

IN THE COURT OF APPEAL OF BOTSWANA  
HELD AT LOBATSE

CRIMINAL APPEAL NO 27/94  
(HIGH COURT CRIMINAL APPEAL NO 70/93)

In the matter between:

**STEPHEN LEBOGANG**

Appellant

and

**THE STATE**

Respondent

MR. H.M. Sekhakhane for the Appellant  
Mr. K. Rammekwa for the State

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**R E A S O N S   F O R   J U D G M E N T**  
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**CORAM:**     **A.N.E. AMISSAH, J.P.**  
                  **LORD N. WYLIE, J.A.**  
                  **J.H. STEYN, J.A.**

**WYLIE J.A.**

The Appellant was convicted on two counts. The first charge was a charge of escaping from lawful custody on 24th April, 1988 and the second charge was on 21st April, 1988 breaking and entering a dwelling house in JWANENG TOWNSHIP and stealing therein a Video Machine and a blanket. In respect of the latter charge he was sentenced to 5 years imprisonment plus 4 strokes, and in respect of the charge of escaping from lawful custody he was sentenced to 2 years imprisonment, both sentences to run concurrently. He has appealed against both these convictions, and it has to be said at the outset that in relation to the charge of escaping from lawful custody State Counsel intimated to the Court that he was not seeking to have that conviction sustained. This concession was on the view that there was no evidence on record to indicate that the Appellant had escaped

within the permitted detention period of 48 hours as prescribed by section 36 of the Criminal Procedure and Evidence Act. Accordingly the conviction and sentence on that charge falls to be quashed.

The appeal however, against the conviction on the charge of House Breaking and Theft is, in my view, without any merit whatsoever. The main thrust of the argument advanced by Counsel in relation to that conviction, as I understand it, was to the effect that the evidence as to the identification of the perpetrator was unreliable and that the identification of the Appellant as the perpetrator was unsatisfactory to the extent that the burden of proof on the prosecution could not be said to have been discharged. In light of the evidence which was adduced in relation to identification I regard this proposition as virtually untenable.

There was, and could be, no dispute that the break in and theft was clearly established. The witness DINEO AKANYANG (PW2) testified that as a housemaid employed by the Complainant (PW1) she saw an intruder leave the house by the kitchen door as she was coming in. He was carrying the Video wrapped up in a blanket. She immediately raised the alarm and the Complainant got out of bed and witnessed the intruder putting the Video and the blanket down on the grass as he ran out of the court yard. At the same time a neighbour, JACKSON BAPEGE (PW3), who had likewise been alerted, rushed into the yard and saw a man leaving the yard. He began to run and PW 3 proceeded to chase him for some considerable distance to the bush but he failed to catch up with him and he disappeared. This all happened about 7 a.m. on

21st April, 1988.

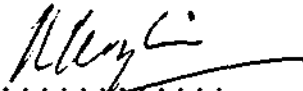
The Complainant was unable to make an identification at the time because having just got out of bed she was not wearing her contact lenses. PW2 however, although she did not know his name, recognised the Appellant as someone she had seen before. She saw him face to face at a distance of about 2 m as he left the house and on the following day again saw him and recognised him notwithstanding that at the time he was in a group of some ten other people. She immediately contacted the police to whom she pointed him out and the Appellant was promptly arrested. In the charge office he was identified by PW3 as the man he had chased from the court yard. He was equally positive in his identification, having seen the Appellant's face when he, the Appellant, had threatened him, and this was in broad daylight. It is difficult to envisage more clear cut positive evidence of identification.

The position adopted by the Appellant in evidence was simply that he was not present at the scene at the time of the theft and could not be the person who committed the break in and theft. He began by saying that he left KANYE between 8 and 9 a.m. to go to LOBATSE in order to collect some clothing from a dry cleaners. He went along with one WAKGOMO (DW2) and returned there between 2 and 3 p.m. In cross-examination however, he said he had been wrong in stating that he had left between 8 and 9 a.m., because he was actually in Lobatse at that time, waiting for the dry cleaners to open at 8.30 a.m. He had in fact left about 5 a.m. DW2 stated that they left KANYE for LOBATSE at 8 a.m. A further defence witness STEVEN SEBUSO (DW3) was quite clear that,

although he could not remember the date in April he did recall the Appellant coming to collect clothing from the dry cleaners. That however, was shortly before he closed the shop at 5 p.m. Having regard to these as well as to other inconsistencies in the defence evidence the Magistrate was driven to reject as wholly false the alibi defence advanced by the Appellant. He accepted as both reliable and credible the identification evidence of PW2 and PW3 as of course he was perfectly entitled to do so.

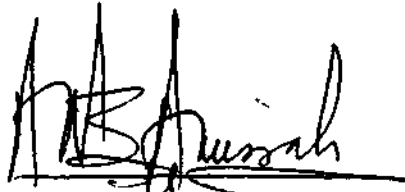
I would only add that although the appeal was also marked as an appeal against sentence no submissions were advanced by Counsel in this connection. The appeal is accordingly allowed in so far as it relates to count 1 and in so far as it relates to count 2 it is dismissed.

Delivered in open court this 30<sup>th</sup> day of January, 1995.



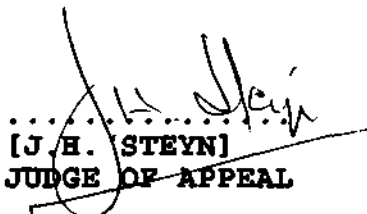
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[LORD WYLIE]  
JUDGE OF APPEAL

I agree



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[A.N.E. AMISSAH]  
JUDGE PRESIDENT

I agree



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[J.H. STEYN]  
JUDGE OF APPEAL