EXPLICATION OF THE RULE OF LAW IN BOTSWANA JUDICATURE WITH REGARD TO NATURAL JUSTICE

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ABSTRACT

The Courts in Botswana have evolved a salutary practice over time, natural justice dictates that in order to ensure a fair and just trial the magistrate should on the accused's first appearance and before a plea is taken, informed the of his right to legal representation. The right to legal representation is a fundamental right in the Court process that should been explained to every accused person, whether he be literate or illiterate. The right to legal representation is a sine qua non for any fair hearing to which an applicant also has a constitutional right. Also, when a presiding judge or magistrate become agitated at an appellant's unbecoming demeanour in Court, the judge or magistrate's language should at all times be measured and in keeping with the Court's dignity. A judge should be careful not to led a judicial decision assume what might be regarded as a tone of partisan argument. On the other hand, if bias is inferred by litigants to a case, then there must be reasonable evidence for such a claim. It would be unfortunate if the mere vague suspicions of whimsical, capricious and unreasonable people should be made a standard to regulate the determination of recusal in a case. Mere flimsy, elusive, and morbid suspicions should not be permitted to form a ground for recusal.

Keywords: Constitutionalism, rule of law, natural justice, magna carte of 1215, nemo iudex in sua causa, audi alteram partem rule.

GENERAL OVERVIEW

The idea of constitutionalism is bolstered by the specific entrenchment of the rule of law. As originally conceived by the English constitutional lawyer, A.V. Dicey more than a century ago, the purpose of the rule of law was to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures. Put at its simplest, the rule of law requires state institutions to act in accordance with the law.

The rule of law has both a procedural and a substantive component. The procedural component forbids arbitrary decision-making and the substantive component dictates that government must respect the individual's basic rights. The rule of law therefore implies that every citizen and even the ruler are subject to the law.[1] The principle of rule of law finds its fulcrum in the idea of natural justice which forms the substance matter of this manuscript.

HISTORICAL EVOLVEMENT OF THE RULE OF LAW
An Introduction

The Magna Carte of 1215 indicated that no free man shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.[2]

[1] Ian Currie & Johan de Waal. 2005. The Bill of Rights Handbook. 5th edition. Juta & Company Ltd: 10-12.
[2] J.C. Holt. 1992. Magna Carta. 2nd edition. Cambridge University Press: 2.

In those words were the seed of rights: like the right to know of what one is accused, the right to counsel, the right to confront and examine one's accusers, the right to remain silent, the presumption of innocence and the government's burden of proving guilt, the right to trial by jury, and the right to be judged fairly and impartially.[3]

This was the first time in English history that a written organic instrument exacted from a sovereign (King John) lay down binding rules of law that the ruler himself may not violate. In the Magna Carte is to be found the root principle that there are fundamental rights above the state, which the state may not infringe.[4]

Although, the Magna Carte spoke of the "law of the land," the phrase "due process of law" appeared in 1344, when the Parliament forced King Edward III to accept a statute designed to curb his own excesses: "No man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited nor put to death without being brought in answer by due process of law."[5]

Centuries later the phrase "due process of law" became synonymous with the phrase "by the law of the land, which eventually culminate into the rule of law.[6] Under English judicature, the rule of law and natural justice are synonyms of each other. Natural justice stands on two legs or principles, namely (*nemo iudex in causa sua* = no man a judge in his own cause) and (*audi alteram partem* = hear the other side).

NEMO IUDEX IN CAUSA SUA (RULE AGAINST BIAS)

A person is barred from deciding any case in which he or she may be, or may fairly be suspected to be, biased. This principle embodies the basic concept of impartiality. One form of biased on the decision-maker being a party to a suit, or having a pecuniary or proprietary interest in the outcome of the decision.

A classic case is *Dimes v Grand Junction Canal Proprietors* [1852] 3 H.L. Cas. 759, 10 E.R. 301, which involved an action between Dimes, a local landowner, and the proprietors of the Grand Junction Canal, in which the Lord Chancellor, Lord Cottenham, had affirmed decrees made to the proprietors. However, it was discovered by Dimes that Lord Cottenham in fact owned several pounds worth of shares in the Grand Junction Canal. This eventually led to the judge being disqualified from deciding the case.

Biased can also be imputed when the decision-maker's interest in the decision is not pecuniary but personal. This was established in the case of *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (no.2)* [1999] UKHL 1, [2000] 1 A.C., H.L. (UK). Bias is also present where a judge or other decision-maker is not a party to a matter and does not have an interest in its outcome, but through his or her conduct or behaviour gives rise to a suspicion that he or she is not impartial.

