

IN THE HIGH COURT OF LESOTHO

In the Application of :

FAKO GRIFFITH Applicant

and

THE COMMISSIONER OF POLICE 1st Respondent

THE ATTORNEY-GENERAL 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 25th day of March, 1991.

In an application wherein the applicant has moved the court for an order directing the Respondents, inter alia, to release his Toyota combi with registration No. A2032 the latter have raised, in limine, a point of law in which they contend that there is a pending criminal case concerning the same vehicle against the applicant. The vehicle cannot, therefore, be properly released to him until the criminal case has been finalised.

Briefly stated, the facts surrounding this application are that on 1st April, 1988 the vehicle, which is the subject matter of this dispute, was seized by the officers of the 1st Respondent on a suspicion that possession thereof by the applicant's co-accused in C. R. 415/88 was in contravention of S.343 of the Criminal Procedure and Evidence Act, 1981. The

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vehicle was retained by the officers of the 1st Respondent under the authorisation of the magistrate court, presumably in terms of the provisions of S.55 (2) of the Criminal Procedure and Evidence Act, supra.

On 18th April, 1988 the applicant's co-accused in C.R. 415/88 was duly charged, before the Maseru magistrate court, with contravening S.343 of the Criminal Procedure and Evidence Act, 1981. The applicant himself was joined as co-accused in C.R. 415/88 on 12th July, 1988.

However, it would appear that on 14th April, 1988 and whilst the criminal case against his co-accused was still pending in the magistrate court, the applicant had instituted, before the High Court CIV/APN/192/88 seeking, inter-alia, an order for the release of the vehicle, which is the subject matter of this dispute, to him. The application was opposed by the Respondents

It is significant that on 18th August, 1988, after several remands, the applicant's co-accused in C.R. 415/88, who incidentally is an Attorney of this court, applied that the case against him be struck off the roll by the presiding magistrate. One of the grounds for the application was that the case had taken too long to prosecute. The public prosecutor pointed out that the delay in prosecuting the case was due to the fact that the docket was still with the investigating officer, a

certain Major Koza, who was called to testify that his investigations were still incomplete and continuing. However, the prosecutor did not object to the case being struck off the roll provided that the articles which would be sued as exhibits (including the vehicle) were to remain in the safekeeping of the police.

On 2nd September, 1988 the Magistrate gave the following decision in the matter:

"The application that the case be struck off is granted but exhibits and other documents will be kept by P.W.1 (Major Koza) until the case is disposed of or otherwise determined."
(My underlinings)

Following this decision of the magistrate, the applicant withdrew CIV/APN/192/88 per his notice of withdrawal which was filed with the Registrar of the High Court on 7th March, 1989. However, the applicant has now instituted the present application for an order as aforesaid.

As it has already been stated earlier, the Respondents are opposing the application and have raised, in limine, the point of law viz. that there is a criminal case still pending against the applicant and the vehicle which is involved in that case cannot be properly released to him until the case has been finalised.

In his argument Mr. Putsoane, counsel for the Respondents told the court that our Criminal Procedure and Evidence Act 1981 knows of no procedure whereby

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a Criminal case can be struck off the roll by a magistrate. He referred the court, inter alia, to S.278(1)(b) of the Criminal Procedure and Evidence Act 1981 which empowers a subordinate court to dismiss (not to strike off the roll) a charge if the case were not prosecuted on the court day appointed for hearing. As the magistrate struck off the roll the criminal charge against the applicant, his decision to do so was null and void and of no legal force. That being so, the criminal charge against the applicant was still pending.

In reply Mr. Phafane for the applicant, argued that S.278 (1)(b) of the Criminal Procedure and Evidence Act, 1981 dealt with a situation where the prosecutor did not turn up on the court day appointed for hearing. In C.R.415/88 the prosecutor was in attendance. S.278(1)(b) of the Criminal Procedure and Evidence Act, 1981 did not, therefore, apply. In any event, there was nothing wrong in the magistrate striking off the roll C.R.415/88. He was perfectly entitled to do so, as a matter of common sense, in the circumstances of the case.

