IN THE COURT OF APPEAL OF BOTSWANA

CRIMINAL APPEAL NO. 21 OF 1996
HIGH COURT APPLICATION MISCRA. 8/96

IN THE MATTER OF REFERENCE
BY THE ATTORNEY GENERAL

IN RE:

MATTHEW WRIGHT - Applicant

and

THE ATTORNEY GENERAL - Respondent

Mrs. L.I. Dambe for the Attorney General
Mr. K. Moesi for Applicant

J U D G M E N T

CORAM: **AMISSAH, J.P.**
STEYN, J.A.
HOEXTER, J.A.

HOEXTER, J.A.:

This is a reference on a point of law by the Attorney General in terms of Section 336 (1) of the Criminal Procedure and Evidence Act.

The essential facts of the matter are the following. Mrs. Julia Kookie Wright ("the first accused") was employed as an Office Manager by a firm of attorneys ("the employer"). The first accused was married to Mr. Mathew Wright ("Wright"). Wright was the director of a private company known as Fastmove Builders (Pty) Ltd ("the second accused").

In the Subordinate Court for the Gaborone Magisterial District the first accused and the second accused stood trial in a criminal prosecution. The offences alleged to have been committed respectively by them were set forth in a single charge sheet. The first accused was charged (counts 1 to 23) with 23 counts of stealing by a servant in contravention of section 271 read with section 277 of the Penal Code. In each of the 23 counts the particulars of the offence alleged that the first accused had stolen a specified sum of money, the property of the Standard Bank, which had come into her possession on account of the employer. The second accused was charged (counts 24 to 42) with 18 counts of receiving stolen property in contravention of section 317 (1) of the Penal Code. In each of the 18 counts the particulars of offence alleged that the company had received a specific sum of money while knowing or having reason to believe the same to be stolen.

On the first page of the charge sheet particulars of the first and second accused are set forth as follows:-

> **"PERSON CHARGED : 1. JULIA KOOKIE WRIGHT**
> **(Female aged .... years)**
>
> **2. FASTMOVE BUILDERS (PTY) LTD**
> **(per its director, Mathew Wright)"**

On 10 May 1995 both the first and the second accused pleaded not guilty to all charges. On the first page of the charge sheet there is a manuscript note by the Principal Magistrate who presided at the trial. The note records the following:-

> "plea of not guilty entered
> against both accused persons."

The prosecution adduced evidence in support of its case from 14 to 16 September 1995, and on the last mentioned date the trial was adjourned to 15 January 1996. When the proceedings were resumed on 15 January 1996 the first accused was indisposed and unable to appear in court. Thereupon the trial Court ordered a separation of trials and the case proceeded against the second accused.

A the conclusion of the case the Principal Magistrate delivered a long judgment in which he reviewed the evidence. He said that in the light of the evidence -

> ".......I am convinced beyond reasonable doubt and accordingly convict as follows:-"

The Principal Magistrate then detailed 14 of the 18 counts laid against the second accused in the charge sheet. On 5 February 1996 Mr. Attorney R. Lyons as the employer made application to the trial court for compensation, whereupon the Principal Magistrate inquired of Wright whether he opposed the application. What happened at that stage of the proceedings is reflected thus in the record of the proceedings:-

> "Accused Director Mathew Wright:
> Yes my Lord. I do not know what I am to compensate for.
> Court:
> You've been convicted of receiving stolen money and basis

> of compensation will be on what
> you received."

On 8 March 1996 the trial Court awarded the employer compensation in the sum of P88 560.00 and then it proceeded to pass sentence. It prefaced its remarks by saying:-

> "The accused company through its
> director Mathew Wright stands
> convicted on charges of receiving
> stolen property........"

and later observed that:-

> "No mitigation was received from
> the director."

