CRI/T/40/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

SEKHOBE LETSIE
NGOANANTLOANA LEROTHOLI

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on the 13th day of July, 1990.

For the Crown : Mr. G.S. Mdhluli, Director of Public Prosecutions;
Mr. V.N. Qhomane, Crown Counsel;
Mr. S.P. Sakoane, Crown Counsel.

For the First Accused : Mr. L. Pheko
For the Second Accused: Mr. M. Matsau

RULING IN TRIAL WITHIN TRIAL

Cases referred to:

(1) R v Barlin (1929) AD 459;
(2) DPP v Ping Lin (1975) All E.R. 175;

I refer to the ruling in this trial delivered this morning, that is, with reference to the facts immediately preceding the alleged making of a statement by the second accused, to a Private Tsephe Tsephe, a bodyguard of the first accused.

I have conducted a trial within a trial in which the only evidence adduced was that of Private Tsephe, the defence declining to adduce any evidence as to involuntariness.

The learned Director of Public Prosecutions Mr. Mdhluli is inclined to the view that the word "confession" contained in section 228(1) of the Criminal Procedure & Evidence Act 1981 is not necessarily given the same meaning as in section 228(2). Hoffman & Zeffert in their work the South African Law of Evidence (3 Ed.) observe at p.183 that the relevant legislation in the Republic of South Africa was intended to reproduce the English common law as it was in 1830. Certainly now the position at common law in England and Republic of South Africa is that the word "confession" extends also to inculpatory statements.

The Director refers to the dicta of Innes CJ. in the case of R v Barlin (1) at p.462 where the learned Chief Justice in effect defined "voluntary",

> "..... in the sense that it (the statement) has not been induced by any threat or promise proceeding from a person in authority".

I do not see that the proviso to section 228(1) takes the common law situation much further, other than to also exclude a statement made, when for some reason the accused's mind was disturbed so as to deprive him of reason. Thereafter, the proviso has been interpreted to mean that any statement made as a result of violence, threats promises or subtler pressures, which operated to negative the accused's freedom of volition, is excluded.

The learned Attorney for the second accused Mr. Matsau submits that the words "person in authority" do not mean that the person to whom the statement is made necessarily has authority over the accused: it is simply that he has authority over the prosecution. That I consider to be a correct statement of the law. Further I am not aware that the person in authority need necessarily have been conducting an investigation in the matter when the statement was made to him: see the House of Lords case DPP v Ping Lin (2). In the present case I have held Private Tsephe to be a peace officer, indeed a "policeman" for the purposes of section 228(2). The weight of authority indicates therefore that he is a person

with authority over the prosecution.

Quite clearly there is no question of any force or violence or threats. The question remains whether there was any promise or inducement, which, and I emphasise this, operated to negative the second accused's freedom of volition.

I am satisfied that Private Tsephe, as the bodyguard of the first accused, had the authority to exclude the second accused and his companion Sgt. Selala Bereng Lerotholi from the first accused's residence, despite the fact that they were both senior in rank to him. Nonetheless, as the Director submits, they voluntarily approached the residence of the first accused. It was they who voluntarily wished to gain entry thereto. They were not in any way obliged to make any statement to Private Tsephe.

Mr. Matsau speaks of an "obligation" to reveal the purpose of their mission, that is, if they wished to gain access to the premises. But that "obligation", if one can call it such, was founded on the second accused's personal desire to gain entry, and that was purely a voluntary matter. Had the second accused declined to make any such statement, he could, as the Director submits, simply have departed. He was, in brief under no

compulsion whatever to make any statement.

Further, even if one could regard the query by Private Tsephe, "Why can't you come tomorrow morning?", as an inducement, it cannot be regarded as an improper inducement held out by the Private Soldier, so as overcome the second accused's freedom of volition and thereby cause him to incriminate himself. It will be seen that the particular wording of section 228(1) is "... unduly influenced". It may well be that the second accused was influenced to say what he said, in order to gain entry to the premises. It cannot however be said that such influence, emanating from one who made enquiry as to the nature of any urgency, was in any way "undue".

Mr. Matsau refers to the contents of pp.203/204 of Hoffman & Zeffert ibid (4 Ed.), and urges the court to give the word "voluntary" its grammatical rather than its technical meaning. He points to the fact that, for example, the English Criminal Law Revision Committee recommended that the ambit of exclusion should be extended to cover statements induced by persons not in authority. I have held Private Tsephe to be a person in authority. In any event, taking the word "voluntary" in its grammatical sense, I cannot, with great respect, see how the statement in the present case could possibly be other than voluntary.

