IN THE COURT OF APPEAL OF BOTSWANA HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO: CACGB-201-16
HIGH COURT CASE NO: UAGB-000153-14

In the matter between:

OUTSA MOKONE **Appellant**

and

THE ATTORNEY GENERAL **1st Respondent**
THE CHIEF MAGISTRATE FOR THE GABORONE ADMINISTRATIVE DISTRICT **2nd Respondent**
THE COMMISSSIONER OF POLICE **3rd Respondent**

Mr. Attorney D. Bayford for the Appellant
Mr. Attorney O. O. Aganga (with him Ms. Attorney F. Mosothwane) for the Respondents

JUDGMENT

CORAM: **KIRBY J.P**
LORD ABERNETHY J.A.
LESETEDI J.A.
GAONGALELWE J.A.
BRAND J.A.

BRAND J.A.:

1. The appellant in this matter, Outsa Mokone, is the Editor of a newspaper published as The Sunday Standard. First respondent is the Attorney General. Second respondent is the Chief Magistrate

of Gaborone while third respondent is the Commissioner of Police. On 8 October 2014, the appellant was detained at the Broadhurst Police Station pursuant to a Warrant of Arrest issued by the second respondent, on an application by the Assistant Commissioner of Police, Mr. Marage on 2 September 2014. According to the warrant it was issued on the basis that there were reasonable grounds of suspicion against the appellant that he committed -

> "the crime of seditious intent in terms of Section 50(1)(a) as read with Section 51(1)(c) of the Penal Code."

2. On the morning of the 9 September 2014 appellant brought an application in the High Court sitting in Lobatse for an order, broadly stated: (a) That he be released from police custody with immediate effect; (b) Declaring the warrant by the second respondent, that gave rise to appellant's detention, unlawful; (c) Declaring that the provisions of Sections 50 and 51 of the Penal Code are contrary to Section 12 of the Constitution of Botswana in that they constitute an infringement to the Right to Freedom of Expression; (d) Declaring that the refusal by the Station Commander of the Broadhurst Police Station to allow appellant's legal representatives access to him whilst he was in police custody during the night of 8 September 2014, constituted an infringement of his right to legal representation under Section 10 of the Constitution of Botswana.

3. As it happened, the appellant was released from custody on the morning of 9 September 2014 without the matter being brought to court. Thereafter an answering affidavit was filed by the third respondent, i.e. the Commissioner of Police only and not on behalf of any other respondent. Thereupon appellant filed his affidavit in reply. Eventually the matter came before Dube Ag. J, who granted the following Order:-

> "(a) The warrant of arrest issued against the applicant by the second respondent is valid and lawful;
>
> (b) The applicant was denied his right to legal representation by the third respondent during his detention between 8-9 September 2014;
>
> (c) Sections 50 and 51 of the Penal Code are not inconsistent with the Constitution of Botswana."

4. The appellant thereupon filed an appeal in which he challenged the correctness of the orders in (a) and (c) while the respondents cross-appealed against the order in (b). The issues that arose for determination will be better understood in the light of the background that follows.

BACKGROUND

5. It all started with the publication of a story in the Sunday Standard newspaper of which the appellant is the Editor, on 31 August 2014. Although the appellant was not the author of the

story, it was published with his knowledge and consent. It reads in relevant part:

> **"President hit in car accident while driving alone at night**
>
> President Lt Gen Ian Khama escaped unhurt when a car crashed into a Black Range Rover SUV he was driving while on a private escapade on the night of Saturday 23rd. The Motorist believed to have tailgated Khama crashed his Jeep on the President's Range Rover shortly after 10pm in Gaborone and suffered minor neck and head injuries. In an apparent bid to conceal the accident, the President violated the country's road traffic laws and failed to report the accident within the prescribed 48 hours. The Sunday Standard can reveal that the man involved in the accident with President Khama, one Mabita Kaunda was not taken to hospital.
>
> Instead he was bought Grand Pa painkillers at a nearby tuckshop and booked for two nights at Montana Lodge room number 3 at the behest of the Presidential Guard. His car was taken away by the Presidential Guard and he was taken to the State House. Around 9 am Sunday morning, the Presidential Guard showed up at the lodge and Kaunda was given a new black Jeep. Sunday Standard has not been able to establish why he was given a new Jeep. He spent Sunday night at the lodge and checked out Monday morning. Sources allege that he then made a trip to the bank in the company of the lodge manager whose name is known to this publication.
>
> The Office of the President has confirmed the accident but denied that the President was driving alone in his official Range Rover. "A presidential vehicle was involved in an accident on Saturday. But the President was not in the vehicle at the time. I am otherwise informed that it was hit from behind by a non-governmental vehicle after it braked. Both vehicles were damaged", said the presidential spokesperson Jeff Ramsay.
>
> The incident has brought into focus how the president's care-free attitude can breach his security

and in the process harm other motorists who would not be able to get redress from the courts since a sitting president is immune from prosecution under Section 41(1) and 2 of the Constitution of Botswana ---
-"

