CRI/APN/131/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LIRA MOTLOMELO — Applicant

and

THE MAGISTRATE (MR. MORUTHOANE) — 1st Respondent
DIRECTOR OF PUBLIC PROSECUTIONS — 2nd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 17th day of October, 1990

This is an application for review of the proceedings of the Magistrate's Court for the district of Maseru in CR 21/90. On the 15th August, 1989 the applicant appeared before the aforesaid court charged with two counts of theft of motor cars, alternatively contravention of section 344 (1) of the Criminal Procedure and Evidence Act 1981. After the charges were read and explained to him, he pleaded guilty to the main charge in count 1 and guilty to the alternative charge in count 2.

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The public prosecutor accepted the pleas and gave an outline of the facts of the case as disclosed by the evidence in his possession. The applicant was then asked if he admitted the facts stated by the public prosecutor. His answer was in the affirmative. He was convicted and sentenced to five years' imprisonment in count 1 and to four years' imprisonment in count 2.

The summary of facts reads as:

"As regards Count 1

Accused lives in Borokhoaneng in Maseru. There is one White man by the name of George Alfred Smith who lives in Zaztron in R.S.A. He owns a motor vehicle with reg. nos OZ 186. 1980 model with Engine no. Z 2874 chassis no. LXZ N 4402 8717.

On the evening of 28/6/89 Mr Smith parked this vehicle outside his home he had closed and locked it. The time was about 5.00 p.m. The following day on 29/6/89 he found this vehicle missing from where he had parked it. He had not allowed anybody to remove it and use it in their own business.

Accused and one Nkule Taoana had no right to remove Mr. Smith's vehicle from where it was parked.

Mr. Smith reported the matter to the police at Zaztron. He looked for it but could not find it.

Accused and one Nkule Taoana left Lesotho to Zaztron. Both of them jointly unlocked Smith's vehicle and drove it from Zaztron and brought it into Lesotho at Lakeside Hotel in the district of Maseru.

Accused was found driving this vehicle by the police in Maseru. At this time the plate numbers of this vehicle had been removed and A 7114 placed for them. Accused was arrested. Particulars of this vehicle were circulated both in Lesotho and R.S.A. On 30/6/89 which was the same day when accused was arrested Mr. George Alfred Smith received a telephone call from Zaztron Police that his vehicle had been found in Maseru. He came to Maseru CID Police in Lesotho where he identified this vehicle as his.

On 1st July accused was released to go home. He was informed that he would be summoned when the case was ready to go to the court.

COUNT II

There is a white man by the name of Joachim Jacobus Cloete who lives in Bloemfontein. On the evening of the 12/7/89 he had closed and locked all the doors of his vehicle Reg. nos OB 30426. The following day he found it missing from the place he had parked it.

Chassis no. of his vehicle was NR 238899. A blue and white Ford Courier, 1987 Model. He had not allowed anybody to unlock and drive his vehicle away from where he had parked it.

After accused was released by Police on 1/7/89 he went to Bloemfontein with one Ezaiah Mafisa. On 13/7/89 Mafisa and another person went to same place. The following day he brought this vehicle in question to accused. Both accused and Mafisa brought this vehicle to Lesotho. It was driven by accused. Mafisa told accused that this vehicle had been stolen.

Accused was driving this vehicle at Ha Matala in Maseru and they suspected it.When they approached accused he drove it away at a high speed. He was running away from them and he took Masianokeng direction the police gave chase. Accused abandoned this vehicle at some place at Masianokeng and ran away. He went to hide at Tsenola in Maseru.

When he received this vehicle from Mafisa, accused had no reasonable grounds to believe that it belonged to Mafisa nor that he had been authorised by its owner to dispose of it or to deal with it. Accused had not acquired this vehicle from a public sale.

Mr. Cloete, reported the loss of his vehicle to Bloemfontein Police, the police in Lesotho circulated the particulars of this vehicle in Lesotho and R.S.A. Mr. Cloete then came to Maseru CID where he identified it as his.

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Accused was later arrested and was charged with theft of both vehicles, which are still with Police in Maseru and handed in as evidence vehicle reg. nos. OZ 168 marked Exh. I vehicle reg. nos OB 30426 marked Exh. '2'."

In his founding affidavit the applicant deposes that he was arrested on the 9th August, 1989 and charged with car theft. On the 14th August, 1989 he was taken to court and met Prosecutor Mr. Tlali who told him that the trial was proceeding on that same day. He informed Mr. Tlali that due to the seriousness of the charge preferred against him, he wished to be given chance to engage the services of a legal practitioner. Mr. Tlali told him that the services of a legal practitioner were not necessary because he had already made arrangements with the investigators, his mother and the magistrate that he should plead guilty so as to get a suspended sentence. He wanted to engage a lawyer because he had heard over the radio that people convicted of car theft were heavily sentenced.

Mr. Tlali called his (aaplicant's) mother into his office and advised her to talk to him as they had pre-arranged. His mother then persuaded him to plead guilty. Though he was not guilty he pleaded guilty. He avers that had it not been because of these undue influences, he would not have pleaded guilty and he would have great prospects of success in the said trial.

