CRI/A/7/2001

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOTSAMAI TSOTANG **Appellant**

vs

REX **Respondent**

R U L I N G

Delivered by the Hon. Mr Justice M.L. Lehohla on the 26th Day of April, 2001

Ms Ntlhakana I have stated that this matter is CRI/A/7/2001 ***Motsamai Tsotang vs Rex***. My Orderly has announced the name of the appellant three times on the public address system and he has reported that there is no response; there also doesn't seem to be any attendance by his counsel.

The grounds of appeal seem to have been prepared by *Mr Snyman* an attorney of this Court, but as it is I mean the court has been waiting for well over 20 minutes now, and the matter has got to be dealt with one way or the other, and I have given three alternatives, viz, to proceed with the case as it stands; alternatively to have it

postponed; alternatively to have it struck off for non-prosecution by the appellant.

Much as I agree with you that there doesn't seem to be merit in the appeal whereupon one would have been inclined to proceed with the case, I nonetheless think that the appellant should be given an opportunity not by postponement, but rather if the matter is struck off for non-prosecution, in which case it is almost the same as dismissing the appeal, but for the fact that should he want to tell the court why the matter should be proceeded with at his leisure and why he was not here, then if his reasons are good it can be reinstated and proceeded with. Otherwise the effect of the order that I am making, namely of striking the matter for non-prosecution by the appellant is of letting the highest water-mark hold sway. The highest water-mark being the Magistrate's order and his findings plus the sentence imposed. So I opt for that one.

Matter struck off for non-prosecution by the appellant.

.....
JUDGE
26th April, 2001

For Appellant : No Appearance
For Respondent : Ms Ntlhakana

CRI/T/52/93

IN THE HIGH COURT OF LESOTHO

In the matter between :

R E X

v

T. RAMMONNENG
M. MABOLOKA

Ruling

Delivered by the Honourable Mr. Justice T. Monapathi
on the 19th day of April 2001

Several rulings have been made which were harbingers to the instant one when now we have dealt with and completed the evidence of PW 12 Detective Police Officer Nkune. The first ruling was that of the 12th December 1995. The second was the 28th June 2000. The last was that of the 4th September 2000.

Reference has before this Court been made to the following documents (first lot) various by witnesses at the Preparatory Examinations:

1. Original Current Account Credit Slip of 15/07/91 marked exhibit 1 at Preparatory Examination (PE).

2. Original Current Account Credit Slip of 17/08/91 marked Exhibit "J" at PE.
3. Credit Copy of bank statement of 29/6/91 marked Exhibit "G" at PE.
4. Original Bank Statement of 30/09/91 market "H" at PE.
5. Original personal cheque no 209622 marked "E" at PE.
6. Original cash register
7. Original salaries register.
8. Photocopy of cheque no. G 1101190 for M18,646.63 marked Exhibit "A" at PE.

The following (second lot) had after the disappearance of original documents from the PE record been made into photostat copies that were subject of the inquiry which resulted in the of the 12th December 1995. They were:

(I) Cheque No. 102688 for amount of M14,363.30.

(ii) Payment voucher No. 70/102688 for M14,363.30.

(iii) Cheque No. 102914 for amount of M14,688.96.

(iv) Payment voucher No. 70/102914 for amount of M14,688.96

(v) Payment voucher No. 70/101190 for amount of M18,646.63.

It will be clear therefore that from the first lot only item 8 was not an original and the evidence born out by the different witnesses was that even at the PE that document was in a photostat copy state. That is why the inquiry of the ruling of the 12th December 1995 did not refer to it because although it was a photostat copy it had not disappeared and as said before it had all along been in that state.

All the documents of the second lot have not been admitted as exhibits although they have only been referred to as IDs (Identified documents). The primary reason was, if one looked at the last two rulings, that since they were photostat and they are not automatically evidence for the purpose of this trial.

They ought to be handed by a person who knows about their origins. I have already ruled that that person in the present Crown Counsel Mr. Lenono. I forgot the number of times reference was made to this in this proceedings that the best thing to say is that this is now beyond doubt. We need to be reminded that the last witness PW 12 (Sgt Nkune) was disabled from handing in these documents as exhibits because he was incompetent to do so. Although he was able to recall and recite the nature of the original documents and their contents that was all he could do.