6. On 1 September 2014 the police obtained a sworn statement from the driver of one of the vehicles referred to in the newspaper's story, Mr. Mubita Kaunda which revealed in broad terms that – (a) On Saturday 23rd August 2014 at about 9 am (not during the night or even in the dark) he was driving a white Ford Ranger 4X4 Double Cab (not a black Jeep) when he collided with a silver Toyota Land Cruiser (not a Range Rover), which was a presidential vehicle, while on his way home to Francistown; (b) President Khama was not the driver or even a passenger in the presidential vehicle; (c) The collision occurred near Dibete village and was reported to the police at Dibete who attended the scene of the accident and marked the scene before the vehicles were removed; (d) Neither Mr. Kaunda himself nor any of the four occupants of the Toyota Land Cruiser were injured. Kaunda's Ford Ranger was towed away to the Naledi Police Station; (e) Because of the damage it sustained at the accident, the Ford Ranger could drive no further and Mr. Kaunda therefore spent the night at the Montana Lodge room 3 at his own expense. He was not taken to any location by anybody; (f) He telephoned his brother who brought his other vehicle, a black Jeep Station Wagon from Francistown in which he

then left the Montana Lodge; (g) According to Mr. Kaunda, it is not true that he was given a new Jeep; (h) He read the story in the Sunday Standard, so Mr. Kaunda said, but he denied that any of it came from him. In fact, he said, no member of the newspaper's staff ever communicated with him and no journalist asked him about the accident that he had with a presidential vehicle.

7. Shortly after publication of the story on 31 August 2014, the appellant left for South Africa and only returned on 4 September 2014. In the meantime his deputy editor was summoned to a meeting at the Police Headquarters on 2 September 2014 which was attended, amongst others, by the Commissioner of Police and two attorneys acting for the newspaper.

8. According to the affidavit by the Commissioner of Police, he arranged the meeting because he had established in the interim, that the newspaper story was devoid of truth in every material respect and because his office had since been inundated with calls and enquiries from members of the press and the public regarding the alleged accident. The Commissioner's affidavit then proceeded as follows:-

> "I arranged a meeting at the police headquarters at which I had invited the applicant, however the deputy editor and the applicant's lawyers did attend the meeting, (the) applicant did not attend the meeting.
>
> It became abundantly clear that the applicant, despite the true version being put across was not willing to

withdraw or retract the damning and very inaccurate story involving His Excellency the President.

[Because] the applicant was not willing to cooperate a warrant of arrest was obtained from the Gaborone Magistrate ....."

9. As we now know, the warrant of arrest was issued on the same day, that is 2 September 2014, by the second respondent, who is the Chief Magistrate of Gaborone, at the behest of the Assistant Commissioner of Police, Mr. Marage. From what the Commissioner said in his answering affidavit, I believe it is fair to infer that Mr. Marage acted on the Commissioner's personal instructions when he brought the application for a warrant of arrest. The written application form signed by Mr. Marage is annexed to the warrant. Save for what appears from the content of the warrant and the application form itself, there is no indication on the papers as to how, when and on what basis it was obtained, barring perhaps that it happened on the instructions of the Commissioner himself.

10. I shall return to the contents of the warrant and the accompanying application form when considering the appellant's challenge that the warrant had not been applied for and issued lawfully. What is relevant for these introductory purposes, however, is that it was issued for the arrest of the applicant "on a charge of seditious

intention contrary to Section 50 (1) (a) as read with Section 51(1)(c)." These two sections provide in relevant part:

"50(1) A seditious intention is an intention –

(a) to bring into hatred or contempt or to excite disaffection against the person of the President or the Government of Botswana as established by law;

(b) - (e) ------

but an act, speech or publication is not seditious by reason only that it intends –

(i) to show the President has been misled or mistaken as way in any of his measures;

(ii) -------

(iii) to persuade the inhabitants of Botswana to attempt to procure by lawful means the alteration of any matter in Botswana as established by law; or

(iv) to point out, with a view to their removal, any matters which are producing or having a tendency to produce feelings of ill-will and enmity between different classes of the population of Botswana.

51(1) Any person who –

(a) - (b) -------

(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; -

(d) ------

> is guilty of an offence and is liable to imprisonment for a term not exceeding three years....."

11. According to the appellant he was blissfully unaware that a warrant for his arrest had been issued when he returned from his visit to South Africa on 4 September 2014. He did, however, upon his return, receive a letter from the Attorney General herself, dated 2 September 2014. With reference to the newspaper's story under consideration the letter inter alia said:

> "You are advised that the headline in question is alarming and not in furtherance of the public interest. Further, the supporting article is entirely deliberately misleading and contains statements which are not only malicious and false but also unlawful and in violation of a number of provisions of the law."

12. In the letter the Attorney General then proceeded to point out in great detail in what respects the allegations in the story were patently untrue. In conclusion she said that she required the appellant, amongst other things, "to publish a full retraction of the said article in both the online and next printed issue of the Sunday Standard with the same or better prominence as the offending article."

