CRI/A/10/95

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOLEFI MOKHELE — APPELLANT

V.

R E X — RESPONDENT

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. G.N. Mofolo
on the 9th day of November, 1995

This is an appeal from the Magistrate Court, Maseru, in which the appellant Molefi Mokhele was charged with Theft Common in that

> 'at or near L.E.C. in the Maseru district and on the 14th November, 1994 the said accused did wrongfully and unlawfully and intentionally steal two (2) car batteries, the property or in the lawful possession of L.E.C., i.e. Lesotho Electricity Corporation.'

The appellant had pleaded not guilty and evidence was led against him. In the end the Magistrate had found the appellant guilty and sentenced him to ten (10) months imprisonment. It was against both the conviction and sentence that the appellant had appealed to this court.

When this appeal came before me, Mr. Putsoane appeared for the appellant and there was no appearance by the Crown. I upheld the appeal and intimated that my judgment would follow as it now does.

From the record of proceedings it appears that P.W.1's evidence had been that he was security officer of L.E.C. and that on 15 November, 1994 he was patrolling complainant's premises at about 6 p.m. and that when, at 7.45 he continued his patrol he saw a person bending down. Getting closer to the accused and asking him what he was doing there he said he had not been to the gate and would show us where he had been at Hoohlo's. They had not gone there. He testified that the man was wearing a blue top and a white skipper. That accused carried nothing at the time. It was then at this time that he saw a man carrying a car battery and wearing a white skipper. When he got closer to the man he put down the battery and ran away.

The accused, according to this witness, had jumped over the fence into Government Stores. He said the top covering the battery was similar to the one which accused had been wearing.

In cross-examination the accused is shown to have asked the question:

> Q. Where is the man with whom you found battery covered with a top?

There is no reply recorded to this question. P.W.2's evidence was that he also worked for Security Lesotho and that on the evening of 14/11/94 after 6 p.m. he went to where P.W.1 worked and the latter gave him a report of finding the gate open and he (P.W.2) closed it. After some time he was given another report

but found nothing there though after some time accused appeared, walked towards them wearing an L.E.C. overall with L.E.C. label. They told him they'd seen a suspicious looking man and they had identified him as the accused though accused had wanted to show them where he came from at Hoohlo's but they had not accepted the invitation.

P.W.2 went on to tell the court he had seen accused under light with the top now removed. A chase had been given and P.W.1 was calling that accused had dropped a battery. Accused had then jumped into the Government Stores yard. They had then looked for accused but failed to find him. They had then found a 2nd battery and a jacket similar to one worn by accused prio thereto.

In cross-examination accused had asked the question:

Q. Do you have a right to check in accused outside the yard fence?

A. We do.

P.W.3's evidence was short and was to the effect that having received a report a search was made to no avail. In due course of the search a battery was found covered by the top and it was the one before court.

P.W.4 Motebang Ntsukunyane testified to the effect that he had found his battery missing from his car - it's name was

"Dixon" and black with a handle. He had been shown his battery in security guardroom and had identified it as his.

P.W.5 Ike Makhoane testified having received a report along with the suspect who had been handed to him and after receiving a report from him he had charged him with theft.

Mr. Putsoane for the appellant submitted that exhibits were not treated in accordance with the Criminal Procedure and Evidence Act, 1981 and particularly sections 52 and 55 of the Act. I should add to this S.53.

I do not think it is necessary to reproduce these Sections in full for purposes of this judgment. Suffice it to say that S.52 speaks of the disposal by a police official of an article after seizure while S.53 speaks of disposal of an article where no criminal proceedings are instituted or where such an article is not required at the trial for purposes of evidence or for purposes of an order of court and that in such an event the article is returnable to the person from whom it was seized.

S.55 requires that where criminal proceedings are instituted concerning the article and the article is required at the trial for purposes of evidence or for purposes of an order of court the police official shall, save for the article's bulk, deliver the same to the Clerk of Court where criminal proceedings are instituted or to the Registrar of the High Court as the case may be.

As there were criminal proceedings against the appellant it being alleged as I have shown that he stole two (2) L.E.C. batteries, it follows that Sections 52 and 55 should have been complied with. I am not aware that these provisions of the law were complied with. I have scanned the record of proceedings in this matter and nowhere do I find that these batteries were before court as is in law required. My earlier impression was that these batteries were not before court and therefore treated as in a case where there was no prosecution as in envisaged by section 53 above.

P.W.3 Mokhethi Kapoko evidence does show, however, that

'It was a car battery under the top, the battery is the one before court.'