On the last day of hearing but one and after completion of evidence of PW 12 Mr. Lenono the Crown Counsel stood up to say that he was going into the witness box to be sworn as a witness and to give evidence about the origins of the documents in the second lot. And that he would speak about the circumstances that led to their existence within a view to ultimately handing them in as exhibits and for that purpose only. That was why the Court ordered Counsel to make submission in view of the fact that Mr. Mahlakeng had objected to the intention by Mr. Lenono to testify. This was a question which the Court was competent to decide in terms of Section 218 of the Criminal Procedure and Evidence Act 1981 (CP & E).

Mr. Lenono submitted that the general law on competency of witnesses was that everyone was a competent and compellable witness unless expressly excluded by the law. He bolstered his argument by making reference to Section 215 of the CP&E which says that:

> "Every person not expressly excluded by this Act from giving evidence is competent and compellable to give evidence in a criminal case in any Court in Lesotho or before a magistrate on a preparatory examination."

That if it was the intension of the legislature to exclude any category it could have stated so. By implication it permitted that which it has not excluded.

I observed that in other jurisdictions a clear policy is that of preventing only judges and jurors from testifying in cases they are trying except in certain specified situation. The Rule 605 of FEDERAL RULES OF EVIDENCE, proscribed judges and jurors from testifying. This case of UNITED STATES v FRANKENTHAL 582 F 2nd 1102 (7th ac. 1978) is quoted for the view that:

> "The judge acted properly in that case in admitting the evidence and and instructing the jury that Judge's testimony was to be used only to assess the defence witness credibility and not as evidence against the accused. (My emphasis)

I would find it difficult to argue that one does not led to the other. Again Mc CORMICK ON EVIDENCE at page 146-146 paragraph 68 "Judges and Juries" says that:

> " ----- According to the third view to which support in growing, that a judge is incompetent to testify in a case which he is trying seems the most expedient."

The point being is that in none of the jurisdictions of a tradition similar to our own are public prosecutors prohibited from testifying in the case which they are involved in.

Mr. Lenono argued a *fortiori* that public prosecutors and Crown Counsel are not expressly excluded as witnesses in their own cases in terms of the CP&E. That if such were the intention of the legislature it could have ben stated in very clear and unequivocal terms. It stood to reason as submitted that since the procedural statute contained no hindrance against a prosecuting Counsel to testify in cases in which he is prosecuting no impediment ought to be assumed. This was so more especially

when a matter was not a matter of substance but of a formality. And therefore strictly speaking such testimony not intended to assist in assessing the credibility of a defence witnesses nor being evidence against the accused and therefore not being prejudicial.

The Crown sought to persuade the Court that such was the absence of any hindrance that as long as it was in the interest of justice one would see no hindrance. This was so even in any of the jurisdiction which shared the same tradition with onus. Learned authors L H Hoffman and D Zeffert in SOUTH AFRICAN LAW OF EVIDENCE (4th Ed) when dealing with competency of: Persons concerned in judicial proceedings at page 378, and with reference to prosecutors say that: "The prosecutor is not an incompetent witness." According to the learned authors, the safeguards should be that such a prosecutor should give his evidence from the witness box, after having been sworn and subjected to cross examination if any. In this regard Counsel reference was made to the cases of: R v BECKER 1929 AD 167, R v MAHOBE 1898 KWLR 50, R v MAKEBE 1942 OPD 162, R v NIGRINI 1948(4) SA 955 (C), R v DUNGA 1939 CPD 10, R v KIRSTEN 1950(3) SA 659(C). In addition HJ May in his book SA CASES AND STATUTES ON EVIDENCE, Juta & Co (4ed) when dealing with competency as witnesses of public prosecutors as a Counsel says:

> "There is no unvariable rule rendering Counsel in a cause incompetent as a witness in that cause - Middledorp v Zipper 1947(1) SA 545 (SR) however understandable it may, be when he has to give evidence on matters involving credibility." (My emphasis)

A clear impression is created as to matters over which it would be improper to testify. My own reason would be firstly that it would be against public policy. Secondly it would be prejudicial. I do not see how it would ever be counter balanced by reason of interest of justice which to my mind is the most predominant

consideration.