13. Upon receiving the letter, so appellant said, he interviewed the journalist who wrote the article, Mr. Edgar Tsimane, on the evening of 4 September 2014. According to the appellant, Mr.

Tsimane then told him that he had heard from reliable sources that his life was in imminent danger from Botswana security agents for the reason that he was writing "a series of stories considered offensive to the powers that be" and that he had therefore decided to seek asylum in South Africa.

14. Since that night, so the appellant said, he had never seen or spoken to Mr. Tsimane again. The fair inference, I think, is that the appellant never obtained confirmation of the story from the journalist who authored it or from anyone else. What the appellant did not explain, was why he did not, in the circumstances, find it appropriate to speak to those involved, such as Mr. Kaunda, and/or the police offers to whom he had been referred. Nor does he say why he believed it unnecessary to accede to the Attorney General's pertinent demand for a retraction with reference to a story which he was told to be untrue and which he could not and simply chose not to confirm in any way.

15. On 8 September 2014 at about 4 pm appellant was summoned to the Broadhurst Police Station. He went there accompanied by his attorney where they met the Assistant Police Commissioner Mr. Marage. He was then informed by Mr. Marage that a warrant for his arrest had been obtained. At about 6.30 pm, so the appellant said, it became clear to him that it had been decided to detain him

for the night. His attorney thereupon bought him some food from Nandos Chicken and then left to prepare an application to seek an order for his release.

16. In compliance with their instructions, appellant's attorneys filed a draft application for an order to this effect after which a judge was allocated to hear the matter as one of urgency. Notice of the application was also given to State Counsel Ms. Neo Sharp. At about 8.30 pm the appellant's attorneys returned to the Broadhurst Police Station in order for him to sign a power of attorney and depose to his founding affidavit in support of the urgent application. The Station Commander declined however to allow the attorneys access to the appellant. It appears that the Station Commander was uncertain as to what he should do and that, in consequence, he sought instructions from the Attorney General and his superiors.

17. In the meantime appellant's attorneys invoked the assistance of State Counsel Neo Sharp who in turn called upon Mr. Nchunga, the acting Attorney General, who personally went to the police station to intercede with the police. Eventually appellant's attorneys were granted access to him at about 1.40 am the next morning. By that time, however, the attorney who availed himself to act as Commissioner of Oath had already left. As a result, so

appellant said, he could only sign the power of attorney but not depose to the founding affidavit. But for the unlawful conduct of the station commander in refusing his attorney's access to him, so appellant contended, he would have been able to bring his urgent application during the night of 8 September 2014, but because of that refusal he was only able to do so the next day and in consequence he had to spend a night in police custody.

WAS THE WARRANT OF ARREST APPLIED FOR AND ISSUED LAWFULLY

18. This brings me to the appellant's first challenge, namely, that the warrant of arrest upon which he had been detained, was applied for and issued unlawfully. As I see it, the determination of this issue turns in the first place on the provisions of the empowering statutory enactment, that is section 37(1) of the Criminal Procedure and Evidence Act [CAP 08:02]. The relevant part of this section reads as follows:-

> "(1) Any judicial officer or justice may issue a warrant for the arrest of any person .... on a written application subscribed .... by any commissioned officer of police setting forth the offence alleged to have been committed and that, from information taken upon oath, there are reasonable grounds of suspicion against the person, or upon the information to the like effect of any person made on oath before the judicial officer issuing the warrant."

19. Save for what appears from the contents of the warrant itself and the rather terse application by Mr. Marage annexed thereto, there is no information on record as to how, when and on what grounds the warrant was obtained. The only affidavit filed in answer to the appellant's case, on behalf of all three respondents was the affidavit deposed to by the Commissioner who appears to have no direct knowledge of the warrant, other than that it was probably applied for by Mr. Marage on his instructions.

20. In this light I find it necessary to visit upon the reader a quotation of the wording of the warrant and the application annexed thereto in more detail than I would otherwise have preferred. The application reads as follows:-

> Botswana Police
> South Central Division
> Gaborone
>
> To:
>
> The Magistrate, Gaborone District
> Justice of the Peace, Gaborone District
>
> Application is hereby made for the issue of a warrant for the arrest of Outsa Mokone on a charge of seditious intention contrary to Section 50(1)(a) as read with Section 51(1)(c) of the Penal Code there being from information taken upon oath reasonable grounds of suspicion against him that the alleged offence was committed on or about 31 August 2014 in the Gaborone Administrative District or (sic) the said Outsa Mokone is at present known or suspected to be within the Gaborone District.

21. The warrant itself reads as follows:-

WARRANT OF APPREHENSION OF A PERSON ARRESTED WITHOUT A WARRANT

TO:

WHEREAS from *written application subscribed by KABO MARAGE * or from information taken upon Oath before me,

Delete whichever is inapplicable

there are reasonable grounds of suspicion against OUTSA MOKONE
of SUNDAY STANDARD NEWSPAPER IN GABORONE
that HE did on the 31st day of AUGUST 2014
commit the crime of SEDITIOUS INTENTION C/S 50(1) (a) A.R.W S.51(1)(c) OF THE PENAL CODE.

