C. of A. (CRI) No.10 of 2004

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

ZWELAKHE MDA **1ST APPELLANT**

LIMAKATSO RALITLHARE **2ND APPELLANT**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

Held at Maseru on 13 October 2004

CORAM:
Steyn, P.
Plewman, J.A.
Melunsky, J.A.

JUDGMENT

Summary

*Appeals to the Court of Appeal – When competent – Appellants seeking to appeal against an order by the High Court overturning a Magistrate's court ruling that there was no case for them to meet at the close of the Crown case – High Court also directing that trial should proceed **de novo** before a different judicial officer – No appeal can be entertained against a ruling that appellants had a case to meet. – Appeal accordingly struck from the roll. – Leave to appeal against the order directing the trial to commence **de novo** sought –Robust credibility findings made by the Magistrate's court – Interest of justice and a fair trial required that hearing should commence **de novo** before a different judicial officer – Leave accordingly refused – The question of the powers of the Court of Appeal in terms of its founding statute raised but not decided.*

THE COURT

1. The two appellants were charged jointly with three other accused in the court of the Senior Resident Magistrate in Maseru with the offence of defeating or obstructing the course of justice. The charge reads as follows:

> "THE ACCUSED ARE GUILTY OF THE CRIME OF DEFEATING, ALTERNATIVELY OBSTRUCTING THE [COURSE] OF JUSTICE IN THAT:
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> 1. During or about September 2002 and in Maseru, Lesotho, one 'MOLE KHUMALO and LESOLI MAPHATHE were duly committed to stand trial in the High Court of Lesotho during March and April 2003 on a charge of murder of one MAILE MOSISILI.
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> 2. One BONANG KOSENE and one BONANG MOLEKO from whom affidavits had been procured by members of the Lesotho Mounted Police Service, were duly subpoenaed by the Crown, being the prosecuting authority in Lesotho, to attend the said trial and, being potential/necessary and material witnesses, to testify as witnesses for the Crown at the said trial;
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> 3. The said accused, well knowing and being fully aware of the said facts, not only consulted with the said BONANG KOSENE and BONANG MOLEKO without the consent [of] or notifying the Crown on or about the month of September 2002; and at or near Liteneng Ha Thatho (Roman Catholic Area) in the district of Mafeteng, the said accused, during the said consultation, unlawfully and intentionally enticed the

said BONANG KOSENE and BONANG MOLEKO to sign false affidavits/statements and to deliver false testimony at the said trial and to deviate from the evidence which they would otherwise have given.

4. The accused's said wrongful and intentional conduct was aimed at weakening or thwarting the Crown's case against the said 'MOLE KHUMALO and LESOLI MAPHATHE and to prevent the Crown from securing the conviction of, alternatively to detrimentally affect the Crown's prospect of securing the conviction of the said 'MOLE KHUMALO and LESOLI MAPHATHE, and consequently the said accused did defeat or obstruct or attempt to defeat or obstruct the course of justice as aforesaid."

2. As can be seen from the particulars contained in the charge it was *inter alia* alleged that the accused unlawfully consulted with two persons who had made statements to the police and had been sub-poenaed to attend as witnesses for the Crown in a pending murder trial.

3. These two persons gave evidence for the prosecution before the Senior Resident Magistrate. At the close of the Crown case the defence applied for the discharge of the accused. The contention advanced by counsel for the accused was that they had no case to answer and that by reason of the provisions of sec. 175 (3) of the Criminal Procedure and Evidence Act 1981 they were entitled to be found not guilty and discharged. This contention was upheld by the subordinate court. It found that there was no evidence on which the appellants could be

convicted, found them not guilty and discharged them.

4. The Crown appealed to the High Court against this decision of the court of first instance. The High Court, per Cullinan A.J., upheld the respondent's appeal and found that in respect of the two appellants before this Court, the Crown had established a *prima facie* case "such as that if (they) were not to give or adduce any evidence at that stage, a reasonable tribunal acting carefully might convict (them)".