Counsel thereafter made reference Peter Murphy in: A PRACTICAL APPROACH TO EVIDENCE (3rd Ed Backstone press page 391 where he expresses the English Legal position as follows on the point in issue.

> The general rule of English Law is that all witnesses are both:
> "Competent and compellable, a rule justified by the need to make available to the Court, as far as possible, all relevant and admissible evidence which may assist in determination of the issues. At common law, this consideration was counter balanced, and probably more counterbalanced, by the emergence of an important body of exceptional cases in which various witnesses were held not to be competent."

Mr. Lenono asked the Court to note that the exceptions alluded to by the learned authors are the same as those found in Part XII of the CP&E.

Mr. Mahlakeng for the two Accused submitted that in the special circumstances of the present case it may not be proper for the Crown Counsel who is prosecuting to give evidence. With this he towed an incongruent reference to the Crown having "led evidence of a witness who purported to hand in photocopies." I thought the attempt by Mr. Lenono was a logical step following on the Defence's success of their objection on PW 12's attempt to put in the photostat copies. Without prejudging the attempt by Mr. Lenono this was dictated by the circumstance that had disabled PW 12 from putting in the photostat copies namely the disputed documents, were not those he dealt with at the PE. In addition they had never been in PW12's possession and custody. That is why more by reason of necessity, by way of speak the Crown Counsel sought to enter into the fray.

The late Mofokeng J as author of HANDBOOK FOR JUDICIAL OFFICERS at page 7 made an apt reference to a public prosecutors as a minister to the truth. In this he emphasised the duty and obligation of a public prosecutor to search for and promote the truth in a case which he is handling even if the truth favours the Accused which facts he must not divulge. I agreed with Mr. Mahlakeng that, as he submitted as a matter of truth it is highly undesirable for him to give evidence in the case he is prosecuting.

I thought it was dangerous and unwise to give the meaning of "undesirable" other than to mean: "what is not advisable". That is to remove an impression that there is a sweeping or wholesale prohibition of a prosecutor giving evidence in cases he is prosecuting. I have already referred to two aspects that should circumscribe this seeming or apparent embargo. Firstly, it should not be in matter of substance and credibility of witness in which event there would clearly be prejudice against the accused person. Secondly, it must be in the interest of justice. Thirdly there must be special over exceptional circumstances.

The same sentiment that expresses the high duty and responsibility of the public prosecutor is to be found as expressed by the learned authors Gardner and Landsdown in their work : CRIMINAL PROCEDURE VOL.1 (6TH ED.) At page 400 where they say:

> "It is his function (the public prosecutor) to present the matter to Court fully and fairly to conduct the case with judicial discretion and a sense of responsibility not merely as desiring a conviction but an officer of the Court charged with the serious duty of assisting the Court to arrive at the truth."

It is once again the accurate assessment of the duty of a public prosecutor that the authors of THE SOUTH AFRICAN LAW OF EVIDENCE (supra) state, at page

378, that:

> "The prosecution has a duty to the Court to present its case with fairness to the accused, and this will be difficult where the prosecutor is a witness particular if he is also a complainant." (My emphasis)

This harps back to the question of what is undesirable. From above quotation the authors are prepared to give a rider that "particularly if he is a complainant" and not more. I observe that it cannot be said in the instant case that the prosecutor is a complainant.

Mr. Mahlakeng answered that the issue was not the competence or the incompetence of the Crown Counsel to testify. The issue what was proper and desirable for the proper administration. It went back to the question of whether what is undesirable is what is prohibited or whether it is not advisable in certain circumstances not to do a thing that is in issue. Proper administration of justice is a broad concept in meaning and otherwise. I thought the real test was what was in the interest of justice.

It would have been was useful however to illustrate cases which have decided that the competence of the prosecutor as a witness notwithstanding, the Court have frequently said that it is highly undesirable that he should give evidence. First of all I thought the defence was on unsteady ground once it admitted that a prosecutor was a competent witness. What is it that remained? While accepting as a general proposition that for Counsel to testify in the case he is prosecuting is undesirable is it the end of the story that in all cases any prosecutor will not testify because that it is undesirable. Undesirable may mean that it is

> "unwanted, unwelcome, unwished for, unasked, uninvited, undervalued, unattractive?"