[33] Justice Willliam O'Douglas. 1978. Due Process of Law: 1.
[4] Justice Willliam O'Douglas. 1978. Due Process of Law: 1.

[5] Justice Willliam O'Douglas. 1978. Due Process of Law: 1.

[6] Justice Willliam O'Douglas. 1978. Due Process of Law: 1.

AUDI ALTEREM PARTEM (RIGHT TO A FAIR HEARING)

A right to a fair hearing has been used by courts as a base on which to build up fair administrative procedures. Lord Atkin observed in *R v Electricity Commissioners, ex parte London Electricity Joint Committee Co* Ltd [1924] 1 K.B. 171, H.C. (K.B.) (England and Wales) that this right applied where decision-makers had "the duty to act judicially.
The right to a fair hearing entails that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

DISCUSSION

An analysis of case law regarding the principles of natural justice through the prism of botswana judicature

In Kwelagobe and Another v Kgabo and Another[7] it has been established that a Commission of inquiry had sat and heard evidence in camera (contrary to the provisions of s. 4 of the Commissions of Inquiry Act (Cap. 05:02), regarding the two applicant's involvement into various land problems. The Commission of inquiry's proceedings were not sanctioned by the President and the commission is a creature of statute and has no independent existence or power of authority to act outside the terms of the enabling statute.[8] In spite of this lack of legal capacity, the commission nevertheless, unilaterally decided to engage in secret proceedings. In order to counter this rather ill and unlawful conduct of the commission, council for the applicants was triggered or spurred to maintain that legislation requires the objective existence of public hearing as a prerequisite for a valid inquiry. In protection of his clients, the two applicants referred under this case, council averred that a commission, siting in private without the legal justification was "*ab initio* null and void and its report was in the same way without validity." The result is that the commissions finding's might very well be tantamount to gossip, hearsay and some unfounded allegations. Where proper procedure was not followed, as was in this case, the recommendations of the commission come down to (a) nullity.[9]

The proper procedure to be followed, would be for the commission to conduct its proceedings in public for stakeholders like the press and other media to be able or in a position to report on the proceedings of the commission. The press would have been at the same time in a position to disseminate information to the public, who would evoked maximum input from members of the public.

But in this case, the commission, drive by malevolent intentions against the applicants, turned out to investigate the latter without advising them that they were in any way in jeopardy. The commission also failed to inform them about the nature of the allegations made against them. Not only were the applicants placed at a disadvantageous position in being unable to deal properly with such allegations, but they were also never informed of the nature of, and were not given access to other evidence given by witnesses in secret, and in their absence.[10] By the irregular conduct of the commission of holding meetings in secret, it infringed the fundamental principles of natural justice. By failing to observe the rules of natural justice, the proceedings of the commission were declared null and void by the High Court in Lobatse.

[7] [1994] BLR 26 (No. 2).
[8] Kwelagobe v Kgabo, 353B-C.
[9] Kwelagobe v Kgabo, 353E-F.
[10] Kwelagobe v Kgabo, 354E.

Bojang v The State[11] is a review application for conviction of the appellant by a magistrate. The application was founded on the magistrate's failure to inform the accused of her fundamental constitutional right to legal representation. The right to legal representation did not automatically form part of the law of Botswana. For an attainment of a fair trial of an unrepresented accused, it is purported that on first appearance, before the accused's plea is taken, the presiding officer should initially advise the accused of the right to engage at his own expense. In the present case the police also unduly influenced the accused and cajoled her to plead guilty.

Agnes Bojang was arraigned before the Village Magistrate's Court, Gaborone on a charge of theft in contravention of section 271 as read with section 276 of the Penal Code (Cap 08:01). She pleaded guilty on arraignment and was consequently sentenced to nine months' imprisonment of which tree months were conditionally suspended. The applicant's (Agnes) founding affidavit revealed that she wanted to be legally represented, but the desire could not be fulfilled due to the magistrate's failure to ask her whether or not she wished to be represented by a lawyer. The magistrate committed an irregularity by failing to advise the applicant of her right to obtain legal representation, and that this omission resulted in a failure of justice.[12] The applicant was also told by the police not to bother about legal representation.[13]

The applicant's second complaint, raised and argued on her behalf was that she had never previously been to court and had been completely ignorant of court procedure and was therefore easily enticed and deceived into pleading guilty by the police and the prosecutor. [14] The police told her that if she pleaded as advised by the prosecutor in particular, that under this offence she was unlikely to be given an effective custodial sentence as the owner had not lost any of the property and that the property was for a small amount.[15]

