CRI/T/80/94

IN THE HIGH COURT OF LESOTHO

In the matter between :

R E X

v

MOLAHLEHI MAQALIKA

RULING

Delivered by the Honourable Mr. Justice T. Monapathi on the 1st day of December 2000

After close of the prosecution case Mr. Monyako for defence made an application for discharge of the Accused. The application was made under section 175(3) of the Criminal Procedure and Evidence Act 1981 (CP&E). That is if at the close of the case for the prosecution, the Court concedes that there is no evidence that the accused committed the offence charged in the indictment or any other offence of which he might be convicted thereon the Court may return a verdict of not guilty. The application was opposed by Miss Mokitimi for the Crown.

In terms of the said section of the CP&E the decision to discharge or not to discharge is entirely in the discretion of the presiding officer. Miss Mokitimi said that at the stage of the proceedings at which the application is made the Court has to satisfy itself that regardless of credibility, evidence exists on the basis of which the

Court might convict. In other words there should be evidence on the basis of which the Crown can be said to have established a case in respect of which the accused is called to anser.

Miss Mokitimi said that the expression "no evidence" in the section meant that there should be no evidence upon which a reasonable man could convict. If the prosecution case does not attain this level of "a *prima facie* case" the accused is entitled to an acquittal at once. See R v SABILONE NALANA CRI/T/51/69 (unreported) by Jacobs CJ.

Mr. Monayko referred to the case of R v KRITZINGER AND ANOTHER 1952(2) SA 401 where Roper J, held that even if a judge:

> " ..... considers that there is insufficient evidence he has a discretion to refuse to discharge ------ if he thinks that the prosecution case may be supplemented by the evidence of the defence."

My comment is that it is a case in which there is insufficient evidence that may be supplemented. Where there is sufficient evidence of a *prima facie* kind there cannot be any fear of the Crown case being boosted. Mr. Monyako again referred to the work CRIMINAL LAW THROUGH CASES at page 267 by the late Mofokeng J in which our case law was referred to by quoting from REX v TEBOHO TAMATI RAMOKATSANA 1978(1) LLR 70 at 73-4, that:

> "The judge (though he sits with assessors) is the final arbiter on the law and fact so that he is justified if he feels that the credibility of the Crown witnesses has been irretrievably shattered, in say to himself that he is bound to acquit no matter what the accused must say in his defence, short of admitting the offence in our High Court the judge is allowed more latitude than in systems where a judge sits with a jury of if the assessors have a vote."

And further at page 303 the learned author quoted as follows:

> "Now at this stage of the proceedings the Court is not entitled to approach the question of credibility on the same basis as when considering the whole case. The sole concern is the assessment of the evidence and in this regard there can be no warrant for excluding the question of credibility."

For the general approach see R v TUMELO RAMOKHESENG AND ANOTHER CRI/T/36/99, Molai J, 1/12/2000 pages 4-5. And finally defence Counsel referred to SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE by Landsdown and Campbell - Vol. V at page 519-520 where the authors say:

> "In S v HELLER AND ANOTHER 1964(1) SA 525 "(W) Trollip J expressed doubt as to the correctness of the view in KRITZINGER'S case, that the court is entitled to refuse to discharge the accused if it considers that there is a possibility that the case for the State may be strengthened by evidence emerging in the course of defence, and in R v MALL(1) 1960 (2) SA 340(N) it was said that the accused should not be put on the defence in the expectation that he might provide the necessary corroboration Caney J said that would not be a judicial exercise of discretion to refuse to discharge upon the evidence of an accomplice where corroboration was required."

At page 520 Kumleben J in S v OSTILLY is reported to have referred to the emphasis in MALL'S case. On the question of discretion which is to be judicially exercised he said:

> "..... where there is no evidence which might reasonably lead to a conviction, sound reasons must exist for nevertheless not granting an application for discharge."

Counsel agreed that it has to be (for discharge of the accused) a situation a reasonable man might convict. The whole situation was well illustrated in the case

of S v SHUPING 1983(2) SA 119 where Hiemstra CJ said:

> " At the close of the State Case, when discharge is considered the first question is;
>
> (i) Is there evidence on which a reasonable man might convict? if not
>
> (ii) Is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes there should be no discharge.

In a great majority of cases questions of credibility do not play a large role at this state of a trial. In S v MPHETHA AND ANOTHER 1983(4) it was said that:

> "If a witness gives evidence which is relevant ..... then that evidence can only be ignored if it is of such a poor quality that no reasonable person could possibly accept it. This would really only be in most exceptional cases where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed."

That a witness testimony has to be outrageous or absurd is one of those characteristics of very bad evidence that lends itself to the above description.

Referring to the facts of the case Mr. Monyako contended that the proceedings showed a kind of a fight that is called "a free- for- all" as a result of which a *prima facie* case could not be established. Also brought under attack was the testimony of one **Sankoela Ramphalla** (PW 1). Having warned ourselves that the "..... judge should not pay regard to the credibility of the witness ...." it was nevertheless worthwhile to look at the evidence of PW1. This account by the witness is very enlightening as to why I adopted the attitude that the evidence at least of the witness was not one to be thrown out as absurd or outrageous.

Deceased had asked one Maraling why he was assaulting the witness (PW 1). After an insolent rebuff by Maraling the two engaged in a fight with sticks. Accused had been standing by aside. Accused then came and parried a blow (with his left hand) used by deceased intended for the said Maraling. With his right hand Accused stabbed the deceased with a knife. The deceased then moved towards the door while exclaiming that he had already been stabbed. This is a story that on its face reveals an offence or more. It might be at the end of the whole case a lot of flaws will be exposed or on its basis a verdict of a lesser offence might be returned.

It is obvious that on the principle enunciated above a reasonable man might return a verdict of guilty if not on the charge but on any other offence of which he would be liable.

The application was accordingly dismissed.

T. MONAPATHI
JUDGE