CRI/T/2/2002

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

ACRES INTERNATIONAL LIMITED

RULING AT CLOSE OF CROWN CASE

Delivered by the Hon. Mr Justice M L Lehohla on the
18 day of April, 2002

The accused an International Company contracted with LHDA as a consultant/ contractor is charged in two counts with bribery details of which are set out in the

indictment. The accused pleaded not guilty to both counts.

At the close of the Crown Case spanning no less than one thousand two hundred and sixty pages of typed pages of evidence Mr Alkema SC learned counsel for the accused moved an application for the discharge of the accused on grounds mainly that the prosecution has failed to adduce evidence on the basis of which the accused should be called upon to answer.

Mr Penzhorn SC learned counsel for the Crown vigorously opposed this application.

In my ruling I will seek only to highlight the law applicable for making a ruling one way or the other in applications of this nature. Reference to local decisions based in part on decisions mainly from South Africa would hopefully prove fruitful in this endeavour.

It is important to note that this court is sitting with expert assessors. Both counsel in their addresses made reference to their role in a proceeding such as the instant one.

Broadly speaking the function of assessors in this Kingdom differs to some extent from that of assessors in South Africa in that while in South Africa Assessors can veto a judge on facts, in Lesotho such is not the position.

The position of assessors in Lesotho is governed by section 9(1) and (2) of the High Court Act 5 of 1978 as follows:-

> " 9(1) The High Court may call to its assistance at any civil or criminal trial or appeal not more than four assessors, whose duty it shall be to give either in open court or otherwise, such assistance and advice as the judge may require, but the decision shall be vested exclusively in the judge.
>
> (2) The agreement or disagreement of the assessor or assessors with the decision of the judge shall be noted on the record."

Before dealing in greater detail with the application in case law of principles relevant to situations where the applications of this nature are made, I wish to deal with a peripheral matter which might be important since counsel urged the court from opposite directions to deal with it, namely that the court need not give reasons for its ruling on the one hand while on the other that it should do so.

Reference to CRI/T/22/88 **Rex vs Motamo Sehlabaka** (unreported) at page 40

shows that this court when faced with the decision whether to make a ruling without giving reasons or not resolved the issue by dismissing the application and later at the final judgement phase incorporated in that judgment the two grounds on which the application had been refused. Those two grounds were extracted from **Rex vs Herholdt and 3 others** 1956 (2) S.A. where it was held that the test to be applied in deciding either to grant or refuse such an application consists in the view that if attendant circumstances

> " might be such that a failure of justice could possibly result if the accused person were to be discharged at the close of the prosecution case even though (the prosecution) has failed to present a necessary degree of evidence"

the application should be refused; further that

> " ..... the test to be applied.... 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"

Needless to say I derived greater comfort from the last ground than the first which in my view represents the Crown case at its barest minimum of dependability.

Before harking back to previous decisions of the High Court I wish to indicate that in terms of our CP and E Act 1981 section 175 (3):

> "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 offence of which he might be convicted thereon, the court may return a verdict of not guilty"

In CRI/T/1/92 **Rex vs Masupha Seeiso** (unreported) at p2 this court cited with approval the dictum of Caney J extracted form **Rex vs Mall & ors** 1960 (2) S A 340 at 342 to this effect :

> "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 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"

I am in respectful agreement with this dictum.

I have also had regard to the decisions where judges of this court sat with assessors in applications of this nature.

In CRI/T/51/69 **Rex vs Sabilone Nalana** (unreported) at P.2 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"

Another decision which is to the same effect as the **Nalana case** above is **Rex vs Ramokatsana** 1978(1) LLR p.70 at pp 73 - 4 where Cotran CJ, as he then was, said:

> "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 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."

The Court asked Mr Alkema as to what happens if it turns out that the accused was put to his defence though there was not any case to answer, but nonetheless virtually confesses to his commission of the offence. The learned counsel, rightly, in

my view stated that the accused should be acquitted despite the confession.