5. It is against this decision that the two appellants sought to appeal to this Court and were granted leave for this purpose by the High Court, on a number of grounds, all of which related only to the decision to uphold the appeal and set aside the order discharging the appellants.

6. We say "only the decision to uphold the appeal" because Cullinan A.J. had after making his decision to uphold the appeal also ruled as follows: "The appeal is allowed therefore and the acquittals of both the first and third respondents (the two appellants before us) are set aside. At this stage the learned trial magistrate having made her findings as to credibility, I consider that it would not be in the interests of justice to remit the case to the court *a quo* for (the) continuation of (the) trial. Instead I order the respondents be tried *de novo*." None of the grounds of appeal

challenged the propriety of this order.

7. Before the hearing of the appeal and on the 11th of October this Court advised the parties that it required their legal representatives to be prepared to address the Court on the following matter:

> "Is an appeal to the Court of Appeal appropriate at the present stage of the proceedings?"

Counsel's attention was in this regard directed to the decisions in Wahlhaus and Others v Additional Magistrate Johannesburg and Another 1959 (3) S.A. 113 (A) and R v Adams and Others 1959 (3) S.A. 753 (A).

8. As a result of this intimation the appellants filed an application for leave to appeal against that part of the judgment of Cullinan A.J. in which he directed that the trial of the appellants had to commence *de novo* before a judicial officer other than the magistrate who presided at the trial in the sub-ordinate court. We will return to this application below.

9. Before dealing with the issue raised in the notification to the parties

dated the 11th of October 2004, it seems to us on re-consideration that we should have asked a more fundamental, additional question. This question is whether this Court has the jurisdiction (power) to hear an appeal which is not directed at challenging a conviction or acquittal of an accused, or an order which is made consequent upon a conviction such as sentence, a forfeiture order, compensation order or the like.

10. I say this because this Court is governed by Statute. Its jurisdiction is limited to those matters which are prescribed by law. Compare: S v Absolom 1989 (3) S.A. 154 (A).

Sections 7, 8 and 9 of the Court of Appeal Act 1978 (as amended) set out the powers of this Court. They read as follows:

"7. (1) Any person convicted on a trial by the High Court may appeal to the Court on any matter of fact as well as on any matter of law.

(2) If the Director of Public Prosecutions is

dissatisfied with any judgment of the High on any matter of fact or law, he may appeal against such judgment to the court.

(3) A sentence passed by the High Court on a person committed to the High Court for sentence shall be deemed to be a sentence passed upon such person on a trial held by the High Court and an appeal against such sentence shall lie accordingly to the Court.

8. (1) Any party to an appeal to the High Court may appeal to the Court against the High Court judgment with the leave of the judge of the High Court, or, when such leave is refused, with the leave of the Court on any ground of appeal which involves a question of law but not on a question of fact nor against severity of sentence.

(2) For the purposes of this section an order made by the High Court in its revisional jurisdiction, or a decision of the High Court on a case stated, shall be deemed to be a decision of the High Court in its appellate jurisdiction.

9. (1) Subject to subsection (2) on an appeal against conviction the Court shall allow the appeal if it is of the opinion that the conviction should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or on the ground of any wrong decision of any question of law, or that on any other ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(2) Notwithstanding the fact that the Court is of opinion that the point raised in an appeal under subsection (1) might be decided in favour of the appellant, the Court may, if it considers that no substantial miscarriage of justice has actually occurred, dismiss the appeal.

(3) The Court shall, if it allows an appeal against the conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered or if the interests of justice so require, order a new trial.

(4) On an appeal against sentence, the Court shall, if it thinks that a different sentence should have been passed, quash the sentence

passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

11. We can find no provision in this statute founding the jurisdiction of this Court that empowers it to hear an appeal which is not directed against an acquittal, a conviction or a sentence passed after a conviction. Section 15 of the Act which deals with the right of this Court to adjudicate upon a question of law reserved by the High Court, confines the powers of the Court to adjudicate upon such question pursuant to a conviction. Section 15 reads as follows:

> "15. (1) In addition and without prejudice to the right of appeal given by this or any other Act, a Judge of the High Court may, upon the determination of a conviction whether in its original or appellate criminal jurisdiction, reserve any question of law arising therein for the consideration of the court.
>
> (2) The Court shall determine any question reserved for its consideration under subsection (1).