In our accusatorial system of criminal justice, it is of fundamental importance that persons who are called upon to answer a charge should be given adequate opportunity to prepare themselves to meet the charge. It is for the achievement of this purpose that section 10 of the Constitution of Botswana is enacted to secure the protection of the law. Section 10(2) entails that every person who is charged with a criminal offence: (a) shall be presumed to be innocent until he is proved or has pleaded guilty; (b) shall be informed as soon as reasonably practicable, in a language that he/she understands and in detail, of the nature of the offence charged; (c) shall be given adequate time and facilities for the preparation of his defence; (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice.

The appeal judge averred that there is a serious misdirection here. The proceedings of the court a quo are hereby declared a nullity. The conviction against Agnes is quashed and sentence imposed has been set aside.

In Arbi v Commissioner of Prisons and Another,[16] the appellant was convicted in the Gaborone Magistrate's Court on 13 May 1986 for robbery. A Presidential Order by the President of Botswana on 30 September 1986, granted remission in part, of prison sentences imposed on

[11] [1994] BLR 146.
[12] Bojang v The State, 106G-H.
[13] Bojang v The State, 161D.
[14] Bojanf v The State, 161C.
[15] Bojang v The State, 150-51H, A.
[16] [1992] BLR 246.

certain categories of convicted persons throughout the country. To give effect to the proclamation, the Minister of Labour and Home Affairs, whose portfolio includes the Prison Service, sent a circular to all the prison authorities in Botswana with the request that they submitted the names of prisoners adjudged to qualify for partial remission of their sentences. The appellant was adjudged not to be of good conduct by the superintendent of the prison. Pursuant to this refusal to grant the appellant partial remission of his sentence, the appellant brought an application to the High Court, wherein he sought a revision of the superintendent not to recommend him and secondly, the appellant asked for a declaratory order substituting the decision of the High Court with that of the Court a quo.[17]

The remission was conditional in that it was intended to those prisoners who were adjudged to be of good conduct. The superintendent alleged that the appellant did not fit that criterium in that he was guilty of bad behaviour. Such evaluation of the appellant stemmed from that rendition of the superintendent that the former refused to work; that he used to smuggle letters and incite other prisoners to revolt against good order; he was also accused that he illegally commemorated "June 16th." These factors were the reasons why the prison authorities did not recommended the appellant for partial remission of his sentence. The reasons for not recommending the appellant for remission of his sentence were never communicated to him. The appellant was never given an opportunity to address the prison authority or to state his side of the case.

The principle of audi alterem partem is part of the bedrock of any civilised legal system. The maxim expresses the principle of natural justice which holds that when a statute or any other form of legislation empowers public officials to give a decision prejudicially affecting an individual in his liberty, property or existing rights, such an individual has a right to be heard before a decision is taken.[18] An obvious concomitant of the right to be heard is that any party against whom action is to be taken which may prejudicially affect his rights, should be given adequate notice of such action.[19] The person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations. It is also stated obiter dictum in the present case of Arbi that the doctrine of "legitimate expectation" also been taken into consideration. The presiding judge, bearing on Council of Civil Service Unions and Others v Minister for the Civil Service, said the following: But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue." An aggrieved party can therefore evoke judicial review if he can show that he had "a reasonable expectation" preceding the decision complained of that such expectation was not fulfilled.[20] Legitimate expectation entitled an applicant to the protection of the principles of natural justice. With the publication of the Presidential Order, the applicant had a legitimate expectation to benefit thereunder. By the refusal to consider the applicant as a suitable person for partial remission of his sentence, he was deprived of the right of such remission and thus gave rise to a forfeiture of his liberty. It is clear that the officials of the respondents did not apply the principles of natural justice in that they did not give the applicant the right to be heard before

[17] Arbi v Commissioner of Prisons and Another, 248B-H.
[18] Arbi v Commissioner of Prisons and Another, 251C.
[19] Arbi v Commissioner of Prisons and Another, 252C.
See also: Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture 1980 (3) SA 476 (T) at p. 486D-G.
[20] Arbi v Commissioner of Prisons and Another, 254F.

adjudging him not to be of good conduct and thus deprived him of the benefit of a partial remission of his sentence.[21]

The Court has review the applicants claim and subsequently set aside the decision of the responsible officials. This Court held that the applicant was entitled to have been adjudged to have been of good conduct and therefore qualified as a candidate for partial remission of his sentence in terms of the Presidential Order.

