

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

'MALERATO MOTHABENG

Appellant

v

REX

Respondent

HELD AT MASERU

Coram:

MAISELS, P.
SCHUTZ, J.A.
GOLDIN, J.A.

J U D G M E N T

Goldin, J.A.

The appellant a public servant, was convicted by a Senior Resident Magistrate of the theft of R1875.00 the property of the Government of Lesotho. She was sentenced to 2 years imprisonment. The whole of the sentence, however, was suspended for two years "on condition that she made good the amount stolen in that period." The proceedings were sent to the High Court on review in terms of section 67 of the Subordinate Courts Proclamation 58 of 1938. This section as amended 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".

In the exercise of his powers conferred by section 69 the reviewing Judge ordered that the adequacy and competence of the sentence be argued and after hearing argument he altered the sentence by deleting the suspension. The learned Judge added : "This order is made without prejudice to the accused's right of appeal". When the matter came before the High Court the Court held that it had no jurisdiction to hear the appeal. Leave was given to appeal on the question of jurisdiction to this Court.

/After

After hearing counsel, and it is relevant to mention that counsel for respondent did not support the decision of the High Court, the appeal was allowed and the matter was remitted to the High Court for decision. It was intimated that the reasons would be filed later and these are now given.

Section 73(1) of the Subordinate Courts Proclamation 58 of 1938 provides that any person convicted of any offence by the judgment of a Subordinate Court "may appeal against such conviction and against any sentence or order of the court following thereupon to the High Court". In the judgment of the Court a quo Mofokeng J said "Prior to the Lesotho Court of Appeal Act 1978 this High Court always entertained an appeal when a Judge thereof enhanced the sentence when seized 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 embarrassing". An appeal under these circumstances is not an appeal against the decision of the reviewing Judge as if it were a judgment of the High Court. The reviewing Judge corrects the proceedings in the Magistrate's Court and an alteration or confirmation of the sentence imposed by the Magistrate becomes the sentence of the Magistrates Court and not a sentence imposed by the High Court.

Section 67 renders certain sentences subject to automatic review while section 73 confers an unfettered right of appeal against "any sentence". The jurisdiction and powers to review exist entirely apart from and in addition to the jurisdiction to hear appeals. The inclusion of the words "but without prejudice to the right of appeal against sentence whether before or after confirmation of the sentence by the High Court" does not restrict the right of appeal. A similar situation was considered in Botswana in the case of State v Maunge(2) BLR 1971-3 at page 6 where Aguda CJ found that the right of appeal had remained unaltered and unrestricted (See also R v Mokwena 1953(4) SA 133(T) and State v Brill 1976-1978 BLR 36 at 38).

The "right of appeal" in section 67 clearly does not confer a right of appeal but relates to and preserves the existing right of appeal. Similarly there is no justification for holding that this reference to a right of appeal upon confirmation of a sentence results in taking away the right of appeal when a sentence is increased or reduced on review. These words in section 67 do not amend the unfettered rights of appeal contained in section 73. It is an established principle of interpretation

that words should not be added by implication into the language of a statute unless it is necessary to give the paragraph sense and meaning in its context. Moreover a distinct and unequivocal enactment is also required for the purpose of adding to or taking away from the jurisdiction of a superior court of law: the general rule is "that the jurisdiction of the superior courts is not taken away except by express words or necessary implication" (Craies on Statutes 7th Ed. pp 109, 122 and 123).

The aspect which apparently induced the decision of the Court a quo is the effect of section 8 of the Court of Appeal Act 1978 which was considered contradictory and subsections(1) and (2) thereof as "mutually destructive". Section 8 reads :

"(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, or, when such leave is refused, with the leave of the Court on any ground of ~~appeal which involves a question of law but~~ not on a question of fact nor against severity of sentence.

(2) For the purposes 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".

This section deems an order made by the High Court on review to be a decision of the High Court in its appellate jurisdiction "for the purpose of this section". Subsections (1) and (2) must be read together. The Court of Appeal is confined to dealing with a question of law as appears from subsection (1). Accordingly where an accused seeks to appeal against a conviction or sentence on a question of law against an order made by the High Court in its revisional jurisdiction, this is deemed to be an order by the High Court in its appellate jurisdiction. Section 8(2) is clearly intended to be used for the purpose of section 8(1) and not to deprive an accused of his rights of appeal against severity of sentence or on a question of fact to the High Court. It does not alter a right of appeal to the High Court but merely affords a more expeditious and less costly means by which to have a question of law brought before the Court of Appeal. Indeed to read section 8(2) as the Court a quo has done involves reading it as containing an implied repeal of section 73 of the Subordinate Courts Proclamation. I do not think that there is any justification for such a reading.

For these reasons the appeal was allowed and the matter remitted to the High Court for decision.

B. GOLDIN
Judge of Appeal

I agree

I.A. MAISELS
President

I agree

W.P. SCHUTZ
Judge of Appeal

Delivered this day of October at MASERU.

For Appellant :

For Respondent: