MOETI v. THE STATE 1998 BLR 55 (HC)

Citation: 1998 BLR 55 (HC)

Court: High Court, Lobatse

Case No:

Judge: Nganunu CJ

Judgement Date: January 28, 1998

Counsel: E. W. F Luke II for the appellant. Morara, State Counsel, for the State.

Flynote

Criminal law - Charge - Offence - Conviction on alternative but "minor offence" - Ingredients of minor offence must form part of essential elements of offence charged - Charge of theft common - Conviction of alternative offence of assisting in C concealing property knowing or believing to have been stolen - Whether conviction on minor offence - Failure to warn accused of being convicted on alternative offence - Whether conviction proper - Criminal Procedure and Evidence Act (Cap. 08:02), s. 187(1).

Headnote

It is provided by the Criminal Procedure and Evidence Act (Cap. 08:02), s. 187(1) as follows: D "When a person is charged with an offence consisting of several essential elements, a combination of some only of which constitutes a complete offence (hereinafter referred to as a 'minor offence'), and such combination is proved but the remaining essential elements are not proved, he may be convicted of the minor offence although he was not charged with it." E The appellant was charged before a magistrate's court, inter alia, with the offence of theft common contrary to section 271 of the Penal Code. At the end of the trial, the magistrate came to the conclusion that the prosecution's case lacked evidence on certain essential elements of theft common. He therefore acquitted the appellant on that charge, but purporting to apply the provisions of section 187(1) of the Criminal Procedure and F Evidence Act, he substituted for the original charge of theft common, a charge of assisting to conceal, dispose or make away with property known to have been stolen contrary to the provisions of section 317(3) of the Penal Code, and convicted and sentenced the appellant.On appeal against conviction, counsel for the appellant contended, inter alia, that the trial magistrate erred in substituting a charge under section 317(3) for the original charge under section 271 because the substituted G charge was not a minor offence.Held, allowing the appeal: for an alternative minor offence to be substituted for the offence charged, the essential elements and ingredients of the minor offence must be part of the essential elements of the offence charged against an accused person. This would ensure that the accused would have been aware of the elements of the H minor offence during the trial for the original charge, so that he would be able to defend himself on those elements whilst defending himself against the original charge. This would also prevent the accused being taken by surprise and convicted unfairly for an offence he was not tried for. In the instant case, the essential ingredients of the substituted offence were quite different from the original charge. Nor could the substituted offence be interpreted as a "minor offence". Consequently the conviction would be quashed and set aside.

Case Information

Cases referred to: A (1) R. v. Ngetu 1958 (4) S.A. 175. (2) R. v. Ackerman 1920 C.P.D. 245. (3) State v. Mnquibisa and Another, High Court (Criminal Trial No. 4 of 1989), unreported.APPEAL against a decision of a magistrate's court purporting to convict the appellant on an alternative minor B charge in accordance with the provisions of section 187(1) of the Criminal Procedure and Evidence Act (Cap. 08:02). The facts are sufficiently stated in the judgement.E. W. F Luke II for the appellant.Morara, State Counsel, for the State

Judgement

Nganunu C.J.:The appellant was convicted by a magistrate's court in Gaborone on the single count of assisting in the concealing or disposal or making away with a motor vehicle which he knew or had reason to believe that it had been stolen or obtained under circumstances which amounted to an offence contrary to section 317(3) of the Penal Code (Cap. 08:01). After conviction he was sentenced to 12 months' imprisonment and to a fine of P400 D failing payment to an additional four months' imprisonment. He appealed against his conviction and the same was argued on his behalf by

