

IN THE HIGH COURT OF LESOTHO

In the matter between:-

THEESE PHOOKO

Applicant

and

THE MAGISTRATE (MRS. M. MOKUENA)

1st Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 22nd day of May, 1989

The applicant is applying for an order that the judgement of the first respondent delivered on the 25th November, 1988 in the case referred to as Rex v. Theese Phooko, Criminal Case No. 278 of 1988 of the Subordinate Court for the district of Maseru should be reviewed, corrected or set aside.

Alternatively that applicant's failure to lodge his appeal against the said conviction and sentence within the time stipulated by the Rules should be condoned and applicant be granted leave to lodge such appeal out of time.

A rule nisi was issued on the 17th March, 1989 and made returnable on the 7th April, 1989. It was served upon the respondents on the 17th March, 1989. The respondents have not filed any opposing papers, but on the return day Mr. Thetsane appeared for the second respondent.

On the 25th November, 1988 the applicant appeared before the first respondent charged with contraventions of section 344 of the Criminal Procedure and Evidence Act 1981 and section 10 (2) of the Road Traffic Act 1981 as amended by section 3 (a) of Order No.15 of 1987. He pleaded guilty to both charges. The public prosecutor gave a summary of the facts disclosed by the evidence in his possession as follows:

Trooper Moshoeshoe of R.L.M.P. met the applicant driving a red Toyota Corolla motor car with registration number A7471. He asked the applicant how he acquired the vehicle. The applicant said he bought it from someone who is now late. The police officer carried out some investigations and found that the vehicle was stolen though not stolen by the applicant. He had no registration certificate for the vehicle.

The person who sold the vehicle to the applicant was not its lawful owner. Applicant failed to prove that he had satisfied himself that the vehicle was that person's property. The lawful owner of the vehicle had reported its theft to the South African Police.

The applicant admitted the facts stated by the public prosecutor in terms of section 240(1) (b) of the Criminal Procedure and Evidence Act 1981. Thereafter he was convicted and sentenced to five years' imprisonment.

In his founding affidavit the applicant deposes that after his arrest he was asked to make a written statement in which he stated that he bought the car from one Lehana Lebopo who died during July or August, 1988 for M10,000-00; that he paid a deposit of M4 000-00 whereupon the said Lehana Lebopo delivered the car to him; that he did not transfer the car into his name promising to do so once he had completed the purchase price which he had to pay in monthly instalment; and that up to the date of the death of the said Lehana Lebopo he had paid the sum of M8,000-00.

The applicant alleges that he made the written statement on 24th November, 1988. On the following day he was taken to Parliament Building where he met a certain Mr. Tlali who explained that there was insufficient evidence that he (applicant) had stolen the car from the Republic of South Africa where it was alleged to have been stolen and that, therefore, he would face a charge of being in possession of stolen property. He went on to explain that there was no way he (applicant) could contest this charge because it was common cause that he had been found in possession of the car. He advised him to plead to this charge which would result in the matter being disposed of quickly and that at the most he would be sentenced to pay a fine. He agreed to this as he felt that he indeed could not deny that the car was found in his possession.

Mr. Tlali further informed him that the registration numbers on the car were not genuine. He informed Mr. Tlali that he needed the services of a lawyer whereupon he replied that if he had a lawyer the case would be prolonged indefinitely whilst he is kept in custody and that by advising him to plead guilty he was offering him the easiest way out as the whole matter would be disposed of in a day. Mr. Tlali told him that he would not be granted bail because he would oppose the application. He says that he was then taken back to the cell after he had agreed to plead guilty as advised by the said Mr. Tlali.

The applicant says that he was taken to court at 2.00p.m. on the 25th November, 1988. He discovered that Mr. Tlali was the public prosecutor and was prosecuting the case. The first respondent read the charge in English after which she translated it into Sesotho with difficulty. He understood the charge against him to be that he was found in possession of a stolen car and that it bore registration numbers which did not belong to it.

He avers that at the time he received the said motor car from the late Lehana Lebopo he had reasonable cause for believing that the said Lehana Lebopo was the lawful owner of the vehicle because he showed him a registration certificate on which appeared the names of the said Lehana Lebopo. The engine and chassis numbers of the car corresponded with those appearing on the registration certificate.