It is trite law that a magistrate court is a creature of statute. As such it can lawfully do things for which it is empowered by statute. I am not aware of any statute that empowers a magistrate court to strike off the roll a criminal case. To that extent there is some sense in Mr. Putsoane's argument that as he was not empowered by the Criminal Procedure and Evidence Act 1981 or, for that matter, any other statute to

strike off the roll a criminal case the presiding magistrate could not have properly struck off the roll C.R.415/88.

On the other hand I agree with Mr. Phafane that S.278(1)(b) of the Criminal Procedure and Evidence Act, 1981 deals with the situation where the prosecutor has failed to appear on the court day appointed for hearing. As the prosecutor, in the present case, did attend on the court day appointed for hearing, S.278(1)(b) of the Criminal Procedure and Evidence Act, 1981 could not, therefore, apply.

It seems to me, the decision in this matter pivots on whether or not the above cited decision of the magistrate in C.R. 415/88 had the effect of concluding those proceedings. Whilst the applicant says it did the Respondents say it did not.

I shall assume, for the sake of argument, that the applicant is correct in his contention that the magistrate's decision has the effect of concluding the proceedings in C.R. 415/88 and there is, therefore, no longer any pending criminal case against him. In that event, it seems to me, the presiding magistrage would have made an order relating to permanent possession of the vehicle, in accordance with the provisions of S.56(1) of the Criminal Procedure and Evidence Act, 1981. The section reads:

"56(1) The judge or judicial officer presiding at criminal proceedings shall, at the conclusion of such proceedings, but subject to this

Act or any other law under which any matter shall or may be forfeited, make an order that any article referred to in section 55:

- (a) be returned to the person from whom it was seized, if such person may lawfully possess such article; or
- (b) if such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or
- (c) if no person is entitled to the article or if no person may lawfully possess the article or if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the crown."

Indeed, if at the time he finally concluded the proceedings in CR.415/88, as contended by the applicant, the presiding magistrate inadvertently omitted to make an order relating to possession of the vehicle, the subject matter of this case, in accordance with the provisions of section 56(1) of the Criminal Procedure and Evidence Act 1981, it seems to me he is still empowered to do so even now, under the provisions of subsection (3) thereof which reads:

"(3) If the judge or judicial officer concerned does not, at the conclusion of the relevant proceedings, make an order under subsection (1), such judge or judicial officer or, if he is not available, any other judge or judicial officer of the court in question, may at any time after the conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally as he may deem fit."

On his own contention, therefore, I find not the slightest excuse for the applicant to have brought this

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application before the High Court. It is clearly within the jurisdiction of the magistrate court. Be that as it may, the words I have underscored in the above cited decision of the magistrate leave no doubt in my mind that he did not intend to make a final conclusion of the proceedings in CR415/88. In my finding, what the magistrate clearly had in mind was that the charge against the applicant and his co-accused should stand withdrawn until the investigations had been completed. Assuming the correctness of my finding, *it is significant to observe that subsection (3) of section 278 of the Criminal Procedure and Evidence Act, 1981 provides:*

"(3) Nothing in this section shall deprive the Director of Public Prosecutions or the public prosecutor with his authority or on his behalf, of the right of withdrawing any charge at any time before the accused has pleaded, and framing a fresh charge for hearing before the same or any other competent court." (my underlinings)

I am convinced that the words I have underscored in the above cited subsection (3) imply that before the accused has pleaded, as it is apparently the case in CR.415/88, the Director of Public Prosecutions always has the right to have a charge withdrawn and reframed for hearing, Counsel for the Respondents in the present application has told the court that the crown has not abandoned the criminal charge against the applicant and his co-accused in CR.415/88 and the vehicle, which is the subject matter of this dispute is going to be used as exhibit in the hearing of that case. That, in my view, cannot be lightly dismissed or

lost sight of. If a vehicle which is going to be used as exhibit in a case were to be disposed of before a finality has been reached in that case a serious miscarriage of justice will, for obvious reasons, occur.

By and large, I am inclined to accept the contention that a criminal case concerning the vehicle, which is the subject matter of this dispute, is still pending against the applicant. It will, therefore, be improper for this court, or, for that matter, any other court to release the vehicle to the applicant before the case has been finally decided. In the result, I am of the view that the point of law raised in limine has been well taken.

The application is, in the circumstances, dismissed with costs.

B.K. MOLAI
JUDGE

25th March, 1991.

For Applicant : Mr. Phafane
For Respondent : Mr. Putsoane.