CRI/T/44/2000

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

1. **REFILOE MOKALANYANE**
4. **ANDREAS VAN DER MERWE**
5. **MOKHERANE TSATSANYANE**

R U L I N G

Delivered by the Hon. Mr Justice M.L. Lehohla on the 4th day of December, 2000

At the close of the Crown case in support of which no less than fifteen witnesses testified the three defence counsel i.e. Messrs *Mosito*, *Lesuthu* and *Mahlakeng* appearing for accused 1, 4 and 5 respectively applied for the discharge of the respective accused. *Miss Maqutu* for the Crown opposed these applications.

The court has studied the written submissions and carefully listened to oral

arguments advanced by all counsel on either side of the forensic divide.

In moving their respective applications the defence's faith seems to have reposed on the provisions of Section 175(3) of our Criminal Procedure and Evidence Act No.7 of 1981 reading :

> "If, at the close of the case for the prosecution, the Court considers that there is no evidence that the accused committed the offence charged in the charge, or any other offence of which he might be convicted thereon, the Court may return a verdict of not guilty".

The accused face three charges of murder in Count I; murder in Count II and robbery in Count III.

It appears to be the defence's contention that the accused stand on the favourable side of the test usually applied in applications of this nature namely that the Court is enjoined to determine whether or not there is evidence of the commission of the offence or offences charged whereupon a reasonable man might convict.

In the celebrated words of Bekker J in ***R vs Herhordt and 3 Ors*** 1956(2) SA 722:

> "..... the test to be applied in an application of the present nature is not, whether there is evidence upon which a reasonable man should convict, but, whether the evidence presented by the prosecution is such that a reasonable man, acting carefully might properly convict. If there is such evidence then an application of this nature is not to be sustained".

As pointed out in ***S vs Heller and Anor*** 1964(1) SA 524 at 541 to arrive at its decision the Court has a discretion which has to be exercised judicially.

On the question of the discretion and the requirement for its judicial exercise the proponent of the above proposition is on all fours with the view extracted by Bekker J from Roper J's judgment in ***Rex vs Kritzinger and Others*** 1952(2) SA 401 (W) at 406 that

> "It seems to me that the rule is clear, namely, that if at the close of the case for the Crown the evidence against the accused, or against one or more of the accused, is not such that a reasonable man might convict upon it the Judge has a discretion whether or not to discharge".

However Bekker J abruptly parts company with Roper J where the latter asserts that the Judge

> ".....is quite entitled to refuse to discharge if he considers that there is a possibility that the case for the Crown may be strengthened by evidence emerging during the course of the defence".

I would gladly state that in this connection I cast my lots with Bekker J for the

simple reason that if the Crown has failed to establish a *prima facie* case then even if the accused comes later to confess to the crime when he gets into the box he would be entitled to his acquittal because *ex hypothesi* if there was no *prima facie* case against him it would not have been proper to let him go into the witness box in the first place.

Indeed in CIV/T/260/99 ***Masupha vs Masupha*** (unreported) at p.3 this Court said :

> "But in a criminal trial a *prima facie* case has to exist at the conclusion of the Crown case before the accused can be called upon to answer. The importance of this principle is amply illustrated by the fact that even if, when called upon to answer where no case existed to require him to do so, he confesses to the crime charged he would still be entitled to his acquittal because the Crown would have *ex hypothesi* failed to discharge the onus cast on it at the stage when its evidence did not measure up to the standard required in a criminal case".

Suffice it to say that as a general rule, the accused should be discharged if at the close of its case the prosecution has failed to present evidence upon which he might be convicted.

The words appearing in ***R. vs Mall and Ors*** 1960(2) SA 340 at 342 by Caney J are indeed very illustrative and therefore merit citation as follows :

> "There is much to be said for the proposition that if the Crown fails to make a case, the accused is entitled to be discharged and not to be put on his defence to face the risk of being convicted out of his own mouth or out of the mouth of a co-accused".

In seeking to persuade this Court to his view point based on Section 175(3) mentioned above *Mr Mosito* for Accused 1 made the following submission especially with regard to a Judge sitting with Assessors :

> "It may well be that the test to be applied was originally designed for a Judge sitting with a Jury, and that would seem to be the case in Lesotho, south Africa and England, but whether or not such is the case, the test applied today, in Lesotho and England, is whether on the evidence a reasonable tribunal acting carefully, might but not necessarily must convict".

