

STATE v. MATSHEGO 2003 (2) BLR 328 (HC)

Citation: 2003 (2) BLR 328 (HC)

Court: High Court, Lobatse

Case No: Crim Committal No 15 of 2002

Judge: Collins J

Judgement Date: November 7, 2003

Counsel: A C Mubika for the State. J D Williams for the accused.

Flynote

Criminal procedure - Trial - The accused - Right to copies of witness statements - Refusal of magistrate to order prosecutor to hand over copies of witness statements - Whether such refusal occasioned a failure of justice.

Headnote

The accused was convicted in a magistrate's court on four separate counts and was committed to the High Court for sentence. Before sentencing, the court noted that from the record of proceedings in the magistrates' court it appeared that the magistrate had refused to order the prosecutor to hand over copies of witness statements at the accused's request. The court then heard argument as to whether this did not occasion a failure of justice.

Held: The refusal of the magistrate to order the prosecutor to hand over copies of witness statements at the accused's request did not occasion a failure of justice. The magistrate had correctly applied the law as it then was. Attorney-General v. Ahmed [2003] 1 B.L.R. 158, CA and Kenosi v. The State [1993] B.L.R. 268, CA considered.

Case Information

Cases referred to: A

Attorney-General v. Ahmed [2003] 1 B.L.R. 158, CA

Kenosi v. The State [1993] B.L.R. 268, CA

COMMITTAL for sentencing in the High Court after conviction in a magistrates' court. The facts are sufficiently stated in the judgment. B

A C Mubika for the State.

J D Williams for the accused.

Judgement

COLLINS J:

On 3 June 2002, the accused was convicted by the principal magistrate, Mochudi on four separate counts in a charge sheet reading as follows: C

'Count I

Statement of Offence

Burglary C/Sec 300(2) of the Penal Code Cap 08:01 of laws of Botswana.

Particulars of Offence

The accused person Redinnetse Matshego on the night of 15th August, 2001 at Ramotlabaki Village in the Kgatleng D Administrative District did break and enter into a dwelling house of Emang Zambo with intent to steal therein.

Count II

Statement of Offence

Stealing from a dwelling house C/Sec 271 A.R.W. Section 275(b) of the Penal Code Cap 08:01 of the Laws of Botswana. E

Particulars of Offence

The accused person Redinnetse Matshego on the 15th day of August, 2001 at Ramotlabaki Village in the Kgatleng Administrative District after having broken and entered into a dwelling house of Emang Zambo stole the following items: (1) Brown blanket @ P80-00 (2) a bed sheet @ P28-00 (3) a duvet @ P43-00 (4) a tumbler @ P11-00 being the property of the F said Emang Zambo.

Count III

Statement of Offence

Shop Breaking and Theft C/Sec 302(a) of the Penal Code Cap 08:01 of Laws of Botswana. G

Particulars of Offence

The accused person Redinnetse Matshego on the night of the 15th August, 2001 at Ramotlabaki Village in the Kgatleng Administrative District broke and entered a Tuck Shop of Emang Zambo with intent to steal therein and stole the following items: (1) 87 packets of sweet aid @ P60-00, (2) 8 loaves of bread @ P24-00, (3) 1 X 44 toffee lux pack @ P21-60, (4) 2 X H 10 boxes of matches @ P5-00, (5) Cheese snacks twingles @ P21-00 and P65-00 cash. Being the property of the said Emang Zambo.

Count IV

Statement of Offence Stealing a motor vehicle C/Sec 3(1) (2) of the Motor Vehicle Theft Act No. 17 of 1995.

Particulars of Offence A

The accused person Redinnetse Matshego on the 18th day of August 2001 at Seretijwane cattle post in the Kgatleng Administrative District stole a motor vehicle Toyota Hilux 4X4 registration number B325 ABV valued at P23 000-00 from David Sentsho and before such stealing threatened personal violence to the said David Sentsho by pointing at him with a 30.06 rifle.' B

The criminal sentencing jurisdiction of the learned magistrate extends to a maximum of 12 years' imprisonment. He feels that this limitation will not allow him to perform his sentencing function according to law and he has committed the accused to this court for sentencing in terms of s 295 of the Criminal Procedure and Evidence Act, (Cap 08:02). The learned magistrate correctly sums up the situation in his judgment as follows: C

'My criminal jurisdiction is 12 years. The offence in count 4 carries a minimum mandatory penalty of 12 years' imprisonment. Section 3(5) of the Motor Vehicle Theft Act, (Cap 09:04) provides:

"(5) Any sentence imposed in respect of an offence under this section shall be consecutive to and not concurrent D with any other sentence imposed on the same accused person, and no sentence or any part of any sentence imposed in respect of an offence under this section shall be suspended."

The offence in respect of count one carries a maximum penalty of up to 14 years' imprisonment, that in respect of count two is a maximum penalty of up to 10 years' imprisonment and that in respect of count three is a maximum penalty of up E to 7 years imprisonment.

Section 295 of the Criminal Procedure and Evidence Act (Cap 08:02) provides:

"(1) Where on the trial by a magistrate's court a person who is not less than the apparent age of 17 years is convicted of an offence, the court if it is of opinion that the greater punishment should be inflicted for the offence than it has F power to inflict, may, for reasons to be recorded in writing on the record of the case, instead of dealing with him in any other manner, commit him in custody to the High Court for sentence.

(2) For purposes of this section, the aggregate of consecutive sentences imposed upon any person, in case of G conviction for several offences at one trial, shall be deemed to be a single sentence."

