



LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CRI) NO. 04/2023

In the matter between:

MUHAMMAD SHAKIL ASHRAF

1ST APPELLANT

And

TANVEER ALAM

2ND APPELLANT

V

DIRECTOR OF PUBLIC PROSECUTIONS

1ST RESPONDENT

And

**ATTORNEY GENERAL
RESPONDENT**

2ND

CORAM: MOSITO P

CHINHENGO AJA

MOKHESI AJA

HEARD: 11 OCTOBER 2023

DELIVERED: 17 NOVEMBER 2023

SUMMARY

Judge of the High reviewing decision of Subordinate Court in terms of s 68 of Subordinate Court Act 1988 and directing the magistrate to alter sentence imposed on accused persons after a plea of guilty; Accused persons lodging appeal to Court of Appeal before the High Court directive complied with and sentence imposed; Purported appeal being against conviction and directive of High Court;

Held: any appeal in these circumstances must be made to High Court as provided in s 68 of Subordinate Court Act except where the appeal is on a point of law arising from exercise of revisional power by High Court;

Decision of Court of Appeal in Malerato Mothabeng v Rex is binding authority. No point of law having been raised for consideration by Court of Appeal, application for leave to appeal and purported appeal struck off the roll

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] On 16 August 2022, the appellants (hereinafter referred to as “the accused” or “accused persons”) appeared before the Subordinate Court of the Resident Magistrate at Qacha’s Neck on three charges of contravening s 68(1) as read with s 26(1) of the Penal Code Act 2010. They initially pleaded not guilty to the charges but later changed their pleas to pleas of guilty on two counts, one count having been withdrawn by the Crown. By the time the accused changed their pleas, the Crown had led evidence from one police witness. The accused were legally represented at their trial by Adv. Thipe, a fairly experienced legal practitioner.

[2] Section 68(1) under which the accused were charged provides that -

“A person who deliberately makes to another person a false representation or conceals from another a fact which in the circumstances he or she has a duty to reveal, with the intention that such a person should act upon the representation to his or her detriment, and thereby causes him or her so to act, commits the offence of fraud.

And s 26(1) provides that -

“Where two or more persons share a common intention or purpose to pursue an unlawful purpose together, and in the pursuit of such purpose an offence is committed, then each party to the common intention is deemed to have committed the offence.”

[3] After the pleas of guilty, the accused were convicted and sentenced on two counts, count 1 and count 3. This was on the same day of appearance in court, 16 August 2022.

[4] On the first count each accused was sentenced to a fine of M15 000.00 or 15 years imprisonment. Of this sentence, M10 000.00 or 10 years imprisonment was suspended for 2 years on condition that the accused does not commit a similar offence. On the second count, each accused was sentenced to a fine of M2 000.00 or imprisonment for 2 years. Of this sentence, M1 000.00 or 1 year imprisonment was suspended on condition that the accused does not commit a similar offence.

[5] At the hearing in this Court, the accused’s legal representative advised that the accused paid the fines imposed by the magistrate’s court. Thereafter they obviously thought

the matter was behind them. Little did they know that another development in the courts would revive their travails.

[6] At some stage, (it is not clear from the record whether before or after paying the fines), the accused instructed their legal representatives to note an appeal. The notice of appeal is not in the record of proceedings and so one cannot tell whether the appeal was against conviction or against sentence or both. Upon noting the appeal, the accused's legal representatives were advised that the record of the proceedings had been placed before a judge of the High Court for automatic review. The appeal, it seems was then abandoned or not pursued.

Review by High Court judge

[7] On review, the learned judge (Moahloli J) certified the proceedings as being in accordance with real and substantial justice, except for the sentence. He noted that the sentence imposed on the accused persons was wrong. In terms of s 109(4) of the Penal Code and the Schedule of Penalties, the penalty on a conviction for fraud under s 68(1) of the Penal Code is imprisonment up to twenty years without the option of a fine.

[8] Section 109(4) is very specific in this regard. It provides that where an imprisonment penalty is listed, then it shall not be open to a court to impose a fine in lieu of the penalty listed or to suspend the sentence.