his attorney and State Counsel who appeared for the State intimated to me that he could not support the conviction. I immediately quashed the conviction and freed the appellant.The appellant was originally charged with two offences, i.e. (i) theft common contrary to section 271 and (ii) E malicious injury to property contrary to section 333(1) of the Penal Code.At the close of his trial in the magistrate's court a submission of no case to answer was made on behalf of the appellant on both counts. The trial magistrate ruled that there was no case to answer on count 2, i.e. on the charge of malicious injury to property. The magistrate thereafter acquitted and discharged the appellant on this F offence. In regard to count 2, i.e. the theft charge, the trial magistrate came to the conclusion that the prosecution's case lacked evidence on certain essential elements of the offence contrary to section 271 of the Penal Code. He therefore decided that he should acquit the appellant of the charge of theft common but instead of discharging him he decided that he should on his own substitute for the original charge, a charge of assisting G to conceal, dispose or make away with property known to have been stolen under the provisions of section 317 (3) of the Penal Code. The magistrate said that he was entitled to make the substitution of the charges by the provisions of section 187(1) of the Criminal Procedure and Evidence Act (Cap. 08:02). H The appeal of the appellant was based on many points which are contained in the notice and grounds of appeal accompanied by closely argued heads of argument submitted by Mr. Luke. The major grounds were that: (i) The trial magistrate erred in admitting evidence of an inspection in loco on the records which evidence was not sworn in open court.1998 BLR p57NGANUNU CJ (ii) The trial magistrate erred in substituting a charge under section 317(3) for the original charge under A section 271 because the substituted charge was not a minor offence that the evidence on record could not have proved, beyond reasonable doubt the substituted offence even if the substitution was competent.I propose to deal with ground number (ii) above as to me it disposes of the appeal without the necessity of B considering the other grounds that have been filed by the appellant. According to the record the trial magistrate agreed with the submission of counsel that certain essential elements in the offence of theft had not been proved by the State as there was no evidence given by the State on such elements. The trial magistrate on his own decided to utilise the provisions of section 187(1) of the Criminal Procedure and Evidence Act. That subsection C allows a court under certain conditions to convict an accused for a substituted offence instead of convicting him on the one for which he stood trial. It is clear that in granting the court such powers the section confers on the court unusual powers; for a person may ultimately be convicted of a substituted offence which he did not think he was facing during his trial. Such a power would therefore need to be used only upon the existence of the D conditions laid out by Parliament in that section. The subsection reads as follows: "187. (1) When a person is charged with an offence consisting of several essential elements, a combination of some only of E which constitutes a complete offence (hereinafter referred to as a 'minor offence'), and such combination is proved but the remaining essential elements are not proved, he may be convicted of the minor offence although he was not charged with it."The general principle underlying our criminal law is that an accused person should not be convicted of an F offence without trial where he is given an opportunity to defend himself. If a court of law reads the provisions of section 187(1) of the Criminal Procedure and Evidence as authorising the conviction of an accused person on any alternative offence that appears disclosed by the evidence, it is possible to convict people against the principle I have just stated above, i.e. an accused person can be convicted of an alternative offence without him G being given a chance of knowing in advance that he was in jeopardy of a conviction for such an offence and without him having an opportunity to defend himself. That would appear to be the way the trial magistrate interpreted the provisions of section 187(1) of the Criminal Procedure and Evidence Act. In my view however, that is not what the section provides. Section 187(1) talks only of convicting an accused person of offence on an H alternative but "minor offence". "Minor offence" as shown in the section, is not defined in terms of the scale of the punishment for the minor offence as compared with that for the original offence charged. It is defined by reference to the total elements of such offence as being part only of the original offence. Although the side notes in a statute are not part of the statute itself nevertheless the heading and the side note opposite to section 187(1) are very apt as a shorthand description1998 BLR p58NGANUNU CJof the intention of the legislature regarding section 187. It reads, thus: "Verdicts possible on Particular Indictment A or Summons. When offence proved is included in offence charged."What the law requires is that the essential elements and ingredients of the minor offence must be part of the essential elements of the offence charged against the accused. That way the accused will not be taken by surprise and be convicted unfairly for an offence he was not tried for. By requiring that the minor offence, of which the accused may be convicted as an alternative offence, be part of the original offence charged the law B ensures that the accused person would have been aware of the elements of the minor offence during his trial for the original charge, so that he could have defended himself on those elements whilst defending himself against the original charge. C That in my view sums it all. Authority for this view is also found in R. v. Ngetu 1958 (4) S.A.175 and R. v. Ackerman 1920 C.P.D. 245. Where the South African cases were dealing with sections in their Procedure Code worded substantially the same as section 187(1). See for a Botswana authority the judgment of Gyeke-Dako J. in State v. Sebango Mngquibisa and Another, High Court (Criminal Trial No. 4 of 1989), unreported. D It will be seen therefore that in order for the trial court to be able to convict the accused of an alternative crime under section 187(1) of the Criminal Procedure and Evidence Act, the alternative crime must be a minor crime as defined in the subsection. In particular all its elements must be a combination of some of the essential elements of the original crime charged in the case. That way the accused could not substantially be prejudiced. The elements of the crime under section 317(3), that of assisting in concealing or disposing or making away with E goods which the accused knows to have been stolen or which he has reasonable grounds to believe that they were obtained by criminal means are quite different from that of theft common which was the original charge against the accused. It cannot therefore be defined as a "minor offence" to theft under the wording in subsection F 187(1). The conviction of the appellant was for that reason alone and had to be quashed and set aside.The conviction raised other different issues but I need not discuss them in view of the foregoing. The appeal accordingly would be allowed.Appeal allowed. G E.K.T.