

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

vs

MOHOLOBELA THEKO & 7 OTHERS

R U L I N G

Delivered by the Honourable Justice G.N. Mofolo,  
Acting Judge, on the 30th day of August, 1995

This trial came before me on 29th August, 1995.

When the court was about to start, the Assistant Registrar informed me that all the parties to the trial were present save counsel for the Crown.

I caused an inquiry to be made why the Crown was not in attendance and was informed Crown Counsels had been engaged in other matters. I nevertheless stood down the matter.

When the court reconvened, there was no appearance by the Crown.

Now, if crown counsels were engaged in other matters, I would have expected, as a matter of courtesy, to have been so informed but no such information was forthcoming.

In the event, Counsels for the defence submitted that in the absence of appearance by the Crown this meant that the crown had no interest in prosecuting their case and that I was to accordingly in accordance with section 278 of the Criminal Procedure and Evidence Act, 1981 to allow accused persons to plead and in default of evidence against them to find them not guilty and to acquit and discharge them.

Now, section 278 of the Criminal Procedure and Evidence Act, 1981 reads :

sub-section (1)

if a prosecutor

- (a) in the case of a trial by the High Court having given notice of trial, does not appear to prosecute the indictment against the accused before the close of session of the Court; (I have underlined) or
- (b) in the case of a trial by a subordinate court, does not appear on the court day appointed for the trial (I have underlined) the accused may move the court to discharge him and the charge may be dismissed, and where the accused or any other person on his behalf has been bound by recognizance for appearance of the accused to take his trial, the accused may further move the court to discharge the recognizance.

Both counsel for the defence have urged the court to find that sub-sections (a) and (b) of section 278 are one and that (b) flowing, as it were, from (a), are to be read together for determining whether the requisite for dismissing the Crown case rested on 'the court day appointed for the trial.' I couldn't disagree more. As far as this court is concerned, there is a

clear and distinct dichotomy between the procedure to be followed where the crown does not make an appearance in the High Court and in a subordinate court. In the High Court a court can only dismiss the Crown's case 'if a prosecutor does not appear to prosecute the indictment against the accused before the close of the session of the court' (I have underlined). On the other hand, in a subordinate court 'if a prosecutor does not appear on the court day appointed for the trial' (I have underlined) such an accused person may be discharged and the charge dismissed. In my view, these provisions cannot be read or construed as having the same result in point of time when a court may decide to dismiss the charge for non-appearance of the Crown.

The question arises as to what the legislature means by 'the session of the court.'

According to Rule 2 of the High Court Rules, Legal Notice No.9 of 1980, sessions of the court are described as

Sub-rule (1)

Notice of the dates and times of sessions of the High Court as determined by the Chief Justice in terms of section 11 of the Act shall be published by notice which shall be affixed to a board in a conspicuous place within the court precincts.

Sub-rule (3)

The periods between the said terms or sessions shall be periods of vacation during which, subject to the provisions of sub-rule (4) the ordinary business of the Court shall be suspended but at least one judge shall be available on such days to perform such duties as the Chief Justice shall direct.

The true construction to 'session of the court' and the one to which this court subscribes is an extended period between the period immediately after the vacation of the High Court and immediately before the vacation of the High Court: in other words, a period between the 1st day of the sitting of the court and the last day of its sitting before vacation and of course a period published by notice affixed to a board in a conspicuous place within the court precincts.

From the foregoing, I rule that the period sketched above is not a period within which, should the prosecutor not appear to prosecute the indictment against the accused, the court has no option but to discharge accused persons and to dismiss the charge against them.

But there is another matter which is of concern to the court. It is that in civil cases if a party does not appear the court may either proceed regardless or postpone the matter on payment of wasted costs to the defaulting party ostensibly to place the innocent party in the same position he would have been but for the postponement.

I am informed that this rule does not extend to criminal trials apparently because the legislature has always assumed that while private persons can and do go wrong this is not expected of public servants.

Defence counsels reported themselves timeously in this trial and by about 11.00 a.m. when the court went into session they were in attendance. An application was then made for the dismissal of the prosecution case on the ground of non-attendance of the crown. The court decided to proceed with the case at 2.00 p.m. whether or not the prosecution was in attendance. At 2.30p.m. when the court reconvened the prosecution had not attended and an application for the dismissal of the crown's case was renewed and reserved to 9.30 a.m. on 30th August, 1995 and hence this ruling.

If this had been a civil trial, failing appearance costs would have been awarded. For inexplicable reasons, such costs are not exigible in a criminal trial and those who attend have to lump it while those who don't go scott free.

With the present furore on human rights, the time is about to dawn in our daily lives when servants of the state in protection of their so-called basic rights will not submit easily to superior orders or instructions. We are reaching an unhappy syndrome and one in which while courts of law being largely creations of statute are only able to function within the purview of legislative enactments, it will be increasingly incumbent on the legislature itself being the be all and end all of our rights, privileges and immunities to take the initiative in ensuring that sections of its body politic are not unnecessarily disadvantaged or embarrassed.

In this particular case though, it cannot be said that the prosecutor did not appear to prosecute the indictment against the accused before the close of the session of the court, and this court is unable to accede to the application either that the accused plead and having done so to discharge accused persons and to have the charge against them dismissed.

The result is that the application is refused

G.N. MOFOLO

Acting Judge

30th August, 1995

For the Crown: No appearance

For Accused: 1, 3, 4, 5, 6, 7 & 8: Mr. Khaue and 6th  
Accused on behalf of Mr. Fosa.

For Accused 2: Mr. Nathane for Jobodwana, Pheko & Co.