

IN THE HIGH COURT OF LESOTHO

In the Application of :

KENNETH KHOALI

Applicant

vs

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monpathi
Acting Judge on the 31st day of March 1994

This is in a matter of application for leave to appeal out of time and bail pending appeal. The Applicant was represented by Mr. Malebanye and the Respondent by Mr. Mohapi. The Applicant's notice of motion and petition was filed on the 26th February 1994 and the Respondents duly filed their notice of intention to oppose accompanied by an affidavit of opposition sworn to by Miss 'Naki Nku.

The learned Counsels agreed that since both issues, namely: of leave to appeal out of time and bail application depended on an inquiry into prospects of success the application for leave to appeal out of time ought to be argued first. The matter of the Applicant's admission to bail would depend on the first

issue's success.

The Applicant was charged with the crime of theft. In that upon or about the 18th day of July 1993 at or near Thaba-Nchu in the Republic of South Africa the said accused each or one or all of them did wrongfully unlawfully and intentionally steal the motor vehicle, to wit, a white Ford Courier Van - Registration Number OA40265, Engine F8479298, Chassis Number NR95893. - The property or in lawful possession of Theodorus Cornelus.

The Appellant, one of the three co-accused was found guilty on his own plea and was sentenced to Four (4) years imprisonment. The other accused pleaded not guilty and the magistrate ordered for separation of trials.

The Prosecutor after Accused's plea of guilty proceeded to make an outline of the case as follows:

" On 18/07/93 the complainant parked his vehicle at Naledi Sun and locked the doors and closed the window of his vehicle.

On the next day he found his vehicle missing where he had parked it. He made a report to the police about his missing vehicle. The Thaba-Nchu Police relayed the report to Ladybrand Police and gave them the particulars of the vehicle. The Ladybrand Police in turn requested Lesotho Police to help them to trace

the vehicle.

The Lesotho Police carried out investigations and on 17/08/93 D/Tpr. Matlotlo and Sgt. Moriti proceeded to Motimposo and called at the house of Makhama Ralile and found the owner present. The Police introduced themselves and asked him about the vehicle parked at his home. He made an explanation which led the police to the Accused. The accused was present at the home of Ralile and he was called. Makhama explained to the Police that the vehicle belonged to the Accused in his presence. The Accused made an explanation after which they cautioned him and charged him with theft of the vehicle which they found at the home of Makhama. The vehicle was a Ford Courier and a bakkie. The complainant had not allowed anybody to remove it from where it was parked."

It is with regard to the above outline that Mr. Malebanye made the usual attack, that is, it does not disclose all the elements of the offence. I am satisfied that the law required that in order to fully comply with the requirement of Section 240 of the Criminal Procedure and Evidence Act 1971 all of the elements of the offence must be disclosed (see R/O no. 19/89 R v SEBISI MOEKETSI AND OTHERS) (Unreported).

In his criticism of the outline Mr. Malebanye points out the following factors:

"(a) that the vehicle was not found in possession of the Applicant. But the vehicle was in possession of the said Makhama.

(b) That the identify of the vehicle was not fully disclosed in the outline in such a sufficient extent that the Accused can unambiguously be said to have admitted the theft of the particular vehicle.

(i) Following Makhama's explanation the accused was brought to the vehicle and an explanation associating the Applicant with the vehicle was made as in the outline. The vehicle was shown to the Applicant.

(ii) The particulars of the vehicle were spelt out fully in the charge sheet to read: "Registration Number OA 40265, Engine No. F8479298, Chassis Number NR595893."

The above particulars of the vehicle were spelt out together with the reading of the charge sheet of which they are part (see Annexure "A"). It is as to this charge and the outline that the Applicant admitted guilt and associated himself therewith. Mr. Mohapi went on to point out that it was not only the charge and the outline which point clearly to the Applicant having, with full appreciation of all the facts, admitted guilt. In his statement in mitigation he made further corroboration, to that, he was aware of the full nature of the charge against him. His

plea in mitigation reads thus:

" I am first offender. I have been looking for work for a long time without success. After my mother died I faced a lot of problems. My father lives with another woman and have deserted me. I live alone in the home in which my mother built me. I am not married.

I stole the vehicle in order to sell it and continue my studies with the proceeds. I gained access into the vehicle by removing the rear screen.. The steering was not locked and I started it with a piece of iron."

In this he does not only admit his theft but he told the court a quo as to how he did it. Mr. Malebanye says that this incriminating aspects should be ignored. With the deficiencies that he has pointed out in the outline, he submitted that, it would be irregular to consider this. With the fact that the Accused was not represented and with the magistrate having not explained the rights of the accused to him, the statement in mitigation should be ignored. I do not agree. While I will make my comment finally with respect to the outline I am not aware that a Court on appeal has ignored any statement tending to exculpate the Accused or incriminate him in the statement in mitigation.

Together with his criticism of the defence in the prosecution's outline Mr. Malebanye made the following other criticisms which I do not accept namely:

- (a) Because the Accused was unrepresented the proceedings should be declared vitiated.
- (b) Because the Public Prosecutor's outline reveals that it was only after the accused made an explanation that he was cautioned this should render the outline a nullity from failure to comply with the Judge's Rules. (See generally NDABE KHOARAI vs DPP (CRI/APN/614/93)).

I am not satisfied that there are prospects of success in the appeal. I would find that there are no reasons on which the Applicant's application should succeed. I agree with Mr. Malebanye that the canvassing of the reasonableness of the sentence would still be considered when the application for filing of appeal out of time has been allowed. Mr. Malebanye had not sought to persuade me at this stage about interfering with the sentence. I would consider this sentence is reasonable and that there is no basis in law for disturbing it.

The application therefore fails.



T. MONAPATHI
Acting Judge

March, 1994

For the Applicant : Mr. Malebanye

For the Respondent : Mr. Mohapi