THESE are therefore, in the name of the State to command you that immediately
upon sight hereof you apprehend or cause to be apprehended the said OUTSA MOKONE and brought before COURT
to be examined and to answer to the said information and to be further dealt with according to law.

Given under my hand at
this day of

Signature of judicial officer or Justice issuing warrant

[signed by the second respondent and date stamped 2014.09.02]

22. Although the pro forma form of the warrant provides for deletion of that which is not applicable, that was for some reason not done. Hence the ambiguity ex facie the warrant itself as to the whether it was obtained solely on the basis of information appearing from the application by Mr. Marage or also on information taken on oath before second respondent. But from the contents of the annexed

application form it is apparent that the former situation pertained. Moreover, although the crime alleged in the warrant is "seditious intention under section 50 (1)(a) of the Penal Code" it presumably intends to refer to the crime of sedition under section 51(1)(c) as read with section 50(1)(a). But be that as it may, for present purposes, that seems to be neither here nor there. In his founding affidavit the applicant challenged the validity of the warrant essentially on the basis that it was not properly applied for by Mr. Marage or issued by second respondent.

23. The court a quo held, however, that the challenge could not be sustained, its reason for this finding appears in the main from the following three dicta in its judgment: - "(a) The applicant in his founding affidavit fails to substantiate his allegations with factual evidence of what transpired before the Magistrate save to make bare allegations as already enunciated in paragraph 15 of this judgment. He who alleges bears the onus of proof. There is no confirmatory affidavit from either ACP Marage on how he made the application, nor is there a confirmatory affidavit from the Magistrate who issued the warrant as to what transpired before him. The applicant in his evidence fails to set out any basis upon which it could be inferred that the Magistrate acted *Mala fides* in issuing the warrant"; (b) "Statute law is clear that no proceedings shall lie in respect of anything done or omitted to be done by a

judicial officer. Section 11 of the Magistrates' Courts Act provides that – 'A magistrate shall not be liable to be sued in any civil court or prosecuted for an offence in respect of any act done or ordered to be done by him in the discharge of his judicial duty .....''; and "(c) The applicant has failed to discharge the onus resting upon him to show that [in] issuing the warrant the Magistrate [exercised his discretion in] a wrongful, unlawful and mala fide [way]".

24. The first question, it seems to me, is whether the court a quo was right in thinking that section 11 of the Magistrates' Court Act renders the issue of a warrant by a Magistrate immune from judicial review. If this is so, it would clearly signal the end of any enquiry into the validity of the warrant. The position would in my view be rather unpalatable. But fortunately, I believe, this is clearly not the position in our law. That much is apparent from the judgment of this court in **ATTORNEY GENERAL v KONYANGO** CACGB-06-2013. The true position in our law is that if the review court finds (a) that the discretion bestowed upon the Magistrate by section 37 was exercised mala fide or in any other improper way or (b) that the Magistrate did not exercise his or discretion at all, the court is bound to set the issue of the warrant aside. Moreover, and even more significantly for present purposes, the review court will set the warrant aside if it finds that the Magistrate's discretion was exercised in the absence of a jurisdictional fact prescribed by section 37. Absent these

jurisdictional facts the enquiry into the exercise of second respondent's discretion undertaken by the court a quo does not even come into play.

25. It has by now become well-established that jurisdictional facts refer broadly to preconditions or conditions precedent that must exist before any discretion can be exercised. (see e.g. **UNION OF REFUGEE WOMEN v DIRECTOR OF PRIVATE SECURITY INDUSTRY REGULATORY AUTHORITY** 2007(4) SA 395(CC) par.78.) They are jurisdictional because the exercise of the administrative jurisdiction depends on their existence or observation as the case may be. Conversely stated, absent their existence or observation, the administrative authority has no discretion and no power to act at all (see e.g. **PAOLA v JEEVA NO**. 2004 (1) SA 396 (SCA).

26. Before we get to the exercise of the Magistrate's discretion when she issued the warrant in casu, the antecedent question is therefore whether the jurisdictional facts contemplated by section 37 had been established. The next question is – what were these jurisdictional facts? As I understand section 37 it contemplates two different situations that may arise in the present context. (a) A commissioned police officer brings a written application for a warrant before the Magistrate on the basis that, from information

available to the officer which was taken upon oath, there are reasonable grounds of suspicion against the person involved of having committed the crime set out in the application. (b) The commissioned police officer applies to the Magistrate in writing for a warrant and then presents information to the Magistrate under oath on the basis of which there are reasonable grounds of suspicion that the offence set out in the warrant had been committed by the person involved.

