CRI/A/3/83

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

JOHANNES MARITE Appellant

v

REX Respondent

REASONS FOR JUDGMENT

Filed by the Hcn. Chief Justice, Mr. Justice T.S. Cotran on the 15th day of June 1983

Yesterday, on the 14th June 1983 the appeal was struck off the roll and a warrant for the arrest and commitment of the appellant, who was out on bail pending appeal, was issued.

Full reasons are not normally given for such orders but in this case I have to go at some length because what happened ought to have been avoided.

The appellant was charged in the magistrate's court of Maseru with nine counts; three of theft, three of forgery, and three of uttering forged documents, in respect of three cheques for the sums of M900, M7000, and M6500, all offences occuring between the 30th May 1980 and the 9th June 1980. That is over three years ago.

The trial, which commenced on 3rd August 1982, was concluded on 1st October 1982. That is more than two years after the event. It resulted in the conviction of the appellant on six of the nine counts relating to the cheques of M7000 and M6500 and an acquittal in respect of the cheque for M900. He was sentenced to an aggregate of three years substantive imprisonment plus a suspended sentence of two years imprisonment.

/An Appeal

An appeal was noted.

On 12th October 1982 the appellant was released by the magistrate on bail pending appeal.

The record of the proceedings at the magistrate's court was placed before me in my appellate capacity on 26th January 1983 in the usual course of business. Under s.327 of the Criminal Procedure and Evidence Act 1981 the appellate Judge seised of the file is enjoined to peruse the record, and if he considers that there is no ground for interfering may dismiss the appeal summarily. It is a useful weapon to eliminate frivolous appeals and a terrible weapon if the utmost of caution is not exercised for something favourable to the appellant may not be apparent on the face of the record or may escape the eye. It is idle to pretend however that first impressions could not be formed though our precepts of justice demand that these should be withheld but in the present instance I see no reason why initial thoughts should not be put on paper. The acquittal on the counts of theft and uttering in respect of M900 was probably wrong because the magistrate failed to appreciate that similar facts are items of corroboration that could have rendered the accomplice's evidence safe and trustworthy within the totality of the evidence. I also thought that summary dismissal of the appeal against conviction on the two counts of theft and the two counts of uttering, in respect of the M7000 and M6500 cheques respectively,would be justified but that an appeal on the counts of forgery proper (for reasons which will be given in a moment) could be entertained with a chance of success.

For the purpose of this Judgment there is no need to go into great detail suffice it to say that the complainant, the proprietor of a shop known as Maseru Cafe, provided his bookkeeper Miss Liako Ntai, with cheques signed in blank, entrusting to her the task of filling in the name of the payee (I suppose suppliers or debtors) and the amount owed and required. Her evidence was that she succumbed to the charms of the appellant and presented him with <u>one</u> of the signed cheques(this

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was cashed in the sum of M900) and two other cheques which were rubber stamped with the firm's name but did not bear the proprietor's signature. The proprietor, Mr.Soares, testified however that all three cheques subject matter of the charges bore his signature, i.e. the probabilities did not favour the appellant forging the signatures on the two cheques upon which he was convicted. The point was arguable, as also whether fraud was a competent verdict in view of the provisions of s.184(which seem to be at variance with the marginal notes) or s.196(which marginal notes seem to be rather mixed up and do not reflect what appears in the text) of the Criminal Procedure and Evidence Act 1981. In addition the sentences passed seemed rather erratic and possibly excessive since the appellant did not in fact get the value of the cheque for M6500 and his prosecution was unduly delayed. I did not think it was wise, in exercise of the Judges functions under s. 327, to split the appeal and deal with it piecemeal. Added to that was an instinctive distaste of any act of a summary nature if this can be avoided. I accordingly ordered the appeal be set down on the roll for a hearing and, if the appeal did come before me I was prepared to listen to all submissions. The usual course after this stage is to dispatch the file back to the Registrar, who would fix a date, and would allocat it (on the monthly roll) at random and provisionally (until the weekly roll is prepared) to one of the Judges.

The appeal was first fixed before me on the 8th March 1983. My time was at the disposal of Mr. Sello for the defence and Miss Moruthane for the Crown and I waited to be called into Court but both came to see me in chambers and requested an adjournment. I did not minute what reason was advanced but I did minute to the Registrar that an early hearing should be arranged. At the back of my mind was the fact that an appellant was at large on bail and attorneys, Crown Counsel, and the Registrar should in combination see to it, as part of their duties, not to allow a lapse in the requirement that the prosecution of a criminal appeal in circumstances such as these should be expeditious. There is on the one hand the temptation of convicted appellants to flee, and there is on the other hand the anxiety experienced by an appellate tribunal on sentence when

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a long time elapses between the date of the commission of the offence and the date when the convicted appellant who does not flee but loses his appeal will start to serve his sentence. Examples of both can be found in our Judgments though few are reported.

