CRI/A/35/82

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

'MALERATO MOTHABENG APPELLANT

v

R E X RESPONDENT

Coram: COTRAN C.J.
MOFOKENG J.

REASONS FOR JUDGMENT FILED ON
1st day of July 1982

Mofokeng J.

On the 22nd June 1982 the Court held that it has no jurisdiction to hear this appeal which was presumably made under s.73(1) of the Subordinate Courts Proclamation No. 58 of 1938. We said reasons will be filed later and these now follow.

The appellant was charged in a Subrodinate Court with theft of Government money (M1875-00); she pleaded guilty and was duly convicted and sentenced to two years imprisonment. The whole of the sentence, however, was suspended for two years on condition "that she made good the amount involved in that period". The learned Resident Magistrate added: "Accused's attention is drawn to Criminal Procedure and Evidence Proclamation s. 315(b)" - in fact he meant s. 322(1) of the new Criminal Procedure and Evidence Act 1981 for the former has been repealed. She was quite happy with the suspended sentence and did not wish to appeal but under s.67 of the Subordinate Courts Proclamation 58 of 1938 the proceedings were sent to the High Court for automatic review. The section reads :

> "67. All sentences in criminal cases in which the punishment awarded is imprisonment .... in the case of a Resident Magistrate's court imprisonment for any period exceeding eighteen months or a fine exceeding five hundred rands .... shall be subject in the ordinary course to review by the High Court: but without prejudice to the right of appeal against such sentence whether before or after confirmation of the sentence by the High Court. (Our underlining)

/The file

The file was put before Rooney J who under the provisions of s.69 (2) of the Proclamation had vast powers, which can be exercised in a variety of ways, including a summary increase in sentence without calling on anyone to argue (though this is not very often resorted to), or by calling upon the party that may be adversely affected to show cause why the sentence should not be increased, or by a fully fledged review hearing in open Court under s.69(3). The learned Judge (in fact) invoked the last subsection and made the following order: "The order suspending the sentence of imprisonment is set aside. Accused is committed to prison. This order is made without prejudice to the accused's right of appeal". There is no doubt that the High Court, on review, acted in terms of s.69(2)(b)(i) and that the order was within its powers. It is also clear that the learned Judge did not wish to deprive the appellant from challenging the sentence he imposed which, by reason of the removal of the suspension order, has become a substantive sentence of imprisonment and hence more severe than the magistrate had ever intended it to be. In fact the appellant noted an appeal and went back to the magistrate and sought and was granted bail pending appeal.

This appeal is against "sentence in CR 939/81" i.e. against the order of the High Court on review. It should be noted that the suspension of the sentence on the condition the magistrate imposed was, in view of s. 322(1) of Criminal Procedure and Evidence Act 1981 perhaps unnecessary, but it was not illegal because it had the effect of forcing the appellant to pay up the amount of money she stole by leaving the sentence of imprisonment hanging over her head in terrorem in case she defaulted. This would not have been the position under s.322(1).

The question for our determination was whether or not an appeal lies to the High Court.

The Court was referred to the case of State v. Maunge (1) and (2) 1971-1973 Botswana Law Reports (p 73 of 1971 and p.6 of 1972) in which a similar problem arose. In that case Aguda CJ held that an appeal still lay to the High Court from a revisional order - however arrived at (i.e. even if s.69(3) was invoked) - because both the conviction and sentence must be regarded as the judgment of the Subordinate

/Court

Court for to hold otherwise (p 12) "would be to prevent an accused from exercising his right to have his case properly heard in a competent court created for that purpose". Prior to the Lesotho Court of Appeal Act 1978, this High Court always entertained an appeal when a Judge thereof enhanced the sentence when seised of the case on review (on which appeal hearing of course the reviewing Judge would not sit) but the matter was unsatisfactory and sometimes perhaps embarassing. As Maisels P said in the State v. Brill 1976-1978 Botswana Law Reports at p.36, a case on the same point, endorsing Aguda C.J.'s opinion:

> "It is of course clear that although the present position of the law is in my opinion unsatisfactory this Court cannot remedy what appears to be a casus omissus on the part of the legislature. In my view it would be appropriate for the legislature to give consideration to granting an accused person an absolute right of appeal to the Court of Appeal where the High Court acting in its revisional jurisdiction increases the sentence imposed by a subordinate court or varies the sentence so as to make it more severe".

We understand that in Botswana there was an amendment to their Court of Appeal Act on the lines suggested by Maisels P but we do not have sight of the text. Section 8(2) of the Lesotho Court of Appeal Act is a new subsection which did not exist under the Court of Appeal Proclamation 1954. It provides :

> "For the purpose of this section an order made by the High Court in its revisional jurisdiction or a decision of the High Court on a case stated shall be deemed to be a decision of the High Court in its appellate jurisdiction".

It follows from this that where a High Court Judge on review simply certifies that the proceedings were in accordance with real and substantial justice in terms of s.69(1) of the Subordinate Courts Proclamation an appeal lies to the High Court itself in terms of the last paragraph of s.67 above quoted, but where the review results in any other order for example enhancing the sentence (or indeed reducing the sentence) s.8(2) of the Court of Appeal Act 1978 comes into operation.

/There

There is however an apparent anomaly: Is s.8(2) an independent and [illegible] subsection that gives an accused, in such plight as in the present case, an absolute right to appeal against severity of sentence, or is the subsection to be read in conjunction with and subject to the requirements of s.8(1)? The marginal note to the section speaks of "second appeals" but an occurrence under s.8(2) is not a "second appeal" properly so called. The subsections are mutually destructive in our opinion but it is for the Court of Appeal to decide on interpretation. If leave to appeal is needed, we are prepared to grant it, for there is a point of law involved, but if no application is made for leave to appeal or if no appeal is noted to the Court of Appeal within the time specified by the Rules then the appellant must be committed to prison to serve her sentence. Time will start to run from the date of this Judgment.

.....
M.P. MOPOKENG
Judge

I agree .....
T.S. COTRAN
Chief Justice

For Appellant : Adv. Ramodibedi
For Respondent: Mr. Khauoe