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

CLHLB-000091-06

In the matter between:

KEABETSWE MOOKETSI **APPELLANT**

vs

THE STATE **RESPONDENT**

RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. The matter was initially brought by the Appellant on grounds that his sentences, in respect of case no 4 of 2004 originating from Mmathubudukwane Customary Court for "*Use of Insulting Language*" contrary to Section 180 of the Penal Code and for which he was sentenced to three (3) months imprisonment, pronounced on the 10th March 2004, and that of MU 00005/04, originating from Mochudi Magistrates Court for two (2) counts of "Robbery" contrary to Section 291 as read with Section 292 (2) of the Penal Code (Cap 08:01), and for which he was sentenced to 10 years imprisonment each, both sentences ordered to run concurrently and reckoning from 7th January 2004, be ordered to run concurrently.

2 During the presentation of his appeal on those grounds, the Appellant informed the court that at the time the sentence for Robbery was pronounced he had already served a good part of the sentence relating to "Use of insulting language" and that he was actually left with about five (5) days to complete such sentence when the one for "Robbery" was pronounced. From his grounds of appeal it appeared he wished for the court to order that the said five (5) days run concurrently with the ten (10) year prison term for the two (2) counts of "Robbery". However, upon the oral presentation of his case, he averred that the prison authorities have actually added an extra fifty-five (55) days to the ten-year imprisonment term, and as such disregarding the portion of the 3 months imprisonment term he had already served, to which only five days remained to complete the sentence.

3. Upon this averment from the Appellant, Counsel for the State was ordered by court to investigate the correctness or otherwise, thereto. Counsel contacted the First Offenders' Prison and such cumulated in the "Answering Affidavit" of

Senior Superintendent Ookeditse Mpeo, in which he explained how the Botswana Prisons Services compute prisoner's sentences where there are several of them pronounced in different courts as per paragraph 8 of the said "Answering Affidavit".

4. It was also during such consultation with Prison Authorities by Counsel for the State that it occurred that the Appellant had another committal warrant from Mahalapye Magistrate's Court in CMMMY 000225/06 in which he was sentenced to an effective one year imprisonment term effecting from 26th July 2006, as per paragraph 6 of Ookeditse Mpeo's "Answering Affidavit" and attachment marked "Annexure C".

5. From the investigation or consultation, it therefore transpired that from all the three counts of Mmathubudukwane Customary Court, Mochudi and Mahalapye Magistrates Courts, the Appellant had an effective eleven (11) years 3 months prison term to serve.

6. However, the committal warrants from Mmathubudukwane Customary Court and Mahalapye Magistrates Court show that the sentences were ordered to commence on the 10th March 2004, and 26 July 2006, respectively, while that from Mochudi Magistrates Court commenced on the 7th January 2004. This would therefore mean that since the sentences from Mmathubudukwane Customary Court and Mahalapye Magistrate Court commence while the 10 year prison term from Mochudi Magistrates Court is running, and are shorter, 3 months and 1 year respectively, they would in effect be running concurrently with the 10 year imprisonment term, though none of the courts that pronounced such sentences specifically and expressly ordered that the sentences would run concurrently with the 10 year imprisonment term.

8. **ISSUES TO BE DETERMINED**

a) Whether the Botswana Prison Service, in the computation of the Appellant's sentences, and in other cases similar to the one *in casu*, as per paragraph 9 of the "Answering Affidavit", are wrong in disregarding the dates stipulated in the committal warrants for the commencement of sentences pronounced, or are duty-bound to so compute the sentences as per Section 300(2) of the Criminal Procedure and Evidence Act (Cap 08:02).

b) Whether the presiding officers who pronounced the effective dates upon which the sentences were to commence, by such pronounciation, implied that the sentences are to run concurrently with any sentence that the Appellant was serving at the time.

