

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 36 of 1995

High Court Criminal Appeal No. 72 of 1995

In the matter between:

ROY MPHUSU

Appellant

and

THE STATE

Respondent

Appellant in person

Mr R.S. Busang for the State

J U D G M E N T

CORAM: T.A. AGUDA, J.A.
LORD N. WYLIE, J.A.
G.G. HOEXTER, J.A.

Lord N. Wylie: J.A.

The appellant, along with three co-accused, stood charged with one count of shop breaking contrary to Section 302(a) of the Penal Code Cap 08:01. The premises concerned, namely Thari ya Batho Liquor Restaurant, were broken into on the night of 23rd August, 1994 and certain items of property stolen. The owner of the premises, Mrs Jane Gaborekwe (PW1) had left them locked and secured at the close of business that day and when she returned to open up for business on the following day she found that the burglar bars on the windows had been broken and the window panes smashed. She reported the matter to the police, which report was

received by Detective Constable Moncho (PW8) and circulated to all the police stations in the area to assist in the investigation. On 12th October, 1994 he received a message from Broadhurst Police that certain property had been recovered and that four suspected persons were in custody there. In due course PW1 identified a music player and a C.D. player, as well as two oxygen cylinders and a compressor. She later identified a cash register, all property which had been stolen from her premises. The commission of the crime was not and could not be challenged.

There was indeed an abundance of evidence implicating the appellant in the commission of the crime, which is fully narrated in the judgment of the learned magistrate and which I do not find necessary to repeat in any detail here. With the exception of the cash register the property recovered had been located in the appellant's house. His explanation was that he had simply been asked by one Daniel Boko to store the goods there and having consulted his fiancé, Bonny Medupe (DW4), he had agreed to do so. They both gave evidence to this effect and under cross-examination he said that he had not known Dan Boko before this time. As the magistrate observed in his judgment it would be surprising that the appellant had not thought fit to ask him where these goods came from and concluded that they had come into his possession not from Dan Boko, but when he, along with two of

his co-accused stole them from the complainant's shop. He was in fact the driver of the get away motor vehicle.


In relation to the cash register it was the appellant himself who took Detective Constable Moncho to the business premises of one Lucas Molapi where he pointed it out to the Detective Constable. Molapi (PW6) told the Court that he had contacted the appellant because he was an auto electrician who could repair his own cash register. He later found the cash register in his shop and was told on the following day by the appellant that he, the appellant had brought it into the shop in his absence, for his use in the shop. This evidence, incriminating as it is, was not in any way explained by the appellant in his evidence. It was not disputed in any way, nor was any explanation given as to how this cash register, identified as it was by PW1, had come into his possession.

The appellant conducted the appeal against conviction and sentence in person. His position was simply that he was totally innocent and in no way involved in the commission of the offence. He had been convicted of a crime he had not committed and all the evidence on which conviction proceeded was simply untruthful. His co-accused had implicated him simply because they knew that the bulk of the stolen property had been found in his house and he had nothing to say about the pointing out by him of the cash

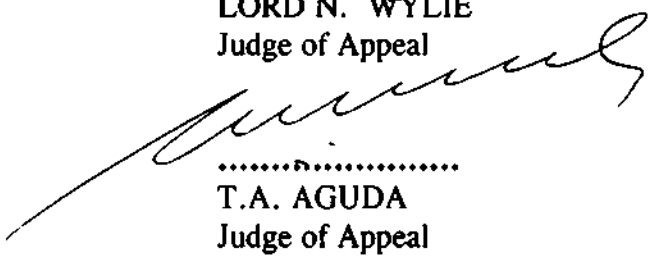
register. In the circumstances of this case an appeal against conviction is simply unstateable and is refused.

The magistrate sentenced the appellant to 4 years imprisonment, no part of which was suspended. The appellant accepted that he had been told that the maximum penalty for a contravention of Section 302(a) of the Penal Code was 7 years imprisonment, but in so far as anything was said about sentence he appeared to suggest that the sentence of 4 years was excessive. I do not agree, and the appeal against sentence likewise falls to be refused.

DELIVERED IN OPEN COURT AT LOBATSE THIS 2nd DAY OF JANUARY, 1996.


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LORD N. WYLIE
Judge of Appeal

I agree



.....
T.A. AGUDA
Judge of Appeal

I agree


.....
G.G. HOEXTER
Judge of Appeal