CRI/S/6/91

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

LECHABA AKONE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L.Lehohla
on the 24th day of May, 1991

In this case the accused was charged before the Subordinate Court with the crime of Robbery to which he pleaded guilty.

At the end of the day the Magistrate who tried the case - a Senior Resident Magistrate with sentencing powers extending to eight (8) years - committed the accused for sentence by this Court.

This Court is aware that one branch of the High Court encourages what the Magistrate has done. But this Court supports or is in favour of the view which is opposed to that held by that branch of the High Court; and following on its conviction that the proper procedure is to remit matters which come in this way for trial de novo this Court made Judgments in CRI/S/1/90 and CRI/S/13/89 Rex v. Tempele Elias and Rex v. Letsie Molapo respectively. This Court for its attitude has solace in the decision given by Schutz P. in C. of A. (CRI) No.3 of 1984. This appeal consists of two appeals which were jointly treated by that Honourable Judge. One is Bothata Thakeli v. Rex the other

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Semanki Majoro v.Rex - unreported - at page four.

It is important to note that Schutz P. in those appeals relied on a case Rex v. Dhlamini 1952(4) SA 194 where Ramsbottom J. is reported at 199 as having said :

> "The fact that the legislature has decreed that a minimum sentence for a particular kind of punishment shall be imposed on conviction for a special offence does not confer upon Magistrates' courts that power to impose that sentence if it is in excess of their ordinary powers unless the power to pass that sentence is specifically conferred. Persons charged with offences of that kind must be committed for trial and tried by a superior court".

Following the above quotation this Court had occasion to emphasise the learned Judge's use of the phrase committed for trial and tried for in that honourable Judge's careful use of that phrase it is patently clear that he has not said persons charged with offences of that kind must be committed for sentence and sentenced by a superior court.

So the distinction here is very clear. In the first instance the law as pronounced by the learned Judge seems to be that persons who have been convicted of an offence the minimum penalty of which is in excess of the Magistrate's powers definitely would be wrongly convicted or even wrongly have been tried in the first place. So what all this means is that if the Magistrate who presides over a case of this nature realises that should he convict this man he would be unable to meet the minimum penalty prescribed by the law then he should not deal with the matter at all. The best thing for him to do would either be to try it as a Preparatory Examination at the end of which he should commit it for "trial" and not for "sentence" in the High Court.

The learned Counsel for the Crown had urged that for purposes of expediency this Court has got the power to try and perhaps even sentence without this matter even being brought here for trial but was unable to produce any

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authority to support the view he was persuading the Court to adopt. He pointed, rightly however, that the accused might be prejudiced by delays if this case is remitted for trial by a Magistrate of competent jurisdiction. But the principle has to be demonstrated that this Court will persistently remit matters which come in the manner in which the accused's matter has been brought before it after all the authority referred to above, namely, that of R. v. Dhlamini which is in full support of the attitude of this Court has been ignored. That case in turn was relied on by Schutz P. who was the Judge of the Court of Appeal which has got binding authority on this particular Court.

In terms of the Minimum Penalties Order of 1988 in cases of Robbery, the minimum penalty is prescribed as ten (10) years' imprisonment. The Magistrate who tried and convicted the accused is possessed of only eight years' sentencing powers. So regard being had to the fact that committing for sentence is a discretionary matter then he cannot properly exercise that discretion to commit the accused for sentence to this Court if in the first instance the law has deprived him of exercising such a discretion; because in order to have exercised his discretion properly it must be demonstrated that the maximum sentencing powers that he is possessed of coincide with the minimum that the statute allows. Furthermore his maximum sentencing powers could even exceed the minimum prescribed. In that instance if he felt that the maximum sentence that he is entitled to impose would still fall short of the sentence required to meet the offence, he is at large to exercise his discretion in terms of which the matter is committed for sentence by this Court.

Having said this, therefore, I find that the Magistrate who tried this case and purportedly committed the accused for sentence to this Court has done so irregularly and without any power or authority to do so. There is a Chief Magistrate whose sentencing powers just coincide with the minimum penalties

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prescribed by the law. He should have been the one to have tried this matter. So the order I make, therefore, is that the Chief Magistrate should try this matter de novo. The proceedings before the Senior Resident Magistrate who purportedly tried this matter are declared a nullity. Another way of going about a matter such as this one would have been for the Magistrate who heard it to treat it as a Preparatory Examination at the end of which he should have committed the accused for 'trial' and not for 'sentence' to this Court.

I have also been informed by both Counsel that there is no objection to the accused being granted bail. He is accordingly granted bail on the following conditions :-

(1) Down payment of Three Hundred Maloti (M300-00)

(2) Production of surety in the sum of Three Hundred Maloti (M300-00) (not cash) acceptable to the Registrar.

(3) That he report himself every Saturday between 6 o'clock a.m. and 12.00 noon at the Mohale's Hoek Central Charge Office.

(4) Furthermore he is not to interfere with Crown witnesses

(5) Further that he should stand trial and that he should hand over to the same Charge Office Mohale's Hoek his travelling documents if any.

(6) Further that the accused is not to venture beyond five (5) kilometers radius from the Mohale's Hoek Charge Office. If occasion should demand such as health, or if grave occasions which affect him personally should require his absence beyond five kilometers from that Centre the matter should be brought to the attention of the Magistrate in that place.

Finally I do realise that the subordinate Court dealt with this matter on 22 December 1988,i.e. long before the prescribed minimum Penalties legislation was repealed at the beginning of this month.

J U D G E

24 th May, 1991

For Crown : Mr. Lenono

For Defence : Mr. Fosa