CRI/A/22/86

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

GERARD HALEKHETHELOE PHOHLO Appellant

R E X Respondent

J U D G M E N T

Verdict
was given by the Honourable Acting Mr. Justice M.L. Lehohla on the 30th day of June, 1986. He undertook to submit reasons for judgment.

Here do they now follow:

According to the Weekly Roll this appeal was supposed to be heard by me on 30th June, 1986.

On Sunday 29th June, I discovered that the file was not placed before me. I, however, searched for it and studied the record. On the hearing date while in Court, I was referred by the Assistant Registrar to a photocopy of a Notice of Hearing at the bottom of which was scribbled "matter withdrawn".

Needless to relate neither the appellant, his Counsel nor Counsel for the Crown was present in Court to argue this appeal.

I accordingly ordered that all concerned should come before this Court to have this appeal dealt with on 3rd July, 1986. Mr. Pheko appeared for the appellant while Miss Nku represented the Crown.

/...

I was shown a copy of Notice of Withdrawal dated 3rd February, 1986, bearing a faint and undecipherable proof of service both on the Crown and on the Registrar of this Court. Service of this Notice was effected on unspecified dates.

Mr. Pheko informed the Court that he drew that Notice of Withdrawal in accordance with his client's instructions but was quick to concede that such a move was not in accordance with the directive given by this Court in CRI/A/55/83 WILLIAM MABOTE vs REX (unreported) where Mofokeng J. resolved the question: "Whether once a criminal appeal has been set down on the roll of cases for hearing in this Court it can unilaterally be withdrawn by the appellant."

As in the MABOTE appeal the appellant has not given any reasons for the purported withdrawal in this one despite that he had set it in motion. The file containing the relevant papers to the appeal does not bear any indication that the Crown would apply for an increase of sentence should the appeal on conviction fail.

Mofokeng J. pointed out that the process of prosecuting an appeal is a continuing one. It is necessary to quote his analysis in this regard in toto:

> "A convicted person has the choice whether to note an appeal against his conviction or not. If he exercises an option in favour of noting an appeal there are statutory procedures he has to follow until a finality is reached in his appeal. Section 73(1) of the Subordinate Courts Proclamation 58 of 1938 ..... gives a right to appeal to a convicted and

sub-section (2) gives a right of appeal to the Director of Public Prosecutions. in certain circumstances. Sub-section (3) reads:

> 'Any such appeal shall be noted and prosecuted within the period and in the manner prescribed by the rules: But the High Court may in any case extent such period.'

Section 73(4) provides

> "The High Court shall thereupon have the powers set out in sub-section (2)(b) of Section Sixty-Nine: Provided that, notwithstanding that the High Court is of opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record of proceedings unless it appears to the High Court that a failure of justice has in fact resulted therefrom or that the accused has been prejudiced thereby". (My underlinings).

The Criminal Procedure and Evidence Act 1981 Section 329(1) outlines powers of Court of Appeal i.e. the High Court in its appellate jurisdiction as follows under (c) (to) "give such judgment as ought to have been given at the trial, or impose such punishment (whether more or less severe than or of a different nature from the punishment imposed at the trial; or" under (d) (to) "make such order as justice requires".

It seems to me that Mofokeng J. correctly summed up the position when he stated in the appeal cited above that (see page 7) "It would appear that there is no procedure which permits the appellant to withdraw his appeal at any stage. If he desires to do so it must be with the leave of the court in whose hands the appeal is". (My underlings)

/...

The remarks are abundant in the above mentioned judgment, and they seem to show that the conclusion reached by the Learned Judge that "The discretion whether or not to allow a withdrawal of an appeal rests entirely with the appellate court.

It is therefore regrettable that his concluding directive that "This matter should be considered to affect future cases only" was overlooked or given scant attention.

The need for the foregoing to be regarded as binding on the Office of the Registrar, the litigants and their counsel in criminal appeals cannot be over-emphasised if proper and ultimate determination of such appeals is to be reached. It was in deferrence to the dictum expressed in that judgment that I called for the record of this appeal despite the purported withdrawal.