Having regard to Section 295(2) of the Criminal Procedure and Evidence Act, Chapter 08:02, and the minimum mandatory penalty prescribed in respect of the offence in count 4 it is my considered opinion that were I to proceed to sentence the accused person in respect of the charges in counts 1, 2, and 3 the aggregate of the consecutive sentences would be in H excess of my criminal jurisdiction.

In the result, I commit the accused person in custody to the High Court for sentence.'

On 4 December 2002 the matter came before me. Although this is not an appeal, s 296(3) of the Criminal Procedure and Evidence Act enjoins this court to be satisfied, from the record, A of the accused's guilt. Something on the record caught my eye which caused me to question whether the convictions were satisfactory. This appears from a section of my ruling at the time reading as follows:

'In the meantime, there is a passage in the record which causes me to ponder whether I am satisfied with the accused's B guilt. Very recently (and long after the learned magistrate delivered his judgment in this matter) two judgments of the High Court have been delivered; both of which conclude that an accused person has a right as a matter of general principle to disclosure of prosecution witness statements in order to safeguard his constitutional right to a fair trial (See Ndaba v.. The State Misc. Cr. App. No. F95/2001, unreported and Motshwane and Others v.. The State [2002] 2 B.L.R. 368.) C

At page 20 of the record of proceedings in this matter the following interchange took place between the accused, the prosecutor and the court on 22nd January 2002 (a few months before the trial commenced):

"Accused: I am requesting for witnesses' statements, charge sheet and also whether the value of motor vehicle is D P30 000.00. I would also like the case to be postponed so that it does not proceed on 5 February 2002 as I was not furnished with the amended charge sheet.

Prosecutor: The accused person was furnished with the charge sheet. If he lost the charge sheet we will avail it to him. Since he has requested for it we will give him. As for the statements by prosecution witnesses these are E privileged and cannot make them available to the accused. As for the value of the vehicle it is P23 000.00 and it appears in the charge sheet. We will give accused a copy of the charge sheet forthwith.

Court: The prosecutor has indicated that he will forthwith make available to the accused person a copy of the charge sheet. Case is adjourned to 5 February 2002 at 0830 hours for trial and accused is further remanded in custody. The F case is scheduled to proceed for trial on 5 February 2002 at 0830 hours as scheduled and there is nothing to warrant a postponement.

As for the statements by the prosecution witnesses the position of the law is that they are privileged and can only be made available to the accused with the consent of the State. The State has not waived the privilege and as such accused is not entitled to the prosecution witness' statements as of right." G

The issue which arises is whether, in the light of the refusal by the State to supply copies of the requested witness

statements and the denial by the magistrate to order the State to do so, the accused was, in the light of the aforesaid High Court judgments, afforded a fair trial. The issue is not without complexity because even if the failure to supply copies of the H requested statements is held to be an irregularity it does not automatically follow that such irregularity necessarily vitiates the conviction. I need to be addressed thoroughly on the issue and the Registrar has given me the assurance that he will appoint an amicus curiae from the bar to assist the court on this specific issue which I hope will be heard early in the new year.'

On 30 October 2003 this issue was addressed in argument before me. Mr Williams, a highly respected and A experienced practitioner, appeared as amicus curiae and I am deeply thankful for his research and services. I am satisfied, after hearing both Mr Mubika (for the State) and Mr Williams that the refusal of the learned magistrate to order the prosecutor to hand over copies of witness statements at the accused's request did not occasion a failure of justice. It is true that ever since 31 January 2003 when the Court of Appeal decided in B Attorney-General v. Ahmed [2003] 1 B.L.R. 158, CA at p166B that:

'1. In proceedings in the High Court and proceedings for serious offences in the Magistrates' Court, it is the duty of the prosecution to serve on the defence copies of all witnesses statements in the hands of the prosecution (whether or not the prosecution intends to call these witnesses) and copies of all documents on which the prosecution intends C to found.'

prosecution witness statements are required to be served on an accused person. However, that was not the law prior to 31 January 2003 when the prosecution was entitled to claim privilege from disclosure of witness' statements following the decision of the Court of Appeal in Kenosi v. The State [1993] B.L.R. 268, CA. D

The trial in this matter took place during the 'Kenosi docket privilege regime' and the learned magistrate was correct to follow the law as it then was. Had the accused elected to bring a constitutional application to this court, as happened in Ahmed supra, following refusal by the magistrate to order disclosure, the result may have been E different. He did not do so and there was no failure of justice. In all other respects I am satisfied that the accused was correctly convicted.

In regard to sentence, it is only count four which carries a mandatory minimum sentence for the reasons stated by the learned magistrate. The first three counts (theft, burglary and shop breaking) took place on 15 August F 2001. It was a single thieving spree in a sense. The items stolen were small. Cognisance will be taken of that as well as the fact that the accused is youthful and a first offender. However, the last count is very serious indeed. The accused stole the motor vehicle three days after the thieving spree and did so by threatening to shoot the victim owner with a 30.06 rifle.

I believe that the following sentences are appropriate and they are hereby imposed: G

1. Count 1:

The accused is sentenced to six years' imprisonment, four years of which is suspended for three years on condition that the accused is not during the period of suspension convicted of any crime of which breaking and entering is an element. H

2. Count 2:

The accused is sentenced to four years' imprisonment, two years of which is suspended for three years on condition that the accused is not during the period of suspension convicted of any crime of which theft is an element.

3. Count 3: A

The accused is sentenced to three years' imprisonment, one year of which is suspended for three years on condition that the accused is not during the period of suspension convicted of any crime of which theft is an element.

4. Count 4:

The accused is sentenced to 12 years' imprisonment. B

5. The sentences in counts 1, 2, and 3 shall run concurrently with one another, but consecutively to the sentence in count 4.

Sentence of imprisonment imposed. C