Cross-examined P.W.4 Motebang Ntsukunyane also reflects that there was another battery before court. P.W.3's evidence tends to support P.W.4 that the 'black battery' is P.W.4's though I am making no finding on this. I am making no finding because the charge sheet claims 'intentionally steal 2 (two) car batteries the property or in the lawful possession of L.E.C. '

What I find very strange is that there was no claim by L.E.C. that the batteries or anyone of them is their property and I fail to appreciate how the Magistrate convictd the accused 'as charged.' He could, in the light of P.W.4's evidence convict the accused but not in respect of the other battery which was not proved to be L.E.C's.

What was going on in the court a quo confuses the mind. I don't know how the batteries came before court if they were there at all: besides this they were not court exhibits for they were not handed in as exhibits. How the learned Magistrate made the order "Batteries to be returned to owner' puzzles me for he cannot make an order in respect of articles that are not before him in law quite apart from the fact that L.E.C. had not claimed the batteries as theirs.

There is also another thing: it was P.W.1's evidence that events complained of occurred on 15 November, 1994 while other witnesses said it was on 14 November, 1994. Certainly there was conflict in the crown evidence which called for the court a quo's comment and resolution? I am also of the view L.E.C. the complainant did not claim the batteries because they were not satisfied that there was such theft.

It is also claimed that appellant worked with witnesses in this case. If these witnesses positively identified appellant I don't understand why if he was their colleague they did not say to themselves or in court that the man who was seen fleeing was Molefi Mokhele: that it was accused as they said has no basis whatsoever and not without cause because while P.W.1 and P.W.2 said the man fled and that it was after 7.45 p.m., P.W.3 said.

> 'at about 7.50 p.m. we received a report, pursuant to that we went to L.E.C. we found P.W.1 and P.W.2 searching for a man. We helped search but to no avail.'

This witness concedes that a car battery was found but

> 'I never saw the man reportedly fleeing.'

As P.W.1, P.W.2 & P.W.3 were together looking for the culprit how come P.W.3 'never saw the man reportedly fleeing?' And yet the learned Magistrate did not reflect on this very serious conflict in the crown evidence?

It seems to me there are times when evidence is taken for granted or first impressions rule the roost. They must not be allowed to be the order of the day for they can, sometimes, be misleading. Before arriving at conclusions, we have to be alert and alive to facts and consider our judgments well.

The English case of Elias and others, (1934) 2 K.B. 164 sheds light on the use of exhibits where on p.173 Horridge J. said:

> 'In my opinion the seizure of these exhibits was justified, because they were capable of being and were used as evidence in this trial.'

on the same page above Horridge J. continued:

> "In this country I take it that it is undoubted law that it is within the power of, and it is the duty of, constables to retain for use in court things which may be of evidences of crime, and which have come into the possession of the constables . I think it is also undoubted law that when articles have once been produced in court by witnesses it is right and necessary for the court, or the constable in whose charge they are placed ( ): to preserve and retain them, so that they may be always available for the purposes of justice until the trial is concluded."

The above passage is to be read in conjunction with S.55 of the Criminal Procedure and Evidence Act, 1981 so that a fortuitori a seizure by a policeman of goods which are not likely to be used or be of use in substantiating a charge of theft is a wrongful seizure and in such circumstances, were the batteries found on accused, seized and not produced in court as exhibits though they were available, whoever was responsible exposed himself to and was liable to accused for trespass.

In his judgment the learned Magistrate seemed to place much reliance on the fact that accused was identified by P.W.1 and P.W.2 very well as he worked with them and appears to have relied on accused's suspicions movements. The learned Magistrate said nothing about the evidence of P.W.3 which was exculpatory of the accused.

In this regard it was held by Schreiner, A.C.J. in R. v. Nzimande, 1957(3) S.A. 772 (A.D.) at pp. 777-9 that a court disregarding the evidence of a witness favourable to the appellant was as much a misdiscretion as a court precluding the defence to call a witness in its defence or willing to give such evidence.

On identification Wigmore (3rd Ed. Vol.3 sec.786(a) p.164) advocates for caution in that

> 'On the one hand, the risk of injustice being so serious, the great possibilities of lurking error should cause hesitation.'

In E. v. T. 1958(2)S.A. 676 (A.D.) Ogilvie Thompson (as he then was) at p.677A said

> "The position accordingly is that the Crown's case against appellant depends, in the ultimate analysis, solely upon the reliability of complainant's identification of appellant. The essence of the inquiry is whether complainant's evidence identifying the appellant as the assailant, can be accepted as proof beyond reasonable doubt."

I reach the conclusion that in this case the evidence was inconsistent with accused's guilt and far from convicting the appellant the learned Magistrate should have found the appellant not guilty and acquitted him.

I have accordingly upheld the appeal, set aside both the conviction and sentence of the appellant by the court a quo. The appeal deposit is to be refunded appellant.

G.N. MOPOLO
JUDGE
9th November, 1995

For the Appelant: Mr. Putsoane
For the Crown: No Appearance