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

COURT OF APPEAL CRIMINAL APPEAL NO. CLCGB-090-12 HIGH COURT CRIMINAL TRIAL NO. CTHFT-000066-09

In the matter between:

Abote Batsietsi Monnana **Appellant**

and

The State **Respondent**

Mr. Attorney T. Elijah for the Appellant Mr Attorney C. Mbenda for the Respondent

JUDGMENT

CORAM: FOXCROFTJA LORD

ABERNETHY JA LEGWAILA

JA FOXCROFT JA

1. The appellant was tried in the Francistown High Court on charges of kidnapping in order to murder, contrary to section 254 of the Penal Code (Cap 08:01), and murder, contrary to section 202 of the Penal Code.

The particulars of the offences were:

(a) that the appellant had on or about the 25th November 2008 at or near M….. Village kidnapped a four- year old child, B….. M…. M…… in order to murder her, and

(b) that he had between the 29th November 2008 and 6th December 2008 murdered the kidnapped child. I shall hereafter refer to this child as the missing child, where apposite.

In the judgment of the Court *a quo,* Solo J held that the offence of murder embraced all the criminal acts of the appellant. Accordingly, the learned Judge struck out the kidnapping charge as "offending against the rule against splitting of charges". On the charge of murder, the appellant was convicted and, there being no extenuating circumstances shown, sentenced to death.

2. The immediate difficulty which arises is the correctness of the decision to strike out the kidnapping charge. In a number of passages in the record, the witness PW3 told how the appellant had taken the missing child from her saying that he was going to sell the child to one D…… There is no evidence that the appellant kidnapped the child "in order that such person may be murdered,

or may be so disposed of as to be put in danger of being murdered", to use the words of section 254 of the Penal Code. Indeed, the prosecution may have considered that there was sufficient evidence available to it to prefer a charge of kidnapping in order to murder, and that a charge of murder might be more difficult to prove. If the essential element of intention to murder the kidnapped child could not be proved, a conviction under section 253, read with section 251, of the Penal Code would have been competent in terms of section 187 (1) of the Criminal Procedure and Evidence Act (Cap 08:02), in any event.

3. After hearing the argument of Mr. Elijah, Mr. Mbenda properly conceded that intention to murder the kidnapped child had not been proved beyond reasonable doubt. He submitted further that a conviction for kidnapping would have been appropriate in terms of section 253, read with 251, of the Penal Code.

4. As Mr. Elijah had correctly pointed out, the State case in respect of the murder charge stands or falls on the evidence of PW3. She testified that she had gone to the Serale stream to gather wild green vegetable leaves (thepe), had been "given" the child M..... by women with whom the child had been, and asked to take the

child home to her grandmother. On the way home, the appellant came out from behind the bush and took the child saying that he was going to sell the child to D….. The appellant told her that if she told anyone that he had taken the child he would kill her. In great fear of the threat, she had lied about what had happened for five days until she eventually told a neighbour M…. G…. (PW8) that the appellant, Abote, had taken the child. This led to a report being made to the police.

5. Mr. Elijah submitted that the evidence of PW3 was so unsatisfactory that all that could be gathered safely from her was that the "deceased person was given to the witness".

He also contended that the evidence of PW5 should have been rejected as well. She testified that she is the mother of PW4 who lived with the appellant in the same village. She had gone to her daughter to borrow pegs and had seen the missing child through a crack in the door. She had asked her daughter "Is this not the child who everybody is searching for being M…..", and was told not to get involved in the appellant's family affairs. The appellant was also inside the house at the time. She then went to tell M….. (PW7) what she had seen and the police were called.

6. The evidence of PW5 was supported by that of PW7 who told how PW5 had come to her on the 29th November 2008 to tell her that she had seen the missing child. This witness was also able to say that the child had disappeared on the 25th November 2008. PW5 had told her that she had gone to borrow some pegs from her daughter and had seen the child in the house where her daughter lived with the appellant. It is interesting that this visit by PW5 to PW7 had occurred before the 30th November which was when PW7 testified that she had been woken up by PW6, who was her nephew, to look out of her window at a man holding a crying child at midnight about 150-200 metres distant.

7. PW6, who had awakened his aunt, confirmed that he heard a child crying at midnight on the 30th November 2008. He even heard at a distance estimated in Court to be 400 metres (although he called it 150-200 metres) the child saying she was cold and wanted her mother. He added that he knew this had happened on the 30th of the month since he had gone to his cattle post "on the 31st". If he meant the 1st December (there being no 31st of November) then this confirmed what his aunt said namely that it was after the visit of PW5 on the 29th November that she had been

woken and seen a distant crying child in the arms of a man with his back to her.

