The court to which application is made under subsection (1) may, if it is satisfied that the offender ought to be called upon to show cause why he shall not undergo the sentence which has been, or may be, imposed, grant a warrant for the arrest of such offender for the purpose of bringing him to court to show cause as aforesaid.

(4) The court, before which any offender appears in consequence of an application under subsection (1), shall read, or cause to be read, to the offender, such application and the evidence given in support thereof, and shall thereupon call upon the offender to say whether he opposes such application.

(5) If such offender does not oppose the application and admits that he has not fulfilled the conditions of the order made, or recognizance entered into, the

court may order that the offender shall undergo the sentence which was, or is then, imposed upon him or may make an order under section 312 if the original order was made under section 308(2) or under section 310.

(6) If the offender denies the allegations and opposes the application, the court shall proceed to hear the matter in accordance with the principles generally applicable to criminal trials under this Act, and if it finds that the offender has not fulfilled the conditions of any order made, or recognizance entered into, the court may thereupon order that the offender shall undergo the sentence which was, or is then, imposed upon him, or may make an order under section 312 if the original order was made under subsection (2) of section 308 or under section 310.

Section 308 is the section which empowers a Court to postpone sentence or to suspend its operation for a period not exceeding three years and regulates matters incidental to the exercise of such powers.

The provisions of section 311 of the enactment are in my opinion clear. Subsections 311(4) to (6) prescribe what is in effect a hearing, before a suspended sentence is brought into operation. Clearly, these provisions require the Presiding Officer, whether a Judge or Magistrate, to apply his mind to a consideration as to whether or not he should now, and because of the commission of a crime constituting a breach of the conditions imposed and committed during the period of suspension, bring the sentence suspended in terms of the original order into operation.

Ms. Solomon who appeared on behalf of the State conceded that the Court on appeal had ex facie the record mero motu and without reference to the applicant reactivated the sentence concerned. She also indicated that to her knowledge the procedure prescribed in this section was not one which was

generally observed in practice. She was also unable to find any authority in Courts of this jurisdiction in which the provisions of this section relative to the procedure to be followed when a suspended sentence is activated, was judicially considered. See however Magosi v. The State - Criminal Appeal 162 of 1993 delivered on 24th June, 1994.

The section clearly does not contemplate that upon mere proof of a breach, an automatic activation of the suspended portion of the sentence is to follow. That this is in accordance with the principles of sound jurisprudence, I believe is self-evident. The breach of the condition may be technical. The offence committed may be of minor kind or the cumulative effect of all the sentences imposed in respect of similar offences committed at or about the same time may be such that the imposition of the suspended sentence results in undesirably lengthy sentences of imprisonment being imposed on the affected accused.

This principle has been endorsed by the courts of another jurisdiction. Thus the South African Supreme Court has held that a failure by a presiding officer to apply his mind to the question as to whether "for any other good or sufficient reason" a further suspension of a suspended sentence should be ordered, constitutes a "gross irregularity". See in this regard Berg v. Regional Magistrate 1956 (2) S.A. 676 (T). See also R. v. Arries 1959 (3) S.A. 913 where at p. 915 Van Winsen, J. says with reference to the South African statutory provisions:

"Now, clearly, every accused brought before the magistrate under (and he cites the relevant section) has the right to claim to have the question of whether his suspended

sentence should be further suspended, heard and decided by the Court that suspended the operation of the sentence."

It should be pointed out in this regard that the provisions of the South African statute are in no way as explicit as the provisions of the Botswana enactment - more particularly the provisions of subsections 311(4), (5) and (6).

The present case is in a way illustrative of the need for a proper observation of the provisions of the relevant enactment. Ms. Solomon conceded that the High Court when acting as it did, was unaware that in addition to the sentences of imprisonment imposed by the Court in the present case i.e. 5 years and 12 months (to run concurrently) and the 3 years suspended sentence now activated, applicant had received a further sentence of 5 years' imprisonment also for a burglary committed at or about the same time. This would mean that cumulatively applicant has to serve 13 years' imprisonment.

I am certain that had the learned presiding Judge in the High Court complied with the relevant provisions of section 311 he could well through the process prescribed by its provisions have acquired knowledge of these facts. It would have prompted him to consider whether the activation of the 3 years suspended sentence was just in all the circumstances, instead of automatically decreeing its enforcement. This failure to comply with the provisions of the relevant Statute was therefore an irregularity which vitiates the proceedings insofar as they relate to the "reactivation" of the 36 months sentence of imprisonment suspended in terms of the order made on the 24th of August, 1990.

