

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Criminal Appeal No. 31 of 2001
High Court Criminal Committal N. F10 of 2000

In the matter between:

THE ATTORNEY GENERAL

Appellant

vs

MOHAMMED ISHMAEL

Respondent

Mr. L. Z. Ngcongco for the Appellant
Mr. U. Mack for the Respondent

J U D G M E N T

Coram: P. H. Tebbutt, A.J.P.:
N. W. Zietsman, J.A.:
C. Plewman, J.A.:

TEBBUTT, A.J.P.:

The respondent was convicted by a Magistrate of rape contrary to Section 142 of the Penal Code, and in terms of the provisions of Section 142(3) of the Penal Code, the Court directed that the respondent undergo the Human Immune Virus

Test, commonly referred to as the HIV-test. The respondent underwent this test and the test indicated positive results. This rendered the respondent liable to a minimum punishment of not less than 15 years' imprisonment, which exceeds the sentence jurisdiction of the trial Magistrate. Accordingly the trial Magistrate committed the respondent to the High Court for sentence in accordance with Section 295(1) of the Criminal Procedure and Evidence Act. The Respondent then purported, but probably irregularly, to bring a civil motion under Section 18 of the Constitution before the Court which was going to sentence him, alleging various infringements of his constitutional rights in the course of the proceedings before the trial court. The High Court dealt with the matter in terms of Section 295(1) of the Criminal Procedure and Evidence Act and formed the view that appellant's constitutional rights had been infringed rendering the proceedings irregular. On the 14 of July 2000, Mwaikasu, J. made an order in which the learned Judge quashed the proceedings before the trial Magistrate, set aside the respondent's conviction and ordered a retrial of the respondent. There was no mention in that order of any costs against the Attorney General. Subsequently, the learned judge gave full written reasons for having made his order, and having set out the reasons for so doing, made the following comments at the conclusion of his reasons. He said that the facts as set out by him vitiated the trial and rendered it null and void and then added the following: "with the inevitable result of having the proceedings quashed and a retrial ordered, with costs to the applicant."

It is against this statement of the learned judge that the Attorney General now comes on appeal to this Court averring that the court a quo erred in making the order as to costs against the Attorney General. In fact there is no order. Although as I have indicated, the learned judge in his reasons awarded costs to the applicant, this was never translated into an order of this Court.

However, despite the fact that there is no valid order to be appealed against, in my view the learned Judge's remarks as to costs should not be allowed to stand on the record, in case they should give rise to confusion. Moreover, I think it is necessary that the attention of the court a quo should be directed to what the law is in this regard. In the matter of Re Attorney General's Reference: State v Malan 1990 B.L.R. 32, this Court held that there is no statutory provision, save in certain instances relating to private prosecutions and in section 12(5) of the Court of Appeal Act (Cap 04:01), which enables the High Court to make an order for costs against a party, including the Attorney General, in criminal proceedings. It was held, however, in that case that the High Court has inherent jurisdiction to award costs in criminal proceedings but that this power is hardly ever used and is to be reserved for very exceptional cases to mark its strong disapproval of high-handed conduct amounting to bad faith. There is no suggestion in the present case that anything of that sort arises here, and Mr. Mack, who today appears for the respondent, has conceded that this is not a case where there was any conduct on

the part of the Attorney General or any bad faith in the proceedings either in the trial Court or before the court a quo of which the Court a quo should have marked its disapproval. Accordingly, the learned judge in the High Court was incorrect in making the statement at the end of his reasons in relation to the question of costs.

Secondly, attention should be drawn to the fact that having made the order on the 14th July 2001, the learned judge was functus officio. Of course a trial court or judge can always give his reasons for an order that he has made. In fact, it is desirable in all cases that the judge should give such reasons. First of all, it informs an unsuccessful litigant as to why he has lost his case or had an order made against him so as to enable him to decide whether he wishes to appeal or not; and, secondly, it is of assistance to the Court of Appeal in that the Court of Appeal is then aware of what the learned judge a quo's reasons were for the order without having to speculate as to those reasons. However, while he is entitled to set out his reasons, the judge is not entitled, except to effect formal corrections to patent errors or ambiguities, to alter the original sense, substance and effect of his earlier order. He certainly could not do as he did in the present case. And particularly without affording the Attorney General the opportunity to be heard before making a costs order against him.

For all these reasons, therefore, the learned judge in the court a quo was in error in making the statement that he did in relation to the question of costs as against the

Attorney General and those remarks cannot be allowed to stand and must be struck from his judgment . The appeal therefore succeeds.

Given in open Court at Lobatse this 16th day of January 2002.



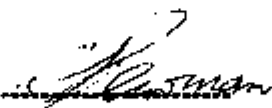
P. H. TEBBUTT
Ag. Judge President

I agree



N. W. ZIETSMAN
Judge of Appeal

I agree



C. PLEWMAN
Judge of Appeal