8. The difficulty I have with this evidence is the improbability of recognizing even a person whom one knows at a distance of some 400 metres at night, or even 150-200 metres. There was no light other than that from a neighbouring house, and the man holding a child had his back to the witnesses.

If indeed this midnight observation of a child allegedly wanting its mother occurred after PW7 was told about the child being seen, it is not difficult to see how both witnesses identified the appellant. They might be right but there is at least an equal possibility that they could have been mistaken, and influenced by what PW7 had been told the day before. I also have grave doubt that they could have heard the child crying that she wanted her mother.

9. Given the absence of the body of the child who was taken from her family, and the clear possibility that she might well have been sold, the verdict of murder cannot be supported. In this regard, there was a statement to the police made by PW4, the mother of

the appellant's child, that she had been told by the appellant that he had taken the child to D…., and sold her for P5000. It is most unfortunate that D….. was never called to deny this statement, or to deal with the evidence of witnesses claiming that the appellant had said that the child was to be sold to D……

10. The prosecution case obviously could not have been strengthened by the evidence of PW4, since she had recanted her police statement. The trial Judge made no finding as to her allegations of torture by the police, and rightly did not use her evidence against the appellant. However, it was absurd for her to suggest that the police had also told her to say in her statement that the appellant had told her he had sold the child for P5000. Why would the police have done that when investigating a murder case? Moreover, if the police did suggest that a sale was envisaged by the appellant, at that price, it is extraordinary that the version of D……. was never placed before the Court. There is a stony silence from the State. In the result, I cannot hold that the Court *a quo* could properly have found that the child was kidnapped in order to be killed. There is simply no evidence to that effect. Of course, this also covers the murder conviction which the State rightly did not support. The possibility exists that there was never any

intention to kill the child, and also that the child is still alive. There is sufficient doubt on the evidence to show that there is not only one conclusion which could reasonably have been reached. An acquittal on both charges preferred against the appellant should have resulted. See **S. v. MMESETSE [1998] BLR 604 (HC); R. v. ONUFREJCZYK [1955] 1 ALL E. R. 247** where Lord Goddard remarked that the prosecution must prove their case beyond all reasonable doubt, and if the trier of fact is satisfied on the evidence that the crime is proved and the accused is the killer, then a verdict of guilty must be returned. If at the end of the day there is some reasonable doubt on any of these matters, then the accused cannot be found guilty because the case has not been satisfactorily proved.

See p. 609 B-C of *Mmesetse's* case, *supra*

11. It was put to Mr. Mbenda that there appeared to be room for a finding on the evidence of kidnapping contrary to section 253 (read with 251) of the Penal Code. He submitted that the charge which was appropriate in the light of the evidence was indeed one under section 253, read with section 251, of the Penal Code. He submitted further that this Court had the power to amend the

charge in terms of section 149 (1) of the Criminal Procedure and Evidence Act. That section provides that a trial court may at any time before judgment, order that an indictment or summons be amended, where necessary, by an "officer of the Court or other person".

12. The power contained in section 149 is a power to bring the wording of a charge into line with the evidence that has been led. Although intended to be exercised during the trial, it is a power which can be exercised by this Court on appeal. In **MABUTHO v. THE STATE [2002] 1 BLR 67 at 70 C,** Lord Sutherland added that:-

> *"It is however a power which should be exercised sparingly in this court because at the stage of an appeal there would no longer be an opportunity for the accused to lead evidence about the amended charge, or to consider recalling witnesses for further cross- examination. "*

This judgment was followed in this Court in **MOTSWASELE v. THE STATE 2006 [2] BLR 477.**

13. In the present matter, one is not so much concerned with an "error in the wording of the charge" as the Court was in *Mabutho's*

case. However, the "error" in the charge in *Motswasele's* case was

-

> *"The real defect that the charge sheet did not say that the sexual intercourse was unlawful or without the consent of complainant".* (Per Tebbutt JP at p. 478 H of the judgment).

In casu, the "defect" in the charge is that intention to murder has not been proved while kidnapping in a less serious form has, in my view, been proved. While it may be that this Court has the power to alter the appellant's conviction for kidnapping with intent to murder to kidnapping without such intent without an amendment of the charge (see section 187 (1) of the Criminal Procedure and Evidence Act, section 13 (6) the Court of Appeal Act), I see no reason not to amend the charge as requested by the State. The procedure suggested has already been adopted on at least two occasions by this Court and achieves the same result as a competent finding on a lesser charge without amendment. There is certainly no prejudice to the appellant if the amendment is granted. The more serious charge against him, which should not have been struck out by the learned Judge *a quo,* has fallen away by the concession of the State, and a less serious charge substituted.

