

IN THE COURT OF APPEAL OF BOTSWANA HELD AT LOBATSE

CRIMINAL APPEAL NO. 36/96  
HIGH COURT CRIMINAL APPEAL NO. 196/94

In the matter between:

BUTI KING - Applicant

vs.

THE STATE - Respondent

Applicant In Person  
Mr. P.M. Acheampong for the State

-----  
R U L I N G  
-----

AGUDA J.A.:

Sometimes in 1994, the appellant and another person who has not taken part in these proceedings, were arraigned before a Magistrate in Mahalapye for causing grievous bodily harm to one Phorego Kegakilwe. They pleaded not guilty to the charge and the trial of the accused persons began. On September 20, 1994 the prosecution having closed its case the learned trial Magistrate adjourned the trial to the next following day for a ruling on whether or not the prosecution had made out a prima facie case against the accused persons. By the following morning, the record of proceedings had disappeared from the Court Registry.

The record before this Court shows the following as having taken place in that court on September 28, 1994:

"The Prosecutor : When this matter was last tried on  
20/9/96 the case record disappeared  
when this matter was continued on

21/9/94.

Accused I : That is so. I will conduct my own defence.  
Accused II : I will also conduct my own defence.  
Court : Very well trial may proceed."

This was followed by a record of all the evidence given at this latter trial at which four witnesses gave evidence for the prosecution. Each of the witnesses was cross-examined by the two accused persons in turn. After the learned trial Magistrate had ruled that a prima facie case had been made against each of the accused persons, the first accused opted to, and did give evidence, whilst the second accused opted to remain silent. In a judgment subsequently delivered the learned trial Magistrate found both accused persons guilty of the offence charged and convicted them accordingly. The first accused was sentenced to a term of 7 years imprisonment together with 4 strokes of the cane whilst the second accused was sentenced to 6 months imprisonment.

In due course the first accused who is the applicant in this case, and will hereafter be so referred to, filed an appeal to the High Court. During the hearing of the appeal to the High Court the applicant called the attention of the Judge, Nganunu J., to the first incomplete trial which was, for the reason which I have stated earlier, aborted. He told the court that the evidence which was given by witnesses in the latter trial was substantially different from the evidence which they had given

in the aborted trial. The learned Judge not being quite clear as to what had happened, then sent a Minute to the Registrar and Master of the High Court dated May 18, 1995, saying inter alia:

"I stopped the submissions of the appellant midway because he had not given notice of that ground of appeal and therefore the State had not had an opportunity to investigate same and to inform the court....."

I have directed that the appellant should make his allegations in an affidavit and send it to you with a copy to the Attorney-General. The purpose of this note to you is to explain the background and to require you to ask for an explanation of what actually took place once the appellant has submitted to you a sworn statement containing the allegations he has made to me in court today ....."

There is nothing on the record before me to show what steps were taken by the applicant. However in an internal savingram dated June 30, 1995, made part of the record of this case, the learned trial Magistrate, apparently in reply to another internal savingram sent to her by the Registrar in consequence of the Judge's memorandum, set down the details of how the second trial had to be conducted. Nothing more about this matter appears on the record before this Court; all that one sees is the judgment

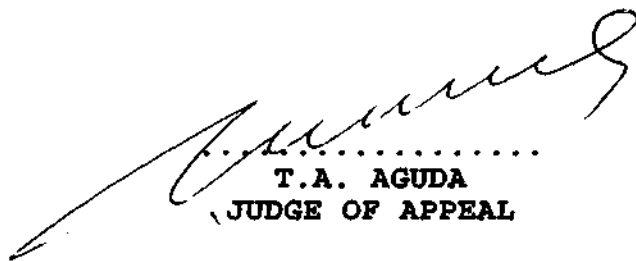
delivered on August 21, 1996, by which the applicant's appeal against conviction and sentence was dismissed. There is nothing on the record to show that the applicant ever made the affidavit and served as he was apparently requested to do by the learned Judge. However two days after his appeal was dismissed, the applicant filed a notice of appeal to this Court. Apparently Nganunu J., treated this as an application for leave, and after giving it due consideration, made a Ruling on October 1996 refusing leave. Still dissatisfied with that Ruling the applicant filed a further Notice of Appeal which I have treated as an application for leave since he has not had the benefit of counsel.

When the matter was mentioned before me on Friday January 10, 1997, I gave the applicant the fullest opportunity to proffer whatever arguments he had in support of his application. On the facts he had next to nothing to say in support, the facts being so very heavily weighted against him. He then went on to call my attention to the "two" trials and to submit that the learned Magistrate was wrong to have carried out the second trial which led to his conviction. In his submission, the Magistrate had two alternatives, namely, either to adjourn the trial indefinitely until the Police were able to recover the missing record file, or to have entered a verdict of not guilty in his favour. Had the learned trial Magistrate taken the first course of action the case should have been adjourned sine die, and as we now know a possible prosecution should have continued to hang over the head of the applicant till this very moment since the file has not

been found. If he had decided to take the second course then he would have been faced with the problem of what facts would be the basis of the verdict. In the event the learned Magistrate took the only sensible course open to him, namely, to start the trial de novo. The trial and the verdict subsequently returned cannot be faulted on this ground.

I have considered all the facts placed before the trial Magistrate very meticulously against the background of the proposed grounds of appeal filed by the applicant, and I cannot say that the verdict which was returned upon those facts was in any way perverse. The inevitable conclusion which I have reached is that there is no slight possibility of success were I to grant the applicant leave as prayed. In the result the application is refused.

Delivered in open court this 17th day of January, 1997.



.....  
T.A. AGUDA  
JUDGE OF APPEAL