CRI/T/32/82

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

SETENANE MABASO
THABISO MOHLOUOA

RULING - MISJOINDER - REASONS THEREOF.

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 14th day of April, 1983.

To appreciate the significance of this ruling it is best that events are narrated, albeit briefly, in their proper sequence.

The accused, Setenane Mabaso, was indicted on a charge of murder. The details thereof do not concern us at the moment. However, when he appeared before me, Crown Counsel stood up and read to the Court a notice in writing, couched in terms of section 5(c) of the Criminal Procedure and Evidence Act 10 of 1981 which gives the Director of Public Prosecutions power to "discontinue in writing at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself ...." There was nothing the Court could do but let the accused go. He was not entitled to a verdict at that stage because he had not yet pleaded to the charge.

In the afternoon of the same day, two accused persons appeared before me on a charge of murder. The provisions of section 144 of the Criminal Procedure and Evidence Act (supra) were purportedly invoked. One such an accused was the person who had appeared before me in the morning and against whom the Director of Public Prosecutions had decided, for reasons best known to himself, to invoke the provisions of section 5(c) as already explained.

The general rule is that "no person shall be tried in the High Court for any offence unless he has been previously so committed for trial by a magistrate ...." (Sec. 92(1).

One such committal is effected after a preparatory examination has been duly held and concluded in a subordinate Court. The latter procedure was followed in the case of Setenane Mabaso. The exception to invoking the general rule, in terms of section 92, is that provided for by section 144. All that the latter section does is to dispense with the holding of the preparatory examination. It follows, therefore, that where the provisions of section 92 have been <u>duly</u> satisfied there is no room for the subsequent application of section 144. It would be an absurdity.

In the case of <u>Rex v Rampine & Another</u>, 1979(1) LLR. 377 at 381 it was held that an act similar to what the Director of the Public Prosecutions has done in the present case i.e. had liberated an accused person and now wished to re-indict him again, he could not do so because as a consequence of his act the committal had fallen away. The preparatory examination has to be re-opened and accused re-committed. That has not been

done in respect of the accused Setenane Mabaso. He could not, therefore, be joined with his co-accused in the summary trial proceedings (in terms of section 144) since in his case a preparatory examination had been held which runs counter to the very basic requirement of section 144. Setenane Mabaso cannot be charged with any offence arising out of the same preparatory examination before the High Court unless the committal is revived. If the converse had taken place i.e. if the preparatory examination proceedings against Setenane Mabaso had been irregular ab initio or in any other manner whatever as occured in the case of Rex v Matete, 1979(2) LLR. 325 at 328-9, then as Rooney J, correctly held, in my view, ".... a committal which was irregular would be insufficient for the purposes of section 92" because "committed for trial" simply means "lawfully committed and legally committed for trial." In such a case where there never was a valid committal, summary proceedings would be proper since no legal preparatory examination was ever held hence no legal committal either as required by law. But that is not the position in the present case. The mere holding of a preparatory examination is not per se a bar from the application of section 144. It will only be so if those proceedings were valid.

For the above reasons I came to the conclusion that Setenane Mabaso had been wrongly joined. The Crown conceded.

J U D G E.

14th April, 1983.

For the Crown : Miss G. Moruthane

for the Defence : Mr. Sunyane