The adjourned appeal was fixed before my brother Molai J for the 25th April 1983. No doubt he too spent some time reading the proceedings and Judgment in preparation for the hearing. In the meantime and on 22nd April 1983 the appellant's attorneys officially informed the Registrar and the Director of Public Prosecutions that they were withdrawing as attorneys of record. In the event neither attorney nor Crown Counsel appeared before the Judge. Instead a clerk, Mr. Mopeli, informed the Judge, whether in open Court or in chambers is not clear, that the appellant was ill. There is on record a sick report from a doctor filed or sent or delivered to the Registrar's office, it does not matter which, apparently dated the 23rd April 1983. The Judge returned the file to the Registrar to fix another date after endorsing the cover.

The Registrar fixed the third adjourment of the appeal for the 14th June 1983 and this came before me. In the meantime by letter dated the 8th June 1983 addressed to the High Court the appellant informed it that he will appear in person to seek a further postponement but will give his reasons for the proposed application then and there. He was therefore seeking a fourth adjournment which was unlikely to have been arranged before August since the session was due to end on 15th June and only two Judges would be available until October 15th.

The appeal was called at 9.30 a.m. The appellant was present. With him was Mr. Matsau a member of the firm of attorneys formerly representing the appellant.

Mr. Matsau said that he requests to be reinstated as attorney of record, that the reason why the firm withdrew on 22nd April 1983 was because they "had no instructions" from the appellant, that the appellant now wishes to engage counsel from Johannesburg and hence he applies for an adjournment to yet another date to be fixed by the Registrar.

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Now it seems to me that if attorneys agreed to represent a party they are perfectly entitled to withdraw as attorneys of record but there must surely (1) be good reasons, and (2) give ample notice to their client or former client and to the Court: the first to enable him or her to engage another attorney timeously, and the second for the purpose of enabling the Registrar and the Judge if necessary to readjust the roll. As we have seen none of this happened. On the 8th March 1983 the application for adjournment was made in the last minute and Court's time was lost and on the 25th April 1983 Molai J was left dangling and his time too was lost. If the appeal was further adjourned it could well have been placed before Mofokeng J and he too would have had to read the proceedings and prepare for the hearing, on the day of which, for all what I know, the appellant may emerge with a new illness or advance some other hazard, and the end will not be reached, and if reached, would be long after the event.

When an attorney notes an appeal from the Subordinate Court on behalf of a convicted client and then after the notice of appeal actually appears at the scheduled date of hearing he is deemed to have accepted (either in person or through a colleague) to prosecute the appeal to its finality without undue delay. Mr. Sello had represented the appellant throughout the trial, had noted the appeal on his behalf, submitted his grounds of appeal, and appeared on the abortive hearing date on the 8th March 1983. The attorney may of course find it impossible to oblige but some body ought to make an appearance. Mr. Matsau says there was "lack of instructions" but I am unable to understand the phrase and I do not quite know what the problem is. If. Mr. Sello found it professionally difficult to appear to argue he should have told his client sometime ago or passed it on to a colleague able to do so. If the problem is that the dispensation of legal advice and representation is dependant on whether or not a client is keeping up with his payments for professional services then there will be constant applications for withdrawals followed by applications for reinstatement. This impedes and frustrates, as it has here and in many other cases, the proper administration of Justice.

I told Mr. Matsau that I accept that he be reinstated as

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attorney of record but that the application for an adjournment to yet another date is refused. However I was prepared :

1. To give him an opportunity to study the record if he had not done so already and argue the appeal himself at 2.30 p.m. That was nearly five hours grace for only some 30 pages of triple space foolscap.

2. Ask Mr. Sello, who is familiar with the record, to argue the appeal at 2.30 p.m.

I warned Mr. Matsau that failing 1 or 2 the appellant will be left on his own. That would not be the Court's fault. It is the appellant's and/or his attorneys operating on and off.

The appellant was also ordered to appear in the afternoon.

At 2.50 p.m. when the Court was convened there was no sign of the appellant at all. Mr. Matsau said that he had seen his client just before the luncheon break and does not know where he disappeared to; that he had in the meantime consulted his senior colleague Mr. Sello about the appeal and added that Mr. Sello who had at one time "lost touch" with the appellant but had seen him on Thursday last (that would be the 9th June) had specifically informed him(appellant) that he would not be able to argue the appeal on his behalf on the 14th June. If so Mr. Matsau or any member of the firm or a colleague would have had five days to prepare. Finally Mr. Matsau said that he must now formally withdraw since the appellant absconded. The whole episode was distressing, disconcerting and disturbing.

As I intimated earlier in this Judgment there was no alternative but to strike off the appeal,order the arrest of the appellant and on his apprehension to begin to serve his sentence. It goes without saying that the appellant's cash deposit is forfeited and the bond entered by the surity is to be estreated. I also notice that the appellant had to surrender his passport. If he did so I order the Registrar to return it to the Passport Office and in any event to provide them with copy of this Judgment since sooner or later the appellant is bound to come and apply for one in which event they should get in touch with the police.

I. S. Postma
CHIEF JUSTICE
15th June 1983

For Appellant : Mr. Matsau
For Respondent: Miss Moruthane