CRI\A\27\95
CR\490\93 (Leribe)

IN THE HIGH COURT OF LESOTHO

In the matter between :

MOFOLO MORAKE

and

REX

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 15th day of June 1995

The Appellant was convicted on charges of Culpable Homicide and Assault with intent to do grievous bodily harm and was sentenced to four years imprisonment and two years imprisonment respectfully. Both sentences were to run consecutively. He was unrepresented.

A Preparatory Examination was originally held on a charge of murder with which the Appellant was charged. This was as a result of the Director of Public Prosecution's directive L\DPP\93\519 dated the 25th day of October 1993 as recorded on page 1 of the record. At the end of the Preparatory Examination

proceedings at page 7 of the record the learned magistrate recorded that "the evidence discloses a case of murder". That was on the 21st December 1993. About six dates of remand intervened until the 10th March 1994 when the Appellant was charged as aforesaid. There was not record of compliance with Section 89(1) of the Criminal Procedure and Evidence Act 1981 either by way of an indication that the accused was now being committed for trial by the High Court and the record of proceedings was being sent over to the Director of Public Prosecutions. Nor was there an endorsement of receipt of a directive by the Director of Public Prosecutions that having considered the record of proceedings, he directs that the accused be charged of an offence within the competence of the magistrate.

Out of concern with the absence of the minute of the directive of the Director of Public Prosecutions I directed Mr. Ramafole to investigate this matter. I had however assumed that it happens, but it is not often, that a magistrate can neglect to record the fact of receipt of the Director of Public Prosecution's directive on the record of proceedings itself. In that case it would be a mere omission to record that the Public Prosecutor has acknowledged receipt of the directive, the document which more often than not the public prosecutor keeps in his file. I have discovered that some magistrates attach the directive to the proceedings. At the commencement of the hearing

Mr. Ramafole the Crown Counsel brought a register from the office of the Director of Public Prosecutions which showed an entry recording that on the 10th January 1994 a directive was made to the effect that the matter is remitted to be tried by a magistrate of necessary competence on a reduced charge.

The Crown called five witnesses to prove the two charges against the Appellant and thereafter closed its case. The Appellant gave evidence on his own behalf and led one witness and thereafter closed his case. A brief address by the public prosecutor followed in which he asked the Court to find the accused guilty on both counts, as he could not have been defending himself, having stabbed the deceased for no reason. The accused then replied to say that he was not guilty and went on to say that: "I did not surprise these people I was defending myself." The record at page 18 then reads as follows:

> "Verdict : Accused is found guilty on both counts. P. P. No previous conviction. Plea in mitigation: Accused says nothing. To question by the Court: I am married with two children. I did Std 4 at school. I am a peasant farmer. I have no livestock. I have two fields. Sentence : Four years in jail. Count II Two years in jail. To run consecutively."

It is clear from above that the learned magistrate did not give reasons for his judgment neither did he give reason for his sentence.

While I did not find fault with his conclusion and finding on conviction itself after hearing the Appellant I am quite concerned that there was no written judgment justifying the magistrate's conclusion and furthermore there had not been compliance neither Order XXXV Rule 1 (3) of the Subordinate Court Rules. The rule reads that:

> "Upon an appeal being noted the judicial officer shall within seven days deliver to the Clerk of Court a statement in writing showing :
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> (a) the facts he found to be proved;
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> (b) the grounds upon which he awarded at any finding of fact specified in the appellants statement as appealed against and
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> (c) his reason for any ruling of law or as to the admission or rejection of evidence so specified as appealed against."

This is amongst other in order to enable the accused person to amend his grounds of appeal. I do not see why furthermore, such a statement cannot have the effect of supporting the accused person in mitigation of his sentence. The absence of such statement is in that respect a disadvantage to the ordinary convicted accused person.

I have looked at this Appellant's grounds of appeal. They have been translated. I have looked at both the Sesotho and the translated English text. Compared to either the defence that he speaks about in the record and the quotation I have extracted from the record at the end of the proceedings this grounds of appeal are not enough to explain but enough to puzzle. Indeed even on the issue of challenging the learned magistrate's sentence these grounds are far and different from what the Appellant said in Court. The Appellant appeared in this Court from the Leribe Prison. This was very helpful.

In Court the Appellant said that he was not challenging the fact of his conviction for the stabbings and the death resulted. However the Appellant to my amazement stuck to some matters which he raised in his grounds of appeal which appeared to me to be unrelated to his charges nor to the conduct of the proceedings. I feel that this can only be elucidated by the text of the notice of appeal itself. It reads as follows :

" ..... I am appealing against my case which was not well conducted in this court of Leribe on both sides Magistrate and Prosecution. They did not satisfy me with my Murder case and I was arrested, in the case of deceased and alive where I was charged by the Crown. I was brought to Maseru in January, and brought back in March. I was remanded everyday and back to the Prison. In the beginning, I was charged with rape which is Indecent Assault, I denied that I did not rape. I was made to line up amongst Bapalami. I's sentenced to six years not against my case. I'm ill and disabled, my knee is broken and supported with a steel in Maseru. I don't see mercy I am asking for the mercy, all my houses have been burned and animals have been killed. Houses equipments and money that is five hundred pounds for Lobola have been burned I'm asking for the help my Lord." (my underlining)

I have underlined the matters above for the simple reason that they are strange additions to the extent that I found difficult to believe. They made it difficult for me to understand what was going on in the mind of the Appellant. The Appellant was not charged with rape. The other statement could only be explained by suspecting that this Appellant could have been made to assist in an identification parade where a rapist or a stock thief was

suspected and sought to be identified. But certainly not the Appellant. This brings into my mind the unfortunate and desperate situation of an unrepresented accused. The matter of identification parades or all other matters could and should have been easily explained to the poor man. It seems this did not happen.

