CRI/A/15/96

IN THE HIGH COURT OF LESOTHO

In the matter between:-

FUSI RATSOEU	APPELLANT
AND	
R E X	RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 7th day of June 1996

This Appellant and another were convicted of the crime of Armed Robbery by Maseru Resident Magistrate on 8/02/96. The two accused were convicted on their own plea of guilt to the charge. They were sentenced to (8) eight years imprisonment. One of the two, this appellant, has appealed against both the conviction and sentence.

The outline of the admitted facts showed the court that the nightwatchman at those business premises was frightened by the robbers, who fired some shots to the ground and forced him to open the cafe. In the said cafe one Lucy Mohloai was asleep.

She must have been awakened. Lucy Mohloai was shot on the left leg by one of the robbers. By the use of these violent means the robbers forced Lucy to part with M800-00 which was in her care and custody.

These facts were admitted by the two accused. Having pleaded guilty to the charge and having admitted the facts outlined by the public prosecutor, there was no trial as such. The court adopted the procedure as provided in terms of section 240 (1) (b) CRIMINAL PROCEDURE & EVIDENCE ACT 1981. The terms of that provision were complied with fully.

The first ground of appeal is that the court aquo erred and/or misdirected itself by failing to explain to the appellant the latter's right to legal representation in view of the serious nature of the charge levelled against him. It was argued on appellant's behalf that there is definitely a duty placed on the trial magistrate to explain to the accused his rights to legal representation.

There is no automatic legal aid available to all accused in criminal trials. A great number of accused persons in magistrate's court, appear in person. In the Court of Appeal, Judge of Appeal Ackermann in the case of PHOMOLO KHUTLISI v.REX Court of Appeal (CRI) No.5 of 1989 - emphasised the importance of informing unrepresented accused of his legal rights in regard

to legal representation at the commencement of his trial. The question of information or advice to the accused as regards his right to legal representation, has been dealt with in quite a few cases by the High Court. See LEHLOHONOLO PULUMO V REX CRI/A/37/88; MOEKETSI MOTSOARI V REX CRI/A/22/84; NDABE KHOARAI V DPP CRI/APN/614/93

NDABE KHOARAI v D.P.P CRI/APN/614/93. Bearing in mind the time factor, the feeling with regard to placing a duty upon the Judicial Officer to inform the accused of his right to legal representation has been, gradually, losing its weight and importance. Nowadays, everybody in Lesotho knows about lawyers and the services provided by the lawyers. Lesotho is a small place. Its population of about 2 two million is but a fraction of the population of some cities such as JOHANNESBURG, CAIRO or NEW YORK. The modes of communication have fastly improved. The campaign for human Rights in this era of Human Rights, was started in Lesotho in the late eighties or early nineties. Non-Governmental organisations took upon themselves the responsibility to educate and make people aware of their rights. The present numbers of lawyers in Lesotho are a proof that the people have become aware of the need for their services. Even if there was a duty placed upon the judicial officer to inform the accused at the commencement of the criminal trial, of his rights to legal representation, such a duty would now be superfluous. In the case of NDABE KHOARAI v DPP - SUPRA the

Honourable Acting Mr. Justice T. Monaphathi as he then was, had this to say:

> "I believe that as a general rule a presiding officer is not obliged to advise an accused person to seek legal representation."

Honourable Judge Monaphathi was dealing with the case identical with our present case in many respects. The accused had pleaded guilty to the charge. The Public Prosecutor had outlined the facts which the accused proceeded to admit. There is no complaint against the accused's understanding and appreciation of the charge. The facts outlined by the public prosecutor spell out in no uncertain terms the essential elements that constitute the crime of armed robbery. This were admitted by the two accused. The procedure which the court must have followed when an accused tenders a plea of guilt is found in section 240 (1) (b) CRIMINAL PROCEDURE AND EVIDENCE ACT 1981. This section makes no provision for a trial as such. There is no need for the presentation of the accused person's case. The accused who pleaded guilty had no defence to put before the court. The legal skill or expertise is required <u>only</u> where there is a need to present a case to the court. This robbery was committed on 6/09/1994. Almost one and half years later when the accused appeared before court to answer the charge, the court is expected to decline to proceed and advise the accused to go and look for a defence lawyer. The accused did not indicate to the court his need to be legally represented.

