CRI/APN/58/83

IN THE HIGH COURT OF LESOTHO

In the Application of

SOBHUZA SOPENG Applicant

v

R E X Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 16th day of December, 1983.

This is an application for leave to appeal to the Court of Appeal pursuant to the provisions of section 8 (1) of the Court of Appeal Act No. 10 of 1978 which reads :

> "8(1) Any party to an appeal to the High Court may appeal to the Court against the High Court judgment with the leave of the judge of the High Court, ... on any ground of appeal which involves a question of law but not a question of fact nor against severity of sentence." (My underlining).

The notice of application for leave to appeal, which sets out clearly the reason(s) thereof, simply states that the appeal is against ... "enhanced sentence and the procedure followed." The grounds of appeal which are annexed (there are eight (8) of them) are clearly concentrated on what the applicant states in his application, namely against sentence.

In his notice of appeal to this Court from the judgment of the Subordinate Court, the applicant clearly stated that

/he was

he was appealing against "both conviction and sentence ..." When an accused person notes an appeal in a Criminal case one of the following things are inherent therein he may win the appeal, he may lose it and the sentence be not disturbed or he may lose it and have his sentence increased or may lose the appeal on conviction but be successful as far as the appeal against sentence is concerned in the sense that it may be altered in his favour. Moreover, these are embodied in the provisions of section 8 (1) (d) of the High Court Act No. 5 of 1978. In my view, therefore, no other notice need be given the appellant nor will he be taken by surprise if the sentence is increased. (Rex v Solomons, 1950(4) SA 140 at 141 (C)) In the present application and in his seven (7) of his grounds of appeal, the applicant complains that the procedure laid down in the case of R. v Grundlingh, 1955 (2) SA. 269 at 2734, namely that the applicant was not notified of the fact that his sentence was likely to be increased was not followed. There is no provision in our law which requires that the appellant should be notified. In a similar situation where an appellant faced the prospects of his sentence being increased, our Court of Appeal held otherwise. This was in the case of Phaloane v Rex, 1981 (2) LLR. 246 at 266. In that case, as in the present, the appellant complained that he had not been given notice of intention, by the Director of Public Prosecutions, that an application would be made for an increase of sentence. That was held to be quite irrelevant. However, Maisels, P. proceeded to say

> "It is of course well recognised that an appellate Court will not lightly interfere with a sentence imposed by the trial courts, the question of

/sentence

> sentence being largely one in the discretion of the trial judge, but it will do so where it is satisfied that the sentence imposed is manifestly too high or too low either because the trial judge has not taken into account all the relevant factors or if he has, full or sufficient weight has not been given to them."

I entirely agree. No doubt counsel for the appellant in that case had Grundlingh's case in mind and the principles and procedure stated therein. This Court is not bound by that case but by that of Phaloane (supra). It may just be mentioned, in passing sentence, that in the case of R. v Coetzer, 1937 T.P.D. 221 (approved in R v Swanepoel, 1945 A.D. 444) while it was said that it was a good thing to warn the appellant about the possible intended increase in sentence and that the learned magistrate should also be notified to give his reasons, the Court, nevertheless, said that it did not lay down a "hard and fast rule, and in many cases the Court of Appeal will have adequate material before it for dealing with the matter without such notice or reference." (See Gardiner & Lansdown SA. Criminal Law & Procedure Vol. 1 6th Ed. p. 764). To refer back to the case of Phaloane (supra), it is clear from the report that the appellant received no notification whatsoever about the possible increase of his sentence prior to the actual hearing of the appeal. It was during the hearing of the appeal, as happened in the present matter, that the question of the increase of sentence was raised. In Phaloane's case it was put thus

> "At the commencement of the hearing of this matter, Mr. Erasmus was specifically asked by me whether the appellant intended pursuing his appeal against sentence his attention was drawn to the powers of this Court, where

/there is

> there is an appeal against sentence, to quash the sentence of the trial Court and to pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed. (Section 9(4) of the Court of Appeal Act 1978). Appellant's counsel stated that the appeal against sentence was indeed being pursued."

It was through the kindness of the Court that he was allowed to address the court the following morning. The Court merely exercised its discretion. It would have proceeded to hear argument on sentence forthwith as counsel ought to have prepared himself in the event of a possible increase sentence.

It is trite law that the appeal court is entitled, in considering whether a sentence should be increased, to examine the evidence and make up its mind whether the Court a quo took a sufficient serious view of that evidence. (R. v Abdullah, 1956 SA. 295 (A.D.)).