I wish to digress at this juncture and make some remarks. The applicant has not taken the Court into his confidence and told it what his prospects of success are based upon. According to the summary of the facts made by the public prosecutor, which were

admitted by the applicant, the two vehicles in question were stolen in the Republic of South Africa and were later found in the possession of the applicant here in Maseru. The applicant had gone to the Republic of South Africa and had stolen these vehicles assisted by some people whose names are given in the statement of the facts of the case. I think it was the duty of the applicant to disclose what his defence is going to be because he is asking this Court to set aside the proceedings in CR 21/89 and to order a trial de nova before a different magistrate and a different prosecutor.

In Theese Phooko v. Magistrate (Mrs. M. Mokoena) and another CRI/REV/1/89 dated the 22nd May, 1989 (unreported) the applicant was found in possession of the stolen vehicle. In his applicantion for review he explained how the vehicle came into his possession. He had bought it from the late Lehana Lebopo who showed him a registration certificate in which the names of the said Lehana Lebopo appeared. The engine and chassic numbers tallied with those on the registration certificate. In the instant case the applicant is not prepared to tell this Court how the two vehicles came into his possession.

Coming back to the evidence on behalf of the applicant, his mother 'Malerato Motlomelo deposed that on the 10th August, 1989 she went to the Police Headquarters to make enquiries about her son who had been arrested; she met one policeman named Mkemele Sehlabaka. He informed her that the applicant had been arrested in connection with forty stolen cars but he would be charged with the theft of six cars. He went further to say that police were

going to shoot and kill applicant as the law of the state of emergency empowered them to do so. He said that recently they shot dead a number of people suspected of theft of cars in the districts of Butha Buthe and Quthing. He lastly informed her that in their Special Court for car theft cases lawyers are not allowed to appear. She then burst into tears.

Noticing that she was crying Nkemele Sehlabaka told her that he understood how she felt as a parent and that if she raised and gave him the sum of M1,500-00, he would see to it that her son's life was spared. He would negotiate with the public prosecutor and the magistrate that her son be released. She gave him the required sum of money. She goes on to aver that at the court she met one Mr. Tlali who asked her to persuade the applicant to plead guilty so that he could be released without delay and trouble.

Policeman Setlama Nkemele and Mr. Tlali have filed affidavits in which they deny all the allegations made against them by both the appellant and his mother. Mr. Tlali deposed that all he did when the applicant was brought to him by the police was to ask him how he was going to plead. If Mr. Tlali is telling the truth then there was no question of plea-bargaining. The public prosecutor is entitled to ask an accused person to tell him how he is going to plead so that he can subpoena the witnesses if the accused person says that he is going to plead not guilty or dispense with the work of issuing subpoenae for the witnesses if the accused indicates that he is going to plead guilty.

The explanation of the applicant and his mother that he was forced by policeman Nkemele and Mr. Tlali to plead guilty to an offence he has not committed is totally unworthy of belief. The applicant is not an ignorant Mosotho person but a fairly sophisticated young man who often heard over the radio that car theft was regarded by the courts as a very serious offence for which very heavy sentences were imposed. It is totally unbelievable that the applicant and his mother could be happy with a suspended sentence for the offence he has not committed. An innocent man cannot plead guilty to a serious offence he has not committed. It is well known that sometimes accused persons make confessions under duress but very often when the matter comes to trial they reveal to the presiding judicial officer that the confession was not freely and voluntarily made.

In the instant case the applicant was allegedly forced to plead guilty on condition that he gets a suspended sentence. The presiding judicial officer who was allegedly aware of the arrangements for a suspended sentence did not stick to the agreement but sentenced him to a total of nine years' imprisonment. Why did the applicant not complain to the presiding judicial officer immediately the sentence was announced? He did not do anything until eight months later when the present application was launched. I have already stated above that the story of the applicant and his mother is totally unworthy of belief. She alleges that she parted with her M1,500-00 on condition that her son got a suspended sentence but when this was not done she did not do anything. She did not complain to the presiding judicial officer.

Mr. Phafane, counsel for the applicant, submitted that the presiding judicial officer committed an irregularity by failing to explain to the applicant his right to legal representation. In Phomolo Khutlisi v. Rex C. of A (CRI) No. 5 of 1988 dated 26th January, 1990 (unreported) at page 7 Ackermann, J.A. said:

> "I need hardly add that the question as to when, or under what circumstances, an impecunious accused is entitled to free legal representation might be answered differently in different countries. The duty to provide free legal representation in a wider range of cases may, for a variety of reasons, be greater in the United State of America than in the Republic of South Africa and greater in the latter than in the Kingdom of Lesotho.
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> It is important, for the proper administration of justice, nonetheless, that an unrepresented accused, at the commencement of his trial, be informed of his legal rights, in regard to legal representation, and, if he is indigent and desirious of legal representation, what avenues are open to him in this regard.
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> The difficulty facing the appellant in the present case on this issue is the paucity of facts. There is no evidence that the appellant's rights in this regard were not explained to him. There is indeed no evidence that the appellant was unaware of his rights concerning legal representation nor, if he had been informed of, his rights that he would have wanted legal representation. Consequently I am not satisfied that the appellant has established any procedural irregularity in this regard."

In the instant case the applicant was actually aware of his right to legal representation but failed to exercise his right for reasons of his own. I am of the view that the presiding judicial officer committed no irregularity because the applicant was aware of his rights. There was no need for her to explain to the applicant what he already knew. It would have been a different matter if the applicant was unaware of his right to legal representation.

In the result the application is dismissed.

J.L. KHEOLA
JUDGE

17th October, 1990.

For the Applicant - Mr. Phafane
For the Respondents - Mr. Sakoane.