Learned counsel in this regard re-echoed the words of this Court in CIV/T/260/99 **Masupha vs Masupha** (unreported) at P.2 to the following effect:

> "Thus then I find it fitting to indicate that at the close of the plaintiff's case this Court refused to entertain an application for absolution from the instance made on behalf ..... of the defendants. The Court having indicated that on the evidence before it there was a strong case made on behalf of the plaintiff requiring the defence side to answer .... But in exercise of their right and no doubt through the advice of their counsel the defendants decided to close their case without finding it necessary to answer the *prima facie* case established on behalf of the plaintiff."
>
> It is thus important to note that unlike in a criminal case where the existence of a *prima facie* case against the accused does not necessarily always result in a conviction even where the accused has decided not to give evidence in his defence, in a civil case once a *prima facie* case has been established it cannot be dispelled by the defendant's silence. The rationale being that one of the most important factors to take into account when refusing an application for absolution is that there may be something that would strengthen the case for the plaintiff emanating from the defence side even if the court was wrong in finding that the plaintiff at the close of his case had established a *prima facie* case. But in a criminal case 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".

Needless to say the appeal to the Court of Appeal was turned down in that court.

The words of Mofokeng J in CRI/T/32/78 **Rex vs Basotho Makhethe and 2 others** (unreported) at P13 are very appropriate. The learned Judge is recorded as having said the following:

> "It was argued that at the close of the Crown case that there was *prima facie* evidence on which a reasonable court might convict and that when the defence closed its case without leading any evidence whatsoever, the *prima facie* evidence became conclusive evidence. The position as I understand it is this: at the close of the Crown case but before the defence has closed its case the question to be decided is: is there evidence against the accused on which a reasonable court might find the accused guilty. But when the defence has closed its case without leading evidence, the question to be decided is; has the Crown established the charge beyond a reasonable doubt...."

It is for the above considerations that I find to be proper, that I have grave doubts whether reliance can properly be reposed in **Rex vs Blom** 1939 AD 188 at 202 - 3 which as the reading of the Judgement clearly shows considerations pertinent thereto were at the stage where the defence had closed its case.

The simple view I take in a case based on circumstantial evidence is that if

there exists evidence on the basis of which a conclusion is reached at the close of the Crown case that a conviction might be secured then the application for the discharge should be dismissed. The next question to ask at the close of the defence case would be whether a verdict of guilty is the only finding to return. If it is the only one to return then the accused would be convicted. If it is not the only one then on the basis of a plethora of cases including **Blom** above a doubt will have been shown to exist and on that score the accused would stand to be acquitted.

In going about this exercise the Court has decided not to engage in evaluation of evidence but only confined itself to the applicable principles elicited from the authorities supplied to the court by both counsel. However in doing so, the court has been alive to the fact that it is not a proper approach in a case based on circumstantial evidence to treat the evidence on hand piecemeal, and seek to draw inferences of guilt from each and every piece but rather that inferences should be drawn from the totality of these separate pieces of evidence taken together cumulatively at the close of the defence case.

The Court paid particular attention to the warning given by Alexander and Nicholson JJ in Case No :AR 627/96 **Lawrence Trevlyan - Cresswell and Another**

vs The State (unreported) from Pietermaritzsburg at pp 6 - 7 that:

> " In the cause of filing his judgment the magistrate expressly disbelieved the appellant. In my view this is undesirable. It is not the practice in this court where an interlocutory ruling is to be made which may have an adverse effect on an accused's willingness to give evidence in the main trial to say so."

I would therefore say that in the view I take of the evidence so far led and the arguments advanced by learned counsel for both sides the application for discharge ought to be refused. And it is so ordered.

My Assessors agree.

M L LEHOHLA
JUDGE

18 APRIL, 2002

For Plaintiff/Accused : Mr S Alkema SC
: Mr W Geyser
: Mr T Matsau

For Respondent/Crown : Mr G H Penzhorn SC
: Mr H T Woker