

IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE

COURT OF APPEAL CASE NO. CLCGB-072-12
HIGH COURT CRIMINAL APPEAL NO. CLCHLB-000075-09

In the Matter Between:

MOTHUSI MORAKE

APPELLANT

and

DIRECTORATE OF PUBLIC PROSECUTIONS

RESPONDENT

Mr Appellant in Person

Ms Attorney T. Makolo for the Respondent

JUDGMENT

CORAM: Kirby J.P.

Twum J.A.

Lord Abernethy J.A.

Dr S. TWUM JA:

1. This is an appeal from the judgment of Lesetedi J. sitting at the High Court, Lobatse. It was delivered on 15th July 2010. He confirmed the judgment of the Magistrate who tried and convicted the appellant on two counts of armed robbery but varied the sentences imposed on the appellant as will hereinafter appear.

2. The appellant was charged, tried and convicted by the Subordinate Court, Gaborone on two counts of armed robbery contrary to section 191 as read with section 192(2) of the Penal Code. The robberies were so brazenly carried out that in cold print they are almost unbelievable. One small correction needs to be noted. Originally 3 counts were preferred against the appellant. Count 1 was then withdrawn and counts 2 and 3 remained. There was no explicit amendment to the numbering of the remaining counts 2 and 3. In the result the trial proceeded and count 2 notionally became count 1 and count 3 became count 2.

In the now first count, the appellant is alleged to have stopped the driver of a vehicle used for distributing gas cylinders to customers and seized the sum of P1375.00 from his pocket under threat of using his knife to cause him bodily harm if he resisted him. In the now second of these counts, the appellant is alleged to have entered a chibuku depot at Mogoditshane. He went to the counter where a container in which the complainant in charge of the chibuku put the takings for the day. He dipped his hand into the container and took away with him the takings amounting to

P350.00. When the complainant tried to stop him he twisted her arm and drew a knife.

3. The learned trial magistrate concluded that the complainant in either offence was a credible witness and found the explanations of the appellant false beyond reasonable doubt. He convicted him and sentenced him to 10 years of imprisonment on each count. He ordered that the sentences should run concurrently.
4. The appellant was dissatisfied with his conviction and sentence and appealed against them to the High Court, Lobatse. The appeal was heard by Lesetedi J. After he had heard arguments on the appellant's grounds against conviction, the learned Judge asked him to satisfy the court whether in the event of his appeal against conviction being dismissed, it would not be appropriate for the Court to consider increasing his sentence in view of the fact that in his opinion the trial magistrate misdirected himself in ordering the two sentences to run wholly concurrently. The record shows that his Lordship then adjourned the hearing for a period of 14 days to give the appellant opportunity to consider his response.

5. Upon resumption of the hearing on the adjournment date the appellant, instead of a response to the issue put to him by the learned Judge, rather sought to withdraw his appeal against conviction. He then launched into a plea of mitigation and prayed that the Court should not increase the sentence.
6. In my view the appeal before His Lordship turned on two main issues:-
 - (a) whether or not the trial magistrate misdirected himself by ordering that the 10 year sentence on each count should run concurrently; and
 - (b) whether or not the learned Judge was entitled, indeed, bound to correct any error made by the magistrate. This is because, sentencing is primarily in the discretion of the trial court.
7. The learned Judge examined the sentencing policies of the courts and came to the conclusion that the trial magistrate had applied a wrong principle as distilled by the Courts from section 300 of the

Criminal Procedure and Evidence Act. Accordingly, he set aside the order that the sentences of 10 years imprisonment for each of the two counts on which the appellant had been convicted, should run concurrently. In their stead, he ordered that the sentence for count (1) should run concurrently with the first 7 years of the 10 – year sentence for the second count, but that the last 3 years of the sentence for the 2nd count should run consecutively with the sentence for the 1st count. This meant that the appellant would serve an effective 13 years in the aggregate for the two counts.

Appeal to this Court

1. On or about 15th of August 2012, the appellant filed a Notice of Appeal against the decision of Lesetedi J. It is clear that he did not have the assistance of a lawyer to draft his grounds of appeal. However, it appears from pages 62 and 63 of the record that he was appealing against his sentence (page 62) and his conviction, (page 63).
2. On sentence the appellant claimed that he only wished to have his sentence back-dated by 3 months to take account of the period he alleged, he was in lawful pre-trial incarceration. He complained

that Lesetedi J. did not understand his appeal against sentence and instead, rather worsened his plight by ordering the two sentences to run partly concurrently with each other and partly to run consecutively.

3. It is clear in this jurisdiction that mission goals of the Judiciary are not only to administer the law but to do substantial justice. The appellate system is a necessary part for the realization of those mission goals. If a subordinate court makes a mistake whether of law or of fact, generally, one superior court or other, will have statutory duty to correct that mistake.
4. Lesetedi J. in his said judgment quoted section 300 of the Criminal Procedure and Evidence Act in extenso and explained that in the application of the section the courts have worked out 3 guiding policies:-

- (i) Where two or more offences are committed "in pursuance of one fell design" then the court ought to order such sentences to run concurrently.

- (ii) Where an accused is convicted of more than one offence which are not part of a single transaction or are not in pursuance of one fell design, the sentences for those offences ought not to be ordered to run concurrently. Rather they should be ordered to run consecutively.
- (iii) Where upon two or more sentences being ordered to run consecutively and the aggregate sentence would be so long as to constitute inhuman or degrading treatment, then to ameliorate the hardship the court may order the sentences to run partly concurrently and partly consecutively. See *MOATSHE v. THE STATE*, 2004 (1) BLR page 1.

4. In the appellant's cases under discussion the offence which formed the subject of the first count was committed on 29th October 2006. The second offence was committed on 2nd December 2006. The first offence had no connection to the second. Indeed, the location of the offences, the victims and the quantum of the monies stolen pursuant to the robberies were different. Section

300 itself directs that in the appellant's situation his punishments, if they consisted of imprisonment, should commence the one after the expiration ... of the other, in such order as the court may direct unless, of course, for good reason appearing on the record, the court orders such punishment to run concurrently.

5. One important matter usually considered in the exercise of the court's discretion is whether or not the appellant had had little or no brush with the law. In the appellant's case he had a number of previous convictions, one of which was robbery which was committed in 2004, barely two years earlier than the commission of the offences the subject matter of the appeal. I am fully in agreement with the order made by Lesetedi J. He was right in setting aside the sentences imposed by the trial magistrate and substituting them with the mixture of concurrent and consecutive sentences which left the appellant serving an aggregate sentence of 13 years. In that order, Lesetedi J. considered the triad of sentencing:- that the sentence must fit the crime, be fair to the accused and the interest of society should equally be considered. I am not persuaded that the aggregate sentence of 13 years

would break the appellant as he claimed. I affirm the order of Lesetedi J., accordingly.

The Appeal is dismissed.

**DELIVERED IN OPEN COURT AT GABORONE THIS 1st
DAY FEBRUARY 2013**

**DR S. TWUM
JUSTICE OF APPEAL**

I agree

**I.S KIRBY
JUDGE PRESIDENT**

I agree

**LORD ABERNETHY
JUSTICE OF APPEAL**