(3) On the determination by the Court of a question reserved for its consideration under subsection (1), the Court may make an order confirming, or setting aside the decision of the High Court, and shall have the same powers in relation to a case stated by the High Court as it has in relation to an appeal."

12. *Prima facie* therefore it would seem that this Court in a criminal appeal has no power to adjudicate on any matter other than issues that arise concerning or pursuant to a conviction or an acquittal. However, this matter was not fully argued before us and should therefore not form the basis for this judgment.

13. We therefore proceed to deal with the issues argued before us. These are the following:

(1) Can a party to criminal proceedings appeal to this Court against an order by the court below which has refused

an application for the discharge of an accused at the close of the Crown case?

(2) Is it proper for an appellate Court to hear an appeal against a decision made in the course of unterminated criminal proceedings? (see our noted cited at para. 7 cited above and the decisions in Wahlhaus and Adams.)

(3) Should we grant the appellants leave to appeal on the ground that the decision to direct that the appellants should be tried *de novo* before a different judicial officer constituted "unusual circumstances" and that grave injustice might result?

14. In the course of his argument, appellants' counsel conceded that this Court should not have entertained the appeal if all that Cullinan AJ decreed was that the court of first instance had erred in granting the application for the discharge of the appellants at the close of the Crown case. This necessarily involved an abandonment of the original grounds of appeal.

15. This concession was correctly made. It is clear that no appeal lies against a decision of a trial court that refuses an application for the discharge of an accused at the conclusion of the Crown case. See in this

regard: Commentary on the Criminal Procedure Act; Du Toit *et al* - 22-32D. where the learned authors say the following: "The decision to refuse a discharge is a matter solely within the discretion of the presiding officer and may not be questioned on appeal. (R v Latakula & Others 1919 A.D. 362. R v Afrika 1938 A.D. 556)". See also R v Abrahamson 1920 A.D. 283, R v Lambi and Others 1921 A.D. 85 and S v Moringer and Others 1993 (4) S.A. 452 (A) at 455 J. The effect of Cullinan AJ's judgment was simply to rule that there was a case for appellant to answer and his decision is therefore not appealable.

16. The appeal as noted should therefore be struck from the roll on this ground alone.

17. I proceed therefore to deal with question 2 cited in par. 13 above. The two judgments referred to in our notice to the parties dated 11 October 2004 i.e. Adams and Wahlhaus and numerous subsequent decisions in the South African courts have held that it is not in the interests of justice for an appellate court to exercise any power "upon the unterminated course of criminal proceedings" except in rare cases where

grave injustice might otherwise result or when justice might not by other means be attained" (Wahlhaus). In Adams the Court of Appeal held that as a matter of policy the courts have acted upon the general principle that it would be both inconvenient and undesirable to hear appeals piecemeal and have declined to do so except where unusual circumstances called for such a procedure (per Steyn .CJ. at p. 763). The authorities on the point are legion. See McComb v Assistant Resident Magistrate Johannesburg and the Attorney General 1917 T.P.D. 717 at 719, Brock v S.A. Medical and Dental Council 1961 (1) S.A. 319 at 324 (C), Die Staat v Labuschagne 1962 (3) S.A. 574 at 578 (T). In the latter decision Bekker J described such a procedure as "practically unknown."

18. Indeed judicial experience dictates that courts must only deal with concrete and determined situations and facts. A court should not give advice on abstract questions. If, as here, the trial against appellants had yet to proceed to completion it would be highly undesirable for this Court to express or commit itself to any view either on the law or the facts before the case is concluded. This is the more so if it is recognized that when

the case against appellant is completed and if the result were to be either a conviction or an acquittal at the termination of those proceedings, there is a reasonable possibility that the matter will return to this Court. The determination of whatever the issue is that would then have to be decided would be governed *inter alia* by the provisions of Section 9 of the Court of Appeal Act 1978. For such purposes it will be essential, for example, that this Court should be free to make a finding that the conviction is "unreasonable" or, as a further example, was "wrong in law" or that there had been (or not been) a "miscarriage of justice". Such considerations must surely be decided on a conspectus of the proceedings viewed as a whole and not on an incomplete part thereof.

