



IN THE COURT OF APPEAL OF BOTSWANA HELD AT GABORONE

CLCGB-066-12
High Court Criminal Appeal No. LHLB-000138-11

In the matter between:

**DAVID GABAATLHOLWE
MOKGANEDI NGWAKO**

**1st Appellant
2nd Appellant**

and

DIRECTORATE OF PUBLIC PROSECUTIONS

Respondent

**Appellants in person
Mr. C. B. Diundu for the Respondent**

J U D G M E N T

**Coram: KIRBY, J.P.:
 TWUM, J.A.:
 LORD ABERNETHY, J.A.:**

LORD ABERNETHY J.A.

1. On 12 November 2010 in the Magistrate's Court at Lobatse, the Appellants were convicted as charged on two counts. The first count was one of housebreaking contrary to Section 300(b) of the

Penal Code [Cap. 08:01]. The second was one of stealing from a dwelling house contrary to Section 275(b) as read with Section 271 of the Penal Code.

2. On 26 November 2010, the Appellants were each sentenced to 3 years imprisonment on count 1 and 2 years imprisonment on count 2. The Court did not direct that the sentences were to run concurrently. Accordingly, in terms of Section 300(2) of the Criminal Procedure and Evidence Act [Cap. 08:02], they were to run consecutively. The Court did, however, direct that the sentences were to run concurrently with any other sentence that either of the Appellants were currently serving or may serve in the future.
3. The Appellants appealed to the High Court against both conviction and sentence.
4. On 29 September 2011, Gaongalelwe J. deleted the Magistrate's direction that the sentences were to run concurrently with any other sentence the Appellants may serve in the future but otherwise dismissed the appeals.

5. The Appellants then applied to the High Court for leave to appeal to this Court.
6. On 15 December 2011, Gaongalelwe J. dismissed the application.
7. The Appellants then applied to this Court for leave to appeal to this Court.
8. In his Ruling dated 25 September 2012, Legwaila J.A. recorded that the Appellants had withdrawn their appeals against conviction. However, the appeals against sentence remained. The Appellants also sought to have their sentences backdated.
9. Legwaila J.A. granted the Appellants' applications for leave to appeal against their sentences on the two counts, (1) in so far as they were consecutive sentences, and (2) on the question of backdating.
10. Only the first Appellant's appeal was listed for the hearing before this Court. However, the second Appellant also appeared and asked that his appeal be heard at the same time. Counsel for the State did not object and accordingly we heard both appeals.

11. The submissions of both Appellants were to the same effect. The two offences of which they had been convicted were each part of the same single transaction. Therefore the sentences should have been concurrent rather than consecutive. When it was put to them that it was plain from the Magistrate's remarks when he passed sentence that each Appellant should serve a total of 5 years imprisonment, they submitted that that was excessive.
12. The Appellants made it clear that it was only on this point that they wished to proceed. Accordingly, no submissions were made on the question of backdating. Any period of possible backdating was in any event minimal.
13. Counsel for the Respondent submitted that the sentences should be consecutive, as the Magistrate had ordered. In any event, the total period of imprisonment should be 5 years.
14. Before going further, it is necessary to deal with a technical point. Count 1 on the charge sheet states the offence as housebreaking contrary to Section 300(b) of the Penal Code. In fact, there is no Section 300 (b) of the Penal Code; it is Section 300 (1)(a) which makes housebreaking an offence. Counsel for the Respondent

agreed that the count should have been one of housebreaking contrary to Section 300 (1)(a) and that an appropriate amendment should be made. It is important to be accurate in such matters. It has been held that amendments to a charge sheet can be made even at the appeal stage provided that there is no prejudice to the appellants. See **MOTSWASELE v. THE STATE [2006] BLR 477 (C.A.) at 479**. There was no prejudice to either Appellant in making an appropriate amendment. Accordingly, in terms of Section 149 of the Criminal Procedure and Evidence Act, the Court will order that count 1 on the charge sheet be amended by deleting “300(b)” and substituting “300 (1)(a)” therefor.