In case law, Thipe v Mogwe and Others,[22] the applicant was the father of a scholar, one Kevin, who had been expelled from a private school because he had allegedly stolen money from a fellow scholar. It appeared that Kevin had been found in possession of the money and had given contradictory and unsatisfactory verbal and written explanations therefore to the school principal. The principal discussed the matter with the chairman of the school council and the decision was taken to expel Kevin. The case brought by the applicant was based on the sole point that Kevin's expulsion had been illegal because he had not been given a proper, formal hearing.

The facts of the case is as follows: Kevin Thipe, a 14-year-old boy admitted at Maruapula was told by the principal of the school that he will not be enrolled for the 1995 academic year. This was confirmed by a letter written by the principal to his parents on 8 December 1994. From both this letter and the answering affidavit of Mr Mackenzie, the principal of Maruapula, it is clear that a student boarder's trunk was broken open and some money and music cassettes were stolen. This happened whilst most of the students went for breakfast. When a report was made to the housemaster students on hand were immediately searched but nothing was found.[23]

On 24 November Kevin handed to his form representative a torn P5 for the purposes of paying a P2 contribution to the class party. A discussion ensued about whether this note was a legal tender or not. Kevin is said to have argued that it was a legal tender and that he had obtained it from the school tuck shop. On 1 December the form representative handed the collected money to the overall coordinator of the class party who happened to be the student whose trunk was opened. This boy is called Joshua. When Joshua saw the torn note he matched it with the torn piece of his P5 note that had been left in his trunk during the theft. The two matched perfectly and it is common cause that these two pieces make the same one P5 note. They were produced in court and counsel from both sides agreed that they must be regarded as one note.[24] The principal then decided not to enrol Kevin for the 1995 academic year resulting in effect in the expulsion of the student. Kevin parents could not convinced the principal to revoke his decision.

Kevin in his replying affidavit says that when he was talking to Mr Mackenzie, he was being required to confess rather than being given an opportunity to explain his version of the facts. The matter brought by the applicant should be properly understood. Kevin Thipe, who is a 14-year-old boy admitted at Maruapula, was told by the principal of the school that he will not be enrolled for the 1995 academic year. This was confirmed by a letter written by the principal to his parents on 8 December 1994. On 19 November a student boarder's trunk was broken open and some money and music cassettes were stolen. This happened whilst most of the students went for breakfast. When a report was made to the House Master students on hand

[21] Arbi v Commissioner of Prisons and Another, 255C.
[22] [1995] BLR 242.
[23] Thipe v Mogwe, 246A-C.
[24] Thipe v Mogwe, 246E-F.

were immediately searched but nothing was found. On 24 November, Kevin handed to his form representative a torn P5 for the purposes of paying a P2 contribution to the class party. The form representative noticed that the note was torn and it is said that a discussion ensued in the presence of two other male students about whether this note torn as it was, could be a legal tender or not. Kevin is said to have argued that it was a legal tender and that he had obtained it from the school tuck shop. On 1 December the form representative handed the collected money to the overall coordinator of the class party who happened to be the student whose trunk was opened. This boy is called Joshua. When Joshua saw the torn note he matched it with the torn piece of his P5 note that had been left in his trunk during the theft. The two matched perfectly and it is common cause that these two pieces make the same one P5 note. They were produced in court and counsel from both sides agreed that they must be regarded as one note. Joshua therefore reported the matter to Mr Vernall the house master who then brought the matter to the principal's attention. The principal instructed Mr Vernall together with the deputy principal Mr Alan Wilson to interview Kevin. Kevin claimed that he had obtained the note form the tuck shop – a claim that was no different from what he told the other boys.[25]

The next day, on 2 December, the principal interviewed Kevin. Kevin is adamant that he received the torn note from the tuck shop. The principal, feeling that their discussion got nowhere, asked Kevin to make a written statement. Kevin did so, but as the statement was unsatisfactory to the principal he crumbled it and asked Kevin to write him another one. Kevin wrote more or less what he had said in the first note.[26] The principal then decided not to enrol Kevin for the 1995 academic year resulting in effect in the expulsion of the student.[27]

