CRI/APN/696/01

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX APPLICANT

and

MAGISTRATE B. MAHOOANA 1ST RESPONDENT
THABANG MOKOROANE 2ND RESPONDENT

Before the Honourable Mrs Acting Justice Hlajoane
on the 5th Day of February, 2002

RULING

This is an application for review in terms of Rule 50 of the High Court Rules . The first Respondent is the Magistrate who presided over the case in a certain CR. 230/01 at Mafeteng Subordinate Court, and the Second Respondent was the Accused in that case.

The Accused (2nd Respondent) was charged at the Magistrate's Court - Mafeteng for contravening Section 3 (1) of the Motor Vehicle Act No. 13 of 2000;

it being alleged that he was found in possession of a motor vehicle knowing it to be stolen . The second Responded who was the accused was found not guilty acquitted and discharged after he had pleaded not guilty to the charge. The discharge, it is alleged, was pronounced without the participation of the Prosecution in the proceedings. The vehicle, subject matter therein was released to the accused.

It would be interesting to state the reasons that prompted the verdict that was passed, being the manner that the proceeding of that case were conducted.

According to the copy of the proceedings at the Lower Court, which proceedings were made an annexure to the answering affidavit, the alleged offence was committed on the 6th December, 2000 and the Accused made his first appearance on the 16th May, 2001 when the charge was read to him.

The Public Prosecutor informed the Court on that day that the investigations were complete. Though the defence complained that police sat on their laurels, I must at this juncture not hesitate to commend the investigating officers in that case who conducted their investigations within such a reasonable time. Five to six months could not be considered to be an unreasonable delay, as there are cases which go up to five years before accused makes his first appearance in Court for

hearing or remand.

On that first appearance a date of hearing was agreed as the 6th June, 2001. The case did not proceed on that agreed date as witnesses did not turn up and defence counsel engaged in another Court. It was again postponed to two more dates during the month of June, 2001 and on both those dates it was postponed. And on both occasions the Crown witnesses had not shown up. The matter was thus postponed to July, same year as a last postponement.

On the 16th July, 2001 both sides were represented and the Crown applied for a further postponement, as he said (Mr Posholi) that the matter had not been properly set down. I failed to understand what the Public Prosecutor meant by saying the case was improperly set down as the postponement according to the record was done in Court in the presence of two parties. The improper setting down is explained by Crown as their wish to have the matter heard by a different magistrate of first class powers or above not the first Respondent whom they considered not to have competent jurisdiction as 2nd class magistrate. The Crown went further to show that they had made their own arrangements with another magistrate, Mr Montši to come and preside over the matter on a date yet to be arranged with the Defence Counsel.

It has been the Defence contention that it was not for the Prosecutor to determine before whom the case was to proceed, and that the kind of behaviour of the said Prosecutor bordered on contempt in the absence of good reason why the magistrate had to recuse himself. To me the Defence Counsel had put things mildly, and I will explain later why I am saying this.

It has already been stated that when the matter was postponed to the 16th July all sides were present. The other reason advanced by Crown for asking for a further postponement was that the vehicle could not be brought to Court due to technical problems. The Court had made a special request when the matter was postponed to that day that the vehicle "must" be brought to Court on the date of hearing.

Earlier on I had shown that I was going to explain why I said the Defence had put mildly the behaviour of the Public Prosecutor by saying it bordered on contempt. There was no bordering on contempt but a clear case of contempt of Court.

According to the copy of the record of proceedings and also as deposed to by the two prosecutors, one Mr Raselabe was in Court as the Public Prosecutor for

the case on the 16th July when the case proceeded after the application for further postponement was refused by the Court. In fact the Prosecutor conveyed to the Court the messages from the Principal Public Prosecutor, Mr Posholi, for the postponement. The wishes of Mr Posholi were that the matter be placed before a Resident Magistrate.