15. The maximum sentence on conviction for housebreaking in terms of Section 300(1)(a) is 10 years imprisonment. The maximum sentence on conviction for stealing from a dwelling house contrary to Section 275(b), which is the offence in count 2, is also 10 years imprisonment. It is plain that the Magistrate considered that each of the Appellants should serve a total of 5 years imprisonment for the two offences.
16. In coming to that view, he took into account the points made by each Appellant in mitigation of sentence. In respect of the first

Appellant, he had just started a 10 year sentence for rape, (he informed us at the hearing that his appeal against that conviction had recently been allowed), he suffered side effects from ARV medication and he was asthmatic. He promised to do his best to reform and rehabilitate himself. The second Appellant asked for forgiveness, saying he was still young. He was nursing his mother who had been crushed by a car and he had a 6-months old baby who was dependant on him. The Magistrate, perhaps generously, accepted that the Appellants were still young, although at the date of the offences they were 38 and 36 years old respectively. He pointed out, however, that both Appellants had bad criminal records. The first Appellant had no fewer than 21 previous convictions. On examination these date from 1989 to 2007, 14 were for housebreaking and theft or other offences of dishonesty and in respect of 9 he received sentences of imprisonment, some of them suspended. Indeed, his last previous conviction, on 21 May 2007, was for housebreaking and theft. In respect of the housebreaking, he was sentenced to 18 months imprisonment, wholly suspended for 3 years provided he did not commit a similar offence. The present offences were committed a little over 2 years after that sentence was passed, in other words during the period of suspension. The second Appellant had 9 previous convictions.

The details of these were not available at the hearing but were later made available. These convictions date from 1990 to 2006, 4 were for housebreaking and theft or other offences of dishonesty and in respect of 3 of these he received substantial sentences of imprisonment, one of which was suspended.

17. The first Appellant's record is substantially worse than the second Appellant's. The Magistrate recognised that when he said that the first Appellant possibly deserved life imprisonment. But in the end he made no distinction between the two Appellants in the sentences he imposed. It is trite that sentencing is a matter for the discretion of the trial court and an appeal Court will not interfere with the trial court's decision unless it is manifestly wrong. In all the circumstances of this case, I am not persuaded that the Magistrate's decision to impose the same sentence on the second Appellant as he did on the first Appellant was manifestly wrong. In that respect, therefore, it should not be disturbed.

18. Section 300 of the Criminal Procedure and Evidence Act [Cap. 08:02] provides as follows:

“(1) When a person is convicted at one trial of two or more different offences, or when a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence

him to such several punishments for such offences or for such last offence (as the case may be) as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such punishments shall run concurrently.”

19. In terms of Section 300(2), therefore, the Magistrate had a discretion whether to direct that the sentences on the two counts should run concurrently. If he did not so direct, the sentences would be consecutive. It is well settled practice, however, that where two or more offences are committed in the course of one transaction, the Court should order that the sentences for those offences should run concurrently, unless there are exceptional circumstances sufficient to justify consecutive sentences. See, for example, **GARE v. THE STATE [1990] BLR 74** and **MOSIIWA v. THE STATE [2006] 1 BLR 214 (C.A.) at 218**. There are no such exceptional circumstances here.

20. Having regard to all the circumstances of this case, I have come to the conclusion that the Magistrate was well entitled to the view that each Appellant should serve a custodial sentence of 5 years. In the light of what I have said in the preceding paragraph,

however, I do not think that he should have divided the 5 years in the way he did, with the result that the sentences on the two counts were to run consecutively.

21. It is, of course, wrong in principle to pass just one sentence in respect of the two counts. (**STATE v. BOTHA [1986] BLR 232**). Where an offender is convicted of two or more counts on the same indictment, the court should normally pass a separate sentence on each count and, if appropriate, direct that the sentences should run concurrently in whole or in part. (**MOSIWA, supra, at 219**).

22. In light of these authorities and to give effect to the Magistrate's intention that each Appellant should serve a custodial sentence of 5 years, the appropriate course to take in my opinion is, in the case of each Appellant, to increase the sentence on count 1 to 5 years imprisonment and to direct that the sentence on count 2 should run concurrently. Each Appellant was given an opportunity to advance good reason why this course should not be taken. (See **NTHEBOLANG v. THE STATE [1998] BLR 1 (C.A.) at 3 F-G**). Neither was able to do so.

23. The Order of the Court is as follows:-

1. Count 1 on the charge sheet is amended by deleting “300(b)” and substituting therefor “300(1((a))”.
2. In respect of each Appellant –
 - (i) The sentence on count 1 is increased to 5 years imprisonment.
 - (ii) The sentences on counts 1 and 2 are to run concurrently from the date of passing sentence, namely, 26 November 2010.
 - (iii) These sentences are to run concurrently with any sentences which either Appellant was serving on 26 November 2010.

Delivered in open court at Gaborone this 1st day of February 2013.

LORD ABERNETHY
Judge of Appeal

I agree

I.S. KIRBY
Judge President

I agree

S. TWUM
Judge of Appeal

