

CRI/APN/187/2001  
IN THE HIGH COURT OF LESOTHO

In the application of:

LITEBOHO LESITHA	1st APPLICANT
TUMELO LETSIKA	2nd APPLICANT
and	
THE DIRECTOR OF PUBLIC PROSECUTIONS	RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice K.J. Guni on the 7th day of August, 2001.

This matter came before me on appeal from the Subordinate Court - sitting in Botha-Bothe. There, the three accused, including these two appellants, were charged with contravention of section 10 (1) MOTOR VEHICLE THEFT ACT NO. 13 OF 2000. It was alleged that each or all of the accused broke into a motor vehicle of one TSEPANG THEKO without his consent and did unlawfully steal a car radio, fire extinguisher, a cell phone, a jack and a driver's licence, the property of the said TSEPANG THEKO.

Section 10 of the said Act deals specifically with offences which relates to breaking into motor vehicle. It reads as follows:-

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"10. (1) A person who breaks into a motor vehicle without the consent of the owner or a person in lawful possession thereof, shall, unless the contrary is proved, be presumed to have broken into it with the intention of stealing, whether of the vehicle or of articles in the vehicle, and is guilty of an offence and on conviction is liable to imprisonment for a period not less than 3 years or to a fine not less than M6.000 or to both.

(2) A conviction and sentence imposed in terms of subsection (1) is in addition to any conviction and sentence imposed in respect of the theft of the vehicle concerned or of the theft of anything in the vehicle."

The three accused appeared before the trial court in person. Now on appeal by the two of them, they are legal represented. There is nothing on record which indicates that the three accused were informed of their right to legal representation. This has been raised as one of the grounds for this appeal. I shall deal with it at the time I consider the grounds of this appeal. The accused pleaded guilty to the charge. Their plea was accepted by the public prosecutor who thereafter proceeded to outline the facts of the case. The accused admitted the facts as outlined by the public prosecutor.

Here I shall make a brief summary of that statement of agreed facts. The complaint, one TSEPANG THEKO was driving his motor vehicle along the road-travelling from Botha-Bothe to MOKHOTLONG. He was involved in an automobile accident, in the course of which his motor vehicle overturned. The accused arrived at the scene of accident in the company of one THABANG.

Apparently, they were travelling with THABANG in a motor vehicle driven by him. They must have stopped to see what has happened and perhaps to render assistance. It would appear that a decision was made for the complainant to go to the hospital in the company of THABANG - presumably in THABANG's motor vehicle. The three accused were left behind with the instructions to take care of the complainant's car in his absence.

While the complainant and THABANG were gone to the hospital, the accused took and hid in the veld away from the scene of the accident, the items of property listed in this charge. The total value of the stolen property was estimated at M2,000,00. The complainant had not permitted the accused or anyone to take away that property.

THABANG and the complainant returned from the hospital. Nothing is said about the complainant's injuries. May be he had sustained no injuries. He was not detained by the hospital. The accused were still present at the complainant's overturned motor vehicle when the owner and THABANG returned. The complainant noticed that the property listed in the charge was missing from his motor vehicle. The complainant together with THABANG confronted the accused about the missing property. The accused denied any knowledge of the missing

property.

THABANG and the accused boarded their motor vehicle and continued with their journey. They travelled a short distance from the scene of the accident where they left the complainant in his motor vehicle.

The motor vehicle in which the accused and THABANG were travelling was stopped just a short distance from where the complainant was left and still within his sight. Complainant must have seen the accused go out of that motor vehicle. They entered into the grass from hence they retrieved the items of property which the complainant had found missing from his motor vehicle. Having noticed what was happening, the complainant approached the accused and THABANG. On his arrival there, he recognised and identified the property in their possession as his property which he found missing from his motor vehicle when he and THABANG returned from the hospital.

The report was made to the police. The accused gave their explanations to the police who thereafter cautioned and charged them. Nearly all the items of the missing property were recovered except for the driver's licence and a cell phone. At the trial the accused were found guilty as pleaded. They were sentenced, as

appears from the reasons for sentence of the learned magistrate, in terms of the statute under which they were charged. In addition, the learned magistrate had other considerations such as the prevalence of that type of offence in that jurisdiction.

Two of the accused appealed against both the conviction and sentence on the following grounds:-

- a) The facts outlined by the public prosecutor did not disclose an offence.
- b) The sentence imposed by the learned magistrate is harsh and induces sense of shock.
- c) Accused were not informed of their right to legal representation.

The accused were convicted and sentenced on the 26th January 2001. The notice of appeal together with an application for condonation for late filing of that notice of appeal were filed on 26th March 2001. In that application for condonation for late filing of the notice of appeal the appellants are seeking the leave of this court to appeal out of time.

When considering this application for condonation for late filing of the notice of

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appeal, there are two most important factors of which the court must be satisfied.

Firstly, the appeal must have clear prospects of success. Secondly, the appellants must show good cause why they failed to appeal timeously.

The crime with which the accused were charged has three most important elements. Firstly, there must be the breaking into the motor vehicle without the consent of the owner. Secondly, there must be an unlawful entry made into the said motor vehicle without the consent of the owner. Thirdly, once the entry is effected, there must be the taking and the removal of the property in question. In this case, there are no facts indicating the condition, be it that of the car itself or its contents or both.