27. For situation (a) section 37 requires evidence under oath available to the police officer. It does not require an affidavit. The evidence can be obtained by the policeman orally, as long as it is deposed to under oath. The further requirement under (a) is that it must appear from this evidence that there are reasonable grounds to think that the person against whom the warrant is sought had committed the crime. As I see it, this in effect involves a two-fold requirement: first, that a commissioned police officer entertains the suspicion; and secondly, that the officer entertains that suspicion on reasonable grounds. In situation (b) it is the Magistrate who must entertain the suspicion on reasonable grounds, appearing from the information placed under oath before him or her.

28. Ex facie the application by Mr. Marage, which is attached to the warrant, it is apparent that he relies on the situation contemplated

in (a) namely that from information obtained under oath there was reasonable grounds of suspicion against the appellant that he had committed the crime of which he is accused. Once Mr. Marage had said that in his application, I do not think section 37 required the second respondent to establish what evidence Mr. Marage relied upon or whether that evidence would give rise to reasonable suspicion or not. Upon my reading of section 37, the Magistrate is bound to accept the officer's ipse dixit to that effect. But once the issue of the warrant is challenged on review, the position is different. The reviewing court is bound to enquire whether the jurisdictional facts contemplated for purpose of situation (a) were present before the Magistrate's discretion to issue the warrant had been exercised. (see e.g. **MINISTER OF LAW AND ORDER v HURLEY** 1986 (3) SA 568 (A)). The review court is therefore bound to enquire –

(1) Whether there was information under oath;

(2) from which a commissioned police officer formed the suspicion;

(3) on reasonable grounds that;

(4) the offence in question had been committed;

(5) by the person against whom the warrant is sought.

29. As to the requirement in (3) two categories of jurisdictional facts have been identified by the courts, (see e.g. **SOUTH AFRICAN**

DEFENCE AND AID FUND v MINISTER OF JUSTICE 1967 (1) SA 31(C) at 34H – 35D). The first category, objective jurisdictional facts, requires a set of facts to exist objectively before the power can be exercised. In this event the reviewing court is therefore bound to enquire objectively whether those facts actually existed or not. What needs to be established will depend on the wording of the statutory enactment under consideration. If the requirement is, as it is in section 37, that there must be "information under oath", there is no need to establish whether that information is true. Suffice it for purposes of the section that someone had made a statement under oath and that the information giving rise to the suspicion appears from that statement. The second category, subjectively jurisdictional facts, only requires the decision maker to be satisfied, subjectively, that the set of facts specified are in existence. In this case the court is not entitled to enquire into the actual existence of the facts. The only question is whether the decision maker bona fide concluded that they were in existence.

30. The reference to "reasonable grounds" in section 37 – as opposed to merely requiring that the police officer be "satisfied" or "of the opinion" that the suspect committed the crime, - in my view introduces a requirement of objective jurisdictional facts which are justitiable on review. In sum, the court is therefore bound to set the warrant aside on review if it finds: (a) That the commissioned

police officer did not rely on any information on oath but on information otherwise obtained, as happened for instance in **APHIRI v THE ATTORNEY GENERAL** 1997 BLR 192 (CA) at 200 C-D; (b) That the police officer involved did not himself or herself entertain a bona fide suspicion that the person against whom the warrant was issued had committed the alleged crime, but that for instance, he or she acted on the instructions of others; (c) That the suspicion entertained by the police officer was not based on grounds which were objectively reasonable. This means that the grounds that appear from the information under oath which were available to the police officer, must also be made available to the review court. If not, the court will not be able to determine the reasonableness of the suspicion that the officer allegedly formed on those grounds.

31. This leads me to the next question, namely, who is to introduce the facts necessary to decide whether or not the jurisdictional facts required by section 37 existed, in evidence before the review court. The court a quo held that the onus of proving what transpired during the proceedings which culminated in the issue of the warrant, was on the appellant. The appellant's contention is however, that the court had erred in doing so. In my view this contention is supported by good authority, both in South Africa and in our jurisdiction. In South Africa the general position, broadly stated, is that administrative decisions will generally be

regarded as lawful in accordance with the maxim omnia praesumuntur rite esse acta (see e.g. **DE BEER v HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA** 2005 (1) SA 712 (T) para 34).

32. But for more than 50 years now, since **BRAND v MINISTER OF JUSTICE** 1959 (4) SA 712 (A) 714 F-H, it has been held in South Africa, that where the alleged illegality takes the form of an unlawful arrest, the applicant's task is merely to challenge the lawfulness of the respondent's action, in which event the onus is on the respondent to adduce evidence to establish such lawfulness. Or as Rabie CJ said in **MINISTER OF LAW AND ORDER v HURLEY** 1986 (3) SA 568 (A) at 589 F, after confirming the correctness of the decision in **Brand**:

> "I would add that I consider it to be good policy that the law should be as stated. An arrest constitutes an interference with the liberty of the individual concerned and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."

