

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

MOTLEPU NKONE                      1st Appellant  
MOKONE NTILI                        2nd Appellant

v

REX                                      Respondent

J U D G M E N T

Delivered by the Honourable Acting Judge, Mr. Justice M.L. Lehohla,  
on the 17th day of August, 1986.

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The Appellants appeared before the Resident Magistrate Mafeteng on 7th February, 1986, charged with the crime of robbery.

The charge sheet set out that "the accused are charged with the offence of robbery in that upon or about 29th October, 1985, and at or near Mafeteng Urban Area, in the District of Mafeteng, the said accused did one or other or both unlawfully assault Ts'eliso Tsehlo, George Seabata Ramarou and Thabo Sesinyi and by intentionally using force and violence to induce submission by the said Ts'eliso Tsehlo, Seabata George Ramarou and Thabo Sesinyi, did take and steal from their person or their presece out of their immediate care and protection certain property, to wit M23,319-59, the property of Maluti Retailers Mafeteng Urban Area in their lawful possession and did rob them

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of the same.

The accused pleaded not guilty. The Crown called evidence at the end of which the accused were convicted as charged and sentenced to four years' imprisonment each.

In a notice of appeal drawn by Mr. G.G.Nthethe accused appealed against both conviction and sentence (with right reserved to file further grounds of appeal when the records is available) on the following grounds:-

1. The learned Magistrate erred in convicting the Appellants despite the fact that the Crown evidence did not beyond reasonable doubt prove them guilty.
2. The learned Magistrate overlooked the fact that the identification parade held was improperly held.
3. The learned Magistrate erred in rejecting Appellants' story yet it was probable.

Suffice it at this stage that no supplementary grounds had been filed when this matter was placed

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before me on 14th July, 1986, for treatment in terms of Sect.327 or 328 of the Criminal Procedure and Evidence Act 1981.

Having read the record I, acting in terms of 327 supra dismissed the appeals summarily and ordered that the Registrar should forward to the Subordinate Court Mafeteng the relevant returns to ensure that Appellants are informed of the results of their appeals.

I was somewhat taken aback when a few days afterwards the file was brought before me again with the request that Appellants' Counsel had come to argue the appeal for Appellants on 21st July, 1986. As the matter had been properly dealt with in terms of the law and finalised before that day, it appeared the matter could not be carried any further. There was no notice of hearing for that day in the file when I dealt with the matter on 15-7-86. In any case that would have been pre-mature as the right procedure is for the notice of hearing to be issued in terms of Sect. 328 supra only after the determination by the Judge to that effect. Furthermore as indicated earlier when heads of argument for Appellants were filed on 21st July, 1985, in preparation or anticipation for the hearing that would follow the matter had long been decided.

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As a result of a mistake on the part of the Registrar's office, to wit, setting the matter down on a future date before letting the Judge make a determination on the issue this file once more found its way on the Honourable the Acting Chief Justice's desk for hearing. He rejected it on the grounds that the matter had been finalised in terms of Sect. 327 supra.

It is on account of the irregularities pointed out above that I decided to prepare a written judgment in this appeal. General remarks expressed in PHOHLO vs REX CRI/A/22/86 (unreported) at Page 4 et sequel avail. MABOTE vs. REX CRI/A/55/83 unreported.

The evidence led before the Court a quo revealed that P.W.1 Mats'eliso Chitja was an employee at Jandrell's. She works as an accountant there. On the day in question she arranged cash and books to be conveyed to the bank. Her duty entails making entries in a bank book in triplicate. The money is carried along with two copies to the bank while the first copy remains in the bank book in her custody.

On the day in question she had counted the money reflected in the cheques ready for depositing. It amounted to M3509-57 and the bank notes in

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cash amounted to M19,810.00 making a total of M23,319.57...in all. She produced before Court photocopies of amounts of money she had hoped to deposit in the bank that day. She detailed Thabo Sesinyi, a fellow employee, to deposit the money in the bank in the company of the driver Ts'eliso Tsehlo and Seabata Ramarou, the security guard.

P.W.1 also produced as exhibit the book from which photocopies were made.

An hour after she had handed the money to P.W.2 Thabo Sesinyi the latter entered the Jandrell's shop and gave P.W.1 a report whereupon P.W.1 went to the Charge Office where she found Sesinyi wounded. She reported to the police that she had not authorised anybody to divert the money from the bank or take it by force or any means from P.W.2. P.W.1 was not cross-examined.

P.W.2 Thabo Sesinyi testified that on the 29-10-84 Ramarou, Tsehlo the driver and he left the shopping area at Jandrell's and headed for the bank in a light delivery van. The three of them were sitting side by side in the van. He was flanked by the driver of the van and by Ramarou. He had been handed paper bags containing what he believed to be money of unknown amount to him. He was detailed to take this money to the bank.

The driver was the last to enter the van. P.W.2 did not notice the presence of the accused as there was much traffic.

Their vehicle travelled about 100 yds along the tar road after entering it. Suddenly, when it was about 8 paces from the Standard Bank where money was to be carried, it swerved to the right taking the road leading to the bus stop. In this unexpected turn of events when P.W.1 turned his head and looked through the back window of the van he saw that two people were occupying the buck of their van. There and then he saw a person "pointing a gun next to the driver." Before the vehicle branched off P.W.2 heard the driver say "Is it not better to take them to Thabana-Morena?" At the time P.W.2 did not see the face of the man holding the gun. The vehicle was then moving fast. The man holding the gun was shouting and saying "Race this car you satan". He was saying this repeatedly with a raised voice. The vehicle went past the main Mafeteng bus stop and moved fast in the direction of the road leading to Thabana Morena. P.W.1 questioned the driver about where he was driving the vehicle to. The driver said "Don't you see that these people are carrying guns?" When P.W.2 turned his head to the left he heard another man at the back saying "Bring this money you satans." This was Accused 1.

