CIV/APN/215/79

IN THE HIGH COURT OF LESOTHO

In the Application of :

MAKALO KHIBA — Applicant

v

DIRECTOR OF PUBLIC PROSECUTIONS
MINISTER OF JUSTICE — Respondents

J U D G M E N T

Delivered by the Hon Justice F.X. Rooney
on the 23rd day of June, 1980.

On the 7th March, 1979 I found the present applicant guilty on 4 counts of theft of a cheque form and of money amounting in all to R112,135 of which sum about one half was actually acquired by the applicant and disposed of by him in various ways. I found in the course of those proceedings that on the 18th August, 1978 Captain T.M. Takalimane of the L.M.P. searched the house of the applicant and found him to be in possession of a total of R2,514.17 in cash.

In November, 1979 the applicant launched the present proceedings by notice of motion in which he claims the return of the R2,514.17 on the premise that the money did not form part of the proceeds of the crime and was the applicant's personal asset, which he had acquired by lawful and legitimate means. In his founding affidavit the applicant swore that the money was in the custody of the Registrar and that at the time that the verdict in the criminal trial was pronounced this Court made no order regarding the money seized by Captain Takalimane. The affidavits in reply all filed in November 1979 did not dispute the whereabouts of the money and said it was retained by the Registrar pending the applicant's appeal to the Court of Appeal against his conviction and sentence.

I have ascertained from the Registrar that it is indeed the case that he is still in possession of the money, that the applicant's appeal against his conviction and sentence was dismissed on the 10th January, 1980 and that no orders with regard to the disposal of exhibits were made at the conclusion of the trial.

2/ Section 318(1) .....

Section 318(1) of the Criminal Procedure and Evidence Proclamation provides for the making of a special order for the return of seized property. It goes on to read

> "318(1) The Court may, after the conclusion of any trial and subject to any special provision contained in any law, make a special order as to the return to the person entitled thereto of the property in respect of which the offence was committed or of any property seized or taken under this Proclamation or produced at the trial. If no such order is made the property shall, on application, be returned to the person from whose possession it was obtained (unless it was proved during the trial that he was not entitled to such property) after deduction of the expenses incurred since the conclusion of the trial in connection with the custody of the property; but if within a period of three months after the conclusion of the trial no application is made under this section for the return of the property, or if the person applying is not entitled thereto or does not pay the expenses aforesaid, the property shall vest in the Crown."

The applicant did not make his application to this Court within three (3) months of the conclusion of the trial. The respondents have not relied upon the terms of the section to defeat the application, but, it is a statutory provision which cannot be ignored.

In Ex parte Passano : In re R. v. Passano & Another 1958(2) S.A. 610, Classen J.P. considered Sec. 333(1) of the Criminal Procedure & Evidence Proclamation of South West Africa which is in exactly similar terms to our own statute. He said at 617 "in the second part of Section 331(1) it is not clearly stated whether the application should be made to the Court or the officers of the Crown." He referred to the cases of Meyers v. Triegaardt N.O.1948(4) S.A. 208 and Rosenberg v. Attorney-General 1931 W.L.D. 269 where it was suggested that the application need not be made to the Court in the first instance. In the first mentioned case Lucas A.J. was of opinion that the application was correctly made to the Secretary for Justice. The trial ended in April and the application was not made to the Court until August.

In Rosenberg v. the Attorney-General, de Waal J.P. made the following observation on Section 336 of the Union Act 31/17 (from which our legislation is copied) at 272

3/ "Coming now .....

" Coming now to the second half of the section, the difficulty that arises from the construction thereof is apparent. The Legislature thereby proceeds to state what shall be done where no order is made under the first portion of the section, by enacting that if no such order is made under the first half of the section, the property seized shall, upon application, be returned to the person from whose possession it has been obtained, unless it was proved during the trial that he was entitled to such property. Now, it seems to me that there is much to be said for the contention that application under this portion of the section means an application to the Department of Justice and not to the Court, and that the Department, acting on the advice of the Attorney-General, makes restoration to the possessor who, during the trial, was proved to be not disentitled to the property. But as I have already indicated, I do not think it is necessary for me to interpret the section in view of the facts."

I accept that the above quoted obiter sets out the proper interpretation of the section. In Lesotho the application is more likely to be made to one of the officers of the Court such as the Registrar of the High Court or a magistrate or clerk in a Subordinate Court. On receipt of such application the officer concerned would be expected to seek the advice either of the Permanent Secretary for Justice or the Solicitor General and act according to that advice.

In the present instance, after the conclusion of the hearing, I enquired from the Registrar as to any approaches made by the applicant between the termination of the criminal trial and the formal application made to this Court. I have now ascertained that on the 29th March, 1979, the applicant wrote to the Registrar as follows :

"Dear Sirs,

I wish to request you to supply me with information and guidance regarding the problem which faces me at this moment.

It is known that the police did seize the Savings Book, shares Certificate and cash from me when they were conducting their search at my house and on me; when judgement was given nothing was said about my seized property, i.e. whether the police still had the right to retain it or ought to release it to me.

It is, therefore, my desire to know whether since I was convicted, that automatically terminates any rightful claim to such property, or whether in order for it to be released, I have to tender an application with the Registrar of the High Court.

4/ I have .....