On the 3rd January, 1989 Sir Peter Allen, J. certified the proceedings in the present case to be in accordance with real and substantial justice. The question before me is whether after a

Judge of this Court has reviewed the proceedings from a Subordinate court in terms of section 65 of the Subordinate Courts Order 1988 another Judge of this Court can review such proceedings when a formal application for review is made. With regard to an appeal after the proceedings have been automatically reviewed the law is very clear that an appeal can be lodged.

Regarding a second review by another Judge there is nothing in the Subordinate Courts Order 1988 that gives guidance as to how the matter should be resolved. I have no alternative but to resort to case law of the Republic of South Africa because I have not come across any Lesotho case on this point. In the case of S. V. Maseko 1971 (4) S.A. 475 a Judge on review cancelled another Judge's confirmation where the latter was on Circuit and the review was urgent.

In the present case the Judge who reviewed the proceedings and confirmed them has left this country permanently and is no longer a Judge of this Court. In S. v. Makebe, 1967 (1) S.A. 464 it was held that where, after a Judge has confirmed a conviction and sentence on automatic review it appears that justice demands that the sentence be altered, it is competent for the Court to deal with the matter notwithstanding that the reviewing Judge is no longer able to withdraw the certificate (see also S. v. Renhold, 1971 (1) S.A. 317).

I cancel the certificate issued by Sir Peter Allen, J. on the ground that there were certain irregularities which did not appear on the face of the record.

It was submitted on behalf of the applicant that the facts stated by the public prosecutor did not disclose an offence because:

- (a) There was no allegation that the applicant acquired the vehicle otherwise than at a public sale;
- (b) That the applicant was unable to prove that at the time he acquired the vehicle he had reasonable cause for believing that the vehicle was the property of the deceased;
- (c) That the applicant failed to prove that he had reasonable cause for believing that the deceased, if not the owner, had been duly authorised by the vehicle's owner to deal with or to dispose of it.

I do not propose to make any finding as to whether the facts stated by the public prosecutor disclose an offence or not. What I propose to do is to decide the matter on the serious allegations of misconduct on the part of Mr. Tlali who is alleged to be a public prosecutor who was involved in the prosecution of the present case. The allegations show that he wrongfully deceived the applicant that because he was found in possession of a stolen motor car he had no defence. He did not tell the applicant that if he did not know that the vehicle was stolen he could not be convicted. He further threatened the applicant with long detention without trial if he wanted his attorney to represent him.

I am of the opinion that what Mr. Tlali did amounted to a very serious misconduct and sheer oppression of the applicant. He had a right to be represented by his attorney if he so wished, but the public prosecutor who is an officer of the magistrate's court threatened him with a punishment of long detention without trial. A public prosecutor may enter into a plea bargaining exercise with an accused person provided he explains clearly and honestly what the charge is all about. However, I must point out that where the accused person is not represented by a lawyer plea bargaining is always fraught with danger and should not be encouraged.


The abovementioned allegations of sheer cheating have not been denied by the second respondent because Mr. Tlali has not filed any opposing papers. This Court is bound to admit the allegations therein as the truth.

The charge faced by the applicant was not a very simple charge like theft. There is a possibility that the applicant did not understand it as well as the procedure under section 240 of the Criminal Procedure and Evidence Act 1981. The applicant has deposed that even the first respondent translated the charge from English to Sesotho with difficulty. This allegation has not been denied by the first respondent and I have no alternative but to accept it as the truth.

In Count 2 the proceedings were irregular in that under section 10 (2A) of the Road Traffic Act 1981 no prosecution for an offence under this section shall be instituted without the consent in writing of the Director of Public Prosecutions. There was no evidence that such consent had been granted.

I come to the conclusion that there was failure of justice occasioned by the undesirable conduct of the public prosecutor of cheating the applicant into pleading guilty to the charge. The proceedings in Cr 1273/88 Rex v. Theese Phooko are set aside. I order a re-trial before another magistrate.

A copy of this judgment shall be sent to the Chief Magistrate and to the Senior Public Prosecutor, Maseru to enable them to make arrangements for a re-trial as soon as possible.


J.L. KHEOLA
JUDGE

22nd May, 1989.

For the Applicant - Mr. Sello
For the Respondents - Mr. Thetsane.