In the matter of Leluma v Rex, 1981 (1) LLR. 233 at 234 the Court of Appeal in interpreting section 8 (1) of the Court of Appeal Act (supra) held that there is no "appeal" to it on a question dealing with the severity of sentence where "an appeal has already been heard by the High Court." That decision is applicable to the present matter before me. In emphasising the principle of law stated it was put in this way, by Schreiner, A.J.A., in the case of Forrester v Rex, 1979 (1) (C.A.) (in the press):

> "Only matters of law are relevant in considering the prospects of success on appeal because it is only these questions which this Court may consider in appeals from convictions originating in the Subordinate Courts."

/Mr. Maqutu

Mr. Maqutu submits that an increase in sentence, by the High Court in its appellate jurisdiction, is a matter which can be taken to the Court of Appeal because that sentence is not the sentence of the Court a quo but of the High Court itself. It is also a question of law, so he argues, if the appellant has not been given sufficient notice of such an increase. For the reasons already stated I do not agree with him. The whole purpose of his application is to appeal to the Court of Appeal against sentence (even though through the back door) in the face of the provisions of section 8 (1) of the Court of Appeal Act (supra).

As to the only ground that seems to be of fact or a mixture of fact and law, namely that no reasonable Court on the evidence given would have convicted applicant, the facts upon which the applicant was found guilty were very simple. The applicant assaulted the complainant and in fact conceded as much.

In order to succeed in an application of this nature the applicant must show a reasonable prospect of success. (See E.N. Tsita v Regina, 1959 H.C.T.L.R. 1 at p. 20, Forrester v Rex, 1981 (1) L.L.R. 75). This has not been done in the present case. It is trite law that a Court of Appeal will not interfere with findings of facts by the court a quo even if it would not, itself, have come to the same conclusion. (R.B. Cranko v Regina, 1963-66 H.C.T.L.R. 279 at 283E). It is however, a question of law where the Court convicts an accused person on evidence on which a reasonable man may not convict. As said earlier,

/the applicant

the applicant has not shown any prospect of success on appeal. It is not enough to enunciate a principle and rest. It must then be shown how that principle is applicable to the facts before Court. (See Forrester v Rex, 1981 (1) L.L.R. 75). In the case of R. v Shaffee, 1952 (2) SA. 482 at 486 Greenberg, J.A. is reported as having said .

> "It remains unfortunately necessary to say something in regard to granting of leave to appeal. The considerations which should guide a Court a quo in granting leave to appeal to this Court have been laid down more than once. (See Rex v Baloi 1949 (1) SA. 523 (A.D.) and Rex v Kuzwayo, 1949 (3) SA. 761 (A.D.). It is clear that the primary consideration is whether there is a reasonable prospect of success."

I entirely agree. In the present matter the applicant, not only assaulted the complainant who as a result bled through the mouth but also admitted boldly that not only had he assaulted the complainant but would still do so again and even kill him. During argument at the appeal stage, I recall, it was conceded on behalf of the applicant, that he should have been found guilty of assault common. The totality of the facts were such that a reasonable court properly instructed would have come to no other conclusion than that the applicant was guilty of the crime with which he was charged. It has not been shown, by the applicant, to the satisfaction of this Court that there is a reasonable prospect of success. In any event, applicant's counsel concedes that he has not done nor can he seriously argue the point. This argument supporting ground 8 of his grounds of appeal has, therefore, been abondoned.

Finally the law is quiet clear as to the form the application of this nature should take. In the case of

/E.N. Tsita

E.N. Tsita (supra) the application had been brought to Court on petition (p. 2B). In the case of Lebea Morolong v Rex, CRI/APN/42/77 it was suggested that it should be brought to Court on petition. This method is recommended because it is precise and, above all, the accused who adopts it is assured of his matter being set down for hearing. As a matter of practice an application for leave to appeal ought to have been brought to Court on petition. This seriously offends against the practice established in the case of Rex v Von Vollenhoven, CRI/A/68/73 by the late Chief Justice Mapetla and emphasised again in the matter of Lebea Morolong (supra). A warning was made by this Court in the case of Rakoti v Rex, 1979 L.L.R. (in the press) about the departure from a well-established practice. There has occured such a serious departure from the well-established practice in this case.

The present format adopted by the applicant is a mere formal notice but it does not indicate when the matter is likely to be heard. Surely it is not being presumed that the notice is but a mere formality and that the granting of leave to appeal will automatically follow.

Taking all the factors that have been mentioned above, and that this Court has a responsibility in the matter (R v Shaffee (supra) p. 487F) the application for leave to appeal to the Court of Appeal ought to be refused and it is accordingly so ordered.

J U D G E.
16th December, 1983.

For the Applicant · Mr. Maqutu
For the Respondent Miss Nku