In Kevin's replying affidavit, he averred that the school principal, Mr Mackenzie, required of him to confess rather than being given an opportunity to explain his version of the facts. The presiding judge concede, however, that Kevin gave the torn P5 to his form representative for the party; that the torn portion of the note that Kevin gave for the party forms the bigger portion of the P5 note stolen from Joshua's trunk. The judge said: "Having seen the two portions of the note and compared them myself there can be no doubt that they form one P5 note."[28]

But, the judge conceded by maintaining that Kevin was not given a fair opportunity to answer the charges levelled against him. According to the judge, it is not a question of whether the school authorities allowed him an opportunity to answer the allegation of theft. If this was not done then the dismissal was illegal for failing to give Kevin a proper hearing. It seems that the audi alterem partem rule which is a very important aspect of natural justice was breached. Unless some formal hearing was held then this court must take the view that Kevin was not given an opportunity to answer the allegations against him. It was grossly unfair to conclude that Kevin was a thief or involved in the theft without holding some formal inquiry, to more or less take evidence from the parties concerned and for Kevin to ask questions of those who accuse him.[29]

[25] Thipe v Mogwe, 246B-G.

[26] Thipe v Mogwe, 247E.

[27] Thipe v Mogwe, 247G.

[28] Thipe v Mogwe, 248C.

[29] Thipe v Mogwe, 248D-G.

The rules of natural justice require that before any person can act on information and make a decision averse to another person's right or interest he should give that person an opportunity to explain or counter that information. This has been mentioned in a large number of cases, including those where a judicial, or quasi judicial, administrative or other authority is having to make a decision adverse to the interests of another person.[30] Kevin was enrolled to finish his school at Maruapula unless he withdrew or was properly expelled. It is clear that Kevin could legitimately expect to have continued to the next form in the academic year 1995. In Schmidt and Another v Secretary of State for Home Affairs [1969] 1 All E.R. 904, C.A. at 909C Lord Denning said that the speeches of their Lordships in Ridge v Baldwin [1963] 2 All E.R. 66, H.L. showed: "[That] an administrative body my, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

In the present case, what is important is that the person to be affected must be given an opportunity to give an explanation on the situation that has arisen, and if possible to controvert any allegation. It is said that on 1 December the principal asked the house master and the deputy headmaster to interview Kevin. Kevin was given an opportunity at that stage to explain to the authorities how he came by the P5 note. The situation not having been resolved the headmaster saw Kevin the next day. It does seem that Kevin was at least given an opportunity to tell the principal his side of the story, to explain how he would have come by the bigger portion of the note which was stolen. The accusation was fairly put to Kevin so that he had no illusions as to the seriousness of the matter.

In conclusion, Kevin was being given an opportunity and he was being dealth with fairly in the process. The application for setting aside the decision of the respondent-principal to expel the applicant's son, Kevin, from school was dismissed. Kevin's expulsion is therefore legitimate. In Leow v The State[31], the appellant was tried by the magistrate's court at Jwaneng for the offence of rape, contrary to section 141 as read with section 142 of the Penal Code. He was convicted of the said offence and sentenced to 7 years' imprisonment and six strokes of the cane. During the trial he was not legally represented.

On appeal, the appellant averred that the trial court failed to inform him of his right to engage a lawyer of his choice in his defence at the commencement of the trial – and such failure was a gross irregularity which had led to a miscarriage of justice.

The courts have over time evolved a salutary rule of practice. The rule requires that in order to ensure a fair and just trial, the magistrate should, on the accused's first appearance and before a plea is taken, inform the accused of his right to defend himself in person or at his own expense to engage the services of a legal representative of his choice to defend him.[32] The right to legal representation is a fundamental right in the court process that it should be explained to every accused person, whether illiterate or literate. It matters not whether the accused is unsophisticated or intelligent or educated, the accused must be informed of that right. This perception was stated in S v Radebe; Sv Mbonani 1988 (1) SA 191 (T) at 195 quoting from a speech by Sutherland J in Powell v Alabama 287 U.S. 45 (1932): "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a

[30] See. Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) and Others [1971] 1 All E.R. 1148, C.A.
[31] [1995] BLR 565.
[32] Leow v The State, 566A-B.

crime, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue, or other inadmissible [evidence]. He lacks both the skill and knowledge adequately to prepare his defence, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

But, a failure to inform an accused person of his right to legal representation does not amount per se to an irregularity or failure or failure of justice such as to vitiate the proceedings. Whether or not there is an irregularity or not depends on each particular case, having regard to the facts, legal rules and peculiar circumstances surrounding it.[33]