The Appellant told the Court that in seeking to file an appeal and prepared grounds of appeal he sought assistance of the clerk of Court and Prison Officers. They refused. This is distressing. This does violence to the requirement of the law that an appellant should be assisted to prepare his grounds of appeal which are "a written statement setting out clearly and specifically the grounds on which the appeal is based."(see Subordinate Court Rules Order XXXV Rule 1(1)) This is an unenviable task to an ordinary unrepresented accused. That is why the rule maker in his wisdom went on to provide further in Rule 1(2) that "If that accused person is unable, owing to illiteracy or to physical defect to write out such a statement, the Clerk of Court shall, upon request, do so." This means that the special problems of not only illiterate people but unrepresented accused were well appreciated. The Appellant should not therefore be overly blamed for the shoddy piece of work he brought forth.

I now come to the question of sentence. I have had occasion to comment about this question in a somewhat different setting in the matter of REX vs MAHAO NAHA Review Order No. 4\94 of the 11th March 1994 where I said at page 5:

> " The aspect of sentence seems to have worried the learned magistrate. It also worried me for a different reason, namely, that the magistrate has not stated his reason for the sentence. I am able to glean a few aspects which would definitely redound in favour of the accused. These are:
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> (a) Drunkness, (b) that it was the deceased who seems to have provoked the incident; (c) deceased and accused were friends; (d) the attitude of the accused after the incident which showed serious contrition.

I would find that there was a misdirection on the part of the magistrate, not to have stated his reasons for the sentence. The learned magistrate also felt or feared that his sentence was rather harsh. This is an area in which the magistrate has eminent discretion. I say that it was a misdirection that there were no reasons for the sentence (see SIMON PHALA MOKOALELI R\O 3\93) " In this appeal the Appellant sought to show the following factors as mitigation: (a) he was married and had two

children; (b) he did Standard 4 at school; (c) he is a peasant farmer; (d) he had no livestock; (e) he had two fields.

At least one of the factors should have influenced the magistrate. If they have or have not, has the magistrate told us Could it be the reason why he ordered for the two sentences to run consecutively He may have had good reason but which reasons are those And which are the bad reasons that he chose not to consider If there has been a misdirection this Court is entitled to interfere with the sentence. This ought to be done in the instant matter while being well aware that: "Imarginary misdirections should not be relied on merely in order to find that the Court of Appeal can alter the sentences. Such a court creates no confidence in the judicial officer who has tried the case. A sentence will only be interfered with if <u>there is a misdirection or if the sentence is found to be too heavy."</u> (see the Law of South Africa N.A. Joubert (1991) Vol. 25 at page 4). Furthermore in REX v MOHLAKA MOHLAKA Review Order No.4\95 of 19th April 1995 at page 8 I emphasized that: "Before concluding my remarks on why the magistrate's sentence ought to be interfered with I would borrow the remarks of Lehohla J in TELLO TSOKOLO CRI\A\17\94 dated 3rd February, 1995 - unreported, where the learned judge had this to say at page 3 of the judgment:

"An important aspect relates to the fact that the

> learned magistrate has not stated why she has imposed this rather stiff sentence which (otherwise if he had stated the reasons perhaps) this Court would even if it did not agree with the sentence where imposed, would have found something in the reasons to refrain from interfering. But Where no reasons have been supplied the Appellant comment is at large to look at the facts which have not been laid bare." (my underlining)

May be the magistrate had a reason for ordering that the two sentences shall run consecutively. He has not stated the reason.

I believe that the justice of the aspect of the sentence can best be done by making the two sentences run concurrently. In no way can this Court be seen to be minimizing the seriousness of the sentences to any extent that the sentence does not fit the crime, the offender and is not seen as adequate and deterrent by the community. Rarely have I seen a more apt comment, in lay press, concerning sentencing by courts of law than that: "There are or should be four primary aspects to legal sanctions applied by the state against its citizens: punishment, deterrence, protection of society and rehabilitation. Of course they are all linked, the first two particularly so - because without sufficient severity there will be no deterrence." (see Financial

Mail - June 16, 1995) The writer may have forgotten to add that the Courts must, in the event they impose a severe sentence or less severe, state the reasons for that kind of sentence. My Order is that the two sentences imposed must run concurrently.

T. MONAPATHI
JUDGE

15th June, 1995