CRI\A\9\93

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

LERATO SKUNDLA — Appellant

vs

R E X — Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 10th day of April, 1995

I have had a look at the record. Both Counsel have been very helpful in their arguments and submissions.

The whole thing seems to revolve, as to conviction, on whether Section 217 should be followed or the remedial Section 329 of the Criminal Procedure and Evidence Act 9 of 1981. Mr Mda relying on Section 217 wishes to persuade this Court that the degree of irregularity that prevailed in the court below led to failure of justice because that degree was a very gross one. He went further to indicate that this was prejudicial to the accused who was then unrepresented. This consists in the fact that the learned Magistrate who was presiding over the case where the accused was charged with theft at the end of the day, in explaining the accused's rights allowed him to give unsworn

statement. And that used to be the case before 1981. It was in 1984 when the Magistrate gave the misleading explanation referred to above. But in terms of our Criminal Procedure and Evidence the only options that an accused has are that he can give evidence; and if he gives it, it should be a sworn one; or else he just keeps his silence. So indeed the learned Magistrate misdirected himself in applying a law which no longer existed by requiring or advising the accused to give an unsworn statement.

Now, the main question facing this Court is whether this procedural irregularity is so gross as to lead to failure of justice. Section 239 provides a remedial option - some form of remedy to irregularities. In its broad terms it states that notwithstanding that an irregularity has been committed in the procedure or whatever then this Court i.e. the High Court is at large to correct such irregularity and the High Court in exercise of its powers under that section is enjoined to ensure that even if the irregularity could be decided in the accused's favour, however if failure of justice would result thereby then the court is entitled not to decide the matter in the accused's favour. The actual words used in Section 329(2) say :

> "Notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the court of appeal that a failure of justice has resulted therefrom".

I don't think a failure of justice has resulted from the irregularity pointed at in these proceedings.

Thus notwithstanding breach of provisions of Section 217(3) that

> "an accused may not make an unsworn statement at his trial in lieu of evidence but shall, if he wishes, do so on oath,"

these proceedings cannot be set aside on account of the irregularity pointed out earlier. It is also stimulating to notice that the section only says an accused may not make an unsworn statement. Conversely it perhaps would have been otherwise if it said he shall not make an unsworn statement.

Miss Mokitimi for the Crown having perused the sections that the Court allowed her to have a look at during the short interval that the court allowed, is of the opinion that and duly submitted that the form of irregularity that exists here can be cured in terms of Section 329. I have no doubt in my mind that that view is correct and in the circumstances therefore the appeal against conviction is dismissed.

As for sentence it was argued on behalf of the accused that it induces a sense of shock regard being had to the fact that the accused is a first offender and the fact that he was a young man at the time of the commission of the crime. The court below didn't seem to say anything about the age of the accused. The age of the accused is not reflected in the evidence. It only appeared in the charge-sheet. I have however learned from arguments that the accused or the appellant was still in the custody of his parents therefore was a dependant at the time. The Crown on the other hand feels that the accused was

sufficiently old having passed the age of majority, to be treated as a major because the charge-sheet so indicates and therefore a sentence of 18 months' imprisonment cannot induce a sense of shock. But now the learned Magistrate doesn't indicate that he took the question of that age into account or what age in fact he took into account. What remains exceedingly puzzling is that then this eighteen months' imprisonment is to be served in Juvenile Training Centre. Now, this is an indication that the learned Magistrate regarded the accused as a minor and this is the only thing that can be inferred from directing that the sentence should be served at Juvenile Training Centre. Then the court as far as the question of age is concerned would have to have this matter either referred to the Court a quo for purposes of establishing the question of age of the appellant or rely on what appears on the charge-sheet. But because it interests the State that litigation should come to an end, I propose to rely on what appears on the charge-sheet. In that regard therefore I feel that the court is enjoined to interfere in the question of sentence. The fact that the appellant is the first offender and that he was relatively young and therefore immature and impressionable at the time though he had gone past the age of discretion and the fact that there was some form of peer pressure - he was with another man who had bad imfluence on him and was encouraging him - all warrant interference by this court on sentence. These are all factors which this court feels it should take into account. I am very much indebted to both Counsel especially Mr. Mda for bringing to the court's attention cases which might be of relevance to this matter. I am referring

particularly to a case which he referred this Court to by Molai J - Malefetsane Mokolokolo vs Rex CRI\A\15\85 (unreported) and I wish to state that with respect I dissociate myself from the dictum of my learned brother in that case, I thought I should raise this before I impose what would in the circumstances of this be an appropriate sentence regard also being had to the value of the property stolen - the value of the property stolen is also a factor that moves me to review the question of sentence. This property is said to be a grill. Although I have heard that it is of little value, I have not been able to establish what its cost is but what is paramount is that the grill has ben restored to the complainant. In these circumstances then I think a lesser sentence than the one that was imposed is justified.

The sentence of 18 months' imprisonment is set aside. In its substitution is imposed a fine of M120-00 or sentence of six months' imprisonment half of which is suspended for twelve months provided the appellant is not convicted of a crime involving dishonesty committed during the period of the suspension.

J U D G E
10th April, 1995

For Appellant : Mr. Mda
For Respondent : Miss Mokitimi