Another matter of grave concern which is ancillary to the foregoing is the question of postponement of criminal appeals. A practice has arisen where criminal appeals are postponed to a date to be arranged with the Registrar. While this practice is in order with regard to civil matters, it is not so with criminal matters. In as much as Mofokeng J. has properly pointed out that a criminal appeal is a continuation of a criminal trial, it stands to reason that in much the same way that an accused in a criminal trial is required to attend remands and know dates of such remands, the appellant in a criminal matter is required to know the date of hearing of his appeal and prosecute it. Conceding that practical difficulties

occur in the sense that the Registrar keeps only one master diary and therefore cannot be in all courts at the same time when criminal appeals are postponed yet these difficulties can be overcome by providing tentative dates beforehand to which each such appeals can be postponed in full hearing of the appellant or his counsel. This would obviate the irksome practice of issuing one notice of hearing of appeal after another occasioning the necessity of limited state resources and manpower being required to serve one and the same appellant each time a criminal appeal has been postponed.

The unwholesome result of this practice is that ultimately neither the appeal is prosecuted nor is the subordinate court judgment from which such appeal emanated satisfied as was the case in TSIETSI MOLAPO vs. REX CRI/A/20/69.

But the salutary effect of following what is advocated in the foregoing remarks is that once there is proof of service of notice of hearing of an appeal on the appellant and subsequent notification to him in court of dates to which the appeal has been postponed or "remanded" and he fails to attend, then the Court would be at large to strike the matter off the roll consequent upon which the subordinate court judgment will take immediate effect.

Otherwise the court becomes hamstrung by criminal appeals which fail to proceed either because the appellant on subsequent occasions has not been served with notice of hearing, or if he has, then a return of service has not been

filed, thus depriving the court of the knowledge of the true state of affairs until too late.

To return to the charge, I would summarise the facts of the present appeal as follows:-

The appellant Gerard Phohlo was charged with the crime of theft. He appeared before the subordinate court in Maseru.

The charge sheet sets out that "on or about 8th May, 1985, and at or near L.N.D.C. Development House in the District of Maseru the said accused did wrongfully, unlawfully and intentionally snatch and steal a black bag containing a sum of M6076-05 the property of Gain Store which was in the lawful possession of one Mots'oari Mots'oari".

The case for the Crown rested mainly on the evidence of P.W.2 Mots'oari Mots'oari who testified that he was sent to the bank to deposit money collected from his employer - the Gain Store. as he walked past the old Lesotho Bank the appellant pulled the bag from under his armpit and ran across the road carrying the bag and its contents. P.W.2 shouted "stop thief" and people gave chase. The appellant was ultimately run to earth and arrested near the tennis ground on the other side of the statue of Moshoeshoe I. He was hand-cuffed by police volunteer reservists who gave him in charge. The bag and all its contents were handed over to P.W.2.

Mr. Pheko for the appellant very properly confined himself to arguing the appeal on sentence only. He argued that

/...

the trial magistrate did not give any consideration to the personal circumstances of the appellant and also that scant attention was given to the fact that he was a first offender and that although he is a member of the disciplined forces he was a mere trooper at the time of the commission of the offence, further that because of his conviction he had lost his job and all attendant benefits. Finally regard being had to all the personal circumstances of the appellant the sentence of five years' imprisonment of which only one year was suspended was rather on the high side and thus induced a sense of shock by its severity.

Miss Nku for the Crown in reply readily conceded that the learned magistrate omitted to consider some personal circumstances of the appellant and argued that the sentence imposed did not evoke in her a sense of shock. She, however, did not state which among the personal circumstances implied in her submission were given consideration to.

My perusal of the record did not reveal any either. The Crown relying on SOPENG vs REX CRI/A/58/83 and 'MOTA PHALOANE vs REX C of A(CRI)7 of 1980 argued that both appellants were members of the disciplined forces and because of their despicable acts the appellate courts increased their sentences on appeal, therefore by virtue of the fact that the present appellant is also a member of the disciplined forces his sentence should not be interferred with.

In reply Mr. Pheko argued that although both appellants in the above cited appeals were members of the

/...

disciplined forces their positions and rank differed drastically from that of the present appellant. They were Captain and head of the C.I.D. respectively as opposed to this appellant who was a mere trooper. Their actions involved a common element of violence to a person resulting in assault in one victim and death in the other.