As to the aspect of the strict rules of admissibility operating unfairly against the second accused, and the aspect of the court's residual discretion in the matter, I cannot see that the circumstances of the making of the statement in any way gave rise to any question of unfairness, and I decline therefore to exercise my residual discretion in favour of the second accused.

I am satisfied beyond reasonable doubt, on the evidence before me, that the statement was voluntarily made and I rule it to be admissible.

Delivered at Maseru This 13th Day of July, 1990.

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B.P. CULLINAN
CHIEF JUSTICE

CRI/APN/186/90
CRI/APN/187/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

KHANO NTENE — Applicant
MPALI-PALI LEROTHOLI — Applicant

and

R E X

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 12th day of July, 1990

This is an application for bail made by the applicants. They have filed affidavits in which they depose that they are prepared to stand trial. They allege that they know nothing about the robbery with which they are charged. The application is opposed by the learned Director of Public Prosecutions on the grounds that there is a likelihood that the applicants will interfere with Crown witnesses who are accomplices. Secondly, that investigations are not yet complete. Thirdly, that there is a likelihood that the applicants will abscond regard being had to the gravity of the offence with which they are charged.

At the hearing of this application, Mr. Mokhobo, Crown Counsel, virtually abandoned the first two grounds because there was altogether no evidence why the Crown alleged that it was

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likely that the applicants would interfere with Crown witnesses. The offence with which the applicants are charged was committed on the 19th September, 1989 and the applicants were arrested in May, 1990. There was no evidence that during that long period before they were arrested they ever attempted to threaten or to influence witnesses in any way.

Regarding the allegation that the investigations were not yet complete, Mr. Nathane, Counsel for the applicants, pointed out that it is trite law that the liberty of a subject cannot be impaired simply because the police are not through with their investigations. He referred to the case of S. v. Bennett, 1976 (3) S.A. 652 at p. 655 where Vos, J. said:

> "In my view the State cannot merely arrest in order to complete the investigations. There must be a reasonable possibility that the accused will interfere with the investigations."

Mr. Mokhobo submitted that because of the gravity of the offence and the severe punishment the applicants are likely to abscond. I agree that in this country robbery has become a very serious offence because a minimum sentence of ten years' imprisonment is now prescribed by law. It has become almost as serious as murder with extenuating circumstances because in the latter people are often sentenced to imprisonment for a period of less than ten years.

In Kok v. Rex, 1927 N.P.D. 267 at p. 269 Tatham, J. said:-

> "As was said in In re Robinson, 23 L.J. Q.B., 286, the test to govern the discretion of the Court is the probability of the prisoner's appearing to take his trial, and in applying that test the Court will not look to the character or behaviour of the prisoner at any particular time, but will be guided by the nature of the crime charged, the severity of the punishment which may be imposed, and the probability of a conviction."

Again in Ali Ahmed v. Atterney-General, 1921 T.P.D. 461 the headnote reads as follows:

> "Section 109 of Act 31 of 1917 (similar to our section 109 of the Criminal Procedure and Evidence Act 1981) gives the Supreme Court jurisdiction to admit any accused to bail at any time. An accused charged with rape applied for bail before the preparatory examination had been commenced. The police authorities and the Attorney-General were opposed to the granting of bail on the grounds, inter alia, that it was not certain that the accused would stand his trial, that the accused was a man of means, which made his chances of escape the easier, and that as the penalty might possibly be death, no extradition could be obtained if the accused reached Portuguese territory. Held, that under the circumstances, bail should be refused."

In the instant case I have already agreed with the Crown that robbery is a very serious offence. The next question which I have to consider is the probability of a conviction. Because no preparatory examination has been held and I have no record of

It is common cause that on the evening of the 14th June, 1990 the first respondent started to evacuate its supervisors from the Katse camp because it was clear that there was going to be a strike on the following day. The applicant cannot be heard to say that the workers failed to work on the 15th June because supervisors were not at the site. The strike had been planned over a very long time and as late as the 13th June, the workers made it quite clear that the strike would take place.

I reject it as a pack of lies that on the 15th June, 1990 the workers were prepared to go on with their normal duties.

In terms of section 59 of the Law I find that the strike was unlawful.

On the 16th June, 1990 the first respondent summarily dismissed the striking workers in terms of section 15 (3) (b) and (e) of the Employment Act 1967. It seems to me that an employee who goes on an unlawful strike is absenting himself or herself from work without the permission of the emplyer and without a reasonable excuse.

The workers who have been dismissed are not entitled to a notice because they were being summarily dismissed for being involved in an unlawful strike.

The applicant is unhappy that the first respondent employs supervisors who have no valid certificates of employment issued by the Minister in terms of section 28A of the Employment Act 1967.