In refusing the application the Court had these to say,

> "An application for a recusal of a presiding officer cannot be substantiated by the whims of a Public Prosecutor. There must be grounds for such an Application. Further , the Court is not even sure whether by stating the wishes of Mr Posholi Mr Raselabe is applying for my recusal. In fact, the Court will not waste time deliberating on that issue as if this is an application for recusal of a presiding officer (myself). It is not couched properly. In fact, the Court is inclined that what Mr Raselabe has conveyed to this Court borders on contempt of Court."

After refusing the postponement the Public Prosecutor asked for a 1½ hours adjournment. When the Court resumed the Principal Public Prosecutor was in Court assisted by Mr Raselabe. Mr Posholi addressed Court on the issue of postponement giving same reasons which had been earlier on advanced by his colleague.

The Court in giving its ruling gave a sequence of dates on three occasions, for the postponements when the matter was set for hearing. On the issue of jurisdiction the Court ruled that it in fact had jurisdiction otherwise the legislature in its wisdom would have clearly stipulated otherwise. I wouldn't agree with him more and in case of doubt the Prosecutor ought to have sought directive from Director of Public Prosecutions. The other ground for postponement was the inexperience of Mr Raselabe yet he had all along been allowed to deal with the matter.

The charge was then read to the Accused who pleaded to it. It was at this point that Mr Posholi then realized that in fact the case was proceeding that he applied to Court to recuse itself as a grave irregularity had occurred according to him.

He addressed the Court using these words;

> "The Court cannot compel us to place this matter before it. If the Court does not recuse itself I I will not be part of these proceedings."

The Court interjected and tried to warn him that it has already made a ruling, but Mr Posholi replied that the ruling was "misdirected and ill informed". He then asked to be excused and was excused amidst the defence making an

objection, and the defence withdrew the objection.

It was at this point in time that Mr Raselabe asked the Court to proceed with the case. He called the first witness to testify. The case went on to a stage where the Court had to go out to see the vehicle. Since it was already dark the case had to be postponed to another date for purposes of agreeing on a date of hearing.

As borne out by the record the matter was then postponed to the 30th July, 2001, 30th August, 2001, 6th September, 2001, 28th September, 2001. On all these occasions the Crown showed some reluctance to proceed with the case. There were finally three prosecutors involved , one authorizing the other to proceed presumably as his superior, and the one authorized adamant that he was not willing to co- operate. The third having been asked to recuse himself and as the most junior prosecutor torn between two forces, one of respecting the Court and the other of disassociating himself with his boss who even accused him of insubordination and forcing him to submit his report.

We have already been told that Mr Posholi was the Principal Public Prosecutor and one would expect that with the experience he had would instill in other prosecutors below him some respect to the Court no matter what. There

were more decent ways open to him to follow in situations where he thought he was justified, and showing disrespect to the Court would not be one of those. I consider the Court to have been too lenient to have allowed the Prosecutor to behave in the manner that Mr Posholi did without taking him on serious contempt.

In his own words in his affidavit Mr Posholi showed that he made an open remark in Court that the proceedings were irregular. As if that was not enough he then deposed that,

> "I then invited the other prosecutor to walk out, he hesitated and I stood up and walked out of Court."

Was this still a Court of Law or a circus? Would the members of Public still be expected to respect the Court and take any of its decisions serious if officers of Court behave in that fashion? Though the defence commented the magistrate for his patience, this I considered to have been an outright insult to the bench and ought to have been treated with similar degree of contempt it deserved.

Unusual things happened in this case. Realising that the prosecution was sitting back and playing marbles, the Accused had the matter set down for hearing with notice to the Crown. Mr Posholi did not make his appearance still yet he had

received the notice. The Junior prosecutor came to Court but since he had been ordered to recuse himself from the case by his administrative boss, Mr Posholi, he made known to the Court the instruction from his boss.

When things stood thus, the defence counsel, by invoking the provisions of Section 278 of the Criminal Procedure and Evidence Act, applied for the discharge of the Accused which was granted and an order made for the release of the vehicle to the Accused. It is against that order and ruling that the present Application for review was filed.