While the conclusion reached by Learned Counsel in his submission is accepted on the one hand on the other hand his premise is somewhat out of step with the obtaining reality in Lesotho regarding the role of Assessors in that in South Africa they do not merely sit as advisors but are entitled to veto the Judge if they hold a view opposed to his on a fact. In England the judge directs or in other words advises the Jury who at times reject the Judge's direction and in such a case their decision holds sway.

In Lesotho the situation has repeatedly been laid down in such important decisions as CRI/T/52/69 ***Rex vs Sabilone Nalana*** (unreported) at p.2 where Jacobs C.J. as he then was said :

> "Now it has been said in many cases that when considering an application at the close of the Crown case the Judge should not pay regard to the credibility of the witnesses and that his sole duty is to consider whether the evidence advanced by the crown if believed, might be sufficient to satisfy reasonable men that the accused are guilty of the crime charged.
>
> This is undoubtedly so where a Judge sits with assessors who are joint triers of fact; but I am of the opinion that where the assessors are merely sitting in an advisory capacity the Judge is allowed a little more latitude and need not completely divorce his mind from the question of credibility"..... and ***Rex vs Ramokatsana*** 1978(1) LLR 70 at 73-74 where Cotran C.J. as he then was said :
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> "Furthermore, the Courts, it has been held, should not at this stage embark upon a final assessment of credibility and should leave that matter in abeyance until the defence have closed their case and then weigh the two together. In Lesotho, however, our system is such that the Judge (though he sits with assessors is not bound to accept their opinion) is the final arbiter on law and fact so that he is justified, if he feels that the credibility of the Crown Witnesses has been irretrievably shattered, in saying to himself that he is bound to acquit no matter what the accused might say in his defence short of admitting the offence".

It is a compliment on all counsel who argued at this stage of proceeding that they spared the Court the necessity of ruling on the question of credibility of witnesses as the two authorities immediately above had amply illustrated that this cannot be the

stage where such a question need be decided.

If this is not the stage for deciding on credibility what issue do defence counsel wish the Court to decide. Largely it seems to be that because of the absence of some of the accused from the scene of the two murders and robbery charged it is highly unlikely that they could be convicted of the crimes charged.

In fact *Mr Mahlakeng* went so far as to show the specimen of a charge that should have been preferred against the accused if he or they were going to be convicted of being accessory after the fact which charge has not been preferred in this proceeding. Learned Counsel seems oblivious of the fact that the crime of accessory after the fact is a sleeping crime that comes awake when evidence pointing to its existence is properly led.

Mr Lesuthu was not to be behindhand in indicating that possible convictions such as receiving stolen property knowing it to be stolen would not stand in the end.

But in my humble view both counsel seem to be seeking to jump the gun. As for *Mr Mosito* the Court can scarcely overlook the heavy accent he laid on the fact that

he had been instructed to move this application when he first alerted the Court to this instruction and sought time to be allowed for all counsel to prepare written heads for the purpose.

I may only indicate that it is not unheard of that a man charged with a certain crime has ended up being convicted either as an accessory or under any of the sub-species of offences regarded by law as competent verdicts relating to the particular crime charged.

More importantly the message entailed in the words of Bekker at p.723 deserves special mention, to wit,

> "..... It is, of course, beyond question that in a particular case the attendant circumstances, ..., might be such that a failure of justice could possibly result if an accused person were to be discharged at the close of the case for the prosecution, even though it has failed to present a necessary degree of evidence. But the attendant circumstances in such event should, in my opinion, at least be of such a nature as to afford the necessary grounds upon which that discretion could be judicially exercised".

I am far from entertaining the view that the Crown has failed to establish a *prima facie* case in respect of each of the accused on trial to-day.

That being the case it may be fruitful for them to pay particular heed to the passage appearing in the works of S.E. van der Merwe *et al* styled Evidence at p.417 saying :

> "The State will have established a *prima facie* case; an evidential burden (or a duty to adduce evidence to combat a *prima facie* case made by his opponent. .....) will have come into existence i.e. it will have shifted, or been transferred, to the accused. In other words, a risk of failure will have been cast upon him. The onus rests on the State, but, if the risk of losing is not to turn into the actuality of losing, the accused will have the duty to adduce evidence, if he wishes to be acquitted, so that, at the end of the case, the Court is left with a reasonable doubt.....".

