CRI/S/8/89

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

THABISO TSOAUOA

Before the Honourable the Chief Justice Mr. Justice B.P. Cullinan on the 26th day of May, 1989.

For the Crown : Mr. S.P. Sakoane, Crown Counsel
For the Accused : In Person

JUDGMENT

Cases referred to:
(1) S v Magao (1959)1 S.A. 489 (AD)
(2) Smith v Desmond (1945)1 All E.R. 976 (H.L.)
(3) R v Tebbie & Anor. (1945)3 SA 776 (S.R.)

The accused was convicted by the Subordinate Court of the First Class for Thaba Tseka district of robbery.

The appellant pleaded guilty. He agreed with a statement of facts and was duly convicted. After the accused had spoken in mitigation the record reads:

/...

"Sentence:

Committed for sentence by High Court."

The offence was committed on 15th January, 1989, so that I presume the learned trial Magistrate committed the accused for sentence under section 293(1) of the Criminal Procedure & Evidence Act, 1981, in view of the minimum sentence of 10 years' imprisonment provided by the Revision of Penalties Order 1988. Section 293(1) reads as follows:

> "293. (1) Where on the trial by a subordinate court a person whose apparent age exceeds 18 years is convicted of an offence, the court may, if it is of opinion that greater punishment ought to be inflicted for the offence than it has power to inflict, for reasons to be recorded in writing (of) on the record of the case, instead of dealing with him in any other manner, commit him in custody to the High Court for sentence."

It will be seen that a Magistrate must record his reasons for committing an accused for sentence. In the present case no reasons at all were given. More importantly, it will be seen that

(i) The use of the words "opinion" and "may" indicate that the court's power in the matter is discretionary and

(ii) the court may commit the accused "instead of dealing with him in any

other manner", but that such discretion may only be exercised if the court

(iii) "is of opinion that greater punishment ought to be inflicted for the offence than it has power to inflict."

In the present case the learned trial Magistrate had no power to deal with the accused "in any other manner", nor, as will be seen, in any manner at all. The matter of sentence is not discretionary in the present case, that is, any sentence less than 10 years' imprisonment: the statutory minimum sentence is that of 10 years' imprisonment. Further, there is no question that "greater punishment ought to be inflicted" than the Magistrate had power to inflict: the position was that it was statutorily mandatory that greater punishment had to be imposed than the Magistrate had power to impose.

Quite clearly the provisions of section 293(1) embrace the situation where the Magistrate has the power to impose a punishment, up to the maximum of his particular jurisdiction, but considers that in the circumstances of the case, a greater punishment should be imposed. In the case of a statutory minimum sentence which exceeds the Magistrate's jurisdiction, the Magistrate's opinion in the matter as to an appropriate sentence (less than the statutory minimum) is irrelevant. In brief I consider that section

293(1) has no application to the present case.

Further, the learned trial Magistrate ventured upon a trial when it was quite clear to him that if the accused were convicted of the offence charged he would have no power to punish him. Section 293(1) provided no answer to the situation. The object of trial is surely to convict and to appropriately punish the guilty, and also of course to acquit the innocent. If there is no power to punish, then I cannot see that there is any power to try and convict. In brief, in my judgment the learned trial Magistrate had no power to enter a conviction in the present case.

In the circumstances, the learned trial Magistrate should not have embarked upon the trial. Having done so however, I do not say that he would have lacked for jurisdiction if he, for example, had found a lesser offence to have been proved and had entered a conviction in respect of such lesser offence. Such, I consider, was the situation here.

The statement of offence did not reveal the identity of either of two persons who broke and entered the female complainant's house at night. The statement indicated that one of the two stabbed her in the hand, whereupon she fled to the house of a neighbour nearby. Thereafter property was stolen from her house. It was not stolen in her presence,

but it was in her presence when violence was exercised: see S v Magao (1) and Smith v Desmond (2). Hunt in his work South African Criminal Law & Procedure Vol.II at p.646 is critical of the decision in the review case R v Tebbie & Anor. (3) and comments thus:

> "It is accordingly submitted: first, that 'presence' is a matter of degree very much bound up with the particular circumstances. Secondly, that it is inaccurate to say that the taking must be in Y's presence: it is the property which must be in Y's presence when X puts his plan of violence into execution. Any other conclusion would be ludicrous. It would involve holding that X is not guilty of robbery if by violence he makes Y run miles away so that X can ransack his house when Y has gone. Thirdly, that the thing is outside the limits of Y's perception when Y is assaulted and/or the thing is taken is indecisive, though in an appropriate case it may be a circumstance relevant to deciding whether it is in his 'presence'."

In my view a robbery was committed, but the identity of the robbers was not established. The only aspect to incriminate the accused was that he led the police to where the stolen items were hidden in a field, indicating guilty knowledge. The inference of robbery may certainly be drawn, but on the facts before the learned trial Magistrate that was not the only reasonable inference. There was no evidence in particular as to when the appellant led the police to the field: it could have been as much as 3 days after the crime. Another, the only other reasonable inference, was that the accused received the stolen goods

knowing them to have been stolen. In such circumstances the Court should not have drawn the inference which had graver consequences for the accused, as it was clearly unsafe to do so.

Under the circumstances the conviction of the Court below is set aside and there is substituted therefor a conviction of receiving stolen goods knowing them to have been stolen. As to sentence, the accused is a first offender, who pleaded guilty. He has been in prison for four months, that is, the equivalent of a sentence of six months' imprisonment with remission. The value of the goods stolen was clearly negligible. In all the circumstances I sentence the accused to one year's imprisonment with effect from to-day.

Delivered at Maseru This 26th day of May, 1989.

(B.P. CULLINAN)
CHIEF JUSTICE