In his submission, counsel for the appellant argued that although the appellant's defence was one of mistaken identity, his cross-examination of the prosecution witnesses did not address that defence. Indeed that is so. The complainant gave a long statement in court but appellant's cross-examination was very brief, amounting to only four questions. When later in the proceedings the complainant was recalled, he only managed to ask one question. The second prosecution witness, who was also a material witness regarding identification, was only asked one question and this question had no relevance to the issue of identification. The other argument advanced was that the complainant gave evidence in a language which the appellant did not understand. It is further argued that this also hampered the appellant in cross-examining her and other witnesses. In order to shed more light on this argument, reference is made to the following interchange, which took place during the course of the prosecution case:

"Accused: Last time I did not understand prosecution witness 1 as she would from time to time speak in her mother's tongue, Sekgalagadi.
Court: Why did you not indicate that when she was giving evidence?
Accused: I did so but then after having been warned to speak Setswana she would very quickly venture into Sekgalagadi again with the result that I did not understand her. I was therefore unable to examine her as much as I wanted on account of my inability to comprehend her dialect."[34]

The above interchange says it all. By this stage only one state witness remained. After this interchange, the witness (first prosecutin witness) was recalled. When appellant could not ask her any more questions other than the colour of the shirt worn by the alleged assailant on the day of the incident and as to who pulled the witness, the following exchange took place:

"Court: Do you have any further questions?
Accused: Yes but she is not telling the truth.
Court: Well, you can show that by asking her questions to dig the truth. (Accused first keeps quiet). If you do not have any questions I am afraid I will have to discharge her.
Accused: (Quiet).
Court: The witness is discharged."[35]

[33] Leow v The State, 567A.

[34] Leow v The State, 567D-E.

[35] Leow v The State, 567G-H.

It is quite clear from the above that this was an accused person who, although he believed a witness was lying, he could not put to her the kind of questions that in law would be necessary to put his side of the story to the witness or to challenge the witness's credibility. The magistrate also does not help the accused much as to the nature of questions to be asked.

What took place after the witness was discharged casts more doubt in my mind as to whether justice can be said to have been done in this case:

"Public prosecutor: There is another witness who understands the dialect better. I have asked him to assist us.

Court: The interpretation oath shall be administered to him."[36]

It is clear that the interpretation had all along been unsatisfactory. It is not clear as to what statements were made in Sekgalagadi. Neither can one say as to how crucial to the case those statements were.

The appellant in this case was at the time of the trial a 20-year old Tirelo Sechaba participant. The magistrate did not at any stage inform him of his right to legal representation. From what transpired during the trial, it is doubtful whether justice was done in this case.

This Court therefore set aside the whole proceedings and referred this matter back for trial before a different magistrate.

In Moletsane v The State,[37] the appellant had been convicted in a magistrate's court of robbery contrary to section 291 as read with section 292 of the Penal Code; unlawful possession of arms, contrary to section 9(1) read with section 9(4) of the Arms and Ammunition Act; and unlawful possession of ammunition in contravention of section 9(4) of the same Act.[38] The appellant lodged an appeal against his conviction alleging a number of grounds of irregularity committed by the court.

Appellant was sentenced to 10 years' imprisonment plus four strokes of the cane on the robbery count; and, in respect of counts two and three charging him respectively with unlawful possession of arms and ammunition, he was on each count sentenced to a fine of P250 or to four months' imprisonment in default of payment.[39] His present appeal is against conviction and sentence.

The evidence shows that just as a vehicle was about to pull up at the entrance of a bank, a man, who subsequently turned out to be the appellant, approached the vehicle at the front. He suddenly pulled out a pistol. He thereafter opened the passenger door of the vehicle and threateningly placed the muzzle of the pistol behind the passenger's ear and successfully made away with a sack of money. The driver of the vehicle and his passenger (co-worker) raised an alarm as they chased after the robber. Their shouts for help for the apprehension of the robber yielded fruits. The

[36] Leow v The State, 568B.

