

IN THE HIGH COURT OF LESOTHO

In the Appeal of

AUPA KALI

Appellant

v

R E X

J U D G M E N T

Delivered by the Hon Mr. Justice J L. Kheola
on the 5th day of March, 1986

The appellant was charged before the Subordinate Court of First Class at Mafeteng with the offence of theft. It was alleged that he stole two bottles of brandy, the property or in the lawful possession of Thabo Mohale. To this charge he pleaded not guilty. In the end he was found guilty as charged and sentenced to six (6) months' imprisonment.

The appellant is now appealing to this Court on the ground that he was prejudiced in his defence because the learned magistrate did not explain his rights properly after the close of the Crown case. Mr. Mda, for the appellant, submitted that the learned magistrate committed a gross irregularity by explaining the rights of the appellant in terms of section 74 (1) (2) of the Criminal Procedure and Evidence Act 1981. In his reasons for judgment the magistrate states that he explained the rights of the accused in terms of the abovementioned section. The section reads as follows

"(1) After the examination of the witnesses in support of the charge in the presence of the accused the magistrate shall ask the accused what, if anything, he desires to say in answer to the charge against him and at the same time caution him that he is not obliged to make any statement but that what he says may be used in evidence at his trial.

/(2) The accused....

- (2) The accused may, then or at any later stage of the proceedings, make a statement or give evidence on oath and the statement or evidence shall be taken down in writing in so far as it is relevant to the charge and after being read over to him shall be subscribed by him if he will subscribe it, and also by the magistrate."

The learned magistrate misled the appellant into believing that the trial he was facing was not a trial and that if he made a statement it would be used as evidence at his trial. The warning he gave to the appellant is applicable at the end of a preparatory examination and not at a trial. In a trial the rights of the accused are explained to him in terms of section 217 (3) of the Criminal Procedure and Evidence Act 1981. It may be that the learned magistrate merely quoted the wrong section and that in court he gave the right explanation of accused's rights. I cannot be sure because he filed his reasons for judgment after he had seen the appellant's grounds of appeal and it was very clear that the appellant was accusing him of a failure to explain his rights correctly

Mr. Mda is of the opinion that where the accused elects to remain silent, it is improper to allow him to call witnesses in his defence. He has not supported his submission on this point with any authority. The duty of the magistrate is to enquire of the accused whether he has any witnesses to call (R.v. Sibia, 1947 (2) S.A. 50 (A D.), R. v. Simon, 1948 (2) S.A. 925 (S R), R. v Read, 1924 T.P.D 718). I am of the opinion that there is nothing wrong with the procedure whereby accused elects to remain silent but is allowed to call witnesses.

It seems to me that the irregularity was of such a serious nature that there has been a failure of justice and that the appeal must be allowed.

The appeal against sentence was abandoned because the accused has already served his sentence.

/The appeal.. .

The appeal against conviction is allowed and the appeal fee must be refunded to the appellant.

J. L. KHEOLA
J U D G E .

17th March, 1986.

For Appellant - Mr Mda
For Crown - Mr. Sehlohoho.