19. Unless therefore the present appeal is one of those "rare cases where grave injustice might otherwise result" or where "unusual circumstances called for such a procedure" this court would not entertain or sanctify such a process. A piecemeal consideration by this Court of the issues raised in the appeal as noted would also have been improper and the appeal should also on this ground be struck from the roll.

20. Mr. Phafane for the appellant in an able and articulate argument indeed correctly conceded that no unusual considerations applied to the

appeal as noted and the leave to appeal granted by the High Court on the grounds filed in the notice of appeal. He was therefore obliged to rely upon the considerations set out in the application for leave to appeal to us filed of record in this Court on the 12th instant as constituting circumstances that were unusual and that "a grave injustice might result". We therefore proceed to deal with that application; i.e. question (3) posed in para. 13 above.

21. In seeking leave to appeal the first appellant says the following in his application:

> "I verily aver that I stand to suffer great injustice and prejudice if the matter is to commence **de novo** for the following reasons among others:-
>
> i) My entire resources which I had assembled for the trial which took its full course in the Magistrate Court would have been in futility;
>
> ii) I would have to start all over again to assemble a legal team to represent me at great and unaffordable cost.
>
> iii) I would have to go once again through the

entire process of a trial from the beginning. I would have to put my defence afresh to all prosecution witnesses. The Crown will have been given an opportunity to patch up and close all loopholes in its case.

iv) The judgement of **Cullinan J,** effectively deprives me of all the points and advantages I had already acquired in the proceedings. This is highly prejudicial to me. It would have been a different case if the High Court had found that there was a case to answer and then let the proceedings proceed from where they had ended, rather than to have directed as it has done.

v) Yet as indicated above, the correctness of the judgement of **Cullinan J.** and that of the **Learned Magistrate** will never be tested unless the Honourable Court grants the application.

vi) Consequently, I aver that the Honourable Court will intervene on the grounds of great injustice and prejudice to my Co-Appellant and I."

22. It was common cause before us that Cullinan A.J. had the power to make the order he did. See in this regard the provisions of section 8(1)(b) of the High Court Act which reads as follow:

> "8. (1) The High Court shall be a court of appeal from all subordinate courts in Lesotho with full power –
>
> (a) to reverse and vary all judgments, decisions and orders, civil and criminal, of any of the subordinate courts;
>
> (b) to order a new trial of any cause heard or decided in any of the subordinate courts and to direct, if necessary, that such new trial shall be heard in the High Court."

The issues therefore are: (1) Did he exercise his discretion judicially and reasonably in doing so? And (2) do the facts including those set out in para. 9 cited above constitute "rare or unusual circumstances?" In regard to (1) above the Court is as well-placed as the High Court was to assess the propriety of the directive it made because all the relevant facts that it could have considered are on the record before us. In regard to (2) above, the record has been supplemented by the considerations advanced in para. 9 of appellant's application for leave to appeal cited above.

23. The basis for the decision of the Court *a quo* was the fact that the presiding officer in the trial "having made her findings as to credibility" and that therefore, "it would not be in the interests of justice to remit the case to the court *a quo"*. The question we have to decide is, giving due weight to the legitimate concerns raised in the citation, did the "interests of justice" require the court to rule as it did.

24. It is in our view that the "interests of justice" would certainly include the consideration as to whether in all the circumstances both parties would be reasonably assured of receiving a fair trial.

Nugent AJA in S v Lubaxa 2001 (2) SACR 703 (A) at 708 comments in this regard as follows:

"whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the

question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances. In the present case those circumstances do not exist, for the reasons that follow, and I do not think it is appropriate to deal with the problem" (emphasis added).