33. My belief that the position is the same in this country is supported, for instance, by the following statement in **APHIRI v ATTORNEY GENERAL** [1997] BLR 192 (HC) at 198:-

> "The arrest and detention of the plaintiff were admitted by defendant. The onus therefore rested on the defendant to justify the arrest and detention.... In

> Thompson and Another v Minister of Police and Another 1971 (1) SA 371 (E) at 374 Eksteen J said inter alia: 'The arrest itself is prima facie such an odious interference with the liberty of the citizen that animus injuriandi is thereby presumed in our law..... In such an action the plaintiff need only prove the arrest itself and the onus will lie on the person responsible to establish that it was legally justified.'"

34. From what I have said thus far it should be apparent that I do not agree with any one of the considerations that lead the court a quo to a dismissal of the appellant's attack on the validity of the warrant issued against him. First I do not believe that section 11 of the Magistrates' Court Act renders the issue of a warrant by a Magistrate immune from review. Secondly, I do not agree that the onus rested on the applicant to establish the invalidity of the warrant. On the contrary, it is clear from well-established authority that the onus to establish the validity of the warrant rested on the respondent. Concomitantly the respondents also bore the onus of introducing the factual basis required by them to discharge this onus. Thirdly, I do not agree with the notion held by the court a quo that the outcome of the enquiry into whether the warrant was unlawful depended solely upon whether or not the second respondent exercised the discretion bestowed upon her by section 37 in a bona fide and a proper way. That notion ignores the jurisdictional facts imposed by section 37 as preconditions to the exercise of that discretion. Absent establishment of those jurisdictional facts, the second respondent simply had no

discretion to exercise. If I may add for the sake of completeness: I tend to agree with the court a quo that on the papers the second respondent probably exercised her discretion in a bona fide and proper way. But first we have to consider whether the respondents had introduced sufficient evidence to establish the jurisdictional facts.

35. Once it is accepted that the onus rested on the respondents to establish the jurisdictional facts contemplated in section 37 as a precondition to the second respondent's decision, it becomes fairly obvious that they had failed to discharge that onus. As I have said by way of introduction, no affidavits by the second respondent or Mr. Marage were filed. The only affidavit filed on behalf of the respondents was deposed to by the Commissioner of Police. It is true that an affidavit by the second respondent would probably not take the matter any further. Since she was not obliged to go behind Mr. Marage's ipse dixit, all she could probably say would be that she was informed by Mr. Marage that he obtained information on oath which gave rise to a suspicion based on reasonable grounds that the appellant was guilty of the crime of sedition. This means that the second respondent would not be able to add much to that which already appears from the application form annexed to the warrant itself.

36. The key element missing was the affidavit by Mr. Marage. He was the one who could tell us –

(a) that he had information on oath, although he would not be obliged to disclose the source of that information;

(b) that he had a suspicion, arising from that information that the appellant was guilty of sedition; and

(c) on what grounds, appearing from that information, his suspicion arose. The reviewing court would then be able to test Mr. Marage's suspicion against the yardstick of objective reasonableness.

37. What I find significant is that even the Commissioner does not say in his affidavit that, when he gave instructions that a warrant for the appellant's arrest should be obtained, he did so because he suspected that the appellant was guilty of sedition. The reason the Commissioner gave for obtaining the warrant was that it became abundantly clear to him that, despite the true versions being put across to him, the appellant was not willing to withdraw a story which the Commissioner regarded as "outrageous, defamatory and demeaning of the President" and at the same time, entirely devoid of any truth. Hence, the Commissioner said,

> "the applicant was not willing to cooperate, [and therefore] a warrant of arrest was obtained from the Gaborone Magistrate .....".

Even if we are therefore allowed to transpose the Commissioner's suspicion on Mr. Marage, which I do not believe we can do, the

suspicion required by section 37 would still not have been established on the respondents' papers.

38. For these reasons I believe that the appellant was entitled to an order declaring that the warrant of arrest issued against him by the second respondent on 2 September 2014, was invalid and unlawful. Accordingly, I hold that the High Court's dismissal of an application for an order to this effect cannot be sustained and that, to this extent the appeal should therefore succeed.

THE CONSTITUTIONALITY OF SECTIONS 50 AND 51 OF THE PENAL CODE

39. This brings me to the next part of the appeal which is directed against the court a quo's finding that Sections 50 and 51 of the Penal Code are not unconstitutional since they constitute a justifiable legal limitation to Section 12 of the Constitution of Botswana. The least the court a quo should have done, so the appellant contended on appeal, was to exercise its powers under Section 18 of the Constitution to make recommendations for amendments and reforms to the challenged sections of the Penal Code.

40. However, as was said by Lesetedi JA in **RAMANTELE v MMUSI AND OTHERS** [2013] 2 BLR 658 (CA) at 670 B:

> "It is a well-recognized general rule of decision-making that where it is possible to decide a case before the court without having to decide a constitutional question, the court must follow that approach."

And Kirby J.P in the same case (at 688 C-F):

> "The first rule, which I adopt as a firm rule of practice (as did Lesetedi J.A.) is that laid down by Kentridge A.J. (a former justice of this court) in S v Mhlungu and Others 1995 (3) SA 867 (CC) at para 59 when he said:
>
> 'I would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed."