[37] [1995] BLR 83.
[38] Moletsane v The State, 83F.
[39] Moletsane v The State, 86A-B.

appellant was arrested and the money and a loaded 9 mm pistol were taken away from him and handed over to the police.[40]

The grounds of appeal filed by the appellant are as follows:

(1) The magistrate who presided over my case used foul language.
(2) He declined to recuse himself from presiding over the case upon my request to do so.
(3) I suffered judicial suppression in a sense that I was never granted permission to present my submissions.[41]

For a better appreciation of the appellant's submissions on these grounds, the proceedings will be reproduced:

"Prosecutor: The trial continues today. I am ready to proceed.
Accused: I am also ready but I have something else to say. Yesterday, I made objections which the court overruled without giving me sufficient reasons…
Court: …If the accused is not satisfied he has the right to appeal…
Accused: How can the trial proceed without the exhibit. I am not going to sit here and listen to the court when it does not do anything to hear my objections.
Court: … I will then warn the accused to desist from passing remarks, mumbling and refusing to sit down for the evidence to be taken down and talking all sorts of rubbish, otherwise the trial will proceed in his absence in terms of section 178(1) of the Criminal Procedure and Evidence Act (Cap. 08:02).
Accused: As I said I do not want to proceed with the trial because I foresee that none of my objections will be acceded to.
Court: The accused seems to think that whatever objections he makes notwithstanding that they are without substance they should be acceded to. We cannot bend backwards all the time to accommodate the accused when he comes up with objections without merit which have in any case been overruled.
Accused: … I will request the magistrate to recuse himself from this case. I may not have a fair trial.[42]

It is clear from the proceedings that the presiding magistrate at some point of the proceedings appeared to be choked with anger at the appellant's unbecoming demeanour in court. There is a duty on trial court to express its views on the unbecoming behaviour of parties, yet the language of the court should at all times be measured, and in keeping with its dignity, it ought not to be so unrestrained and unbridled as to give the impression that moral indignation had clouded the judge's or magistrate's mind so that he could not examine the issues with as much care and clarity of thought as he should. As stated in a case law of Nigeria, Allie Lahan v Asifatu Aremi S.C. no. 570/64, a judge should avoid saying more than is necessary by way of criticism of persons who are not in a position to answer him back and should be careful not to led a judicial decision assume what might be regarded as a tone of partisan argument. It might

[40] Moletsane v The State, 86E-H.

[41] Moletsane v The State, 87B.

[42] Moletsane v The State, 87-88D-H.

> be improper and perhaps not in keeping with decorum to employ the word "rubbish" as a judicial language. But the court notice also that there is nothing in the magistrate's ruling to support the view that his moral indignation in any way beclouded his mind so as to disable him from examining the issues before him with such care and clarity of thought as he should. On the other hand, the court asserts that the conduct of the appellant at the court a quo was clearly discourteous but, did not amount to contempt.[43]

The kernel of the appellant's request for recusal was that since the magistrate had overruled every objection raised by him at that stage of the trial, he could be said to have prejudiced the case against the appellant. But this does not necessarily means that the magistrate was biased. This court opined that there must be reasonable evidence from which real likelihood of bias could be inferred. It would be unfortunate if the mere vague suspicions of whimsical, capricious and unreasonable people should be made a standard to regulate the determination of recusal in a case. The suspicion must rest on reasonable grounds and reasonably generated. Mere flimsy, elusive, morbid suspicions should not be permitted to form a ground for recusal. Any application for recusation which has the tendency to abuse the due process of the court must be stoutly resisted. The mere fact that the appellant's objections are overruled is not a valid ground for recusal.[44]

There was nothing in the conduct of the magistrate a quo which could create in the mind of a reasonable person, the impression that there was a real likelihood of bias, maybe even unconscious bias, if he proceeds, as he did, to try the appellant. The appellant's arguments on recusal is not only flimsy and whimsical, but also grossly unsatisfactory and abysmally unpersuasive. It is clear from the proceedings that the appellant set out to choose his own judge and was completely averse to being tried by a magistrate other than one of his own choice.

The judge in this case have considered the sentences imposed by the magistrate on the appellant and find nothing to justify any interference with them. The appeal against both conviction and sentence be dismissed.

Customary Courts/Law

In Tirelo v The Attorney-General and Another,[45] the applicant made application in the High Court for the review and setting aside of the decision of the Customary Court of Appeal made in terms of s 37(3)(b) of the Customary Courts Act (Cap 04:05). One aspect of the application entailed the transferal of certain civil proceedings in the Customary Court to the Magistrate's Court. The sole ground upon which she had sought a transfer of the proceedings to the magistrate's court was that she wished to avail herself of her alleged right to be legally represented. She brought her review application, first, on constitutional grounds - alleging that her right to a fair hearing and legal representation had been infringed - and, second, on the

[43] Moletsane v The State, 90G.

[44] Moletsane v The State, 92H-93A.

[45] 2008 (2) BLR 38 (HC).

ground of the failure to adhere to the principles of natural justice - alleging that her right to be heard had been infringed.

