CRI/T/10/95

IN THE HIGH COURT OF LESOTHO

In the matter between

REX

v

TS'ELISO MAFEKA

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge
on 31st day of October, 1996.

The accused stands before me charged with murder it being alleged that upon or about the 30th August, 1993 and at or near Semena/Beresi in the district of Thaba-Tseka the said accused did unlawfully and intentionally kill one Mofana Phats'oane.

At the hearing of the matter before me on 24th October, 1994 and before the accused could plead to the indictment I inquired from the Learned Director of Public Prosecutions who appeared for the Crown and Mr. Maieane for the accused whether there was a proper committal of the accused for trial in the matter and whether the latter was therefore properly before this Court in view of the fact that the learned magistrate who conducted the preparatory examination in the matter acted as both magistrate and interpreter in the matter notwithstanding the fact that she was not a sworn interpreter.

Indeed I may mention that both Counsel were in agreement as to the factual position that the said learned magistrate who is not a sworn interpreter herself conducted the preparatory examination in the matter without the assistance of a sworn interpreter. For my part I observe that after each of the witnesses had given evidence at the preparatory examination the following words were recorded:-

> "Deposition read over by me to the witness interpreted by me. Court Interpreter from English into Sesotho and adhered to by the witness."

Then followed the signature of the learned magistrate herself. I have no hesitation therefore in coming to the conclusion that the learned magistrate conducted the preparatory examination without the aid of a sworn interpreter.

In fairness to the learned Director of Public Prosecutions he readily conceded, and quite properly so in my view, that it was irregular for the learned magistrate to have conducted the preparatory examination without a sworn interpreter and that the preparatory examination proceedings were therefore defective. He submitted that it has always been his attitude that there must be a sworn interpreter at a preparatory examination.

Indeed according to May: South African Cases on statutes and evidence 4th edition page 251 in paragraph 485 it is significantly stated thus:-

> "an interpreter should be a sworn interpreter or he should be sworn before interpreting; that is a measure of security for the due administration of justice."

Wigmore On Evidence 3rd edition paragraph 1824 describes an interpreter as "a kind of witness" who must be sworn.

In dealing with this description of an interpreter, Williamson JA in S v Naidoo 1962 (2) S.A. 625 A.D. at 632 had this to say:-

> "It seems much more logical to accept the passage in which Wigmore describes the interpreter as "a kind of witness. That, on analysis, is what he really is. The witness being examined is saying something perhaps understood by the Court or the Court recorder; a species of expert witness is telling the court in a language understood by the court (and by any recorder) what it is the witness is actually saying.
>
> What the expert or interpreter tells the Court becomes the actual evidence in the case put before the court and recorded. If that is not on oath, the evidence so given or recorded is unsworn testimony. Hence the requirement for swearing such an interpreter, for only sworn testimony can generally be placed as evidence before Court."

After having reviewed the evidence in the matter the learned Judge of Appeal came to the conclusion that since the interpreter Naidoo had not been sworn as an interpreter there was no sworn testimony before the jury as to what the witnesses had said. He therefore held that "that must be considered, generally, as an irregularity."

I entirely agree with these remarks and respectfully discern the need to adopt them herein.

In John Motloheloa v Rex 1967-70 LLR 300 Evans J in quashing a conviction for lack of a sworn interpreter at the trial had this to say at page 301:-

> "The magistrate was placed in the unfortunate position of having no interpreter. His obvious duty was not to have proceeded with the trial, but he did so, the Public Prosecutor not only conducting the case on behalf of the Crown but also acting as interpreter.

It is difficult to gather whether the evidence taken down by the Magistrate in English was that translated by the Prosecutor or that transcribed by the Magistrate, probably a combination of both; this in my view is sufficient to nullify the whole of the proceedings."

With respect I agree.

In my view the question of the use of a sworn interpreter is not a privilege but is actually a constitutional right of an accused person. In this regard Section 12(2)(f) of of the Constitution of Lesotho reads thus:-

"(2) Every person who is charged with a criminal offence -

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge."

