REVIEW/5/2002

IN THE HIGH COURT OF LESOTHO

In the matter between:

Rex

vs

Mokula Moeno

Motlalepula Shelile

Review case No. 5/2002 Cri.14/2002

Review Order No.2/2002 In Maseru District

JUDGMENT

Delivered on 18th Day of February, 2002 by the Honourable
Mrs Acting Justice A.M. Hlajoane

This matter was placed before me on automatic review.

The two accused had appeared before the magistrate of first class powers facing two charges; one of housebreaking with intent to steal and theft and the other of theft common.

Accused 1 pleaded guilty to both charges whilst accused 2 pleaded guilty to count one and not guilty to count 2. The Public Prosecutor withdrew charges against accused 2 in count 2 and the Court accordingly found Accused 2 not guilty and discharged him on that count.

The Public Prosecutor them outlined the facts of the case on both counts. In summing up the facts of the case in count one, the Prosecutor outlined what the complainant would have told the Court; closing the café the previous day and putting locks on the burglar door and finding the shooter on the door cut the following day and property missing in the shop.

I will then extract the passage that influenced the magistrate into convicting both Accused on count one.

"On 03/01/2001 she (investigating officer) got information which led him to this accused. It was during the investigations pertaining to accused 2 that he had to charge them for Count 1 as well; she had interrrogated the Accused". Nothing more was said and the Prosecutor went on to sum up the facts for count two.

As one could read from that quoted passage from the record, the facts did not disclose any offence at all. The accused though they had pleaded guilty were still entitled to be tried fairly by admitting the facts which proved the intention to break, enter and steal. Worse still there was nothing that connected the accused to the charge on the facts as outlined.

Cotran C.J. as he then was in the case of **Rex vs Motjela 1977 LLR** I, clearly showed that, although the then **Section 235 (1) (b) of the Criminal Procedure and Evidence Proclamation 59 of 1938** now **Section 240 of the Criminal Procedure and Evidence Act 7 of 1981** obviates the necessity of calling evidence after an accused has pleaded guilty, the outline of the case must (emphasis added) still disclose the commission of an offence, for that the conviction was not allowed to stand, both conviction and sentence were quashed and the accused was released.

Coming now to count 2, theft of 12 x 750 ml Black label empty bottles, the facts of the case as outlined showed that it was Accused 1 who was caught red handed with the empty bottles, nothing was said about Accused 2 that would connect him to that theft. Even besides, Accused 2 had pleaded not guilty to the charge and had been found not guilty and discharged from the very beginning of

the case. But after the Public Prosecutor had outlined the facts for count 2, the magistrate then pronounced a "verdict of both guilty as charged". This was clearly irregular as accused 2 had already been acquitted on that count. Pronouncement of guilt or otherwise ought to have been passed only in respect of accused 1 on that count.

In passing sentence, the magistrate gave Accused one 4 years imprisonment for both counts. He lumped together the two offences for purposes of sentence. Rooney J, as he then was, in **Mohapi and others vs Rex 1981 (1) LLR** 6, had this to say, "It is clearly inappropriate to lump together different offences for the purposes of sentence, when the type of punishment or the maximum punishment which may be imposed for one offence differs from another."

On looking at the two counts on which the accused stand charged, one of of housebreaking where so much stock was involved with the total cost of R700.00 plus and the other of stealing one case of empty black label bottles, surely both counts could not attract an equal term of punishment. Accused 2 has been given 36 months imprisonment.

I therefore feel obliged to tidy up the convictions and sentences for accused on both counts.

Accused I in count 1 found not guilty and discharged as the facts did not disclose the offence.

Accused 1 in count 2: Guilty of theft of empty quarts bottles and sentenced to M200.00 or six months imprisonment, the whole sentence is suspended for twelve months on condition that he is not found guilty of a similar offence during the period of suspension.

Accused 2: Is found not guilty and discharged on both counts. There was nothing that connected him to the two charges, let alone the fact that he had already been found not guilty and discharged in count 2.

A.M. HLAJOANE
ACTING JUDGE

18th February, 2002

CC: The Magistrate Maseru
Director of Public Prosecution
Public Prosecutor
Director of Prisons