CRI/A/57/89

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

CATHOLOTSI MAPONOPONO

v

R E X

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice M.L. Lehohla
on the 13th day of February 1991

After hearing arguments this morning I dismissed the appellant's appeal and stated that reasons would be filed later.

These are now the reasons :

The appellant and a co-accused in the Court below were charged with stock theft involving four cattle, one horse and failure to give satisfactory explanation relating to a horse found in their possession in circumstances where reasonable grounds for suspicion that theirs was an unlawful possession existed.

The grounds of appeal are that the conviction was against the weight of evidence and that sentence was disturbingly shocking. It appears that a maximum of 6 years' imprisonment was imposed in Count 1 and 5 years' imprisonment in Count II on the appellant, his co-accused having absconded. The sentence was imposed by the Court

/below

below on 1st March 1989.

The Criminal Procedure and Evidence Act provides that where the Court imposes respective sentences in cases involving more than one count, then if the Court has not stated how the sentences are to run in that event they shall run consecutively.

In the present case the learned Magistrate's record indicates that he did not indicate how the sentences are to run.

This Court did not have benefit of argument by either side as to the question of the severity of sentence. Because of the poor state in which the record was regarding typographical errors and plain incomprehensibility of the text it was easy for this Court to be in error, yet; following the authority of Rex vs Dhlumayo and Another 1948(2) SA 677 at 705 where the Appellate Court is in doubt as to the reason for the conclusion reached by the court below, the Appellate Court must uphold such conclusion.

But because I discovered the misleading errors in the record before writing this Judgment, I found it fitting to call both counsel to address me on sentence even though impliedly the appeal against sentence had been dismissed also when that against conviction was dismissed.

Counsel duly addressed me on sentence. The Crown conceded that the sentence was on the harsh side. The Court ordered therefore that the Subordonate Court's order on sentence be altered to read : sentences are to run concurrently.

In argument Mr. Klass for the appellant submitted that the Court below erred in failing to give due weight to the appellant's version which tended to show that the explanation of how he got to be found in possession of the stock was reasonable. It was submitted that the learned

Magistrate was wrong to have rejected the appellant's explanation as untrue even though it was probably true. Mr. Klass stressed that the appellant's story need not be true so long as it is possibly reasonably true.

The appellant's version which was never put to the Crown witnesses was that he met the co-accused Lenka who was driving four cattle and two horses. Along the way these two met with five men who asked Lenka where these animals were obtained from. There and then Lenka fled. The story that was tendered for the first time when the appellant gave his evidence was that the animals belonged to Lenka.

The Crown laid stress on the fact that the appellant was represented in the Court below. Thus if his story was not put to the Crown witnesses it must be because the appellant never told his counsel that version.

Mr. Klass countered by saying the appellant's counsel Mr. Nchee in the Court below was too inexperienced at the time to have done his work as efficiently as an experienced counsel.

The Court however referred to C. of A.(CIV) No.5 of 1988 Letlatsa vs Letlatsa where after referring to Small vs Smith 1954(3) 434 (SWA) Schutz P as he then was stated

> "An adverse answer may either be left to stand, at the cross-examiner's peril, or he may seek to undo it or water it down by further cross-examination ..... On the record damning answers were simply allowed to stand. Mr.Maqutu claimed that this happened because of the inexperience of the cross-examiner. This may or may not be so, but if he was inexperienced that fact should not be visited on the plaintiff ....."

If the above criticism is deemed good enough against a lay man it would seem even more deserving to be levelled against a qualified legal practitioner however inexperienced.

Evidence in the Court below showed that appellant tended to fabricate or even to invent evidence as he got along. At page 6 of the record he admitted hearing P.W.3 say in the Court below that he met the appellant and another man prior to the date when he was seen in possession of the cattle. The appellant says this is not true yet it remained unchallenged.

When Mr. Qhomane for the Crown seemed to make much of the fact that a good many pertinent questions were not put to the Crown witnesses the Court referred him to C. of A. (CRI) No.2 of 1983 Lenosa Hamyane vs Rex(unreported) at 7 where Schutz P as he then was said

> "But when at least one instance seems to have been shown to be the fault of counsel, I think that it would be dangerous to embark on the hip and thigh smiting of the appellant that the trial court embarked on".

However taking into account the untruthfulness of the appellant and the fact that simple explanation would have sufficed to account for his possession of the animals at least in the Court below the fact that he lied about this aspect of the matter would tend to lead to an inference of guilt being drawn against him and thereby strengthening the case for the Crown. In this regard I find that the learned Magistrate's assessment of the evidence and ci conclusion on the law can scarcely be faulted.

The appeal against conviction was accordingly dismissed and that against sentence succeeded only to the extent that sentences of 6 and 5 years are to run concurrently instead of consecutively.

J U D G E

13th February, 1991

For Appellant : Mr. Klass

For Crown : Mr. Qhomane