CRI/APN/146/83

IN THE HIGH COURT OF LESOTHO

In the matter of :

KELELLO TSIU	- 1st Applicant
SELLO LITABE	- 2nd Applicant
LEBOHANG MOHALE	- 3rd Applicant
RAFUTHO TSONYANE	- 4th Applicant
THAKHOLI TSONYANE	- 5th Applicant

v

DIRECTOR OF PUBLIC PROSECUTIONS- Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng on the 30th day of January, 1984

This is an application, on notice of motion, for an order as follows:-

" (a) Directing further evidence to be led in CR 1025/83 a case of the Subordinate Court.

(b) Leave to appeal out of time.

(c) Further and or alternative relief.

And that the accompanying affidavit of Kelello Tsiu (or a petition if such is required by statute) will be used in support of such application."

The applicant is an immate convict at the Maseru Central Prison as a result of his (and co-applicants) being convicted for a crime of abduction and serving a prison sentence of nine (9) months.

/In respect ...

In respect of (a) above the applicant deposes that he sent his mother 'Makelello Tsiu to propose marriage on his behalf to the family of Pono Phafoli (the girl he abducted). The said proposal was accepted as he was subsequently told. He says that in accordance with Sesotho custom, he enlisted the assistance of his co-applicants in "brininging the said PONO PHAFOLI to my home because I wanted her as my customary wife." They went to Marakabei High School on the 17th October 1983 where they "sought and found the said PONO PHAFOLI." She agreed to come with them. On the way a police vehicle overtook and stopped them. They were then arrested for abducting Pono Phafoli.

When asked to plead, they had all pleaded guilty. However he complains that the judicial officer did not explain to them that they could, at the mitigation stage, lead evidence on the abduction and this failure amounts to an irregularity. If he had known this he would have told the Court that 'Makelello Tsiu had acquired permission for him to marry Pono Phafoli.

The Public Prosecutor told the Court, inter alia that Pono Phafoli had refused to board the vehicle in which the applicants were travelling. She ran away but was chased and caught by the applicants and put on board the vehicle which then moved away. The applicants agreed to these facts as being correct. She had not consented to their forcefully removing her from the school.

/The Public ...

The Public Prosecutor had also mentioned the fact that at Marakabei High School, the First Applicant had alighted from the vehicle in which he and co-applicants were travelling in and "went up to the school to meet Pono Phafoli his girl friend." At the mitigation level, therefore, the learned magistrate was fully alive to the situation he was dealing with and I have no doubt in my mind whatever that that factor was taken into consideration.

The applicants were in full possession of the facts. They had stated to the learned magistrate that the facts of the case as briefly outlined by the Public Prosecutor, were correct. They were given an opportunity to address the Court in mitigation if they so wished in terms of the Law. (Sec 176 of C. P. & E. Act 1981) They then availed themselves of it. It is difficult to see how the learned magistrate, was expected to know that another version of the same events existed other than the version the summary of which he had been given and which the applicants had confirmed to be correct. Was he, therefore, expected to tell the applicants to be at liberty to tell him another true version? He was in law obliged only to inform them of their right to address him in mitigation of sentence As was made crystal clear by Maisels, J.A (as he then was) in the case of Phakoe v Regina, 1963-66 L.L R 140 at pp 143-4.

" . the trial judge is obliged to give an accused the opportunity of raising the question of extenuating circumstances We think he is so obliged and that the

/accused ...

accused is indeed entitled at his option to decide at what stage of the proceedings he will do so " I entirely agree It was up to the applicants to address him as they pleased as long as the topic had any bearing on matter in issue They did, in fact, exercise their option to which they were entitled, namely to address the Court in mitigation of sentence and it was not incumbent upon the learned magistrate to tell them how to do it He is only required by law to make them aware of their rights but how to exercise them or not is a duty not cast upon him by law. In my view, the learned magistrate has committed no irregularity Counsel for the applicants was perhaps confused by what was said in S v Motaung, 1980(4) S A. 131 where it was emphatically pointed out that in terms of s 151 of Act 51 of 1977 it is imperative not only to explain the accused's rights to adduce evidence but to record such a fact and that even a material part of the proceedings cannot be omitted from the record We have no such a statutory obligation in our law as far as I know It would, however, be a sound practice to record what the accused's response is to such an explanation on the same principles as laid down in R v Parmanand, 1954(3) S.A. 833 (A.D.))

The further evidence sought to be led (it is not stated at what stage) is simply to the effect that the proposal of marriage between the first applicant and Pono Phafoli was acceptable There was, therefore, no

/agreement ..

agreement that Pono Phafoli would as a consequence of such a marriage proposal, be abducted. I frankly do not see how the further evidence sought to be led has any material bearing on the case It does not take the matter one iota any further in favour of the applicants. The tests to be satisfied before further evidence may be allowed to be led are.

(a) There must be sufficient reason why the evidence was not led at the material trial; and

(b) The evidence sought to be adduced must be of material interest in the case (Teboho Sello v Rex, 1971 73 LLR. 200 at 201)

The appellants in my view have satisfied neither of these criteria. Moreover, as Milne, J.A observed in the case of Jeminah Mofubelu v Rex, C of A (CRI) No 5 of 1976 (unreported) at p 9 "Such a power will be most sparingly exercised and in only exceptional circumstances existing in the present case." No exceptional circumstance have been shown here. A failure to satisfy any of the criteria set above is fatal

The order in this respect is hereby refused

As to (b) i.e leave to appeal out of time, the First Applicant deposes that he and the Second Applicant had noted an appeal (It is not stated when this was done except that it was in 1983) What the grounds for such an appeal are is not revealed as they are not annexed to the founding affidavit However, the said appeal was withdrawn for the reason that he, the First Applicant was the "author of the Imprisonment of 2nd to the Fifth Applicants " He is now advised that it

/possible .

possible to apply for appeal for all the Applicants

Firstly, if the Second Applicant did indeed note and file an appeal, that appeal is in the process of being prosecuted if he had noted it timeously In such circumstances, he need not have made an application for leave to appeal out of time

Secondly, the other Applicants have advanced no reasonable explanation for their non compliance with the Rules of the Subordinate Courts Proclamation 58 of 1938 The First Appellant chose to nip his appeal in the bud simply because he had led the other Applicants to suffer a prison sentence and in sympathy with them he decided to undergo the same term of imprisonment with them. However, if he is out of time with noting of his appeal, which seems doubtful, he is then the author of such an inordinate delay There must be sufficient reasons put before the Court explaining why the requirements of the Rules have not been complied with This is totally lacking in the present case

It was argued before this Court by Mr. Gwentswe that the applicants were satisfied with the conviction It would therefore suggested that the appeal would be against sentence only It has already been shown earlier that the fact that Pono Phafoli and the First Applicant were lovers had been brought to the notice of the learned magistrate during the Public Prosecutor's outline of the case However, in the present case, the applicants have not shown that there are prospects of

/success ...

success on appeal. (See Mahloane v Rex, 1981(2) L.L R 272)

In the circumstances in this respect is similarly refused

J U D G E
30th January, 1984

For the Applicant Mr Gwentse
" " Respondent : Miss Nku