

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

SEHLOHO MZINE

R U L I N G

Delivered by the Hon. Mr. Justice B.K. Molai
on the 19th day of September, 1986.

This is a ruling on whether or not the crown counsel can be allowed to lead additional evidence at the trial after the Preparatory Examination has been taken.

On 4th September, 1986, during the course of this trial the crown counsel applied for an adjournment to consider the question of making an application to call as a witness the investigating officer who did not testify at the Preparatory Examination proceedings. The application for postponement was not opposed by the Defence counsel and the hearing was accordingly postponed to 5th September, 1986, when the crown counsel sought a further postponement to enable him to further consider the question of applying for leave to call the investigating officer who had not testified at the proceedings of Preparatory Examination. The application was again not objected to and the hearing accordingly postponed to 16th September, 1986.

When the hearing resumed on 16th September, 1986, the crown counsel referred the court to page 8 of the typed record of Preparatory Examination proceedings, where the magistrate who presided over the proceedings has noted the following:

"Under Sec. 273 of C.P. & E. the accused has admitted in court that he has been arrested to the police at Mount Moorosi and No. 2086 L/Nkholise."

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Whatever the magistrate meant, it was the contention of the crown counsel that that amounted to the investigating officer having given evidence at the Preparatory Examination proceedings. Wherefor he (crown counsel) was entitled to call him as a witness in this trial.

It may well be correct that the accused did admit before the magistrate at the Preparatory Examination proceedings that he had been arrested by the policeman No. 2086, Nkholise, of Mount Moorosi police post and such admission may rightly be regarded as proven fact in terms of the Criminal Procedure and Evidence Act, 1981 of which S. 273(2) provides:

"(2) An admission made by an accused or his representative in his presence at a preparatory examination, which the magistrate presiding thereat noted on the record, may be proved at the subsequent trial of the accused by the production, by any person, of the document purporting to constitute that record."

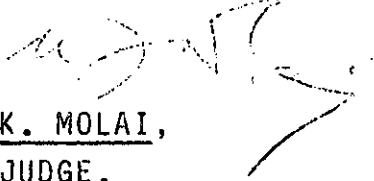
However, that does not, by any stretch of imagination, mean that the admission by the accused person amounts to the policeman testifying at the Preparatory Examination and he can, therefore, be called to give evidence in this trial without much ado. All the witnesses who testified at the Preparatory Examination proceedings have their depositions recorded in the record, and their names are listed in the index, thereof. No. 2086, Nkholise, features nowhere. If he were to testify in this trial, No.2086, Nkholise, (assuming he is the investigating officer contemplated by the crown counsel) would, in my opinion, be an additional witness called to do so after the Preparatory Examination had been taken. Now, in Rex v. Phokojoe Rampine and Another CRI/T/59/78 (unreported) Mofokeng J. had this to say on the issue:

"A practice has grown up whereby the crown makes application to lead additional evidence at the trial, but then usually there are cogent reasons why such evidence was not led during the preparatory examination. In such circumstances, provided sufficient notice, to which

the intended evidence is annexed, is served on the defence counsel and he is given sufficient time to consult with his client and prepare his defence in view of the altered circumstances and there is no objection, it is usually granted at the court's discretion".

I entirely agree. In the instant case no cogent reason have however been advanced why the investigating officer had not been called to testify at the Preparatory Examination. Indeed, as has been pointed out earlier the crown counsel takes the view that for the reason he has given there is not even a need to make application for leave to lead the evidence of the investigating officer. I am unable to agree with such view.

From the foregoing it is obvious that in my view the calling of the investigating officer in the trial will amount to calling an additional witness after the Preparatory Examination has been taken. The crown counsel cannot be allowed to do so unless a formal application has been made and served upon the defence counsel in good time to enable him to weigh his next move in the light of the altered circumstances. The question I have earlier posted viz. whether or not the crown counsel can be allowed to call at the trial, a witness who did not testify at the Preparatory Examination must, in the circumstances of this case be answered in the negative.


B.K. MOLAI,
JUDGE.

19th September, 1986.

For Crown : Mr. Mokhobo
For Defence : Mr. Kambule.