[9] In terms of s 68(2)(b) of the Subordinate Courts Act 1988 and acting in accordance with the penalty provisions of the

Penal Code, the learned judge made the following directive on 12 December 2022 –

“The sentence in respect of count 1 (fraud) is incompetent and improper because according to the Schedule of Penalties in the Penal Code 2010, the prescribed sentence for this offence is imprisonment up to [20] twenty years, and in terms of section 109(4) of the Penal Code “Where an imprisonment penalty is listed... it shall not be open to a court to impose a fine in lieu of the penalty listed or to suspend the sentence” which you have done. You are therefore instructed to vary your sentence to bring it in conformity with the above-mentioned provisions of the above.”

[10] Accused’s counsel submitted that the accused only became aware of the judge’s directive on 7 May 2023. They were taken aback by the fact that they now had to serve a prison term. They noted the present ‘appeal’ on 23 May 2023 according to the registrar’s date stamp, and an application for leave to appeal on 23 May 2023, according to the accused. This was some nine months after their conviction and sentence and some five months after the directive of the High Court.

[11] It is common cause that after the directive on 12 December 2022, the accused were not brought, nor did they appear, before the court of first instance for the imposition of the sentence of imprisonment. Why this did not happen is not apparent from the record. I can only say that where a sentence has been lawfully altered, as was the case here, the accused should have been taken before the magistrate’s court to be sentenced according to law. That was not done.

[12] Potentially the failure to ensure that a sentence was imposed opened the door for the possibility of piece-meal

appeals. If the accused do not succeed in this Court, they must receive the correct sentence after which, having regard to some of their grounds of appeal, they will, if so advised, have to appeal to the High Court against conviction and sentence. Only then may they return to this Court if aggrieved by the High Court decision on conviction or on sentence or both.

Grounds of 'appeal'

[13] Now, the accused are in this Court before the correct sentence has been imposed. The current purported appeal challenges the propriety of the learned judge's directive and the conviction in the magistrate's court. The grounds of 'appeal' are, expectedly, a mixture of challenges to the conviction and to the learned judge's directive. They have lumped together grounds of appeal that suggest they are attacking the conviction and grounds that suggest that they are challenging the directive made by the High Court.

[14] In the normal course of litigation, an appeal against conviction in the Subordinate Court lies to the High Court and from there to this Court. Thus the accused's grievance directed against conviction is properly a matter that must be taken to the High Court. The present purported appeal can therefore only be against the directive given by the High Court.

[15] One thing that stands out as possibly dispositive of this matter is whether it should have been lodged as an application for a review of the High Court directive or as an appeal against the same decision. My view is that this Court may, despite any

procedural flaws in bringing the matter as an appeal or a review, entertain the matter to the extent that the accused challenges the exercise of power by the learned judge and his decision directing the magistrates to impose the correct sentence. This is so because the reason to bring either an appeal or a review is to have a decision of a lower court legally set aside. I have however first to answer the question, was it to be an appeal or a review?

[16] The accused's main contention is that the court *a quo* erred in not appreciating that the conviction was wrong. The court did not correctly apply several provisions of the Criminal Procedure and Evidence Act 1981, focused only on the sentence, overlooked the propriety of the conviction and certified the proceedings as being in accordance with real and substantial justice, except for the sentence. It is argued that the learned judge should have set aside the proceedings after having regard to s 240 and s 228 of the Criminal Procedure and Evidence Act and remitted the matter to the Magistrate Court for a retrial.

[17] This main attack on the conviction is contained in appeal ground number 7, which is that the court *a quo* wrongly confirmed the verdict in the proceedings where the record of the proceedings is clear that no outline of the crown case was undertaken to prove the elements of the charge, among other complaints. The issue here is that, dissatisfied with the conviction the proper route was to appeal to the High Court.

That the accused did not do. It cannot be the function of this Court to hear an appeal which should have been made to the High Court. If they can still do so and are so minded, the appellants have to lodge their appeal accordingly.

Whether reviewing judge erred

[18] The main question here is whether the judge *a quo* erred in any respect in making the directive. The reasons of approaching this Court in this regard are set out by the accused in purported grounds of appeal 9 -12:

“9. The Court a quo under appreciated the fact that a sentence had already been passed when the case was transferred for automatic review which main purpose ought to have been for a Judge to consider the proceedings to be in accordance with real and substantial justice before accused receive sentence in respect of the offence of which they were convicted by the Magistrate.

10. The Court a quo erred and missed the whole of the object of the automatic review procedure when it substituted its own sentence for the sentence already imposed by the Magistrate Court whose verdict it confirmed.