On 6 June 2006 the second respondent caused a summons to be issued out of the Tlokweng Customary Court calling on the applicant, who is a lecturer at the Tlokweng College of Education, to appear before that court on 16 June to answer a claim that 'o mothubelalelwapa' (that she was destroying the second respondent's marriage).

The applicant immediately took legal advice, and on 9 June 2006 her attorneys addressed a letter to the clerk of that court which reads as follows:
"Our client has been summoned to appear before the above mentioned Court on 16th June 2006 on a civil claim. Our client is desirous of exercising her right to legal representation in her defence to such claim.
May you kindly therefore refer this matter to a Court of competent jurisdiction before which our client may be legally represented. To this end, we confirm that our client shall not appear on the trial date set out above."

On 16 June both parties did in fact attend at Tlokweng and, as required by the Act, the customary court suspended proceedings and reported in terms of s 31(7), by submitting the court file to the Customary Court of Appeal, including the letter from the applicant's attorneys. The file was returned to the customary court with an endorsement on the cover from the Customary Court of Appeal stating that it declined to order the transfer of the case, which should proceed before the Tlokweng Customary Court.

On 7 July the applicant was called by the customary court and advised that the trial date had been set for 24 July, whereupon she gave instructions for her urgent application to be launched. As is made clear in her founding affidavit, the sole ground advanced by the applicant for her request that the case be transferred was that she wished to exercise her right, as she put it, to be legally represented, and it is upon this ground that the Customary Court of Appeal made its determination. Her reason for this is that she feels uncomfortable and incompetent to present her own defence.

It is the case of the applicant that the decision of the Customary Court of Appeal directing that the case should proceed in the Tlokweng Customary Court falls to be reviewed and set aside on a number of grounds – whereby two grounds are applicable in this study. These grounds are:

(1) The decision of the Customary Court of Appeal is unreasonable and unlawful in that it infringes the applicant's constitutional right to a fair hearing and legal representation.
(2) The decision is irrational and bad in law in that the audi alteram partem rules was not observed and the applicant had a legitimate expectation to be heard before a decision adverse to her was made.

The Constitution of Botswana and Customary Court practice vis-à-vis legal representation

The Constitution of Botswana entitled every person under section 10 who is charged with a criminal offence to defend him/herself in person or, at his own expense, by a legal representative of his/her own choice. This right has been analysed in a number of cases explicated earlier in this study. These cases held that the right to legal representation must normally be claimed by the accused, and that when he so claimed a reasonable opportunity

must be given to the accused to assert it by hiring a lawyer to represent him. Lord Denning delivered in England his views in Pett v Greyhound Racing Association Ltd [46] (which is more or less similar to what is expounded in earlier case laws). He asserts that it is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses on the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. If justice is to be done he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.

But, it is contended under the same section of the Constitution that the right to legal representation is not absolute. The reason might be that the Botswana Constitution wants to cater or to accommodate the operation of customary law under its judicature. It is why the legislature bring into the ambit of the Constitution the provision of Section 10(2)(d) which prohibits legal representation before a subordinate court in proceedings for an offence under customary law. It seems that the Customary Court and even the Constitution of Botswana take on a patriarchal tone against the applicant by exerting that the applicants request for a transfer solely for the reason that she wishes to be represented by a lawyer, would not be a proper exercise of discretion. A transferal of a case from a customary court to a magistrate court would place the applicant at an immediate financial and tactical disadvantage. It is a well-known fact that magistrate's courts are overloaded and seldom hear a civil case expeditiously, and to hire a lawyer to counter that would probably be unaffordable.
The forum of choice rule by the second defendant against the applicant is that in the present case the claim is between two tribes people for what is undoubtedly a customary offence, namely "go thubalelwapa" and it falls squarely within s 10(12)(b) of the Constitution.

In conclusion. With regard to the present case, when the application for transfer is for purposes of legal representation and for offences likely to earn imprisonment, the Customary Court of Appeal should have grant the application so as to allow the trial to proceed before a legally qualified judicial officer. Where a party has at some expense and in the exercise of his undoubted rights secured the services of an attorney or advocate to advise and represent him in the prosecution of his claims, it would be a direct, not merely an indirect denial of the lawyer's right of audience, to decline to exercise the undoubted jurisdiction vested in the High Court, and refer the parties to a customary court, where the lawyer cannot appear. In respect of the applicant in the present case, it would be a serious inroad on his right to the protection of the law. The right to legal representation is a sine qua non for any fair hearing – to which the applicant in this case also has a constitutional right.

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