I have come to the conclusion therefore that the depositions of the preparatory examination in this matter were not taken satisfactorily and that they amount to unsworn and therefore inadmissible evidence in the circumstances. Moreover in the absence of a sworn interpreter this court cannot be sure that those depositions correctly and accurately reflect what was stated by the witnesses in their evidence at the preparatory examination. The likelihood of prejudice to the accused and the resultant miscarriage of justice cannot be ruled out in the circumstances.

One can only hope that the case before me represents but only one isolated incident. If it is not, I can say with confidence that those magistrates who engage in double standards of acting as their own interpreters must now realise that they were always going to run into trouble sooner or later. This is so because Section 7 of the Subordinate Courts Order 1988 provides thus:-

"Subject to the exceptions provided in this Order or in any other law in force in Lesotho, the proceedings in subordinate courts in all criminal

cases and the trial of all defended civil actions shall be carried on in open court, and not otherwise, and the pleadings in civil cases and the record of proceedings in civil as well as criminal cases shall be in the English language:

> Provided that the Chief Justice may by rules made under section 81, direct that in any particular court or class of court the pleadings and proceedings of the court may be in the Sesotho language."

Well I observe as a matter of fact that there are no such rules.

Now since the majority of people in this country speak Sesotho and obviously give their evidence in Sesotho it was always inevitable therefore that such evidence be interpreted into English. It is the considered view of this court that such interpretation must be left to the expert in the field namely the sworn interpreter, the advantage being that in the event of a dispute arising as to the accuracy of what a witness is alleged to have said the sworn interpreter as "a kind of witness" himself can always be tested by cross examination while the presiding magistrate cannot be so tested in as much as he/she is not a witness as such.

I am satisfied that in terms of Section 92 of the Criminal Procedure and Evidence Act No.7 of 1981 no person shall be tried before the High Court for any offence unless he has previously been committed for trial by a Magistrate. The only exception is summary trial. That section provides as follows:-

> "92(1) Except as provided for by section 144 no person shall be tried in the High Court for any offence unless he has been previously committed for trial by a magistrate, whether or not the committal was on the direction of the Director of Public Prosecutions under the powers conferred by section 90 (1) (c), for or in respect of the offence charged in the indictment, but in any case in which the Director of Public Prosecutions has declined to prosecute, the High Court may, upon the application of any private prosecutor referred to in sections 12 and 13, direct any magistrate to take a preparatory examination against the person accused."

The words "committed for trial" in the corresponding Section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act 1933 of the United Kingdom were held by Goddard J (as he then

was) In R v Gee 1936 A.E.R 89 to mean "lawfully committed, and legally committed for trial." I respectfully agree with this interpretation which in fact has been consistently followed by this court.

See Rex v Tsumane Ntoi and Others 1971-73 LLR 111.
Rex v Mahao Matete 1979 (2) LLR 324.

In S v van Rensburg 1965 (2) S.A. 912 at 913 Friedman J in dealing with a substantially similar section as our section 92(1) above had this to say:

> "It is clear. therefore, that save in the circumstances which do not apply in this case, a proper committal for trial by a magistrate is a condition precedent to the trial of a person in a Superior Court."

In the result therefore the depositions not having been taken in my view satisfactorily, I have come to the conclusion that the accused is not properly before this court for there has been no proper committal. In the circumstances therefore it is my considered view that the only proper course that can be taken in this case is to quash this indictment and that the Crown must be left to take such steps as it deems fit to take in its own wisdom including summary trial if it so wishes.

I accordingly ordered that the indictment be quashed.

There is another aspect that needs to be commented upon. It is this.

Williamson JA in S. v Naidoo (supra) observed at p 631:

> "It is surprising that in relation to the Courts of this country where interpretation of evidence and statements forms such an important and vital element in the placing before judicial officers and jurors evidence from so many persons who speak in tongues strange to the Court and jurors, that there appears to be no statutory provisions

Rule of Court or regulation governing the position of interpreters; at any rate nothing was quoted by counsel for the appellant or by counsel for the State in this matter and I have been unable to find any such provision."

For my part I can only say that it is amazing that I find myself in exactly the same situation as the learned Judge of Appeal was in Naidoo's case. I find that those remarks by the learned Judge are apposite in the case before me. Consequently I discern the need for legislation in the matter.

M.M. Ramodibedi

ACTING JUDGE

For the Crown : Mr. Mdhluli (Director of Public Prosecutions)

For the Accused: Mr. Maieane