11. In adjudicating on the sentence and directing that Appellants be given custodial sentence as opposed to fine, the court a quo missed the point that the Magistrate Court is functus officio on the matter of sentencing particularly in the context where they had been convicted on their own plea of guilty and without invoking the procedure of preparatory examination.

12. In the altering the sentence as it did, and without calling upon the Appellants to plead to the charge afresh, and allowing them opportunity to change their plea, the Court a quo wrongly applied the provisions of section 68 (2) of the Subordinate Court Act No. 9 of 1988.”

[19] The provisions of the Subordinate Courts Act that find application in this matter are sections 66, 67, and 68. In the relevant parts they provide:

“66. Sentence subject to automatic review by the High Court

All sentences in criminal cases in which the punishment awarded is a fine or imprisonment, including detention in a reformatory, industrial school, inebriate reformatory, refuge, rescue home or other similar institutions,

(a) in the case of a Resident Magistrate's Court, a fine of R2,000 and imprisonment for a period of 2 years;

(b) ...

(c) ...

shall be subject in the ordinary course, to review by the High Court, but without prejudice to the right of appeal against such sentence whether before or after confirmation of the sentence by the High Court.

67. Submission of records and remarks to ... judge for consideration

(2) Whenever a subordinate court imposes upon any person convicted of an offence any such punishment as is in section 65 mentioned, the clerk of the court shall transmit to the Registrar of the High Court, not later than one week next after the determination of the case, the record of the proceedings in the case together with such remarks, if any, as the presiding officer may desire to append thereto, and with any written statements or arguments which the accused may, within three days after the sentence, supply to the clerk of the court, and the Registrar shall, with all convenient speed, lay the same before a judge, in chambers, for his consideration.

68. Proceedings on review

(1) If, upon considering the proceedings as are mentioned in section 67 and any further information or evidence which may, by the direction of the magistrate who has power to review sentence in terms of section 65 or the judge, be supplied or taken by the lower court, it appears to the ... judge, ... that they are in accordance with justice, he shall endorse his certificate to that effect upon the record thereof,

and the said record shall then be returned to the court from which the same was transmitted.

(2) If, upon considering the proceedings aforesaid, it appears to ... the judge, ... , that the same are not in accordance with justice or that doubts exist whether or not they are in such accordance,

(a) ...

(b) the judge may,

(i) alter or reverse the conviction or increase or reduce or vary the sentence of the court which imposed the punishment; or

(ii) where it appears necessary to do so, remit such case to the court which imposed the sentence with such instructions relative to the taking of further evidence and generally to the further proceedings to be had in such case as the judge thinks fit, and may make such order touching the suspension of the execution of any sentence against the person convicted or the admitting of such person to bail, or, generally, touching any matter or thing connected with such person or the proceedings in regard to him as to the judge seems calculated to promote the ends of justice:

Provided that in the event of any conviction being reversed or proceedings set aside on any ground mentioned in section 72(6), that section in respect of the institution of fresh proceedings shall mutatis mutandis apply."

Discussion

[20] Section 66 empowers the High Court to review the decisions of Resident Magistrates and such review shall be without prejudice to an appeal against sentence imposed in terms of that section. Section 67 outlines the procedure and the time within which a record of proceedings must be placed before a judge for review. Section 68 provides for what a

reviewing judge has to, or may, do. Upon examining the record of proceedings, if satisfied with the proceedings, the judge will certify that the proceedings are in accordance with justice. If the judge thinks that the proceedings are not in accordance with justice, he may ***alter or reverse the conviction or increase or reduce or vary the sentence of the court which imposed the punishment or remit the matter with such directives as he deems necessary.***

[21] In the present case the judge set aside the sentence as incompetent and directed the magistrate to impose a custodial sentence in accordance with the Schedule of Penalties as read with s 109 of the Penal Code. He acted well within the powers vested in him. If there is anything to criticize, it is his certification of the proceedings as being in accordance with justice. The failure to impose a custodial sentence rendered the proceedings otherwise. However, the certification can be understood from the perspective that the learned judge was satisfied that the pleas of guilty were properly taken and accepted by the magistrate, and to that extent, the proceedings were in accordance with substantial justice. It was only the sentence which did not meet with his approval. It would have been quite in order for the reviewing judge to have withheld his certificate on the basis that the sentence was incompetent.

