

IN THE HIGH COURT OF LESOTHO

In the appeal of:

✓ 1. PETROSE LEHLOHONOLO MAPHATSOE } Appellants
2. JOSEPH MOSOLO MAPHATSOE }

v

R E X

Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice M. P. Mofokeng
on the 29th day of September, 1980

The appeal has already been upheld and what follow are the reasons thereof.

The two appellants were charged, together with another, in the subordinate Court with the crime of Housebreaking with intent to steal and theft it being alleged that upon or about the "4th or 5th" day of May, 1979 and at or near Christ the King High School, Roma, in the district of Maseru, they unlawfully and intentionally "break and enter the classroom there situate of F. Lavigne and did steal twenty-four typewriters, the property or in the lawful possession of F. Lavigne." They all pleaded not guilty. At the end of the day, the two appellants were found guilty of receiving stolen property well knowing it to be stolen and were sentenced to undergo terms of imprisonment for periods of 18 and 12 months respectively while their co-accused was found not guilty and acquitted. The two appellants appealed against both conviction and sentence.

Brother Lavigne gave evidence to the effect that after receiving information from one of the students, he

inspected the classroom at the school. He found "very little damage" to the door which had been forced open as it had been "closed before." One of the windows was open. However, and in his own words, "the doors of the classroom were not locked by me the previous night." Indeed the code numbers of the typewriters which were allegedly missing were "prepared by the teacher of Typewriting." This was most unsatisfactory as the best evidence could have been tendered. The result of this method of presenting evidence by the prosecution was that no "breaking" was proved at all.

Legabanyo Litabe is the appellants' headman. On the 21st May, 1979 the police called at his house. He later accompanied them to the house of one Maphatsoe where they found the appellants. The appellants allowed them to search the house but "nothing" was found. Apparently the appellants were asked as to whom the "toilet pit in the yard" belonged and the answer was that it belonged to the family. The police then asked the appellants to accompany them to the toilet. The back of the toilet was built of stones and the top of the walls was covered with plastic. When that plastic was lifted police "found twenty-four typewriters in the walls." In his own words he continues his evidence -in-chief:

"When the police asked who has brought the machines to that spot they said the machines were brought by one Mike who lived at Motimposo. The police seized the machines and charged the accused (i.e. appellants) and detained..... I parted with the police at that stage."

Under cross-examination he agreed that appellants spent most of their time away from home as appellant 1 works and appellant 2 is a scholar. He also conceded that the home of the appellants had been broken into on several occasions.

W/O Ketane says that he was with the headman when he arrived at appellants' home. He says he "informed accused 1 and 2" that he was looking for "typewriters and dangerous weapons," and that they "declared that they had no such

items." He, and the many police with him, searched the house and found "nothing." In the company of the headman they proceeded to the garden. Behind the toilet he removed stones on the plastic and "looked into the pit" and saw a typewriter. In his own words

"I asked accused 1 and 2 for the explanation and they gave me similar explanations. Accused 1 said machines were brought to them by accused 3 for safe-keeping. The accused further said there were several machines in the pit....."

In cross-examination he was asked the almost inevitable questions:

"Q: Where was P.W.2 (Leqabanyo Litabe)?

A: He was at the door of the toilet.

Q: Could he have heard?

A: Yes.

He was then specifically asked:

"Q: What did accused 1 say in his own words about the machines?

A: He said. "These machines were brought to me by Phillip, who asked me to keep them." Accused further said that he suspected them."

and

"Q: I put it to you that accused never said he suspected the machines to be stolen property?

A: He did says so.

Q: Where was P.W. 2 when he said so?

A: He was present.

Q: Is it not strange that he did not mention that point?

A: I do not know if he heard. But he was still with us.

Q: He should have heard what accused 1 said?

A: Yes."

About the name allegedly mentioned by the first appellant the cross-examination proceeded thus:

4/ "Q: Is it.....

"Q: Is it correct that the machines were brought by Michael?

A: Yes.

Q: Why did you mention Phillip?

A: It is another name for Michael."

But when questioned by the Court his answer was quite revealing:

"Q: Did you know accused 3 before this incident?

A: No."

How then did the witness know that Michael had another name at the time he was speaking to the appellants? The headman says only the name of Michael was mentioned and this witness mentions the name Phillip which was not mentioned in the presence of the chief. Perhaps the witness himself supplied the answer to this unsatisfactory evidence, in his re-examination:

"Q: Do you remember all what the accused said at the toilet?

A: No "

Finally, the witness conceded, in cross-examination:

"Q: Is it correct that the toilet is near a cliff?

A: Yes, the house is the last one on that site

Q: Is it correct that the fence is down on the side to the toilet?

A: Yes "

That was briefly the evidence which the Crown tendered.

The evidence of the Headman and the investigating officer, apart from serious conflicts on material respects, simply boils down to the simple fact that the appellants confessed to a police officer that they received the typewriters knowing them to be stolen property, the crime with which they were found guilty. This evidence, on this charge, is inadmissible because it offends against the provisions of section 223 of

Proclamation 59 of 1938. In my view, therefore, the admissibility of this confession (whether made to the headman or police officer) was fatal. (Rex v. Kgadiete, 1922 T.P.D. 121; Rex v. Du preez, 1935 E.D.L. 10 and Rex v. Seutloali Lesala & Thakholi Mphoso, 1967 - 70 L.L.R. 43).

The learned magistrate states in his judgment:

"An independent witness, P.W.2 testified that the typewriters were brought to them (accd.) by one Mike (accd. 3). His evidence confirmed that of a police witness who investigated the case."

This is not quite correct. The independent witness said the name Mike was mentioned whereas the police officer said the name Phillip was mentioned. At that stage both witnesses did not know the person referred to. How is it then that the same person was referred to by different names at the same breath? The probabilities are that only one name was referred to and not two. However, there are quite important matters which the police officer makes mention of in his evidence which are not even alluded to in the headman's evidence, and yet they are alleged to have been said in his presence and within his hearing. The police officer did not remember them solely because of his training. They were simple facts of life. It would be equally important to a headman to note that a witness said the goods were kept away from the house because they were suspected to be stolen as he daily disposes of similar cases within his area. But the headman never mentioned this aspect of the conversation. Ultimately, the police officer makes matters worse by choosing, for obvious reasons, not to remember certain parts of the conversation. He only remembers those parts which are fatal to the appellants' case. His bias clearly manifests.

The learned magistrate has not commented on the credibility of the Crown witnesses. This Court is, therefore, at large on this aspect. From the mere reading of the record, it is quite obvious that the police officer was giving evidence with an ulterior motive - to get the

appellants convicted. He is given to exaggeration. He was not open with the Court Hence his conflicting evidence with that of the headman.

The locality of the toilet described by the police witness does not exclude the possibility that other person(s) might have hidden the typewriters at the spot where they were found without appellants knowledge, as they alleged. The toilet was near the cliffs, a footpath and on the extreme end of the site The Crown made no attempt to lead evidence to exclude the possibility I have just mentioned This possibility is more real than apparent when the headman himself says that the appellants spent most of their time away from home

For the above reasons the appeals of both appellants were upheld It was further ordered.

- (1) That they be refunded their appeal deposit;
- (2) That the cash bail money be refunded to them and
- (3) That the cash security paid by their parents be paid to them as they fulfilled the stipulated conditions.


J U D G E

29th September, 1980

For the Appellants: Mr. Modisane

For the Respondent: No appearance