25. In assessing whether or not a party could be reasonably confident that he/she would receive a fair trial one has to consider – as in this case - the legitimate entitlements of both the accused and the Crown. Had the presiding officer dismissed the application for their discharge and had she made the same robust credibility findings believing the State witnesses, we are of the view that the appellants would not have been confident that they would receive the fair hearing to which they were entitled. Had the trial continued before the same magistrate and had the appellants testified, called rebutting evidence or closed their case and had they then been convicted, they could legitimately have challenged the

fairness of their trial.

26. We have referred to the credibility findings of the Magistrate as "robust". They are couched in language which permits of no question but that she rejected the testimony of the witnesses as fatally flawed and "riddled with so many inconsistencies and discrepensies the Court was sometimes lost completely". She goes on to say:

> "this is one case where the credibility of the witnesses was so fatal that it cannot be ignored…"

As to the effect of these findings see the comments of Le Roux C.J. in Attorney General Venda v Malepo and Others 1992 (2) SACR 534 (V) at p.544 where the court says the following:

> "The appeal by the Attorney-General accordingly succeeds and the matter will have to be reopened after sufficient notice to the accused (see s 310(4)). In view, however, of the completely untenable finding of credibility of the trial magistrate, there is no assurance that a fair trial will take place if the same magistrate presides at the resumed trial. The new presiding officer will be at a disadvantage as he has not seen the witnesses in the state case. The only way to overcome this problem would be to order the matter to

> commence *de novo* before another magistrate. Therefore, in terms of the powers conferred upon us by s 310 (5), it is my view that it should be ordered that the reopened trial commence *de novo* before another magistrate in the regional division of the magistrate's court.
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> Van der Walt J concurred."

27. It is our view that the Crown and the appellants are both entitled to the same right to a fair hearing. Archbold 2002, Criminal Pleading, Evidence and Practice to which Crown counsel has referred us has the following pertinent comment in this regard at p.328 – 329:

> "Whether a retrial should be permitted depends on an informed and dispassionate assessment of how the interests of justice in the widest sense are best served: full account must be taken of the defendant's interests, particularly if there has been a long delay or if his defence may be prejudiced in any significant way, but account must also be taken of the public interest in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system: *Bowe v The Queen* [2001] 6 *Archbold News* 3. PC.

As to the desirability of a retrial taking place before a different judge, see *R. v Quin and Bloom [1962] 2 Q.B. 245, 45* Cr. App. R. 279,

CCA. There is, however, no rule of law to this effect. It is a matter for the court's discretion (*R. v. Bogle [1974] Crim, L.R. 424, CA)* and the good sense of the judges (*R. v Mulen [2000] 6 Archbold News 2, CA).*" (Own emphasis).

28. In view of the above considerations we have no doubt that Cullinan A.J. was in the circumstances justifiably apprehensive that it was not in the interests of justice to refer the case back to the trial court and to remit the matter for hearing *de novo*. His discretion was in our view exercised reasonably and judicially.

29. We would add that having given due weight to the real and substantial concerns raised by the appellants as well as to the forceful submissions of their counsel, we are firmly of the view that the right to a fair hearing for both parties should outweigh their concerns mentioned above, and that a just outcome as well as the public interest require that the trial should commence *de novo* before a different court.

30. For all these reasons this Court rules as follows:

1. The appeal noted against the judgment of the High Court as per the notice of appeal dated 19th August 2004 is struck from the roll. The order upholding the appeal from the Magistrate's Court was not an order that could be appealed to this Court.

2. The application for leave to appeal dated 12th of October 2004 is refused. The order of the High Court that the trial should proceed *de novo* before a different judicial officer was proper, and in the circumstances of this case, including the considerations raised in the application for leave to appeal, required by the interest of justice.

31. The appellants raised other matters including an application to postpone the appeal. In view of the conclusions we have come to none of these matters require our consideration.

J H Steyn

PRESIDENT

C Plewman
JUSTICE OF APPEAL

L Melunsky
JUSTICE OF APPEAL

Delivered at Maseru this 20th day of October 2004

For Appellants : Mr. S. Phafane

For Respondent : Mr. H.H.T. Woker