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P.W.2 slammed with his foot on the brakes of the vehicle and it stopped. That time they had moved about half a mile from Jandrell's shop which is not far from the Bank.

Giving P.W.2 the rough side of his tongue the driver asked if P.W.2 didn't see that he would overturn the vehicle. Thus roundly reprimanded P.W.2 removed his foot from the brake paddle and the vehicle once more moved at high speed. When the first demand for money was made by the man in the buck of the van P.W.2 handed the first bag to Ramarou who in turn gave it to that man through the left handside of the vehicle. Amidst all the swearing by the accused and the noise caused by them rapping on the roof of the vehicle, P.W.2 handed over to Ramarou the second money bag when the accused protested that "this is not all the money, bring the money you satans."

Ramarou escaped through the door while the vehicle was in full motion. The vehicle stopped. He collected stones and started throwing them at the accused occupying the buck of the van. P.W.2 alighted when the vehicle stopped. He picked up a stone and simultaneously heard a gun report. Accused 2 was carrying a gun. When P.W.2 was about 8 paces from him accused 2 fired the gun at him and shot him under the right arm-pit. This time P.W.2 and Accused 2 were in a donga. Accused 1 and the driver had disappeared into the donga while Ramarou was trying to cross Accused 2's path. Ramarou was being urged to catch Accused 2 by P.W.2 who was telling Ramarou that Accused 2 had fired his last

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shot. As P.W.2 was wounded Ramarou decided to hurry him to the hospital. Ramarou thus drove the vehicle first to the Charge Office and next to the Hospital where P.W.2 was treated.

In trying to cross examine this witness the two accused seemed intent merely in making game of him. For instance Accused 1 to P.W.2 said "Did you want to give me money ....? No. What forced you to give me the money ...? I was afraid because you were swearing at me. Were you satisfied with the insults I directed at you .....? No. Why did you not close the windows ...? I was afraid. Were you instructed to give the money to a person who came and insulted you .....? No. What insults did I utter .....? Devil. Is that an insult .....? It is because I am not one."

Accused 2 merely contented himself with saying P.W.2 was lying.

P.W.3 Seabata Ramarou gave evidence corroborating that of P.W.2 in all material respects. He is a security guard and was a policeman of long standing well trained in the use of fire-arms. That he sustained no injury on bailing out of a vehicle



moving at high speed is comment enough on the benefit he derived from the training he underwent as a policeman. He had heard a gun report from Accused 2 but nonetheless came face to face with him. That Accused 2 was pointing a gun at him did not make him flinch. In this sensitive situation, he scared Accused 2 out of countenance with the result that the latter even asked him "Sir, would you rather I killed you for this white man's money..?" turned tail and fled. It should be remembered P.W.3 was not armed with any fire weapon. Thus his valour, gallantry and disregard of personal safety in adversity are commendable.

At a subsequent parade held on 26-11-84 P.W.3 was able to pick out both accused without any difficulty. He was able to do so first because he had had enough opportunity to take a good look at them during their encounter with him. In the words quoted from the learned Magistrate's judgment "P.W.3 Seabata Ramarou is positive that he identified them ..... He says he took a long time struggling with them and that they will remain in his memory. The evidence of this witness was not shaken." With this finding I agree entirely.

After the fashion of questions put to P.W.2 Accused 1 once again put questions to P.W.3 the purpose of which if anything was to ridicule this

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witness. For instance,

"Do you say Thabo P.W.2 said you should give me the money and you did so ...? Yes.

Was it lawful for Thabo to tell you to give the money ....? That was an easy way of saving our lives.

Why did you agree with Thabo to give us money .....? Because our lives were in danger.

Do you say I asked for money holding the gun ....? No.

Do you say I ran away with the money ...? Yes."

Accused 2's cross examination did nothing to shake P.W.3:

"I say you are telling a lie when you say I was carrying a gun that day ....? I am sure you were carrying a gun that day.

Why did you fail to identify me at the parade ....? I identified you, I know well.

Are you sure I fired the gun that day....? Yes."

P.W.4 Trooper Lephoto had seen the two accused jump into the vehicle before it gained speed that/<sup>day</sup>and because this appeared an innocuous matter he did not attribute any sinister motive

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to it. He later identified the two accused by their facial appearances and the clothes they were wearing thus corroborating P.W.3 and to some extent P.W.2.

Accused 1 gave evidence on oath which did not allude to the events of that day from the time he and Accused 2 jumped into the vehicle to the time he was seen running away with the money. He merely confined himself to what happened at the Charge Office after his arrest. Whatever prima facie evidence was made against him became conclusive evidence against him on account of his failure to rebut any. This of course should not be understood to say there is any onus on him to establish his innocence. The onus rests on the Crown throughout.

Accused 2 having opted to give sworn testimony contented himself with saying he would not say anything before Stanley Tsehlo came before Court. That was all his evidence in chief.

In this regard the Appellants failed to raise any defence against the charge laid against them. They had been recognised and identified. The events took place in broad day-light and their defence was in the circumstances a mere sham. The accused were properly convicted.

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Regarding sentence, it is important to point out that in carrying out their robbery, the Appellants used a firearm not only to threaten, but did actually shoot at and wound P.W.2. No portion of the amount stolen has been recovered. Any crime involving use of or threats to use violence will always be looked at in very serious light. The appeals against sentence are equally dismissed.

M.L. LEHOHLA  
A C T I N G J U D G E

18.8.86