I have discussed this matter with the authorities of Central Prison and they are keen to assist in all possible ways and as a result, your reply will be of great assistance.

I remain, Sir,

Yours faithfully,

(Sgd) MAKALO KHIBA

It is clear from the above that the applicant was concerned about the exhibit seized by the Police and his right to have it returned to him. On the 18th May in the course of another letter to the Registrar, the applicant said "My concerted opinion, however, is that, without referring the matter to the Appeal Court, I ought to apply to the High Court for the release of my seized property".

I am satisfied that the applicant did make an application under the section for the return of the seized property within the 3 months' period allowed.

It is well established that the onus is on the person holding the property which has been taken for the purpose of the trial to show that the person from whose possession it was taken is not entitled to have it back. (Meyers and Another v. Triegaardt N.O. (Supra) and Rex v. Tutu (1943 E.D.L. 55). It is common cause that the money was seized from the applicant by Captain Takalimane and it is for the respondents to prove that the applicant is not entitled to it. To achieve this the respondents have to show that the funds belong to someone other than the applicant. The basis of the respondents' contention is to be found in paragraph 4 of the Affidavit of Captain Takalimane which reads :

> "During the trial, Counsel for the Prosecution alleged that the sum of Rand 2,514.17 formed part of the total sum stolen. The trial Judge in his judgement found that the explanation given by the Applicant to me in his house for possession of the sum of R2,514.17, namely that this money was a loan from Lesotho Bank, was not a true one. The Applicant had the opportunity during his trial to offer an explanation for possession of this money but did not do so. The explanation for possession of the money given in Paragraph 3 of the application is completely different from the explanation given to me when I seized the money. I am not aware of the transactions alleged in Paragraph 3 of the Application. If they took place and were relevant to the sum of money seized by me, the applicant had every opportunity to give this explanation to me and also to the Court hearing the criminal case.

5/ He did not .....

> He did not do so. Further more he did not request the learned Judge Rooney to return the sum of R2,514.17 to him at the end of the criminal case on the grounds that it was his personal property. In the circumstances I cannot accept the submission in Paragraph 3 of the Application is the truth."

It is true that the applicant did not give evidence and the trial Court in expressing an opinion as to the possible origin of the money had to take into account the evidence then available. In my Judgment at the trial I had this to say about the money :

> " The accused was found with R2,514.17, quite a lot of money to have in cash. He told the police officer that he had received the money as a loan from the Lesotho Bank in order to build a house. Pascalis Mafike (P.W.13) the Manager of the Lesotho Bank gave evidence to the effect that in mid-June the accused requested a loan of R2,000 to build a small house. The bank agreed but the loan was not withdrawn in a lump sum. It was withdrawn in small amounts in September and October. Thus it follows that the explanation which the accused made to the Lieutenant to account for his possession of the money was not a true one. It was admitted by his counsel, that the accused did not receive a loan from the Lesotho Housing Corporation."

I do not think that I am in any way bound by these conclusions. The issues I was then considering were quite different in character than those in this proceeding. The finding of the money in the possession of the accused and his reported explanation of the same was just one of number of pieces of evidence present at the trial which were indicative of the guilt of the accused in the absence of any explanation from him. His failure to give evidence at the trial is no bar to this application or to his giving an explanation now which he might have given at the trial.

The applicant states that the sum of R2,514.17 is made up as follows :

(1) R1,200 was received from S.M. Motsekuoa being the final payment for the purchase price of a motor vehicle sold by the applicant for R2,000.

(2) The sum of R800 was received from Maurice Quintsa being the purchase price of another motor vehicle.

(3) R680 was withdrawn from the applicant's current account at the Lesotho Bank on the 17th August, 1978.

This, says the applicant was the fund from which the money was seized. Cross-examined by Mr. Mckee the applicant said that he had explained to Captain Takalimane about the cars and that he was

surprised that his counsel at the trial did not adopt that line in questioning the police officer. He agreed that he told Takalimane about the money being a loan from the Lesotho Bank, but he said that he was referring to only one portion of it.

The applicant's business dealings with Motsekuoa were rather complicated and he could bring no contemporary documentary evidence to support the existence of the arrangements made. In the case of Quintsa the situation was less favourable, as the purchaser is now dead.

In giving evidence Captain Takalimane maintained that the applicant made no mention of the car sales and said that all the money came from the Lesotho Bank.

The applicant produced a certified copy of a bank statement of his current account at Lesotho Bank at the relevant period. This shows that on the 16th August, 1978 the applicant's account was debited with R680 by cheque. This debit increased the applicant's debit balance from R757.02 to R1,437.02. There is nothing to show that this money was not drawn by the applicant himself in cash and that this cash did not form part of the money seized by the police on the 18th August.

Similarly, the evidence of the applicant and Motsekuoa about the origin of the rest of the fund is contradicted only to the extent that Takalimane swears that the applicant did not mention the car sales to him. I take the view that as the onus rests upon the respondents to show that the applicant is not entitled to the money, that onus is not discharged by the evidence of Captain Takalimane standing alone. There is nothing inherently improbable about the case made out by the applicant. It follows that this application must succeed and I direct that the Registrar should cause the money in his custody to be dealt with in accordance with Rule 12 of the Prisons Rules.

F.X. ROONEY
JUDGE

23rd June, 1980.

For Applicant : In Person
For Respondents: Mr. McKee