9. **THE LAW**

It would seem that the Appeal *in casu* is not a first of its kind in our jurisdiction. Our courts have had to deal with the same problem in the following cases, amongst others:

a) **Moses Gaonakala v The State CLHLB 054-07** (Court of Appeal)

b) **Ezekiel Witness v Department of Prisons and Rehabilitation & 2. Attorney-General** Civil Case No F 228 of 2003 (High Court, Francistown)

c) **Moatshe v The State; Motswari and Another vs The State 2004 (1) BLR 1 (CA)**

d) **Ramotlhomane v The State 1993 BLR 118 (HC)**

e) **State v Mokoni and Another 1985 BLR 471 (HC)**

10. In the most recent case of **Moses Gaonakala v The State** *supra* in which the facts are similar to the matter *in casu*, Moore JA had this to say in relation to the computation of sentences by the Botswana Prison Service where an effective date for the commencement of a sentence has been stipulated:

"If the Appellant is correct in his assertion that the conduct of the prison authorities at Boys' Prison, or any other authority or agency for that matter, had the effect of varying the order of Masuku J. and causing his sentence to commence to run on some date AFTER the 19th December 2001, which was the date ordered by the Judge, then the authorities or agencies concerned will have disobeyed the order of the High Court, and although I make no finding on the matter, would appear to have unlawfully deprived the Appellant of his right to personal liberty as guaranteed by Section 5(1) of the Constitution of Botswana."

11. Prior to making the above pronouncement, the Court of Appeal in the *dictum* of Moore J, made reference to the furnishing of records of previous convictions by the state to a presiding officer and the import of such, as well as the provisions of Section 300 of the Criminal Procedure and Evidence Act (Cap 08:02) which reference in summary, especially in relation to previous convictions, is that such furnishing of a record of previous convictions would enable a presiding officer to decide whether or not, to order the sentence in the present case to run concurrently or consecutively to any sentence that the convicted person may have been serving at the time of sentencing.*(Paragraph 10 to 17 of the Judgment)*

12. I believe at this juncture it would also be appropriate to bring up the subject of backdating of sentences. In **Keoagile Khukhwane v The State CLHLB 000039-05,** Tebbut J.P said this

"It has, moreover, also become the practice to backdate sentences unless, in the exercise of its discretion, the trial court has good reason for not doing so"

13. The question that would then arise would thus be "*What is the import of back-dating sentences"* and I would humbly venture to submit that the import thereto is to ensure that convicts who awaited trial in custody are not prejudiced by the failure to take into account time-served while awaiting trial into the sentence. In our jurisdiction, before the introduction of the Judicial Case Management System, it was not uncommon for one to await trial for long periods of time ranging from one (1) year to three (3) or four (4) years, and a failure to take these periods into consideration would therefore result in prejudice to a convict.

14. The next question that would then arise would be "*Is bask-dating of sentences necessary where a convict is, at the time of sentencing, already a serving prisoner for a completely different matter?"* This, I venture to bring up in light of the fact that even if the convict were to have been granted bail in the matter currently for sentencing, he would not have been able to enjoy his freedom because he would have been put back in prison to complete the sentence he was serving at the time he was granted bail in the matter for sentencing. At this point, the last question for consideration is whether our courts back-date sentences as a matter of normal practice or whether they do so after taking into account whether the person being sentenced awaited trial in custody or was a serving prisoner in relation to a different matter, or even whether the person being sentenced awaited trial on bail?

15. In **Ramotlhomane v The State** *supra*, Gyeke Dako J. (as he then was) set out guidelines for ordering that sentences run concurrently, and in relation to sentences for unrelated offences which had been tried separately had this to say, at page 120 of the judgment:

"The record of proceedings of the court below shows that he was, at the time of his conviction and sentence, serving a five-year prison term resulting from a previous conviction for rape on another person. ….. The gravamen of the appellant's plaint which I consider pertinent in this appeal is that the learned trial magistrate erred in not ordering the two sentences (the present six years jail term and the five years' imprisonment for the previous offence) to run concurrently. It is to be noted that the sentence passed was a straight jail term in respect of a single count summons with no reference as to whether or not it should run consecutively or concurrently with some other sentence."

16. The Learned Judge went on

"In my view, the issue boils down to the interpretation and application of Section 300 of the Criminal Procedure and Evidence Act (Cap 08:02) -------"

17. The judge set out the provisions of the said Section *verbatim* as they appear on the Act and proceeded thus:

"From the facts of this case, the appellant was not convicted at one trial of two or more offences. He was, however undergoing sentence when he was convicted, Subsection (1) supra (referring to Section 300(1) of the Criminal Procedure and Evidence Act) *deals with the type of custodial sentence which a trial court may pass in cases where the convicted person is under previous sentence for another crime. The subsection appears to have its origin from the English Criminal Law of 1827. Prior to the passing of the Act, the common law position, in cases of convictions for misdemeanous, was to pass a sentence to commence at the expiration of a sentence which was being served by the accused. R v Greenberg (1943) K.B. 381; Castro v R (1881) 6 App. Cas. 229. However, the Criminal Law Act of 1827 was passed, inter alia, to extend the procedure to felonies. Section 10 of the Act Provided that –*
Whenever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced."

