

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LIPHAPANG MOLOI	1st Applicant
ASAEL LENKA	2nd Applicant
MOHLAOLI LENKA	3rd Applicant

and

HIS WORSHIP MR. MOTINYANE	1st Respondent
DIRECTOR OF PUBLIC PROSECUTIONS	2nd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 3rd day of December, 1990

This is a criminal application for a review of the criminal proceedings in CR 267/89 of the Subordinate Court for the district of Butha Buthe in which the applicants were convicted of two counts of theft and sentenced to various terms of imprisonment. The application is based on the ground that on the 24th April, 1990 when the matter was postponed to the 27th April, 1990 the defence counsel, Mr. Klass was unable to appear because he was not well. The applicants allege that they told the learned magistrate that their attorney was not available and that it would

be unfair to proceed with the matter in his absence. Instead the learned magistrate ordered the public prosecutor to address him and the applicants were convicted a week later without being given the chance to be heard.

According to the record of the proceedings in this matter the trial started on the 9th August, 1989 and after numerous postponements the Crown closed its case on the 28th March, 1990. On the 4th April, 1990 Mr. Klass applied for the discharge of the applicants on the ground that the Crown had failed to establish a prima facie case against his clients. The case was postponed to the 22nd April, 1990 but on that day Mr. Klass did not appear for reasons unknown to the court. The case was postponed to the 25th April, 1990 especially to give the applicants a chance to contact Mr. Klass or to employ the services of another lawyer.

On the 25th April, 1990 Mr. Klass was still absent without any reasons revealed to the court and the applicants had not instructed another lawyer. The learned magistrate exercised his discretion and made an order that the case would proceed in Mr. Klass's absence. He was of the opinion that the applicants' behaviour and that of their lawyer amounted to nothing but delaying tactics. He dismissed the application for their discharge and held that they had a case to answer. He explained their rights to them and they all elected to remain silent and indicated that they had no witnesses to call.

I may mention that on the 3rd November, 1989 and on the 20th February, 1990 Mr. Klass had failed to appear without giving any notice to the court about his failure to appear and the case had to be postponed. One can clearly see what kind of an attorney the court was dealing with. I think it is a sign of impoliteness and disrespect by an attorney to the court to be absent on the day the case is set down for hearing and not to tender any apology or explanation as to why he is unable to appear. The applicants were apparently unprepared to defend themselves in the absence of their attorney and adopted hostile attitude towards the court by electing to remain silent after their rights were explained to them. After conviction they decided to say nothing in mitigation of sentence. It is not correct that they were not given a chance to answer the charge.

The question is whether the learned magistrate exercised his discretion wrongly by deciding that the case would proceed in the absence of the applicants' attorney. I am of the view that he exercised his discretion rightly because he had given the applicants time to contact their attorney or to instruct another attorney but they did practically nothing. I am of the view that the applicants were not denied the right to legal representation and no irregularity was committed. They have only themselves to blame for having behaved in the manner they did.

The facts in S. v. Nongila and another 1970 (3) S.A. 97 (E.C.D.) the facts were that 'at the resumed hearing on a charge of stock theft, as by 11.30 a.m. the accused's attorney was still

not present, the magistrate had decided that the case should proceed. The accused declined to cross-examine the remaining State witnesses, stating that they could not say anything without their attorney being present. They were convicted and the case adjourned until 2 p.m. The accused's attorney then explained that he had noted the wrong date for the postponement on his record, and applied for the recall of the State witnesses for cross-examination and placing on record the evidence of the accused and their witnesses, while both the State and defence witnesses were present. The magistrate held that he could not reopen the case. In an appeal against the conviction on the ground of irregularity,

Held, that the magistrate had rightly held that he could not reopen the case.

Held, further, that in the light of all the relevant facts, the Court could not say that the magistrate had exercised his discretion wrongly in deciding to continue the case instead of postponing it.

Held, further, that the mere fact that an accused had been denied legal representation did not afford a ground for relief, and that it had not been shown that this had resulted from any wrong decision by the magistrate.'

I think that the facts in Nongila's Case are more or less the same with the facts in the present case. They cannot be heard to say that they were denied the right to legal representation when they stubbornly refused to say anything in the absence of their attorney.

In the result the application is dismissed

J.L. KHEOLA

JUDGE

3rd December, 1990.

For Applicants - Mr. Klass
For Respondents - No. Appearance.