CRI/A/34/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

JEILARA LENYEPA APPELLANT

and

R E X RESPONDENT

J U D G M E N T

Delivered by the Honourable Justice G.N. Mofolo
on the 24th day of November, 1995.

This is an appeal from the Resident Magistrate Court, Leribe where the appellant was convicted and sentenced on his own plea.

The accused was charged for stock theft it being alleged that on the 3rd day of April, 1995 at Ha Seetsa the accused

> "wrongfully and unlawfully and intentionally steal one cow, the property or in the lawful possession of 'Maseeiso Seetsa."

It will be seen that as to the norm and practice in the Subordinate Courts, the accused was not statutorily charged.

Mr. Ramodibedi for the appellant has submitted that facts as outlined by the Public Prosecutor do not disclose an offence in that it was not alleged that the appellant stole the animal with the intent of stealing it or that he had the intention to deprive the owner permanently thereof. In the light of the

charge preferred against the appellant it was of paramount importance if the Crown was relying on stock theft at common law to highlight that appellant intended to deprive the owner permanently of his/her beast.

In my view, I am not surprised that the appellant was not charged statutorily and a common law charge was preferred because according to the outline of facts the cow disappeared on 3 April, 1995 and the record is silent as to when it was recovered though it does appear the recovery was not belated having regard to the fact that on 17 April, 1995 the matter was in court. Considering the short lapse of time between the purported theft and the discovery of the cow it is probable that the Public Prosecutor did not consider it impelling to allege that the appellant intended to deprive the owner of the cow permanently thereof.

Cullinan C.J. (as he then was) seemed to have this in mind when, in REX v. MAKOTOKO KHABO CRI/REV/130 /90 - CRI/APN/188/90 (unreported) commented:

> " I have repeatedly said that the Court should not be astute in drawing unfavourable inferences from a statement of facts: The prosecution is relieved by a plea of guilty from adducing evidence; it is not relieved of the duty of stating the facts, including each and every necessary ingredient of the offence, in clear and unequivocal language."

In another case Cullinan C.J. (as he then was) commented unfavourably concerning the fact that:

> "Nowhere is it stated that the accused took without the owners permission, with the intention of permanently depriving the owner thereof" (I have underlined). (MATIASE SESENE and MOHALE'S HOEK MAGISTRATE'S COURT and Or. CRI/REV/169/89 - CIV/APN//36/90

This was a case where an accused had pleaded guilty to the charge.

Mr. Ramodibedi has unfavourably cast doubt whether it is not failure of justice where an unrepresented accused person is made to plead to the charge without enlightening him as to his legal rights as to representation and encouraging him to avail himself of legal representation. He has also said that the appellant in this particular matter had legal representation but the court a quo had ignored this. He has referred me to several cases in this regard but I find that while these cases encourage the line of defence propounded by Mr. Ramodibedi, they have not specifically held that failure to do so would amount to a failure of justice entailing the setting aside of a conviction.

What has worried this court is that in this appeal there are two conflicting records by the same court and there is no explanation, despite the appellant having raised the issue, of these conflicting records. In one of them it appears that the learned Magistrate sentenced the accused before an address in mitigation. In another mitigation comes before the sentence.

So far as these discrepancies in the record of proceedings are concerned, court have not been slow to condemn these errors.

In S. v. BOOI, 1972(4) S.A. 68 (N.C.) it was held where the magistrate had made a mistake in the record he cannot correct it and only the Supreme Court has the power to correct the mistake for the magistrate is functus officio.

In S. v. MTETWA and OTHERS, 1964(4) S.A. 528 (N.) the reviewing judge after finding on review that the magistrate had re-arranged the record for the sake of convenience commented as follows:

> "However laudable the magistrate's intention was in arranging the record in the manner he did, the record should be put in order so that the evidence appears in sequence."

Caney J. in the above case continued on p.529 D-E.

> "The magistrate does not appear to have appreciated that, once he has concluded a case, he is functus officio, and that it is highly improper to tamper with the record. The record should be presented in the form in which it was made during the course of trial; it should not be re-arranged for the sake of convenience or for any other reason and I cannot too strongly condemn the re-writing of the facts of the record. The record is what is recorded in court during the trial, whether that be in the manuscript of the magistrate or in the shorthand or by recording machine. If the record is re-written out of court, not only may there be room for an accusation that it has been "edited", an accusation which may be entirely false,but there is the risk of errors in copying, with a subsequent risk of miscarriage of justice."

I am not saying that either the learned Magistrate or the typist who did the transcript has done anything untoward. I am saying that the record is inaccurate making it difficult for this court to tell what exactly transpired during or after the trial.

In SHENKER v. ADDITIONAL MAGISTRATE. WYNBERG. 1965(3) S.A.121 (A.D.) the magistrate without giving counsel for the appellant chance to address the court in mitigation of sentence where it appeared there had been further evidence in aggravation of sentence and the magistrate thereafter had proceeded to sentence the appellant Steyn J. on p.125A said:

> "In this case our finding is that the appellant was deprived of the opportunity of presenting such argument before the court and that the failure to address the court could not, on the papers before us, be ascribed to the fault of counsel who appeared for the appellant."

Steyn J. was, accordingly, of the view that in view of the irregularity there may have been a failure of justice and that the appellant was accordingly prejudiced.

In similar cases matters have been remitted to the trial magistrate to be addressed on mitigating circumstances or the appeal court has itself listened to mitigation of sentence. I do not think that regard being had of the peculiar circumstances of this appeal any of these options would be preferable.

I am not particularly happy with the tenor and conduct of this trial which appears to have vitiated some of the basic rules of our criminal law and procedure and have accordingly upheld the appeal and set aside the conviction and sentence imposed on the appellant.

The appeal deposit is to be refunded the appellant.

G.N. MOFOLO

JUDGE

24th November, 1995.

For the Appellant: Mr. Ramodibedi

For the Crown: Mr. Lenono