

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Criminal Appeal No. 32/01

In the matter between:

SOLOMON GALEBONWE

Appellant

v.

THE STATE

Respondent

The Appellant in Person
Mrs. S. Mangori for the Respondent

J U D G M E N T

CORAM: Lord Weir J.A.
Sir John Blofeld J.A.
Lord Sutherland J.A.

SIR JOHN BLOFELD J.A.

On 23 October 2000, at the Subordinate Court of the First Class sitting at Maun, this appellant, then aged 30 years, pleaded guilty to one offence of Defilement of Girls under the age of 16 years, contrary to Section 147 (1) of the Penal Code Cap 08:01 as amended by Act No 5 of 1998. The particulars of the offence alleged that he on the 21st day of October 2000, at or near Boseja Ward, Maun

In the North West Administrative District of the Republic of Botswana unlawfully had carnal knowledge of Keabetswe Tau aged 14 years.

The facts alleged that late at night on 20th October 2000, the appellant entered the complainant's home through the window. She asked him why he entered like that. He asked her to forgive him for doing so which she did. They then slept together and during the night he had carnal knowledge of her. The court asked the appellant who was unrepresented if he accepted these facts as true and he said that he did. The Magistrate then asked if he knew the complainant. The appellant said that he did and that they had been lovers for a short period. In response to further questions, he said that he had never asked the complainant how old she was but thought that she was about 15 or 16 years old because she told him that she was "doing form 2." He also told the Magistrate that he never really saw the need to know how old she was. The plea was recorded as unequivocal. The appellant was then ordered to undergo an HIV test. This was found to be positive. He was sent to the High Court for sentence in accordance with the provisions of Section 296 of the Criminal Procedure and Evidence Act Cap 08:02. On 1 August 2001, he was sentenced to 10 years imprisonment by Mosojane J.

The appellant now appeals against that sentence. In his grounds of appeal, he states that:

- (a) I pray to the Honourable Court that the sentence is too harsh considering the fact that I did not know the complainant's age, because we had been together for a very short period of time. The

complainant's physical appearance did not reveal or make anyone suspect that the complainant was under age or not. She look matured. (sic)

- (b) I pleaded guilty to the charge in question, in that I showed the court remorse because I was very sorry and ashamed of what really transpired but unaware."

These grounds of appeal raise an issue as to whether this appellant may have a defence to the charge under Section 147 (5) of the Penal Code (as amended) which reads:

"it shall be a sufficient defence to any charge under this section if it appears to the court before whom the charge was brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of 16 years or was such charged person's spouse."

This complainant was not the appellant's spouse. If this court is satisfied that this appellant may have a defence under this sub section then it would come to the conclusion that his original plea before the Magistrate was equivocal. If it was equivocal then this court must further decide whether to allow this appeal or to remit the case for retrial under the provisions of Section 13 (4) of the Court of Appeal Act Cap 04:01 which reads:

"where the Court of Appeal in a criminal appeal is of the opinion that the proceedings in the trial court were a nullity, through want of jurisdiction or

for any other cause it may order a retrial by a court of competent jurisdiction.”

Section 147 (5) was considered in the case of Lefang Gare v. The State Court of Appeal Criminal Appeal No. 45/2000 judgment being given in January 2001 and thus not available to the Magistrate in the present case. That case decided that the trial Magistrate should have drawn the attention of the appellant to the special defence set out in sub-section (5) during his trial and that his failure to do so meant that he did not have a fair trial.

I briefly set out the facts of that case. The appellant was aged 25 years. He was unrepresented at the trial. He contested the charge. He admitted consensual intercourse with the complainant. The complainant's birth certificate indicated that she was 15 years and 7 months old at the time of the intercourse. In her evidence the complainant said that this appellant had asked her her age and she had told him she was 15 years old. There was no cross examination by the appellant of this aspect of her evidence. Nor, when he gave evidence did he say anything that had any bearing on the special defence. Throughout the trial he appeared solely to be concerned to show that the complainant had consented to sexual intercourse.

