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.

B.P. CULLINAN
CHIEF JUSTICE