IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

1. CHERE SEKOTOKO KHOLOANYANE
2. 'MATIEHO MOSEBI

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice M. P. Mofokeng
on the 17th day of November, 1980

Counsel for the Crown has applied in terms of sec. 222(3) of the Criminal Procedure and Evidence Proclamation 59 of 1938 to be allowed to read the depositions which were made by a Mr. Tieho Machabe at the preparatory examination. This witness was warned and declared as an accomplice in terms of sec.231(1) of the Criminal Procedure and Evidence Proclamation (supra). This witness has simply vanished without a trace. That the Crown can make such an application is quite clear from the wording of the section. It reads:

> "Where the witness cannot be found after diligent search or ..... the Court may, in its discretion allow his deposition to be read as evidence at the trial subject to the conditions hereinafter mentioned."
> (My underlining).

The section clearly confers a discretion up the Court trying the case, It is a discretion which must be exercised in a way that it will not be prejudicial to an accused in the conduct of his defence. It was stated thus by the

2/Chief Justice .....

Chief Justice Innes in the case of Rex v Andrews, 1920 A.D. 290 at 293:

> "The admissibility of the deposition is left in the discretion of the presiding Judge - that is, in his entire discretion. The policy of the clause is to leave the decision in his hands. He is able to satisfy himself there and then whether any prejudice will result to the accused by the admission of the evidence, and his ruling is final ..... The responsibility thus thrown upon the Judge is heavy, and it is his duty to guard against all possibility of prejudice. But it is his duty the discharge of which is at his unfettered discretion."

I have therefore to be satisfied that there will be no real prejudice to the accused; that is, whether the admission of the evidence will not be unfair to the accused in the conduct of his defence. This was neatly put by Greenberg, J. in Rex v Rassol, 1927 T.P.D. 73:

> "The decision in this case may depend almost entirely on the impression that the Court forms of the different witnesses. I understand there will be a conflict between the Crown witnesses and the witnesses for the defence and in cases like that the manner in which the evidence is given is a matter of very great importance. Not only in regard to the actual demeanour of the witness but also whether the witness under cross-examination in this Court still gives the same evidence as was given in the lower Court. It is a matter of common experience in cases that a witness, not necessarily through bias or anything of that sort, does not give exactly the same evidence at the trial as at the preparatory examination. I cannot say that will happen to this witness if she was properly cross-examined, as I have no doubt she would have been if she was here, but I am very doubtful whether an injustice might not be done to the accused by allowing this witness' evidence to be read. And once there is that doubt in my mind, I do not think I should subject the accused to the risk that he may be prejudiced."

In this instant case I have approached the question of the exercise of my discretion before any evidence has been led upon the question of the diligent search has been made for the witness and upon similar matters of which

proof is required in terms of sec. 222(3) of the Proclamation (supra). I have also considered the approach adopted by De Waal, J. in Rex v Stoltz, 1925 W.L.D. 38 as follows:

> "The Court should look at the nature of the evidence sought to be put in, if for instance, it conflicts with other evidence in the case, if from cross-examination the evidence as recorded should seem to leave a doubt, and generally where from the nature of the evidence much would depend on the credibility of the witness, so that a jury should have an opportunity of judging for themselves thereon from the appearance and demeanour of a witness, the Court should be very slow in admitting the evidence under the section."

These considerations were also adopted by Mapetla C.J. in Rex v 'Mathapelo Moeti, 1974 - 1975 L.L.R 6.

As I said earlier, the evidence which the Crown seeks to be read is the deposition of an accomplice witness. This evidence is vital to the Crown. It is a telling evidence against both accused for it implicates them heavily in the killing of the deceased. However, this evidence was not tested in the Court below. Even ordinarily where the evidence of this type of a witness has been tested by means of cross-examination, the Courts, as a rule, approach it with great caution. Indeed, in the case of Rex v Thabiso David Masupha, CRI/T/1/80, the learned Chief Justice Cotran in admitting depositions to be read as evidence in terms of the said section said:

> "It goes without saying that the weight to be attached to a deposition read at the trial, in contradistinction to its admissibility, must be treated with caution since the Court has not heard or seen the witness especially under cross-examination and is therefore at a disadvantage over his credibility as a witness of the truth."

4/ I entirely agree. ....

I entirely agree. However, the remarks, be it remembered were said of an ordinary witness. In this particular case I am dealing with the deposition of a particular type of a witness, namely, an accomplice. The disabilities mentioned are much more greater. Allowing the deposition of this accomplice witness to be read as evidence would deprive the Court of an opportunity of observing the demeanour of this witness in the witness box and forming the impression generally upon the truthfullness of his story. It is not unknown that an accomplice witness, for reasons best known to himself, has substituted an innocent person for the real culprit because of his inside knowledge of the commission of the offence. Sometimes, he involves an innocent person in order to save his own neck. His story should be subjected to vigorous cross-examination in order to test its truthfullness.

I have anxiously considered this matter carefully and I am satisfied that in this particular case I would not be justified at all in admitting the deposition because the accused would clearly be prejudiced in the conduct of their defence. Mr. Muguluma and Mr. Maqutu were unable to find any authorities in which depositions of an accomplice witness were allowed to be read nor any mention of such a precedent anywhere Neither could this Court. However, I am not surprised if one considers the attitude of the Courts to that type of a witness.

For the above-stated reasons I came to the conclusion that I ought to refuse the application and it was accordingly so refused.

J U D G E
17th November, 1980

For the Applicant: Mr. E. Muguluma
For the 1st Respondent: Mr C. Maqutu
For the 2nd Respondent: Mr Moorosi