IN THE HIGH COURT OF LESOTHO

In the Appeal of :

THAKENG KHOSI	1st Appellant
MABILIKOE LEUTA	2nd Appellant

v

R E X	Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 14th day of November, 1983

On 9th November 1983 I allowed the appeal and intimated that I will file my reasons later. These now follow.

The two appellants were convicted of stock theft (12 sheep) on the 1st September 1983 and were sentenced to 18 months imprisonment. The offence had allegedly taken place on 16th July 1980. The trial therefore took place well over three years after the commission of the offence.

It was contended by Mr. Pitso for the Crown and Mr. Tsotsi for the two appellants that the convictions could not stand (and I agree) but whereas Mr. Pitso's submission was that a retrial should be ordered, Mr. Tsotsi's submission was that it ought not.

What happened was this :

1. Three accused persons, the two appellants and a third who was eventually acquitted, appeared before the magistrate on the 31st August 1983.
2. The second appellant had briefed an attorney, Mr. Kolisang, to appear on his behalf.
3. The two appellants (and the third accused) pleaded not

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guilty. The second appellant (Mabilikoe Leuta) said his attorney was unable to attend and requested an adjournment. There was in fact a letter addressed by Mr. Kolisang to the magistrate requesting him to adjourn the case to the 5th October 1983.when he would be available at Thaba Tseka.

4. The public prosecutor objected to an adjournment on the ground that the case has been pending for over three years. He apparently said that if the court feels disposed to grant the application he will seek separation of the trials, i.e. that the trial of appellant 1 and accused 3 who was acquitted would proceed forthwith and the trial of appellant 2 will take place presumably on 5th October 1983 when his lawyer Mr. Kolisang would be available.

The magistrate acceded to the application for separation and ordered appellant 2 to stand down, which he did, but he remained in the well of the court when the case proceeded against appellant 1 and the other accused who was acquitted.

Although I would not myself have agreed to separate trials I see nothing wrong in law with the magistrate acceding to the request of the public prosecutor. Separation is sometimes very inconvenient particularly if the facts are interlocked and the witnesses come from far away. However this is what happened. The first Crown witness was the complainant whose sheep were stolen. He did not know appellant 1 (appellant 2 was out of the trial by then) though he knew the third accused who was acquitted. His evidence was extremely important because he was the witness who claimed he identified his sheep marks which he described as "red paint mixed with letsoku that turn black on mixing" especially "after getting some dust."

He was cross examined by appellant 1 and the accused who was acquitted but not of course by appellant 2 who was by then no longer in the dock.

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On the following day, 1st September 1983, when the trial resumed the two appellants and the third accused appeared before the magistrate. Appellant 2 then told the magistrate that his "lawyer wants to waste time", that he did not need him anymore, and he wants to "join the others" i.e. appellant 1 and the accused who was acquitted.

The magistrate then noted that appellant 2 "steps in again" and the trial of the three continued.

There is in Lesotho an authority (R. v Phate and another 1980(2) LLR p.313 et seq) for the proposition that once separation has been ordered after a plea has been taken, the magistrate is debarred from reversing or recalling his order. It was a case on review dealt with by Mofokeng J and he heard no argument in open court. However he sought the views of the Director of Public Prosecutions who did "not support the conviction". In South Africa (R. v Khataleki and another 1948(2) SA 207) Gardner J had a somewhat similar problem but he did not say positively that joinder of an accused person after a trial starts was unlawful. In that case, which is distinguishable on the facts from the review before Mofokeng J, there was no order of separation of the trials made ab initio. The facts appear from the following passage at p 209 :

> "Now it appears that at the trial three small boys were called for the prosecution when the case opened against A and B. They gave certain incriminating evidence against A and B. At the conclusion of their evidence C was arrested and put into the dock, and then the three boys were recalled. And on this occasion they gave no evidence incriminating A and B, that is the present two appellants. The question arises whether the magistrate was entitled to rely upon the evidence given by the small boys in the proceedings that he heard against A and B for the purpose of convicting in this case. To us it appears that the proceedings against A and B were entirely separate and, when the case started against A, B and C, the proceedings had to begin de novo".

Now I am not prepared to go as far as my brother Mofokeng for I can visualise some instances where reversing

/an order

an order for separation of trials will not result in any prejudice to an accused e.g. if the order was made in circumstances of misunderstanding by the magistrate or the prosecutor and rectified immediately of if only a formal witness had been called and is available to be recalled to give evidence again and does so.

In this case it is impossible to say there was no prejudice. When the magistrate made an order for appellant 2 to "step in" a vital witness, the complainant, had been heard. Since appellant 2 had left the dock he did not have the opportunity of cross examining him. Furthermore the magistrate did not recall the complainant after appellant 2 was joined.

I am left with no alternative but to allow the appeal and the only question that remains is whether, as the Crown submits, I should order a retrial. Now a retrial should not be ordered simply to let the prosecution have another bite the cherry. In addition there is the question of the inordinate delay in the initial prosecution which is nowhere explained. I have perused the original record to find out why but in vain./ It cannot be said that the appellants were responsible for this delay and must accept it at their peril.

Lastly I must consider the consequences of a retrial. Whoever tries the case again, and it will have to be a different magistrate, and this might take months, will be faced with a formidable problem. Only one of the stolen sheep was recovered alive. It was not however produced before the first trial magistrate for him to assess the value of the identification marks detailed by the complainant, and it cannot be produced to the other magistrate who will conduct the new trial because the live sheep was reportedly stolen from the police pound by a person called Sam Sam before the trial started. Nine skins were reportedly recovered by the police from the compound of appellant 1 and these had reportedly the same marks of the complainant but the marks

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were of the common type that many people use. The complainant then alleged that he can recognise the sheep "from their faces". Now he did not actually see except one sheep "from the face". the one recovered alive out of twelve. The skins of some nine other sheep could not have been recognised since I presume "their faces" were gone. The trial magistrate could not himself test the complainant's veracity about the markings on the skins because the skins (by the time the trial took place) had also gone and reportedly "eaten by mice" in a police exhibit store. It would follow that the other magistrate who will conduct the new trial will, like the first magistrate before him, have nothing save the memory of the complainant and the tainted evidence of an accomplice with only little to support him.

I have gone at some length on this application for a retrial because it was submitted that the ends of Justice demand that this course be taken. I have, I hope, demonstrated to the Crown that there are quite apart from the fact that some four years would have gone by when the trial does take place eventually other circumstances that demand an end to the ordeal of having a charge hanging over the appellants heads which will, in all probability, result in their acquittal after all.

Order for a trial de novo refused and the appellants must now be freed.

I do not order refund of their appeal fees. The appeal has been allowed on a technicality which proved fatal and the matter must be left at that.

CHIEF JUSTICE
14th November, 1983

For Appellants : Mr. Tsotsi
For Respondent : Adv. Pitso