The Learned Judge continued at page 121 paragraph A

"It is clear from the provision of our Section 300 supra that, unless a trial court orders sentences to run concurrently, sentences should ordinarily run consecutively;

18. Gyeke-Dako J. proceeded to allude to instances where sentences may be ordered to run either consecutively or concurrently.

At page 122 of the judgment the Learned Judge Gyeke-Dako continued
"(6) Where a trial court, has, on good and reasonable grounds, ordered a sentence to run concurrently with a previous custodial sentence which the accused is serving for another offence, it must be clearly stated that it should run concurrently with the unfinished portion of the previous sentence. Sentences imposed in respect of two unrelated offences (which could not have been joined in the same indictment or summons) tried separately may, in absence of exceptional circumstances, not be ordered to run concurrently. This must be so, because the Penal Code and Criminal Procedure and Evidence Act are designed to punish offenders for any infaction committed thereunder. For were it to be otherwise, a convict admitted to bail, pending the determination of his appeal against custodial sentence imposed, would with impunity commit other crimes

while on bail and on conviction demand that the sentences imposed in respect of those offences be made to run concurrently with his previous sentence."

19. In **Jabulani Lawrence Makhado v The State CLHLB-012-06** Moore JA said

"The Appellant is now facing a gross term of 34 years imprisonment under the order of Kirby J. This court is now required to determine what is the appropriate sentence to impose for the offence for which he now stands convicted. Having decided what that sentence is, it will become necessary to consider whether that sentence should run consecutive to, concurrently with, or partly concurrently with the sentence of 24 years imprisonment which he was already serving when he committed the offence."

20. The court proceeded to quote a paragraph in **Moatshe v The State; Motshwari and Another v The State (2004) 1 BLR** ***at*** page 5 where the Motor Theft Act was considered,

"….. courts trying offences under the Motor Theft Act will be entitled in appropriate cases to order several sentences of imprisonment – or portions of them – to run concurrently so as to ameliorate the narsh and inhuman consequences that may flow from their running consecutively while nevertheless leaving the courts free, where circumstances warrant it, to allow them to run consecutively.

21 **APPLICATION OF THE LAW TO THE ISSUES**

MANNER OF COMPUTATION OF SENTENCES BY PRISON OFFICIALS IN UNRELATED OFFENCES TRIED SEPARATELY.

22. It is conceded by the State that the Botswana Prison Service in computing the sentences of the Appellant did so in a manner that disregards the effective dates upon which those sentences were ordered to commence. However, it is submitted that the Prisons Authorities in so computing the Appellant's sentences were in compliance with the provisions of Section 300 of the Criminal Procedure and Evidence Act. As per Gyeke-Dako's view in **Ramotlhomane v The State** *supra*, that is the correct and proper way of computing the sentences in terms of the said Section 300. It is conceded by the Respondent that in **Ramotlhomane** *supra*, Gyeke-Dako J did admit that the circumstances he alluded to in determining whether to order sentences to run either consecutively or concurrently were only guidelines, it is however submitted by the Respondent that those guidelines are the proper interpretation of Section 300 of the Criminal Procedure and Evidence Act.

23. The court is called upon to consider that sentence for the offence of Robbery pronounced by the Mochudi Magistrates Court was made on the 4th May 2004 and it was ordered to commence effectively from the 7th January 2004, while sentence in respect of the "Use of Insulting Language" was pronounced on the

10th March 2004, the date that it apparently commenced; that sentence in relation to House breaking and Theft from Mahalapye Magistrate Court was pronounced on 19th September 2006 and in which it was ordered that the sentence is to commence on the 26th July 2006.

24. If the court is to make the above consideration, it will find that when the sentence for "Use of Insulting Language" was pronounced, the court apparently had no previous conviction of the Appellant relating to the "Robbery" as at 10th March 2004 the Appellant had not yet been convicted of the offence of "Robbery" and as such the court could not have anticipated or even intended that such sentence would run concurrently with any other sentence.

