

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

COURT OF APPEAL CRIMINAL APPLICATION NO. CLCGB-086-12
HIGH COURT CRIMINAL APPEAL NO CLHFT.00092-10

In the Matter Between:

**Ephraim Mpofu
Keleemetse Gasemotho
Bonani Matebesi
Nyerenda Nyerenda**

**1st Applicant
2nd Applicant
3rd Applicant
4th Applicant**

and

DIRECTORATE OF PUBLIC PROSECUTIONS

Respondent

**Attorney K.K. Kapeko with Attorney L. Mokolwane for DPP
Applicants in Person**

R U L I N G

GAONGALELWE JA:

1. This is an application for leave to appeal against conviction in respect of the offence of robbery. The substance of the charge was that on or about the 20th day of May 2007 at Gweta village applicants jointly robbed the Filing Station belonging to Trans Makgadikgadi Investments (Pty) Ltd of the sum of P54, 347.30.

2. After such conviction they each lodged an appeal to the High Court which was dismissed. Their subsequent application to the same court for leave to appeal suffered the same fate hence this current application.
3. From the evidence, it is clear that the fact of the robbery having taken place on 20th May 2007 has been proved. The same applies to the amount involved. The only issue in the entire case has been the identity of the perpetrators of such robbery.
4. PW1 who testified as an accomplice gave direct evidence associating all the applicants with the commission of the offence. The trial court found him to be a credible witness.
5. However it appears the trial court did not advert its mind to the inconsistency between his evidence and that of PW2. According to PW1, PW2 who was the employee of the Filing Station to whom the keys were entrusted voluntarily joined the team made up of the applicants. According to PW2 he was attacked, bundled up and thrown into the car boot against his will.

6. Applicants contend that this contradiction casts some doubt on the credibility of the accomplice. My view is that whether it is capable of denting the credibility of the accomplice or not the trial court ought to have addressed the issue in its judgment. The judge on appeal concluded that PW1 and PW2 were testifying about two different instances and two different scenes.
7. With respect, I am unable to agree with the conclusion of the learned judge on the issue. The issue is whether the inconsistency is on a material point or not. After all the courts do not expect the evidence of an accomplice to be free from defects whatsoever – See **R v. ISMAIL & OTHERS 1965(1) SA page 452 at page 455.** See also **R.GUMEDE 1949(3) SA page 749 at page 758.**
8. On the other hand the test at this stage is not whether the appeal is bound to succeed or not but only whether they have a fairly arguable appeal. This would become even significant where the trial court did not deal with the issue raised, i.e., the accomplice being contradicted by another prosecution witness.

9. Applicants have raised another point of law. It is clear from page 88 of the record that the accomplice witness who had been a co-accused had the charge against him withdrawn only on the date of commencement of trial. Applicants contend that they were never furnished with his statement prior to him testifying against them.
10. As I stated in relation to the inconsistency between the evidence of PW1 and PW2, granting leave to appeal does not suggest what the ultimate fate of such appeal would be. On this point there are bound to be issues of whether in the circumstances there was a miscarriage of justice or not – **KEABETSWE v. STATE 2008(1) BLR page 259.**
11. It is my view that the two issues referred to above are better determined by the Court in the actual appeal hearing and not by a single judge. In the circumstances the Order I make is the following:-
 - (a) The application succeeds.

- (b) Applicants are all granted leave to appeal against conviction.
Their appeal may be heard in January 2013 if circumstances permit.

**DELIVERED IN OPEN COURT AT GABORONE THIS 16th
DAY NOVEMBER 2012**

**M.S GAONGALELWE
JUSTICE OF APPEAL**