[22] I have set out the accused's grievances against the directive. Most, if not all of them, are unjustified and without

foundation. The judge did not fail to appreciate anything as alleged in the 'grounds of appeal'. He was entitled to alter the sentence himself but preferred that the trial magistrate should impose the custodial sentence instead. Thus, he remitted the case for sentencing having drawn the magistrate's attention to the incompetence of the sentence he had imposed.

[23] The magistrate was indeed *functus officio*, as stated by appellant's counsel, in the sense that he could not himself, *mero motu*, revisit his decision in respect of either conviction or sentence. The provisions of the Subordinate Courts Act referred to above are extant law, binding and applicable. They outline the purpose, procedure and consequences of automatic review. The magistrate can be directed by a judge of the High Court, exercising review power, to revisit his decision. Apart from not understanding the purpose and procedures for review, the point that the accused missed completely is that the learned judge did not alter and impose a sentence. He merely set aside the incompetent sentence imposed by the magistrate and directed him to impose a custodial sentence as required by law.

[24] Counsel for the accused did not make any serious submissions on the question whether the challenge to the judge's directive should have been brought to this Court as a review or as an appeal. What he clearly did not appreciate is the fact that if this matter was supposed to be brought as a review, then the purported appeal and leave to appeal would

fall away as entirely misconceived. All he said on this aspect of the case is-

“[6] As the hearing (sic) of the matter, before granting leave to appeal, their Lordships must have certainty whether the appellants ought to have approached this Honourable Court by way of appeal or review. We respectfully submit that the judgment of MOTHABENG¹ supports the view that this Honourable Court has jurisdiction to entertain this appeal. It is in the interests of justice that leave to appeal be granted as it happened in the case of the Competition Commission of South Africa v Standard Bank of South Africa [2020] ZACC 2; 2020 BCL (4) 429 CC.

[7] The directive issued by the court a quo is appealable and the present appeal is in order. It is submitted the appeal should be upheld. In our respectful submissions we pray that this appeal be upheld.”

[25] Respondent’s counsel submitted that the facts in *Mothabeng* were different from those of the case before us. In that case the judge had altered the sentence on automatic review to the fullest extent and imposed a sentence in substitution for that of the magistrate. The Court of Appeal held that the sentence as altered on review became that of the magistrate’s court and appealable to the High Court. In the case before us, not only was the sentence not altered by the High Court in the sense of substituting it with a different sentence, but also that the accused lodged an appeal to this Court and not to the High Court without relying on a point of law as was the case in *Mothabeng*.

[26] It was at the instance of this Court that, after the hearing, the parties’ attention was drawn to *Mothabeng* and they were

¹ *Malerato Mothabeng v Rex* 1982-1984 LLR at 26

asked to make submissions on it. They had not been aware of it.

[27] In detail, the appellant in *Mothabeng* was convicted of theft and sentenced to a wholly suspended sentence of two years on condition that he restored the stolen property to the victim of the offence. The proceedings were sent to the High Court on review in terms of s 67 of the Subordinate Court Proclamation 58 of 1938, which is similar to s 66 of the 1988 Act in all material respects. The reviewing judge ordered that the adequacy and competence of the sentence be argued before him. After argument, he altered the sentence by deleting the suspension but made it clear that his order was without prejudice to the accused's right of appeal. When an appeal was made to the High Court, the court held that it had no jurisdiction and it granted leave to appeal on the question of jurisdiction. The appeal was allowed, and the matter remitted to the High Court for decision. This means that the Court of Appeal held that the High Court had jurisdiction, hence the remittal.

[28] Section 73(1) of the 1938 Proclamation provided for an appeal to the High Court by any person convicted by a subordinate court, including a decision on a point of law of the High Court on review. The reasoning of the Court of Appeal in *Mothabeng* was that an appeal in those circumstances was not an appeal against the decision of the reviewing judge as if it were a judgment of the High Court because a reviewing judge

corrects the proceedings in the magistrate's court and an alteration or confirmation of a sentence made by the magistrate's court becomes the sentence of the magistrate's court and not of the High Court.