14. I also do not consider it necessary to direct "some officer of the Court" to make the amendment to the charge. In *Mabutho's* case,

the amendment sought was allowed by the Court, without further ado. Tebbutt JP followed the same procedure in *Motswasele's* case without reference to the "officer of the Court". While that procedure is desirable at the trial stage, it can serve no purpose on appeal to this Court.

15. Count One is accordingly amended to read as follows:-

"ABOTE BATSIETSI MONNANA (Male aged 51 years) MOLETEMANE VILLAGE is charged with the following offence -

COUNT ONE

STATEMENT OF OFFENCE Kidnapping, contrary to Section 253 (read with section 251) of the Penal Code (Cap 08:01) Laws of Botswana **PARTICULARS OF OFFENCE** The accused person, **ABOTE BATSIETSI MONNANA** on or about the 25th day of November, 2008 at or near Moletemane Village in the Central Administrative District of the Republic of Botswana kidnapped **B..... M..... M....** a female minor aged 4 years, from lawful guardianship.

16. Mr. Elijah submitted that this Court should not reach the conclusion that the appellant was guilty of any offence since the

evidence of PW3 could not be relied upon at all, and no other evidence showed, beyond reasonable doubt, that the child had been kidnapped. I am satisfied that the trial Court could and should have brought in a verdict of guilty of kidnapping contrary to section 253 (read with 251) of the Penal Code, for the following reasons

(a) there can be no doubt that the child was removed from PW3 in whose care she was on the day when she went missing;

(b) the child has not been returned to her family and there is no evidence as to what has become of her;

(c) the inference that she was kidnapped for some sinister purpose, which has not been revealed, is compelling;

(d) the trial Court accepted the evidence of PW5 that she had seen the child at the home of the appellant and

her daughter some days after she had been reported missing;

(e) this finding is supported by the fact that PW5 went to tell PW7, on the 29th November according to PW7, what she had seen in her daughter's home;

(f) the evidence of PW5 that the missing child was the appellant's cousin's child, further supports her evidence that when she questioned her daughter as to the presence of the child, her

daughter told her "that I should not get involved in his family affairs". (Record, p.48).

(g) the evidence of PW5 was obviously more worthy of credence than that of her daughter PW4, who had recanted her police statement, made allegations against the police which I have already dealt with, and simply accused her mother of lying when her mother's version of events when she visited and saw the child was put to her. The trial Court, seeing these witnesses, was patently in the best position to decide on credibility, and nothing has been said to show that the trial Court came to an incorrect finding.

17. I do not add the evidence of PW6 and PW7 to the above list because I have doubt on the record, whether the claimed identification of a child calling for its mother and of the appellant, could have been used to convict the appellant. However, I am satisfied that the trial Court was fully entitled to convict the appellant of kidnapping without the evidence of PW6 and PW7. The appellant is accordingly convicted of kidnapping on count one of the charge as amended.

18. As for sentence, section 253 of the Penal Code provides for imprisonment for a term not exceeding seven years. In the light

of the fact that the accused is 57 years of age and is a first offender, it does not seem appropriate for the maximum possible sentence to be imposed. However, crimes of this kind are always serious, causing enormous emotional trauma to parents and families of kidnapped children. Especially is this the case where the child is still missing.

In my view, a sentence of six years imprisonment would be a suitable one. Mr. Elijah informed us that the appellant had been incarcerated since the 6th December 2008 save for the ten months of February 2009 until November 2009,when he was on bail.

19. Accordingly, it is ordered as follows:

(a) the conviction in this matter on the charge of murder is set aside, and the appellant is acquitted on that charge;

(b) The sentence of death imposed on the appellant is hereby set aside;

(c) the appellant is convicted on a charge of kidnapping, contrary to section 253(read with section 251) of the Penal Code [Cap 08:01], of B..... M..... M..... a female minor age 4 years from lawful guardianship;

(d) Appellant is accordingly sentenced to 6 (six) years imprisonment. From that sentence is deducted the periods of 2 months (December 2008 to end January 2009) and 3 years and 2 months (November 2009 to end January 2013) being 3 years and 4 months in total during which the appellant has been incarcerated to date.

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

J. G. FOXCROFT
JUSTICE OF APPEAL

I agree

LORD ABERNETHY
JUSTICE OF APPEAL

I agree

E. W. M. J.
LEGWAILA JUSTICE
OF APPEAL