Hasn't the legislature dealt fully with the problem by not saying that other than

those spelt out others are not incompetent? That a thing is undesirable is not always a complete answer.

In the same way that a Registrar of Companies is "authorized to reject a name which in his opinion is undesirable and that he can order a company to change its name for that reason that he has a wide discretion in deciding whether or not a particular name is unacceptable. (See KREDIET BAND VAN SUID AFRIKA BPK v REGISTRAREUR VAN MATSKAAPY EN ANDNRE 1978(2) SA 644(W) at 651 D-N. See DEUTSCHE BABCOK SA (PTY) LTD v BABCOK AFRICA (PTY) LTD 1995(1) SA 1016 at 1022 B-C. The Registrar in exercising his discretion will go further and decide if such similarity has of a name which is undesirable

"has the effect to deceive or mislead the public .....".

I have to determine whether that the matter of the Counsel's testimony can only amount to a mere formality and is not a matter of substance and the Accused will not be prejudiced. Once I had done so I only remained to consider if it is in the interest of justice to allow Counsel to testify. It is the same light and against that test that I would not be persuaded by the following cases from which Counsel for defence has sought support.

The first was R v BECKER 1929 AD 167. In that case de Villiers AĆJ at page 169 quoting Petterson J in STONE v BYRON said:

> "I think when an Attorney appears as an advocate and makes a speech to the jury and cross examine the witness on the other side and address the jury in reply and afterwards tender himself as a witness/or his own client, it is not consistent with the proper administration of justice that he should be heard. (Counsel's emphasis)

Mr Mahlakeng made reference to the second case being REX v DUNGA 1939

CPD 7 at page 10 where Davis J is reported to have said:

> "Except in the matter of a mere formality, it is highly undesirable that a person appearing to conduct a prosecution should become a witness int hat case."

The case of R v MAHOBE 1898, 19 WLR was therein quoted with approval. In R v DUNGA (above) it was further stated that:

> "To attempt to get over this difficulty by allowing the prosecution to make an unsworn statement from the bar is not very undesirable but grossly irregular."

Thirdly reference was made to R v NAKEDIE 1942 OPD 162 when Van den Heever J is reported to have said:

> Where the prosecutor in a criminal case functions also as an investigating officer, delator and principal witness as in the present case which came on appeal from a magistrate court it is difficult to see how he can prosecute the accused person with that detachment and moderation which is in accord with the high tradition of prosecution at the public instance in this country."

The fourth was R v NIGRINI 1948(4) SA 995 per de Villiers AJA at 996 when he said:

> "I need no more than endorse those judgments as expressing my own view of what is a most extremely undesirable practice."

Finally it was R v KIRSTEN 1950(3) SA (3) SA 659 per Ogilvie Thomson the learned judge said:

> "In the present case such an additional reason obtained since as is well known, it is generally recognized to be highly undesirable that a prosecutor should give evidence in a case wherein he is himself conducting the Crown case."

On the basis of these cases Mr. Mahlakeng submitted that this Court may sustain

his objection and curb what is generally recognized as an extremely highly undesirable practice.

One will when looking at the above case easily observe that on the facts they all cannot have been on all fours with the instant case. In addition and alternatively except in R v BECKER (supra) one does not know what were additional considerations besides the objection which appear to be a general one and on principle. The reference in R v BECKER to proper administration of justice is however unhelpful and *nebulous*. It could mean the interest or welfare of a witness in a case (See S v MOTHOPENG 1979(2) SA 180 (TPD)) or the convenience of the Court presiding officer or general Court administration. In connection with R v DUNGA (supra) I have already determined that it was not a matter of substance or credibility or towards assessment of evidence that Mr. Lenono sought to testify.

The facts in the instant case show that witnesses have testified in reference to these documents that are sought to be forwarded as exhibits. They are copies of those original documents which would have regularly been forwarded but for their disappearance after completion of the PE. Mr. Lenono is reported to have made copies of those documents available as PW 1. PW 2 and PW 3 have testified. It can only be in the interest of justice that Mr. Lenono should testify as to the circumstances and originals of the documents. I regard this as a mere formality that is referred to in R v DUNGA (supra).

The Defence objection should therefore fail.

T. Monapathi
Judge