41. In this case it is clear that the constitutional challenge was brought as part of the attack on the validity of the warrant. Since I have already declared the warrant invalid, this is an a fortiori case for resisting the temptation to embark upon a constitutional investigation which would make no difference to the eventual determination of the issues raised in any conceivable way.

42. During the course of his argument the attorney for appellant submitted that we should nonetheless consider the constitutional challenge because criminal charges of sedition have in the interim been filed against his client. But I believe there are two answers to this contention. The first is that the State is highly unlikely to proceed with the sedition charge because on the face of it, this charge is time-barred by Section 52(1) of the Penal Code which

provides in no uncertain terms that: "No prosecution for an offence under Section 51 shall begin except within six months after the offence is committed." And, if the State should nonetheless decide to proceed, the appellant could raise section 52 (1) as a defence which, at least on the face of it, would appear to be unanswerable. The second reason is that, in the unlikely event of the criminal charge proceeding, there would be nothing preventing the appellant from raising the constitutional challenge in the trial court. Should that happen, that court would again be bound to determine at the outset whether the matter can be decided on its merits before consideration is given to the constitutional challenge.

43. Unlike the court a quo, I therefore find it inappropriate to consider the constitutionality of the challenged sections of the criminal code in this case. The practical effect on the appellant remains the same in that his constitutional challenge must fail. Hence the appeal against this part of the order of the court a quo must fail.

WHETHER THE APPLICANT'S RIGHTS TO LEGAL REPRESENTATION UNDER SECTION 10 OF THE CONSTITUTION OF BOTSWANA WERE INFRINGED

44. The factual basis advanced by appellant for the contention that his constitutional rights to legal representation were infringed, was

that he had been refused access to his attorneys by the Station Commander of the Broadhurst Police Station where he was detained at the time. The constitutional basis for the complaint rests on section 10(2)(c) of the Constitution which provides that –

> "(2) Every person who is charged with a criminal offence –
>
> (a) – (b) ------
>
> (c) shall be given adequate time and facilities for the preparation of his defence."

45. In the same way as the court a quo, I think the legal basis for the appellant's contention had been firmly established. As I understand the reported decisions by the courts of this country, the appellant was clearly entitled to access to his attorney, albeit that he had not yet been charged in court. I say that, firstly, on the basis of the wide meaning ascribed by the courts to the concept of "facilities" envisaged by section 10(2)(c), so as to include the right to legal representation (see e.g. **ATTORNEY GENERAL v AHMED** [2003] 1 BLR 158 (CA). The second leg of my conclusion derives from the decision in **KANJABANGA AND ANOTHER v THE STATE** [2012] 1 BLR 416 (CA) at 416 G to the effect that "an accused person is charged either when he was brought before court for the first time or prior to that on the date on which he was officially notified that he would be prosecuted or on a date on which the preliminary investigations were opened. It corresponded

with the start of impairment of his liberty and security of his person".

46. Adopting these two principles in tandem, the conclusion that appears from the following dictum by Masuku J in **STATE v FLY** [2008] 3 BLR 258 (HC) at 277 G-H is in my view inevitable:

> "..... where an accused person demands access to a lawyer upon arrest or even thereafter but he is, however, denied such access by the police that refusal constitutes a breach of the provisions of section 10(2)(c) of the Constitution of Botswana. By so refusing the access required, the accused person or suspect, as the case may be, is being denied "facilities" within the meaning of the subsection."

47. In so far as the court a quo held that a refusal by the police to allow the appellant access to his lawyers would, as a matter of legal principle, constitute an infringement of his constitutional right in terms of Section 10 (2)(c), it can therefore not be faulted. In as much as the court a quo thought that the judgment of Kirby J (as he then was) in **STATE v MPALA** [2008] 2 BLR 26 (HC) was in conflict with this approach, I do not agree. **Mpala** dealt with a different section of the constitution, that is section 10(2)(d) and turned on considerations which find no application in the present context.

48. The next question is whether it can be said that, as a matter of fact, the appellant was denied access to his legal representatives,

or strictly speaking, more correctly, that they were denied access to him. The respondents contended that the attorneys were not denied access, but that access was only delayed and that such access was eventually granted. The court a quo's response to this contention by the respondent was that the "issue is not whether the delay in affording access to his lawyers was negligible or reasonable but [whether] the appellant was able to exercise his right to legal representation when he asked for same."

49. I do not agree with the logic that seems to underlie the court a quo's reasoning. I do not think it can be said that access delayed is necessarily the same as access denied. Thus it can never be said in my view that a relatively short delay to grant access will inevitably constitute a denial of that right. Of course an inordinate delay which cannot be explained on any reasonable grounds may give rise to an inference of denial. But where the exercise of the right is eventually allowed and the delay in allowing it cannot be said to be unreasonable, I do not believe that delay equates a denial.