Zietsman J.A said in his judgment:

“In the South African case of S. V. ANDREWS 1982 (2) S.A. 269 (N.C.), it was held that considerations of fairness require that where a statute raises a presumption which needs to be rebutted by the accused, the accused, if undefended, should be informed of the presumption, and a failure to inform him thereof can lead to the quashing of his conviction if he was prejudiced by such failure.”

Zietsman J.A. after citing South African cases namely S. V. MOETI 1989 (4) S.A. 1053(0), S. V. RUDMAN 1989 (3) S.A. 368 (E) AT 378 G – 379A and S. V. HLONGWANE 1982 (4) S.A. 321 (N) AT 323 C then continued:

“Section 10 of the Constitution of Botswana provides, inter alia, that a person charged with a criminal offence must be afforded a fair hearing, and must be informed, in a language that he understands, and in detail, of the nature of the offence. In the present case the subsection in the Penal Code under which the appellant was charged provides a special defence which can be raised by the accused. It is my opinion that in view of the appellant’s obvious ineptness in conducting his defence, and his probable ignorance of this special defence, the existence and the meaning thereof should have been explained to him by the magistrate. The fact that this was not done leads me to the conclusion that it cannot be said that the appellant was given a fair trial.”

Lord Weir JA agreed with Zietsman J.A. that this appeal should be allowed. He set out the principles which should be applied:-

“In any trial where the accused person defends himself either because he chooses to do so or because he cannot afford a legal representative an onerous responsibility lies on the judge to ensure that he receives a fair trial. There will be cases where the accused may be able to conduct his case with skill and there will be cases in which the issues at the trial will be obvious to the meanest intelligence. In such cases it will probably be unnecessary for the judge to intervene. On the other hand there will be cases where the issues are not straightforward. In such a situation the judge will have to be vigilant to ensure that the defence case does not go by default because of lack of skill or comprehension on the part of the accused. No hard and fast rules can be laid down as to when or to what extent a court should intervene on behalf of accused persons. Each case depends upon its own circumstances.”

In the present case, the interchange between the magistrate and the appellant immediately after the plea of guilty clearly indicated that the magistrate had the special defence in sub-section (5) in mind. Unfortunately he never draw the attention of the appellant to this special defence. The appellant may have not appreciated the reason why the magistrate was questioning him about the age of the complainant. He may have thought it was relevant to the length of sentence. The

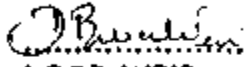
onerous duty placed on a trial court in circumstances such as these requires the judge or magistrate to make certain an accused person does fully understand the legal position. In my view, it is not possible for this court to be certain that this appellant did so.

The State has not sought to uphold this conviction, but has submitted that in the circumstances this plea was equivocal and should be remitted for re-trial. The appellant, who was unrepresented before this court, did not disagree with this proposal. The court during the hearing enquired of the State if it would seek at a re-trial to prove that the appellant was H.I.V. positive at the time of the offence. The State gave an undertaking that they would not seek to do so. The court, further, in answer to a question from the appellant, gave him the assurance that if on a re-trial he were to be convicted, when he was sentenced the court would take into account the time he has already spent in custody. In these circumstances I am of the view that this appeal should be allowed because his guilty plea was equivocal. I am also of the view that in the public interest there should be a re-trial in this case. The appellant at the conclusion of the hearing applied to this court for bail but the court remitted that decision to the magistrate. Finally I note that the State told this court that the re-trial would proceed within 4 months of this hearing in front of the Court of Appeal. This is necessary both in the interests of this appellant and the complainant.

DELIVERED IN OPEN COURT THIS 30th DAY OF JANUARY 2002


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SIR JOHN BLOFELD
(JUSTICE OF APPEAL)

I agree


.....
LORD WEIR
(JUSTICE OF APPEAL)

I agree


.....
LORD SUTHERLAND
(JUSTICE OF APPEAL)