

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

PHOLE JANKIE
LEBOHANG MAHASE
TEBOHO MOLEFE
THABISO TSOAUOA
TLOHANG MAHLEKE
THABANG NTSANE

J U D G M E N T

Delivered by the Hon. Acting Mr. Justice
J.L. Kheola on the 26th June, 1984.

The accused appeared before the subordinate court of Mohale's Hoek charged with one count of housebreaking with intent to steal and theft and another count of robbery. The charges read as follows:

COUNT 1

In that upon or about the 15th day of July, 1982 and at or near Shalane in the district of Mohale's Hoek the said accused did each or all of them wrongfully and unlawfully and intentionally and with intent to steal break and enter the shop there situate of Mothibeli Monongoaha and did unlawfully steal 16 blankets, 4 pairs of trousers, M30, the property or in the lawful possession of Mothibeli Monongoaha. (Value of the property M716.95).

COUNT 11

/In

In that upon or about the 27th day of July, 1982 and at or near Shalane in the district of Mohale's Hoek the said accused did each or all of them unlawfully and with intention of inducing submission by 'Maalice Mphahlele and 'Majubile Mohola to the taking by the accused of M1400, keys, cash box, 20 blankets, 83 packets of cigarettes, a bag, matches, threaten the said 'Maalice Mphahlele and 'Majubile that unless they consented to the taking by the accused of the said property or refrained from offering any resistance to the accused in taking the said property, the accused would there and then kill them; and did there and thereupon take and steal from the person or in the presence of the said 'Maalice and 'Majubile the said property, which was the property of Mothibeli Monongoaha in the lawful possession of 'Majubile and 'Maalice and did rob them of the same.

The accused pleaded not guilty to both charges. At the conclusion of the trial they were all found guilty as charged on both counts and they were committed in custody to this Court for sentence in terms of section 293(1) of the Criminal Procedure and Evidence Act of 1981.

The evidence for the Crown in respect of Count 1 was that on the morning of the 15th July, 1982 'Majubile and 'Maalice, who are salesladies at the shop of the complainant, went to work as usual. They discovered that the window of the shop had been broken and the goods and money described in count 1 were missing from the shop. On the previous day (14/7/82) accused Nos. 1, 2, 3 and 6 were seen passing near the shop of the complainant. The matter was reported to the police. On the 28th July, 1982 five

of the stolen blankets were found in the possession of accused 2 in Maseru. He had already sold the 6th blanket to a person who lives at Ha Ramabanta. The police fetched the blanket and it was also positively identified by 'Maalice as one of the missing blankets. On the same day three blankets, a red pair of stockings and a pair of trousers were found in the possession of accused 1. These goods were also positively identified by 'Maalice as part of the goods stolen on the 15th July, 1982.

The explanation given by accused 1 and accused 2 that they had bought the goods was rejected by the trial Court. For the first time in Court they said they had bought the goods at Ralikoro shop and Mt. Moorosi shop. They denied that on the 14th July, 1982 they were at Shalane but they were seen by not only the two salesladies (PW.2 nad PW.3) but by PW.7 Letsika Ranthimo at whose house they slept that night. Their presence at Shalane on the day the crime was committed is a neutral point which would not in any way incriminate them. However, now that they are denying it the inference may be drawn that there is something about their presence at Shalane which they wish to hide. See Hoffman, South African Law of Evidence, 2nd edition p. 420. I am of the opinion that the mere fact that the two accused were found in possession of the stolen goods only a few days after the breaking and the theft and the fact that they gave unsatisfactory explanations of their possession is sufficient evidence that they committed housebreaking with intent to steal and theft.

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My difficulty on count 1 is that the trial Court found all the six accused guilty as charged. There is practically no evidence implicating accused Nos. 3, 4, 5 and 6. They were not found in possession of any of the goods stolen on the night of the 14th July, 1982.

The Crown evidence in respect of count 11 is as follows: On the night of the 27th July, 1983 the two salesladies were sleeping in their bedroom when somebody claiming to be a policeman knocked at their door and ordered them to open it. Realizing that the inmates were refusing to open the door the man broke the window and entered through it. He produced a knife and threatened to stab them with it if they did not give him money. He also demanded the shop keys and 'Majubile' gave them to him. The man gave them to another man who was peeping through the window. 'Majubile then opened the safe and took out a cash box and opened it. She gave M1400 to the man who had entered through the window. This man was wearing a balaclava cap which made it impossible for the two ladies to identify him at that stage. The man escorted 'Majubile to the shop after 'Maalice had been locked into another room. When they arrived at the shop the keys were given to her and she was ordered to unlock the door. She complied. They entered into the shop and a candle was lit. The man put off his balaclava cap and the other two man she identified as accused Nos. 4 and 6 entered into the shop. The goods described in count 11 were then carried away by the three men.

On the morning of the 28th July, 1982 'Maalice (PW.2)

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was on her way to Mohale's Hoek in order that she could report the robbery to the owner of the shop who lived in Guthing. She travelled in a truck driven by one Phomolo Matsipa (PW.6). Immediately after leaving Shalane area the truck was stopped by four men who were later identified as accused Nos. 3, 4, 5 and 6. They asked for a lift in the truck saying that they were going to Mohale's Hoek. Accused 3 was wearing 5 blankets, accused 4 was wearing 4 blankets, accused 5 was wearing 5 blankets and accused 6 was wearing 4 blankets. As the four men climbed into the truck 'Maalice identified the blankets the men were wearing as similar to the blankets they were robbed of on the previous night. She made secret arrangements with the driver of the truck to take the four men straight to the Charge Office when they came to Mohale's Hoek. This was done and the accused were also found in possession of M1300. The missing goods were positively identified by the two salesladies as the ones they were robbed of the previous night. The accused gave unsatisfactory explanations of their possession of the stolen goods.

At the trial the four accused gave very stupid explanations that they knew nothing about the goods which were found in their possession. The trial court found them guilty as charged on both counts. There is absolutely no evidence connecting accused 3, 4, 5 and 6 with count 1.

It is trite law that a confession made by an accused person to a policeman shall not be admissible in evidence unless it is confirmed and reduced to writing in the presence

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of a magistrate. See section 228 (2) of the Criminal Procedure and Evidence Act of 1981. On page 14 of the record Tpr. Monontsi (PW.10) begins his evidence by saying "They told me that they had committed a crime of robbery at Shalane and stolen blankets and tobacco at a certain shop at Shalane." In the following 30 lines Tpr. Monontsi told the Court what each of the accused confessed to have stolen. I am most surprised why the public prosecutor led such obviously inadmissible evidence and why the Court allowed him to do such a thing. Even under cross-examination the public prosecutor kept on referring to the confession made to a policeman. There was no evidence that the confession had been reduced to writing in the presence of a magistrate. Despite the admission of the inadmissible evidence by the trial Court there was abundant admissible evidence implicating the accused.

For the reasons I have stated above I found accused Nos. 1 and 2 guilty as charged on count 1 and not guilty on count 11. Accused Nos. 3, 4, 5 and 6 were found guilty as charged on count 11 and not guilty on count 1.

Sentence: Accused 1 and Accused 2:
18 months' imprisonment each.
Accused 3, Accused 4, Accused 5 and Accused 6
3 years' imprisonment each.
Sentences shall run from the 8th April, 1983
when the accused were committed in custody
to the High Court for sentence.

Will the Registrar cancel the committal warrants made

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on the 8th June, 1984 because they are wrong and also
notify the Prison authorities accordingly.

I. H. J.
ACTING JUDGE.

26th June, 1984.

For the Crown : Mrs. Bosiu

For the Accused: In person.