Mr Mosito tried to make capital out of the statement allegedly made by accused 1 to PW9 Sgt Masoabi. The thrust of this attack if, I understand it well, is ultimately to treat as inadmissible that statement on account of purported involuntariness tarnishing it at the time it was made. The Court has not lost sight of an earlier attempt during proceedings to challenge the statement as an inadmissible confession. Because the two objections are merely two sides of the same coin I can dispose of them by reference to ***David Petlane vs R*** 1971-73 LLR 85 where Milne J.A. held that :

> "(i) The words used by the appellant should *prima facie* be given their ordinary, natural meaning and, must necessarily be the prime guide to the meaning of the person uttering them.
>
> (ii) Although the surrounding circumstances may be taken into account

> in deciding whether a statement amounts to a confession, the fact that the appellant knew when he made his statement that the police were looking for him in connection with the killing of the deceased could not have the effect of making his statement a confession of the offence with which he was subsequently charged, as the statement did not exclude the possible defences of self-defence or accident. Further, the fact that it transpired at the trial that if such defences had been raised they would not have been maintainable could not operate to turn the appellant's statement to the police into an unequivocal confession of murder".

Thus this Court was animatedly wary during the stage in proceedings where this featured lest the phrase "I killed" should be translated or interpreted as "I murdered" because murder is a term of art. It means killing with intent or unlawfully. Thus, if an accused in making his statement to a policeman does not say "I killed the deceased unlawfully and or intentionally" his statement cannot be excluded as an inadmissible confession to a law officer.

Next, the challenge advanced by *Mr Mahlakeng* for accused 5 to the effect that unless the charge was that of being accessory after the fact nohow can accused 5 be expected to answer to charges regarding which PW9 indicated that throughout his investigations accused 5 did not feature at the two murders and the robbery, was dealt a fatal blow by Crown Counsel's reference to a passage appearing in ***Nkau Majara vs Rex*** 1954(AC) 235(PC) 1954 HCTLR 38 at 47 concurred in by Lord Goddard (the

Lord Chief Justice of England) and Lord Reid where judgment was given by Mr de Silva. The passage reads as follows :

> "It has been suggested that the existence of this provision precludes the appellant from being punished as an accessory after the fact to the crime of murder. It sometimes happens that the elements which constitute a minor offence are present when a graver offence is committed. It is particularly true of minor offences created by statute. But whenever this happens no ground is furnished for not proceeding against the offender for the graver offence ..... Where the latter element is present the offence of being an 'accessory after the fact' has been committed. Their Lordships are of the opinion that the statutory penal provision referred to does not stand in the way of the conviction in this case".

Of vital significance is that their Lordships emphatically concluded as follows:

> "It was not disputed that the appellant though charged with murder could under the law of Basutoland be convicted of having been an accessory after the fact to murder".

It would thus seem beyond dispute that the above is still the position in the present day Lesotho. Transformation from Colonial rule to Independence did not affect that position in the slightest degree. Doing so would have imprudently turned the law on its head and murderers with evil designs would have had a field day on law-abiding citizens and members of the community in respect of whom the criminal justice system was fashioned to afford protection against such.

It is enlightening to observe from A Bill of Rights and The Presumption of Innocence by Andrew Skeen p.534 that :

> "Lamer J, speaking for the majority in ***Dubois vs R*** said that the s.11(d) of the Charter requires the prosecution to make out a case against the accused before he or she need respond - either by testifying or by calling other evidence. Lamer J indicated that the principle of a 'case to meet' is the real underlying protection which the non-compellability rule seeks to promote. The important protection is not that the accused need not testify but that the prosecution must prove its case before there can be any expectation that he will respond. These principles should hold equally good under any Bill of Rights .....".

On the basis that *prima facie* evidence exists in this case and that failure of justice might possibly result if the applications for discharge are entertained I rule that it would be imprudent to do so. The applications are therefore refused.

.....
JUDGE
4th December,2000

For Crown : Mis Maqutu
For Defence : Messrs Mosito, Lesuthu and Mahlakeng