On each of the 18 counts in respect whereof he had recorded a conviction the Principal Magistrate imposed a sentence of imprisonment of four years of which a period of two years was conditionally suspended. However, he ordered that all the sentences would run concurrently. So -

> "that effectively accused serves
> a single proper term of 4 years
> with 2 years suspended."

Thereafter the Principal Magistrate issued a warrant committing Wright to imprisonment.

On Sunday 10 March Wright obtained in the High Court a rule <u>nisi</u> calling upon the Attorney General to show cause why the committal warrant should not be set aside and why Wright should not be freed. On the return day the matter came before Gittings J., and the attorney representing the Attorney General sought to persuade the learned Judge that the trial Court had properly sent Wright to prison. It is not a matter for surprise that the argument was rejected. Having reviewed the facts of the matter Gittings J. concluded his judgment by saying:-

> "In this case there was no prosecution of the Applicant, only a prosecution of the company, and I therefore confirm the rule nisi and order that the Applicant's costs should be paid by the Respondent."

The Attorney General's reference to this Court under section 336 (1) is a lengthy document which concludes by posing for this Court to answer four separate but interrelated questions lettered respectively (a), (b), (c), and (d). It is unnecessary to quote the questions here. The essential issue raised by questions (a), (b) and (c) is whether or not, having regard to the manner in which the charge sheet in the instant case was framed, it was not competent for the trial court to impose upon Wright personally -

> "whatever punishment is meted out against such company [the second accused]?"

On behalf of the Attorney General Mrs. Dambe in an energetic argument urged upon us that the Principal Magistrate had been entirely correct in sentencing Wright to imprisonment for the crimes committed by the second accused. Her argument was based upon the provisions of section 24 of the Penal Code and section 332 (1) of the Criminal Procedure and Evidence Act.

Section 24 of the Code provides that where an offence is committed by any company or other body corporate, or by any society, every person charged with or concerned or acting in the control or management of the affairs or activities of such company....

> "shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being committed and that he took all reasonable steps to prevent its commission."

It is enacted by section 332 (1) of the Criminal Procedure and Evidence Act that in any criminal proceedings under any enactment against a company, the secretary and every director or manager or chairman thereof in Botswana -

> "may, unless it is otherwise directed or provided, be charged with the offence and shall be liable to be punished therefor, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it."
>
> (emphasis provided).

The essence of Mrs. Dambe's argument comes to this. The word "may" which has been underlined in the above quotation from section 332 (1) of the Criminal Procedure and Evidence Act shows that the State is not obliged to charge a director of a company in addition to the company itself. However (so proceeds the argument) even where the director is not charged personally and in addition to the company, section 24 of the Penal Code prescribes that the director shall be guilty of the company's offence. It follows, says Mrs. Dambe, that it was unnecessary for the charge sheet to include any reference to Wright in his personal capacity.

The argument is, I consider, quite untenable. Under section 24 of the Penal Code the "guilt" of a person in the control of the management of the company means guilt established by a criminal court in a criminal prosecution in which such person is an accused person. In the instant case the State did not elect, in terms of Section 332 (1) of the Criminal Procedure and Evidence Act, to charge Wright, and Wright was quite clearly never an accused in the criminal proceedings against the company of which he was a director. As Gittings J. correctly concluded, that fact demonstrated the complete impropriety of the sentences which the Principal Magistrate purported to impose upon Wright. In order to charge Wright himself the charge sheet should have recited: (1) that Wright was an accused person; (2) the offence or offences committed by the company of which he was a director; and (3) that the State was relying on the provisions of section 24 of the Penal Code and section 332 (1) of the Criminal Procedure and Evidence Act.

Questions (a), (b) and (c) of the Attorney General's reference on a point of law are all answered in the negative. Question (d) falls away.

Delivered in open court this 19th day of July, 1996.

G.G. HOEXTER
JUDGE OF APPEAL

I agree.

A.N.E. AMISSAH
JUDGE PRESIDENT

I agree.

J.H. STEYN
JUDGE OF APPEAL