IN THE COURT OF APPEAL FOR BOTSWANA
HELD AT LOBATSE

Court of Appeal Criminal Appeal No. 33 of 1999
High Court Criminal Appeal No. 231 of 1996

In the matter between

OLEBENG IKUTLWENG	1ST APPLICANT
WINKY MOROKA	2ND APPLICANT
KHOKHAE ITIRELENG	3RD APPLICANT
And	
THE STATE	RESPONDENT

Applicants in persons
Mr. B. Nlanda for the State

JUDGMENT

CORAM: KORSAH J.A.

This is an application for leave to appeal to the Court of Appeal.

The Applicants were convicted by the Magistrate Court for the following offences:

Count 1: All three Applicants were convicted of robbery contrary to section 291 as read with section 292 of the Penal Code (Cap. 08:01). The 1st Applicant was sentenced to serve 14 years imprisonment and two strokes of the cane; the 2nd Applicant was sentenced to serve 12

years imprisonment and two strokes of the cane; while the 3rd Applicant was sentenced to serve 14 years imprisonment.

Count 2: All the Applicants were convicted of possession of an arm without a licence contrary to section 9 (1) and punishable under section 9 (4) of the Arms and Ammunition Act (Cap. 24:01). Each was sentenced to a fine of P200.00 payable within 14 days, or 3 months imprisonment in default of payment.

Count 3: The 1st Applicant was convicted of Theft Common contrary to section 271 of the Penal Code (Cap. 08:01) and was sentenced to 18 months imprisonment.

Count 4: The 1st Applicant was convicted of possession of an Arm without a licence contrary to section 9 (1) a punishable under section 9 (4) of the Arms and Ammunition Act (supra). He was sentenced to a fine of P200.00 payable within 14 days or 3 months imprisonment in default of payment.

Count 5: The 1st Applicant was convicted of Robbery contrary to section 291 as read with section 292 (2) of the Penal Code (supra) and sentenced to 14 years imprisonment.

The sentences were ordered to run concurrently.

At page 12 lines 15 to 20 of the record, the learned trial Magistrate found as follows:

> "On count IV also I am satisfied that the State case has been proved beyond reasonable doubt.
>
> Accused 1 was seen removing the gun from the shop and was found in possession of it by PW10.
>
> I therefore find the Accused 1 guilty on this count and convict him accordingly."

And there was, in my view, cogent evidence to support this finding. All these Applicants appealed to the High Court against their convictions and sentences on all counts.

In a short judgement which appears at page 111-112 of the record, the learned trial Judge expressed himself thus:-

> "I accordingly do not find anything wherewith to disturb the convictions on counts 1, 2 and 3.
>
> The evidence of PW2 was so strong against the 1st Appellant on count 5.

Again, I find no fault with the learned Magistrate accepting that evidence and convicting the 1st Appellant on that count."

It will be observed that the Judge made no specific mention of count 4, but concluded that:-

"In the end, therefore, I find the conviction of each of the Appellants is supported by the evidence on record and I therefore dismiss each of the Appellants' appeal."

It seems to me that, though no specific mention is made of the conviction and sentence on count 4, the blanket dismissal of each Appellant's appeal disposes of the conviction and sentence on Count 4, and with that the High Court became functus officio as to the appeals of the three Applicants.

The Applicants were aggrieved and dissatisfied with the determination dismissing their appeals and applied to the High Court for leave to prosecute their appeals in the Appeal Court.

The order of the High Court on their applications for leave to appeal, to be found at page 116 of the record, reads:

"Application for leave to appeal to the Court of Appeal is refused.

1st Appellant's conviction and sentence on Count 4 is quashed."

I am not satisfied that it is competent for the High Court, on an application for leave to appeal, to tamper with its judgment on the substantive appeal.

This is the only issue that I refer to the Court of Appeal for its guidance. In doing so, I am cognizant of the fact that, with the sentences ordered to run concurrently, the cumulative sentence imposed by the trial court on the 1st Appellant is not affected by this belated alteration to the Judgment of the High Court. It is the principle that the alteration in casu may establish a precedent that Judgments that have been handed down may be, added to, or subtracted from, on an application for leave to appeal, to the detriment of an Appellant, that I find disturbing.

Accordingly, I refer this issue for determination by the Court of Appeal.

The Applications for leave to appeal are otherwise dismissed.

DELIVERED IN OPEN COURT THIS 7TH DAY OF JANUARY 2000.

KORSAH J.A.