With these submissions in the backdrop, I was referred to CRI/A/22/84 MOEKETSI MOTS'OARI v REX (unreported where Kheola A.J. as he then was had this to say at Page 3:

> "There is no doubt that many magistrates fail to make any investigation into personal circumstances of the accused before passing sentence".

On Page 5 he went further to say:

> "Taking into account the age (21 years) of the appellant, the fact that he is a first offender, that the vehicle was recovered only a day after it was stolen and still intact ..... the sentence of 3 years' imprisonment appeared to me to be too severe and substantially differed from what I would have imposed".

The Learned Judge then imposed a sentence of fifteen (15) months' imprisonment.

In CRI/A/11/86 STEPHEN MOKHEHLE MAKHOBALO (unreported) writing in the same vein as in MOTS'OARI supra Mofokeng J. said on Page 2 "As regards sentence, the learned magistrate did not take into account the personal circumstances of the appellant ....."

Quoting Mofokeng J. in MOJELA vs REX L L R 321 at P.324 Kheola J. in Review Order No. 7/86 Rex vs Sefofane

Mohashole (unreported) had this to say at Page 2:

> "Perhaps it is not appreciated that a consideration of what sentence to impose on a convicted person is a procedure which has to be carefully followed. It never follows upon conviction as a matter of course. Different considerations now come into play and these must be carefuliy weighed both as affecting the person of the accused and the society. It is the duty of the trial court to consider all the relevant factors and not to adopt a passive role".

Kheola J. went further to point out that of the eleven missing sheep, ten were recovered, "So that the complainant did not suffer a complete financial loss".

In the present case complainant did not suffer <u>any loss</u> at all.

In the South African case S. vs. Giannoulis 1975(4) SA 867 (A.D) Holmes J.A. had this to say:

> "No doubt justice is best seen to be done in the matter of sentence if participants in an offence (even if tried separately) who have equal degrees of complicity are punished equally, if there are <u>no personal factors warranting disparity</u>". (My underlining)

He went further to say:

> " ..... punishment is pre-eminently a matter for the discretion of the trial court, and interference on appeal is warranted only if the discretion was not properly and judicially exercised".

In the present appeal, as I have stated above the Crown conceded that at least some personal circumstances of the appellant were not taken into account. Surely the logical

/...

effect of such concession should redound to appellant's advantage. I have pointed out appellant's personal factors which were raised in argument. None of them as far as the record reveals was taken into account. What seems to have been uppermost in the learned magistrate's view was the need to "demonstrate to these young criminals in the armed forces that their acts will be treated with all the severity at our disposal."

The general purport of the expression in the above quotation clearly shows that the sentence imposed was intended for the generality of members of the young criminals in the armed forces. It cannot thus be said the personal circumstances of the particular individual before Court were properly considered. It was submitted in argument that the "trying period of a spate of thefts" referred to in the judgment related to members of the armed forces who were engaged in atrocious acts of robberies. As indicated earlier, appellant's act though reprehensible takes him out of the generality of members of the armed forces in that it was not accompanied by any violence.

He lost his job and benefits both of which factors were taken into account in the Phaloane case (supra). He is married with two young children whom he has to find in food and clothing. He had since lost his father and has to maintain his sickly mother. Evidence indicated that he had been assaulted on arrest and was not referred for medical attention. The "loot" was all recovered.

It should be remembered that dry rot had set in

among the youth of the nation and some gullible members of the disciplined forces. It cannot be said that the then authorities were ignorant of this fact. Miss Nku for the Crown conceded this point.

Enough has been submitted to me by way of argument and my perusal of the record shows that sufficient weight was not given to the personal circumstances of the appellant and thus he suffered prejudice in the sentence imposed. Regard being had to all factors, I find that the sentence induces a sense of shock.

It would seem therefore that the sentence imposed was based more on emotional extravagance and need to scare members of the disciplined forces than on personal factors surrounding the appellant.

Consequently the conviction is confirmed. Sentence is set aside and in substitution thereof is imposed the following:

Appellant is sentenced to eighteen months' imprisonment or M320 fine, half of which is suspended for 2 years on condition that appellant be not convicted of a crime involving dishonesty committed during the period of suspension and sentenced to a minimum of six months' imprisonment without an option of a fine.

(M.L. LEHOHLA)
ACTING JUDGE

For Appellant - Mr. Pheko

For Crown - Miss Nku