

IN THE COURT OF APPEAL FOR BOTSWANA
HELD AT LOBATSE

Criminal Appeal No. 11 of 2001
High Court Criminal Appeal No. F15 of 1998

In the matter between:

KAMARENGA NGUASENA
KASI WEBB
OLIA KAUTITSIKE

1st Applicant
2nd Applicant
3rd Applicant

vs.

THE STATE

Respondent

E.W.F. Luke II for the Applicants
Mrs S. Mangori for the Respondent

J U D G M E N T

TEBBUTT A.G. P.

This is an application for leave to appeal. The applicants were convicted by the Senior Magistrate in North West District held at Maun. They filed their application for leave to appeal very late. In the High Court Mosojane J. dismissed the application for leave to appeal and they now come before this court requesting that their appeal should be heard. Appearing for them Mr. Luke for the three applicants submitted that the court should grant the application because of certain irregularities in the proceedings relating to the interpretation of the evidence.

They aver that they were prejudiced as a result. The magistrate, however, went to great pains to ensure that there was a proper interpretation of the evidence, changing the interpreter on several occasions when the applicants complained about him. Mr. Luke also takes the point that the magistrate did not satisfy himself as to the competence of the interpreters. However, in several instances the interpreter concerned stated that he knew Herero well – in one case the interpreter said Herero was his mother language and in another that he had spoken it all his life. This seems to me to be eloquent testimony as to the competence of the interpreter concerned. Mr. Luke pointed to other aspects of the evidence where, so he contended, the fundamental constitutional rights of the applicants to a fair trial were violated by reason of the fact that there was not a proper interpretation of the evidence. In his judgment in the High Court Mosojane J. not only dealt fully with the question of the interpretation of the evidence, finding that it was not deficient but also went further and came to the conclusion that there were no prospects of success on appeal. I agree with the learned judge. It must be pointed out that the proviso to Section 10 (1) of the High Court Act (Cap 04:02) sets out that notwithstanding that any point of procedure might be decided in favour of an accused person, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings unless it appears to the court that a failure of justice has in fact resulted therefrom. I also want to draw attention to the provisions of Section 13(3) of the Court of Appeal Act (Cap 04:01) which provide that where the Court of Appeal considers that notwithstanding that it is of

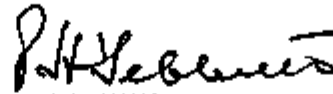
the opinion that a point raised in an appeal might be decided in favour of the appellant, there has been no miscarriage of justice, it may dismiss the appeal. Mr. Luke in his arguments accepted that the evidence was overwhelming against the applicants but said that in view of the irregularities in regard to the interpretation of the evidence they had a constitutional right that the court should give them leave to appeal. No purpose would be served in granting such leave because, in the first place there were, in my view, no irregularities that may have resulted in a miscarriage of justice, and, secondly, the evidence which I have carefully read is indeed overwhelming against the applicants. The provisions referred to above therefore apply. May I draw attention to the case, which was referred to by Mrs Mangori in her heads of argument, of **Nini Makwapeng v. The State Criminal Appeal No. 29 of 1998** where Aguda J.A., who gave the majority judgment of the Full Court, said:

“The approach which I believe that any appeal court in this country – be it the High Court or the Court of Appeal – must take and which I believe is in accord with what the Legislature of this country thought should meet the demands of justice should be this....

In deciding the issue whether or not to set aside the conviction following an irregularity in procedure, the appeal must look at all the facts established by the totality of the evidence led at the trial and if it is satisfied that the guilt of the appellant has been established beyond reasonable doubt,... then the appeal court must exercise the power to do justice given to it by the Act establishing it, and dismiss the appeal. This in my view, must be the proper approach for appeal courts to follow in cases of this nature.”

The application for leave to appeal is refused.

Delivered in open court at Lobatse this 3rd day of July 2001.



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P.H. TEBBLITT
[ACTING PRESIDENT]