The record of the proceedings does not show the appellant handicapped in anyway. Furthermore there appear to be no prejudice suffered by the appellant in those proceedings.

In the case of S v MBONANI 1988 (1) SA 191 at Page 196 H - J JUDGE GOLDSTONE expressed a view that sometimes there is a need for legal representation and not at all times in every serious criminal charge. The exact terms used by the honourable judge Goldstone are: "A failure on the part of a judicial officer to do this (meaning to inform the accused of his right to legal representation and how to go about to secure it), having regard to the <u>circumstances of a particular case, may result</u> in an unfair trial in which there may well be a complete failure of justice. (My underlining). The significance of my underlining of those words is to highlight the permissiveness as opposed to mandatory nature of the words used. Under certain circumstances of a particular case there may be a need for the accused to be legally represented. In my view, that need becomes acute where there is a need for the accused to present his own defence to the court. Where the accused plays no significant part except to indicate his understanding, appreciation and admittance of the facts there is no need for legal expertise or skill.

The procedure provided for under section 240 CRIMINAL PROCEDURE AND EVIDENCE ACT 1981 is deliberately intended to afford an easy, quick and cheap way; whereby accused persons are

afforded an opportunity to unladen their burdened souls of the evils attendant to crime. Our law should not be construed in a fashion that it takes care only of those who want to fight and challenge it. The law must be construed to care for all different types of people. Those who regret what they have done and wish to make clean breast to get over with it must have the justice services available to them under this provision, section 240 CRIMINAL PROCEDURE AND EVIDENCE ACT. There is no evidence that the appellant suffered any prejudice by admitting to the charge and facts without his legal representative, moreover he did not indicate in anyway, that he needed a lawyer.

The rest of the grounds of this appeal deal with the sentence. The court aquo is said to have erred and/or misdirected itself by failing to canvass and take into account personal circumstances of the appellant. The record of the proceedings shows that there were no previous convictions put to and admitted by both accused. The court must therefore have treated them both as first offenders more especially when the appellant himself indicated thus to that court. The courts strive hard to treat each accused as a separate and different individual depending on the particular circumstances of each case. The appellant's co-accused is six years his senior. Appellant is 24 years old. His co-accused is 30 years old. In their address to court in mitigation of sentence both asked for a lenient type of sentence without indicating any peculiar

personal circumstances. The court did not extract them either. The court has no idea whether or not they are employed. If they are married or single and/or if they have families. Had these

or something similar been drawn to the attention of the court aquo, could that court have come to a different type of sentence? I doubt especially because the learned resident magistrate gave his reasons justifying the type of sentence meted out. This being an appeal there was still no mention of any personal circumstances.

First of all, the appellant and others went about by night to rob businesses. That, this is a premeditated and pre-planned type of offence, does not need evidence to establish. The statement of agreed facts showed the court that there were others apart from these two. According to his co-accused those others were shot and killed as and when they robbed other shops. It is from the nature of the type of robbery with which the appellant was charged that the learned resident magistrate came to this conclusion. There must have been a prior discussion to select the area and the shops or cafes to be attacked. From the fact that other robbers got killed while in the process of robbing other shops the learned resident magistrate formed the impression that there was a spade of robberies. Again as it appears from his reasons for sentence he had personal knowledge of cases of robbery reaching the courts. The gangs operating in the manner

the appellant and his gang operated, is unwelcome phenomenon to our society. If others had been killed while in the process of robbing other cafes, that must be a clear indication that people are prepared to defend themselves and their rights in their property. The courts must be seen to play their part so that people are not encouraged to take the law into their own hands for the fear that the courts will let the culprits off very lightly.

The appeal is dismissed.

K.J. GUNI

JUDGE

For Appellant : Mr. Ramodibeli

For the Crown : Mr. Lenono