25. It is also clear from the Record of Proceedings at page 14 and 15 from Mochudi Magistrate's Court on the "Robbery" case that the court was not made aware that the Appellant was a serving prisoner in respect of the offence of "Insulting Language" as it is clear that a previous conviction in relation thereto was not availed to the court, and that by backdating the sentence to 7th January 2004, did so on the assumption that the Appellant awaited trial in custody, otherwise, it would have expressly stated that the 10 year imprisonment term it imposed on the appellant at the time should run concurrently with the unfinished portion of the sentence for "Use of Insulting Language".

26. It is submitted that as per Gyeke-Dako J. in **Ramotlhomane** *supra*, if the court in the "Robbery" case had wanted the 10 year imprisonment term to run concurrently with the unfinished portion of the sentence for "Use of Insulting Language" then it must have clearly stated that it should run concurrently with the unfinished portion of the previous sentence.

27. It is further submitted by Respondent that the Prison Services in computing sentences the way they do, is duty bound to so compute the sentences in compliance with the provisions of Section 300 of the Criminal Procedure and Evidence, and they being in possession of the committal warrants of the convict can compare between them and actually see which sentences have been ordered to run concurrently and for those which no such express intention for concurrency is made, to implement the import of Section 300 of the Criminal Procedure and Evidence Act.

28. It is submitted that the provisions of Section 300 of the Criminal Procedure and Evidence Act are very clear and are peremptory in tone.

The section reads

"***Cumulative or concurrent sentences***

(1) When a person is convicted at one trial of two or more different offences, or when a person under sentence or undergoing punishment for one

offence, is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence (as the case may be) as the court is competent to impose.

(2) Such punishment, when consisting of imprisonment <u>SHALL</u> commence one AFTER THE EXPIRATION, setting aside or remission of the other, in such order as the court may direct, <u>unless</u> the court directs that such punishment shall run concurrently.

29. It is submitted that the words "shall" as it appears in the above section is a peremptory provision and creates a general rule that, where there are several sentences being served by a convict, they <u>must</u> commence one after another, and further that the word "unless" creates an exception to the said general rule and where such exception is made it should be very clear and be made in express terms to avoid confusion.

30. It is therefore the State's contention and submission that in the Appeal *in casu* the presiding officers in back-dating the Appellant's sentences did not do so with an intention that such sentences would run concurrently to each other, but rather that the Appellant does not suffer prejudice if they do not take into account time served while awaiting trial and that the Prison Service is duty-bound to disregard such backdating as it conflicts with a statutory provision, and which back-dating, if it has the effect of making sentences to run concurrently has not been made with any exceptional circumstances attaching to it.

31. Whether by back-dating sentences, the presiding officers, by implication, intended the sentences to run concurrently has already been addressed by the submission that where an exception to the general rule in Section 300(b) of the Criminal Procedure and Evidence Act is sought to be made it should be so done in express term and reasons thereto put into the record. As per the words of Gyeke-Dako J in **<u>Ramotlhomane</u>** *supra*,

"sentences imposed in respect of two (or more) unrelated offences, (which could not have been joined in the same indictment or summons), tried separately, may, in the absence <u>exceptional</u> <u>circumstance</u> NOT be ordered to run concurrently".

32. The above submissions may be attacked by the submission that if the provisions of Section 300 of the Criminal Procedure and Evidence Act were to be interpreted and implemented as submitted, and as per the dicta of Gyeke-Dako J, then they would result in prisoner's being given harsh and inhumane sentences where such sentences run cumulatively and not concurrently. In that regard the Respondent ventures to submit that each case will be dealt with on its own merits and circumstances and a determination made on a case

by case basis. The Respondent submits that the Appeal *in casu* does not culminate in a harsh and inhumane sentence.

33. **CONCLUSION**

It is prayed that the court confirm the manner or formular of computation of sentences as currently done by the Botswana Prison Services as compliant with the provisions of Section 300 of the Criminal Procedure and Evidence Act (Cap 08:02) and it is further prayed that the court make an order for process to be undertaken by the state to ensure that a Practice Directive is issued in relation to express provision to be made where an exception to Section 300 of the Criminal Procedure and Evidence Act is sought to be made.

Finally, it is prayed that the Appeal be dismissed as there are no exceptional circumstances upon which the sentences may be ordered to run concurrently.

DATED AT GABORONE THIS 12th DAY OF DECEMBER 2008.

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