Rule 50(2) of the High Court Rules clearly stipulates what an Application for review must contain.

Rule 50(2)

> "The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and the circumstances upon which the applicant relies to have decision or proceedings set aside or varied."

In the notice of motion, the Applicant sought relief from the Court to have the proceedings reviewed, corrected or set aside by reason of having the Accused

acquitted and discharged without the participation of the prosecution in the proceedings. But the allegation of non-participation had not been born out by the record.

Both the supporting affidavits of Principal Public Prosecutor - Posholi and his Assistant, Paseka Raselabe clearly showed that they participated in the proceedings save that, Mr Posholi wanted to dictate to the Court as to how the proceedings were to be conducted by choosing who the presiding officer should be. As rightly pointed out by the defence counsel and the Court, it was not for the Prosecutor to make a selection, moreso because the Court had already made its ruling on that point. Arrangements for another Magistrate to visit Mafeteng where necessary would be handled by the Magistrate in charge of Mafeteng district not the prosecutor.

The prosecutor had other procedural options open to him. Section 278 (3) of the Criminal Procedure and Evidence Act would have taken care of his concern.

Section 278 (3)

> "Nothing in this section shall deprive the Director of Public Prosecutions or the Public Prosecutor with his authority or on his

behalf, of the right of withdrawing any charge at any time before the accused has pleaded, and framing a fresh charge for hearing before the same or any other competent Court."

The other option would have been that, since the Crown knew well that in criminal cases the Director of Public Prosecutions was the '*litis dominus*' the procedural way would have been seeking for a directive from the Director of Public Prosecutions.

Seeing that the Crown was playing games the Court was entitled under Section 150 of the Criminal Procedure and Evidence Act, to require the Accused to plead to the charge and then decline to postpone the trial; **Griffiths vs Compol and Another C of A No. 9 of 1991**. There was no irregularity there.

As regards the disposal of the vehicle, this is the good ground for Appeal not review, I would therefore not allow myself to be dragged into that area of disguised appeal.

It has also been the Respondents' case that the Rules of Court have been flouted, in that there has not been any compliance with Rule 50 (5) of the High Court Rules. The Application was filed on the 19/11/2001 and served on the

Respondents' Counsel on 20/11/2001. It was then moved on the 26/11/01, less that 14 days open for the Respondents to file their intention to oppose. No prayers for dispensation with the Rules of Court in terms of Rule 8 (22).

The Applicant on the other hand wants the Court to buy his story that though the case had a controversial history, the prosecution was in fact not in wilfull default. This has not unfortunately been borne out by the record. Clearly the prosecution has been in wilfull default and did not want to see the case to finality. He was in contempt from the beginning to the end. He should thank his gods that he met the kind of magistrate of Mr Mahooane's patience or tolerance.

In the case of **Strong Thabo Makenete vs Major General Lekhanya and Others 1991-92 LLR & LB** the court voiced its displeasure on what it termed "the lamentable lax attitude by many practitioners to the Rules of Court bordering on contempt."

I have already shown that in this case there has been non-compliance with the Rules of Court, Rule 50 (5) and Rule 8 (22) and for that alone the Application must fail. In fact as already stated this was a disguised Appeal.

This Court would be failing in its duty if the manner at which the Crown conducted itself at the Court below is left only in the hands of the Magistrate - Mafeteng. The Court invites the Director of Public Prosecutions and the Chief Magistrate to join hands and seriously address that problem before things worsen. Like legal practitioners, prosecutors as officers of Court must respect the Court even where according to them they consider the Court to be wrong. We should not allow anyone to turn our Courts into circus. That would not be justice but injustice. As the saying goes "justice must not only be proclaimed to be done but must be seen to be done." The manner in conducting proceedings in Court must display that justice.

A.M. HLAJOANE
ACTING JUDGE

For Applicant: Ms L. Ntelane
For Respondents: Mr Phafane

CC: Chief Magistrate
Director of Public Prosecutions
Officer Commanding - Mafeteng
Director of Prisons - Mafeteng