

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

TEMPELE ELIAS

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 12th day of September, 1990

In the instant matter the accused is charged with the crime of Robbery. He pleaded not guilty. He appeared before a First Class Magistrate sitting at Qacha's Nek. At the end of the day he was convicted and the matter was committed to the High Court for sentence.

In his reasons for acting as he did, the Learned Magistrate relied on a passage appearing on page 5 of his Judgment, and the paragraph reads :

"Now coming to the question of sentence in terms of the Revision of Penalties(Amendment) Order 1988, where an accused has been found guilty of the crime of robbery, there is a mandatory minimum punishment of ten years without the option of a fine. This Court being a creature of statute, having no jurisdiction to impose a sentence of imprisonment exceeding five years, had to rely on Review Order No.13 of 1989 - Rex v. Pule Raletsapo that emanated from the

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district of Quthing. Briefly in that case, the accused appeared before a magistrate of First Class powers, and was rightly convicted on a charge of robbery. The magistrate imposed a sentence of ten years' imprisonment without an option of a fine. - On review the High Court held that -

'the trial court which sentenced the accused is a magistrate court with First Class powers. As such it is a creature of statute, and has no jurisdiction to impose a sentence of imprisonment exceeding six years. Having regard to the fact that it had limited jurisdiction, the trial court ought to have properly committed the accused for sentence by the High Court''

The learned Magistrate in the instant matter accordingly proceeded and stated -

"In the instant case the accused is accordingly committed for sentence by the High Court."

The learned Magistrate in the instant case properly came to the view that he didn't have the jurisdiction to impose whatever sentence has been prescribed as a minimum in terms of the prescribed minimum Penalties (Amendment) Order of 1988. And he chose, following on the authority emanating from one branch of the High Court that in circumstances where he was faced with a situation similar to the current one, he should commit the accused to the High Court for sentence.

But, as rightly pointed out by counsel for the accused, and relying on a later decision of another branch of this Court; i.e. Rex vs Tsolo Motholo, Review Order No.4 of 1990 the learned Judge who dealt with that matter had consideration of other matters which followed Review Order No.13 of 1989 Rex vs Pule Raletsapo and relied on that authority but chose rightly, in my view, to depart from their dicta.

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In a case where a magistrate possessed of sentencing powers which fall below the minimum prescribed, it is advisable that he should not deal with it at all because the question of committal to the High Court for sentence is a discretionary matter. Thus, a magistrate cannot properly be said to have exercised his discretion properly where in fact the law has deprived him of such discretion. And he cannot rightly be regarded as having exercised his discretion rightly by committing the accused to ^{this} court where the law deprives him of such discretion. Therefore as rightly submitted by counsel for the defence, the magistrate who presided over this matter had no jurisdiction. In parenthesis I wish to refer to a case referred to with approval by Schutz P. in C. of A. (CRI) No.6 of 1984 Bothata Thakeli (treated jointly with) Semanki Majoro vs Rex (unreported) at page 4. The case is R. vs Dhlamini 1952 (4) SA 194 (T) where Ramsbottom J. is reported at 199B as having said :-

"The fact that the legislature has decreed that a minimum sentence for a particular kind of punishment shall be imposed on conviction for a specific offence does not confer upon magistrates' courts that power to impose that sentence if it is in excess of their ordinary powers unless the power to pass that sentence is specifically conferred. Persons charged with offences of that kind must be committed for trial and tried by a Superior Court".

I lay emphasis on the learned judge's use of the phrase committed for trial and tried for in his careful use of that phrase the learned judge has not said persons charged with offences of that kind must be committed for sentence and sentenced by a Superior Court.

I may just point out the importance of taking careful consideration of Schutz P's remarks in Bothata Thakeli above at 9 and urge the magistrates to pay attention to them; namely, that they "should direct themselves specifically to the powers that are given to them by s.63 of the Subordinate

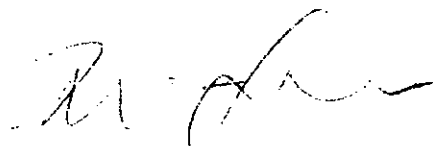
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Courts Proclamation and s.293 of the Criminal Procedure and Evidence Act".

To my mind converting proceedings into Preparatory Examination could afford some help as an alternative means to the requirement that the Chief Magistrate alone should deal with like matters.

The proceedings, therefore, which took place before the Court aguo are set aside. The order of this Court is that the trial should start de novo before a magistrate who's got powers to impose the minimum sentence prescribed. And it is only if such a magistrate feels that the powers that he has, (the sentencing powers that he has) fall short of the desirable sentence, that he can exercise his discretion by committing the matter to this Court for sentence.

I am of the firm view that even if it could be argued that it would save time if this Court dealt with this matter because it has unlimited jurisdiction, such argument has its merit on the one hand but that a countervailing argument is as to jurisdiction. It confounds the order of things if everyone preserve not his jurisdiction. It causes confusion if everyone does not limit himself to his jurisdiction. The order therefore that I make is that this matter be remitted to the Chief Magistrate for trial de novo. The further order that I make is that in the event that the Chief Magistrate finds that the conviction stands, he should take into account the length of time spent by the accused in detention. The Crown is also enjoined to ensure that the matter is dealt with expeditiously.



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J U D G E

12th September, 1990

For Crown : No Appearance

For Defence: Mr. Ramolefe