

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Criminal Appeal No. 35 of 2002
High Court Criminal Application No. 43 of 2001

In the matter between:

THE STATE

Applicant

and

THABO LOKWAE

Respondent

For the Applicant: Mrs S. Mangori and with her Mrs Abram
For the Respondent: (as amicus curiae): Mr. B.B. Tafa and with him
Miss Moribame

J U D G M E N T

CORAM: Tebbutt, J.P.
Korsah, J.A.
Zietsman J.A.
Lord Sutherland J.A.
Grosskopf J.A.

GROSSKOPF J.A.

The Attorney-General, acting in terms of section 336 (1) of the Criminal Procedure and Evidence Act (Cap 08:02), has referred the ruling of the Court a quo to this Court for its decision on the following points of law:

1. Whether the provisions of section 13 of the Motor Vehicle Theft Act, 17 of 1995, ("the Act") are ambiguous?
2. Whether section 13 of the Act allows two interpretations? and
3. Whether the decision of the learned judge a quo, in varying the bail conditions of the respondent by admitting him on bail on condition that he signs a recognisance on his own behalf in the amount of P27 500, was correct?

These questions concern the interpretation of section 13 of the Act which provides as follows:

"Any person charged with an offence under this Act shall not be released from custody on his own recognisance, or on bail for an amount less than half of the value of the motor vehicle concerned, as determined by the court."

The respondent was granted bail by the senior magistrate of Gaborone on 23 October 2000 on condition, inter alia, that the sum of P27 500,00 be deposited with the clerk of the court as bail. On 11 July 2001 the respondent brought an application in the High Court for the variation of his bail conditions. The learned judge who heard the matter, Dow J., held that section 13 was ambiguous and that this was sufficient reason for her to vary the respondent's bail conditions. The respondent was accordingly granted bail, inter alia on the following conditions:

1. That he signs a recognisance on his own behalf in the amount of P27 500.00,
2. That he produces two sureties acceptable to the Registrar who will bind themselves in the amount of P20 000.00 each."

The learned judge gave the following interpretation of section 13:

"Mrs Khan clearly read the section to mean that release on bail on one's own recognisance is not an option under that Act. It seems to me though that the Act is ambiguous in that there are two possible interpretations. This is on positions of two commas in that Section. One possible interpretation is that two threads can be pulled from that Section, namely,

- "i) A person charged with an offence under this Act shall not be released from custody on his own recognisance, as determined by the court.

And

- ii) A person charged with an offence under this Act shall not be released from custody on bail for an amount less than half of the value of the motor vehicle concerned.

The other possible interpretation is that the two following threads can be pulled from the section.

- i) A person charged with an offence under this Act shall not be released from custody on his own recognisance for an amount less than half of the value of the motor vehicle concerned, as determined by the court.

And

- ii) A person charged with an offence under this Act shall not be released from custody on bail for an amount less than half of the value of the motor vehicle concerned as determined by the court."

The first interpretation makes little sense. The second interpretation would mean that it was possible to admit an applicant to bail on his recognisance in an amount not less than (half of) the value of the vehicle concerned. This interpretation would then mean that the trial court erred in not recognizing this as an option."

In my judgment the learned judge erred in her interpretation of the phrase "own recognisance" in the context of section 13. The word "recognisance" is defined in the Oxford Dictionary of Law, new fourth edition, 1997, as follows:

"an undertaking by an offender (or by sureties on his behalf) to forfeit a sum of money under certain conditions."

That is the ordinary literal interpretation of the word "recognisance", but when it is used in the expression "own recognisance", as in section 13, it relates to a different kind of undertaking. An accused person who is released from custody on his own recognisance is released simply on his

own undertaking that he will be at court as and when required. He is actually released on warning only and without any obligation to enter into a recognisance in the sense of a bail bond. That is the meaning which has been ascribed to the phrase "own recognisance" in S. v O'Neill 1967 (4) SA 84 (SWA) at 87 A - B (and see the translation of the headnote). Section 72 of the present South African Criminal Procedure Act, 51 of 1977, allows the release of an accused on warning in lieu of bail. In their Commentary on the Criminal Procedure Act, para 10-2, Du Toit and Others observe by way of comment that section 72 is a statutory embodiment of the earlier practice of releasing an accused on his own recognisance. A similar observation is made in South African Criminal Law and Procedure, vol. V (1982 edition) 343 under the heading "Release on Warning".

Further support for the above interpretation of the expression "own recognisance" is to be found in Black's Law Dictionary, seventh edition 1999, where the following meaning is given to the phrase "release on recognisance":

"The pretrial release of an arrested person who promises, usu. in writing but without supplying a surety or posting bond, to appear for trial at a later date. Also termed release on own recognisance."

The phrase "personal recognisance" bears a similar meaning according to Black's Law Dictionary viz:

"The release of a defendant in a criminal case in which the court takes the defendant's word that he or she will appear for a scheduled matter or when told to appear. This type of release dispenses with the necessity of the person's posting money or having a surety sign a bond with the court."

I am therefore of the view that the first part of section 13 should be interpreted to mean that the person charged shall not be released from custody on warning. When that meaning is given to the expression "own recognisance" the interpretation of section 13 seems clear and unambiguous. But if the phrase "own recognisance" is given its literal meaning of a person's own bail bond it would lead to the conclusion that the legislature intended to express itself twice over when it used the words "on his own recognisance, or on bail". I say this because an accused person can be released on bail upon his own bail bond (recognisance). (See the definition of "bail" in Claassen, Dictionary of Legal Words and Phrases; and section 111 of the Criminal Procedure and Evidence Act). Such a construction would render the provisions of section 13 absurd. It would mean that any person charged with an offence under the Act "shall not be released from custody on his own recognisance (bail bond), or on his own recognisance (bail bond) for an amount less than half the value of the motor vehicle concerned, as determined by the Court". It is a well known canon of construction that an interpretation should not lead to an absurd or tautologous result. That is a further reason in my view why the phrase "own recognisance" should not bear its literal meaning in section 13 of the Act.

I would accordingly furnish the following answers to the questions raised by the Attorney-General:

The interpretation to be given to section 13 of the Motor Vehicle Theft Act, 17 of 1995, is that a person charged with an offence under the Act -


1. May not be released from custody on warning only;
2. May be released on bail (in the form of money or in the form of a bail bond or recognisance taken from him alone or from him and one or more sureties) in an amount not less than half the value of the motor vehicle concerned, such value to be determined by the court.

There will be no order as to costs.

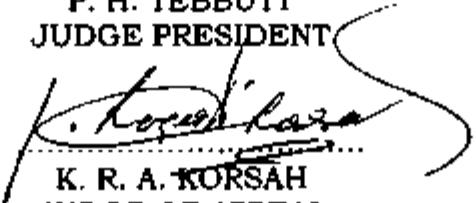
The Court would in conclusion like to thank counsel who appeared amicus curiae for their full heads of argument and helpful assistance in this case.


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F. H. GROSSKOPF
JUDGE OF APPEAL

I agree,


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P. H. TEBBUTT
JUDGE PRESIDENT

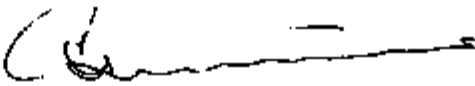
I agree,


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K. R. A. KORSAH
JUDGE OF APPEAL

I agree,


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N. W. ZIETSMAN
JUDGE OF APPEAL

I agree,


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LORD R. I. SUTHERLAND
JUDGE OF APPEAL