The first ground of appeal is that the facts outlined by the public prosecutor do not disclose the offence. The facts must establish the essential elements of the offence charged. *Forere v Rex* 1967 - 70 LLR per JACOBS C.J. as he then was. The conviction for assault with intent to cause Grievous Bodily Harm was set aside and a verdict of guilty for common assault substituted in this case. There was no evidence in that case to show the court that the complainant sustained a wound. Without the physical injury and the degree of its seriousness, the conviction on a charge of Assault with intent to cause Grievous Bodily Harm could not be

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sustained.

In our present case, there are no facts, which show the court that the motor vehicle in question was properly secured before it was left in the care of the accused by the owner. Were the accused left inside or outside the motor vehicle? When the owner returned, did he observe how the entry was effected by the accused if they were left outside the motor vehicle? Bearing in mind that this motor vehicle was involved in an accident, were its doors and windows still intact? Where was this property after the rollover of the said motor vehicle? Could it have been still inside the motor vehicle? Where? The answers to these questions cannot be found in that statement of agreed facts.

There must be facts which establish beyond doubt that an unauthorised entry or access was gained by the accused into the said motor vehicle. The access or entry was gained by removing or defeating an obstruction barring their an unauthorised entry therein. These sentiments were succinctly expressed by the learned author SNYMAN, in his Book CRIMINAL LAW, Third Edition at page 510. "Breaking in" has been divided into two separate components, namely (a) breaking into the structure and (b) entering therein :Breaking into" consists of removal or displacement of any obstacle which bars entry into the structure and which forms part of the structure itself. MOSOSA 1931 CPD 348 at 352.

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The facts outlined by the public prosecutor in this case, do not show the court that there was any breaking into the said motor vehicle. Therefore it was not proper to find the accused guilty as charged without any prove that they did break into that motor vehicle. S.V. RUDMAN 1989 (3) SA 368 at 385. The facts outlined by the public prosecutor establish that the accused committed a crime of theft. Accordingly the conviction is set aside. The verdict of guilty of Theft is substituted.

Another ground of appeal is that the sentence imposed by the learned magistrate is harsh and induces a sense of shock. The reasons for sentence clearly show that the learned magistrate was not entirely using her discretionary powers. It is spelled out in no uncertain terms that the sentence passed was prescribed by the statute under which the accused were charged and convicted. Having set aside the conviction this court on appeal may interfere with the sentence. Otherwise the sentencing was primarily the matter in the discretion of the trial court. MOREKE LEBITSA AND ANOTHER v REX 1980 (2) LLR.

Having found that the facts outlined by the public prosecutor only disclose the commission of the crime of theft which is less serious than the offence with which the accused were originally charged, they are on appeal entitled to a consideration

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of a lesser punishment than the one meted out by the trial court. I shall accordingly reduce the sentence.

He last ground of appeal is that the accused were not informed of their right to legal representation. SV. RUDMAN 1989 (3) SA 368. There is a duty placed upon the judicial office to inform the accused of his or her right to legal representation. S. V. MAUNATLALA 1982 (1)SA 877. The failure to inform the accused of this right does not per se result in the miscarriage of Justice. There must be clear grounds which show that the accused suffered some prejudice because of the complexity of the offence charged. Further the court must be satisfied that the accused needed special skills to deal with his defence and the lawyer was readily available for that purpose had the accused been accordingly advised of his or her right. Our present case was a simple case. No special skills were needed by the accused in order to defend themselves. The accused could not afford to engage a legal representative at the time. They sought and found one to handle this appeal but out of time because they had no money at the time of their trial. In their circumstances of indigence, wealth of knowledge of their right to legal representation was of little or no use at all. There is no merit in this

ground of appeal especially because there is no legal aid in this kingdom to help accused persons charged with such offences.

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This brings me to the consideration of their application for condonation of late noting of the appeal. The grounds on which they seek condonation are:-Their ignorance as regards the prescribed time limit within which to appeal. Coupled with that is their plea of indigence. Even if they knew that they must file their notice to appeal against the judgment of the magistrate within a certain period, they could not do so because at the time they had no money. They enlisted the assistance of their relatives in order to raise the necessary funds to engage the lawyer to file this appeal. This is good enough a cause to entitle the court to grant them leave to appeal more especially because there are clear prospects of success of their appeal.

On the question of imposing a sentence after setting aside the conviction, I have to bear in mind those other considerations which influenced the learned magistrate in sentencing the accused. Apart from the considerations of the provisions of MOTOR VEHICLE THEFT ACT 2000, the learned magistrate bore in mind, and properly so, the prevalence of the crime of Theft of motor vehicle and theft from motor vehicle.

The accused presented themselves to the complainant, as good Samaritans. They stopped or discontinued their own journey temporarily in order to render the

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complainant assistance. They accepted to take care of the complainant's motor vehicle while he went to seek medical treatment. They used an opportunity to be left with his motor vehicle and his absence, to steal from him. They gained the complainant's confidence when they appeared like they want to help him. They in fact manipulated him into believing that they are helping him when they had planned to help themselves to his property.

The sentence is altered to M4,000.00 or 2 years imprisonment.

K.J. GUNI  
JUDGE

For Applicants : Mr Mathafeng  
For Respondent : Ms Makoko