

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

MOTSEKI MAKOALA

Appellant

VS

R E X

Respondent

HELD AT MASERU

FORAM:

STEYN, AP
BROWDE, JA
KOTZE', JA

For Appellant : Mr. Kolisang
For Respondent: Miss Nku

J U D G M E N T

Steyn . A.P.

This matter comes to us by way of an appeal from a decision of the High Court which acted in terms of Section 327 of the Criminal Procedure and Evidence Act of 1981. That section grants the High Court authority to dismiss an appeal summarily. The High Court found that no sufficient ground for interfering with the finding of the learned magistrate both on conviction and sentence existed.

When the matter was called this morning there was an agreement between counsel for the appellant and counsel for the crown. They conceded that there may well have been a miscarriage of justice in this matter. The reasoning is the following: The

High Court in the first place found that the appeal to it had to be dismissed summarily. Now, that finding can only be made when it is clear that the appeal is clearly without merit or frivolous. At the same time when an application for leave to appeal was made to the same Judge, he granted leave to appeal.


Prima facie there is an apparent inconsistency between those two findings. Leave to appeal can only be granted if there is a reasonable prospect of success on appeal. It is difficult to see how a Court can hold that there is a reasonable prospect of success on appeal to this Court when it was also its view that the appeal to it was frivolous or without merit. The agreement to which I have referred was that the cause of justice would best be served if the matter were referred back to the High Court in order for it to hear the appellant in the ordinary course of an appeal hearing. This is right, because when it summarily dismissed the appeal the appellant was given no opportunity to address it on the merits of the appeal.

This Court was more particularly inclined to adopt this course of action because it does seem that the magistrate who had originally convicted the appellant, did so on the basis of what appears to have been an important misdirection. It held that the bullet which caused the death of the deceased was fired from the deceased's firearm. Now it is clear to me on a reading of the evidence, that this finding was not justified on the basis of the Crown case. In this regard I refer to the evidence of the

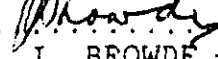
investigating officer and to the evidence of the ballistics expert. Neither of them appears to me to have laid the basis in their evidence for such a finding.

In those circumstances, it seems to me that there has been an irregularity in these proceedings that entitle us to hear and adjudicate upon the appeal in terms of the provisions of the Act. I say this, because as a matter of law the appeal, would seem to have been incorrectly "summarily dismissed". It also seems to me that the appeal is not without merit. Accordingly, in my view, justice will best be served if the matter is referred back to the High Court so that the appeal can be heard properly and appropriately by it in terms of the provisions of the law. It is ordered accordingly. Bail is to stand pending the final determination of this matter.

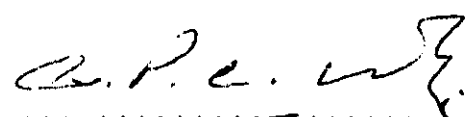
The appeal succeeds to the extent that it is referred back to the High Court to be heard. Such hearing would include the right of the Appellant and the Crown to be heard.

Signed:

 J. H. STEYN
 Acting President

I Concur

Signed:

 J. BROWDE
 Judge of Appeal

I Concur

Signed:

 G.P.C. KOTZE
 Judge of Appeal

Delivered at Maseru this 24th day of June, 1996.