CRI/APN/37/90

CRI/REV/240/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

v

RETSELISITSOE SEJANE
MATSUFU SEJANE
MOLISE MOKHONGOANE
LEETO SEJAKE

Before the Honourable the Chief Justice Mr. Justice B. P. Cullinan on the 21st day of May, 1990.

For the Crown : Mr. P. L. Mokhobo, Crown Counsel

For the Accused : Mr. M. M. Ramodibedi

JUDGMENT

Cases referred to:

(1) R v Molotsi CRI/T/42/85 (Unreported);
(2) R Nthethe CRI/T/76/89 (Unreported);
(3) R v Louw (1918) A.D. 344;
(4) R v Tsehlana CRI/REV/14/87 (Unreported);
(5) R v Tankiso Setaka CRI/S/7/87 (Unreported).

The accused were convicted by the Subordinate Court for the Mafeteng District of assault with intent to do grievous bodily harm. The learned Crown Counsel Mr. Mokhobo has very properly indicated that the Crown does not support the convictions.

The four accused pleaded not guilty. Five witnesses gave evidence for the Crown and were cross-examined by the accused. The Crown closed its case. After an adjournment the learned trial Magistrate recorded:

"Rights of accused explained to them."

Thereafter all four accused gave evidence and indeed called a further witness in their defence. Section 175(3) and (4) of the Criminal Procedure & Evidence Act 1981, reads as follows:

> "(3) If, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged in the charge, or any other offence of which he might be convicted thereon, the court may return a verdict of not guilty.
>
> (4) At the close of the evidence for the prosecution the judicial officer shall ask the accused, or each of the accused if more than one, or his legal representative, if any, whether he intends to adduce evidence in his defence and if he answers in the affirmative he or his legal representative -
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> (a) may address the court for the purpose of opening the evidence intended to be adduced for his defence without commenting thereon;
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> (b) shall then examine his witnesses and put in

and read any documentary evidence which is admissible."

I had occasion to deal with the provisions of sub-section (3) above in the cases of - R v Molotsi (1) and R v Nthethe (2), wherein I made a specific ruling. In both those cases however, an application was made by the defence to acquit the accused, on the basis of a submission of no case to answer. In my view, the court is obliged to make a ruling, even where no such application is made. Let us suppose that the defence ill-advisedly makes no such application, and the court nonetheless considers that there is no evidence that the accused committed the offence, then it seems to me that the court is under a duty (see R v Louw (3) per Innes C. J. at p. 352) to state and record its finding, and to acquit the accused, though no doubt the better course would be to first invite submissions from both parties, due to the finality of such finding.

Sub-section (4) above indicates that at the close of the Crown case the court shall simply advise the accused of his rights and await the defence, if any. It is obvious however, that a Magistrate cannot embark upon such course without first considering the evidence disclosed, and I use the word 'consider' advisedly, as that is the word used in sub-section (3). Upon such consideration, whether with or without application or submission made to him in the matter, a Magistrate must make a

finding, of no case to answer or otherwise. If a Magistrate is obliged to record the former finding, then I cannot but see that he is similarly obliged to record a finding that there is a case to answer. Again, as a Magistrate is obviously obliged to record such a finding where an application has been made by the defence, I cannot then see why he should not be similarly obliged to make such record where no such application is made.

I do not regard this as a counsel of perfection. For one thing, a Subordinate Court is a court of record and each and every finding made by the court is a matter or record. Secondly, the duty and habit of making such record automatically focuses the Magistrate's mind on the question of whether or not a *prima facie* case has been made out, and upon the court's duty to acquit if it has not. Thirdly, the accused, particularly, as in this case, an unrepresented accused, is thus advised of the precise situation reached.

In the present case no finding was recorded by the learned trial Magistrate. That I consider to be an irregularity. It is not necessary for me, however, to decide whether the irregularity was such as to vitiate the proceedings, as in the present case there was a greater irregularity, which has that effect. Much depends on the facts of each case, and it may be that, in a particular case, failure to make a finding in the matter might

result in a conviction being set aside. For present purposes, it suffices to draw the attention of all Magistrates to the duty, where there is no application made by the defence, of making and recording a finding: where the finding is that there is a case to answer, then I consider that it should be of the briefest nature, without necessarily stating any reasons or recounting any evidence; indeed in view of the necessity to ultimately compose and deliver a judgment, the less reference at that stage to the evidence the better.

In the present case, when the defence had closed its case, the learned trial Magistrate simply recorded a verdict of guilty in respect of each accused. No reasoned judgment was delivered. After addresses in mitigation, each accused was sentenced to five years' imprisonment. Subsequently the learned trial Magistrate compiled a manuscript document entitled "Reasons for Judgment". It is undated. That simply will not do. I repeat, a Subordinate Court is a court of record and the date of any action taken by a magistrate in a case, criminal or civil, is a matter of record. The learned trial Magistrate has addressed a letter to the Registrar of the High Court which indicates, *inter alia*, that the document could not have been composed any earlier than some three months after the trial had concluded. There are two judgment of this Court, R v Tsehlana (4) at pp. 4/5 and R v Tankiso Setaka (5), stating that a Magistrate in such circumstances is *functus*

officio and that the reasons for a judgment, not specifically reserved, delivered *ex post facto*, are simply irrelevant.

In any event, the reasons forwarded by the learned trial Magistrate in this case are not reasons: they are findings. The document contains a list of "Facts Found Proved". But it contains no reasons as such, other than to finally say that, "all accused do not deny to have assaulted the complainant". That is certainly correct, but it was alleged by some of the accused that the complainant wielded a battle-axe, that he struck the first accused and that the others thereupon defended the first accused, by the use of sticks. Any finding in the matter therefore depended on the issue of credibility between five prosecution witnesses and five defence witnesses. Nowhere did the Magistrate make any finding of credibility: nowhere indeed did the Magistrate ever consider the evidence for the defence.

I take the view that there is no judgment before this court. This is not the court of trial: that was the function of the court below. In my judgment the trial was completely vitiated by the absence of a judgment.

It may be that in an appropriate case the High Court in such circumstances might order a re-trial, rather than to simply set aside the conviction and sentence. In the present case the

learned trial magistrate apparently assumed that the Revision of Penalties Order 1988 applied. It did not: the transaction took place before the advent of that Order, on 14th July 1988, so that the accused persons were not, in any event, liable to the minimum sentence of five years' imprisonment. The accused were granted bail. At that stage they had served at least five months in prison. I say "at least", as it is not recorded on the charge sheet whether or not the accused were in custody, or on bail, or simply summoned to attend court. Such detention equates to a sentence of 7½ months imprisonment, that is, with remission. In all the circumstances therefore I do not consider that this is a proper case in which to order a re-trial.

It would be unsafe to allow the convictions to stand. The findings and convictions and sentences in the court below are set aside and the four accused are acquitted.

Delivered at Maseru This 21st day of May, 1990.

B. P. CULLINAN
CHIEF JUSTICE