50. The question is therefore whether the delay caused by the Station Commander can in all the circumstances be said to have been unreasonable. I think not. The appellant had access to his legal representatives until late in the afternoon. They then found a

priority in buying chicken rather than getting on with preparing an application or at least to get a power of attorney from him. They could hardly have conveyed any sense of urgency on the part of appellant and his attorneys to the police. When they returned to the police station later in the evening, and after normal visiting hours, the Station Commander was quite entitled to seek instruction from his superiors and the Attorney General as to how he should deal with a man who was held on a warrant obtained at the behest of the Commissioner of Police himself. By the nature of things those from whom he sought instructions would not be readily available at that time of the night. When he eventually obtained the advice of the acting Attorney General, he granted the appellant the access to his lawyers that he sought.

51. The fact that the Commissioner of Oaths arranged by the appellant's attorneys had in the meantime gone to bed, cannot be blamed on the police. Nor can the fact that the appellant and his attorneys decided not to approach an alternative commissioner be held against them. Moreover, I am not persuaded by the appellant's argument that the delay of about five hours inevitably meant that his application could only be brought the next day. Even if the appellant were granted immediate access to his lawyers it would still take some time to approach a judge. That raises the

rhetorical question why it would be possible to approach a judge at say 10pm but not say at 2 am.

52. In all the circumstances I therefore do not agree with the court a quo's finding that the appellant had succeeded in establishing an infringement of his right to access to his attorneys under Section 10(2)(c) of the Constitution. This means that in my view the cross appeal must be upheld.

THE CONDUCT OF THE APPELLANT

53. Lest the effect of this judgment be understood to condone the conduct of the appellant, let me make it clear that it does not. On the contrary, the Commissioner of Police found his conduct outrageous. I tend to agree. On the papers before us the appellant facilitated the publication of a story which was highly defamatory of the President and at the same time alleged to be false in every material respect. Even on the papers before us the appellant does not even try to rebut these allegations. He simply contended that they are irrelevant. But it gets worse. On the uncontested evidence by the Commissioner the appellant was told on more than one occasion what the true facts were and he was offered the opportunity to establish for himself whether this was so.

Nonetheless he doggedly refused to make any enquiries, but elected instead to persist in spreading the defamatory story which he now knew to be probably untrue. Added to that there is the tone of the report which is clearly intended to hurt the victim and to incite public feelings of enmity and contempt against him. In my view this constitutes irresponsible journalism of the worst kind.

54. Freedom of expression, so it was said by the European Court of Human Rights in **HANDYSIDE v UNITED KINGDOM** (1976) 1 E H RR 737 at 754, constitutes one of the essential foundations of a democratic society and "is one of the basic conditions for its progress and the development of mankind". Concomitantly, the importance of the role of a free press in a democratic society cannot be understated. As was said in **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA v SUNDAY TIMES NEWSPAPER** 1995 (2) SA 221 (T) at 227 H:

> "It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern."

55. On the other hand there is the general reluctance among courts in many jurisdictions to open the door to the dissemination of false information which cannot serve any purpose other than to vilify the victim. That reluctance is not only natural, it is right.

Ultimately there can be no justification for the publication of untruths and members of the press should not be left with the impression that they have a licence to do so. In this regard, sight should not be lost of the powerful position of the press and the tendency amongst large sections of the community to accept what they read in the newspapers as true.

56. The function entrusted to the courts by society is to hold the balance between different interests when they come into conflict with one another. In doing so the courts are duty bound to curb excesses in the exercise of powers and privileges. Hence we cannot condone an arrest without a warrant which is lawfully obtained and executed. But at the same time we cannot condone the publication of patently defamatory stories based on, what on the face of it, appear to be blatant untruths.

COSTS

57. What remains is the matter of costs. In this regard I have concluded that for the reasons stated thus far, both the appeal and the cross-appeal must succeed. In argument it was conceded by Counsel for all parties that in this event both sides should pay their own costs, both in the High Court and on appeal. Since I

believe this concession to have been fairly made, the order I propose to make is that there will be no order as to costs.

THE ORDER

In the result the following Order is made:-

(a) Both the appeal and the cross-appeal are upheld with no order as to the costs on appeal;

(b) The order of the High Court is set aside and replaced by the following:

(i) The warrant of arrest issued by the second respondent on 2 September 2014 is declared to be invalid and unlawful;

(ii) The application for an order declaring that the applicant was denied his right to legal representation by the third respondent during his detention between 8-9 September 2014, is dismissed;

(iii) The application for declaring sections 50 and 51 of the Penal Code inconsistent with the Constitution of Botswana is dismissed on the basis that the issue does not arise in this case;

(iv) There will be no order as to cost.

DELIVERED IN OPEN COURT AT GABORONE ON THIS 2ND DAY OF FEBRUARY 2018.

.....
F.D.J. BRAND
(JUSTICE OF APPEAL)

I agree: .....
I.S. KIRBY
(JUDGE PRESIDENT)

I agree: .....

LORD ABERNETHY
(JUSTICE OF APPEAL)

I agree: .....

I.B.K. LESETEDI
(JUSTICE OF APPEAL)

I agree: .....

M.S. GAONGALELWE
(JUSTICE OF APPEAL)