CRI/A/225.91
CRI/A/227/91
CRI/A/229/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

PABALLO MOLEKO	1ST APPELLANT
MANTSI KOU	2ND APPELLANT
SIMON LEPELESANA	3RD APPELLANT
TSELISO KUTLANE	4TH APPELLANT
DIRECTOR OF PUBLIC PROSECUTIONS	RESPONDENT

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on the 13th day of September, 1991.

For the Appellants: Mr. T. Fosa, Chief Legal Aid Counsel
For the Respondent: Mr. N. Qhomane, Senior Crown Counsel

JUDGMENT

These three appeals (involving four appellants) from the Magistrates' Court in Thaba Tseka, Mokhotlong and Thaba Tseka respectively, have a number of things in common, so I have decided to deliver a composite judgment.

The first appellant was convicted of stock theft and was sentenced to six years' imprisonment: he appeals against sentence. The second and third appellants were convicted on two counts of housebreaking with intent to steal and theft and were sentenced to five years' imprisonment on each count to be served concurrently. The fourth appellant was convicted of

/...

housebreaking with intent to steal and theft and was sentenced to five years' imprisonment. The second, third and fourth appellants appeal against conviction and sentence.

I take this opportunity of saying that I am indebted to the learned Chief Legal Aid Counsel Mr. Fosa who has brought these appeals before the Court. I am also indebted to the learned Crown Counsel Mr. Qhomane for his enlightened approach in the matter.

All but the first appellant pleaded guilty. The age of all the appellants is stated to be "about 18 years". That is a statement of approximation by the public prosecutor. It clearly indicates some doubt in the matter as to whether or not the appellants were children. The duty of establishing that aspect lies upon the Magistrate, and not the public prosecutor.

Mr. Fosa submits, and Mr. Qhomane very properly concurs, that the learned trial Magistrates should have immediately been put upon enquiry as to age: they should have conducted an enquiry, to the extent of hearing evidence, and if necessary of ordering medical examination to determine age; thereafter they should have made a finding in the matter. None of these things were done. It is of course important to establish the age of an accused in any proceedings. Where the possibility of childhood is involved, the issue is doubly important: where imprisonment

and indeed a minimum sentence of five years' imprisonment is involved, the issue is critical. Yet the Magistrates in these cases showed no concern whatever in the matter. Neither for that matter do the records indicate that the Magistrates informed the relevant appellants of the minimum sentences which they faced, and of the effect of their pleas of guilty.

In any event, no determination as to age was made and the doubt as to the appellants' age must now be resolved in their favour and I accordingly find that all appellants were children.

That being the case, the Magistrates made no attempt to secure the attendance of parents or guardians. As I have held in the judgment in a similar case, the case of Nkone & Anor. v R CRI/A/228/91 delivered this morning, the pleas of guilty in respect of the second, third and fourth appellants were then equivocal and the trials were nullities. The appeals are allowed in respect of those appellants therefore, and the findings of guilty and punishments are set aside. As to re-trial, the second and third appellants suffered imprisonment, which was invalid, for 21 months and the fourth appellant for 9 months, equating to sentences of imprisonment of more than 2½ years and 1 year respectively, that is, with remission. These are not appropriate cases therefore in which to order a re-trial.

As to the first appellant, he pleaded not guilty. While the

/...

direct evidence against him was that of an accomplice, there was ample circumstantial corroborative evidence and I confirm the finding of guilty. The appeal against sentence is allowed however and the sentence in the Court below is set aside. It may well be that at the time an appropriate punishment was an Approved School Order. It is no longer applicable however, as no doubt the appellant is now over 18 years of age. The appellant suffered nine months' imprisonment, representing a sentence of more than one year's imprisonment, that is, with remission. Under the circumstances I do not propose to impose further punishment and I substitute a discharge with a caution under the provisions of section 319 of the Criminal Procedure & Evidence Act, 1981.

Delivered at Maseru this 13th day of September, 1991.

.....

B.P. CULLINAN
CHIEF JUSTICE