[29] The Court of Appeal held the following to be the correct legal position:

"Section 67 renders certain sentences subject to automatic review while section 73 confers unfettered right of appeal against "any sentence." (The reference is to sections 67 and 73 of the 1938 Proclamation). The jurisdiction and powers to review exist entirely apart from and in addition to the jurisdiction to hear appeals. The inclusion of the words "but without prejudice to the right of appeal against sentence whether before or after confirmation of the sentence by the High Court" does not restrict the right of appeal. A similar situation was considered in Botswana in the case of State v Maunge (2) BLR1971- 3 at page 6 where Aguda CJ found that the right of appeal had remained unaltered and unrestricted (See also R v Mokwena 1953 (4) SA 133 (T) and State v Brill 1976-78 BLP 36 at 38.

The "right of appeal" in section 67 does not confer a right of appeal but relates to and preserves the existing right of appeal. Similarly there is no justification for holding that this reference to a right of appeal upon confirmation of sentence results in taking away the right of appeal when sentence is increased or reduced on review. These words in section 67 do not amend the unfettered rights of appeal in section 73."

[30] The Court of Appeal had to consider s 8 of the Court of Appeal Act 1978, which had created some confusion in the mind of the High Court judge to come to the conclusion that that court had no jurisdiction after it had heard argument on sentence and altered the sentence. The Court of Appeal's reasoning is to be found in a passage of the judgment which reads:

“The aspect which apparently induced the decision of the Court a quo is the effect of section 8 of the Court of Appeal Act 1978 which was considered as contradictory and subsections (1) and (2) thereof as “mutually destructive.” Section 8 reads:

(1) Any party to an appeal to the High Court may appeal to the Court against the High Court judgment with the leave of the judge of the High Court, or, when such leave is refused, with the leave of the Court on any ground of appeal which involves a question of law but not on a question of fact nor against severity of sentence.

(2) For the purposes of this section an order made by the High Court in its revisional jurisdiction, or a decision of the High Court on a case stated, shall be deemed to be a decision of the High Court in its appellate jurisdiction.

This section deems an order made by the High Court in review to be a decision of the High Court in its appellate jurisdiction “for the purpose of this section.” Subsections (1) and (2) must be read together. The Court of Appeal is confined to dealing with a question of law as appears from subsection (1). Accordingly where an accused seeks to appeal against a conviction or sentence on a question of law against an order made by the High Court in its revisional jurisdiction, this is deemed to be an order of the High Court in its revisional jurisdiction. Section 8(2) is clearly intended to be used for the purpose of subsection (1) and not to deprive an accused person of his rights of appeal against severity of sentence or on a question of fact to the High Court. It does not alter a right of appeal to the High Court but merely affords a more expeditious and less costly means by which to have a question of law brought before the Court of Appeal. Indeed to read section 8(2) as the Court a quo has done involves reading it as containing an implied repeal of section 73 of the Subordinate Courts Proclamation. I do not think there is any justification for such a reading.

For these reasons the appeal was allowed and the matter remitted to the High Court for decision.”

[31] In simple terms, what the Court of Appeal decided, when faced with the question whether the High Court had jurisdiction to entertain an appeal to itself after it had reviewed and

confirmed or altered the proceedings against which the appeal was lodged, was that it still had the jurisdiction because under the circumstances, the appeal was not an appeal against the decision of the reviewing judge as if it were a judgment of the High Court. Where a judge of the High Court reviews and corrects proceedings of a lower court and confirms or alters a sentence imposed by that lower court, the sentence as altered becomes the sentence of the lower court and not a sentence imposed by the High Court. It is only where an appeal is lodged on a point of law against an order of a reviewing judge that in terms of s 8 of the Court of Appeal Act, that the decision on review becomes a decision of the High Court in its appellate jurisdiction but only for the purpose of section 8. That section does not alter a right of appeal to the High Court but affords a quicker and cheaper way to have a question of law decided by the Court of Appeal.

[32] In the present case the reviewing judge altered the sentence only to the extent that he set it aside and remitted the matter to the Subordinate Court for that court to impose an appropriate custodial sentence. That was unlike the situation in *Mothabeng* where the reviewing judge heard argument on the propriety of the sentence and actually imposed sentence himself. This difference between the two cases arising from the facts does not, in my view, affect the position at law, which remains that where an accused person is aggrieved by the decision of a judge in exercise of his revisional jurisdiction, such accused must appeal to the High Court because the decision on

review is that of the magistrate's court and appealable to the High Court. The only exception is an appeal on a point of law against an order made by a reviewing judge.

[33] In the purported appeal to this Court in the present matter, the accused did not raise any point of law for consideration by this Court. It was an ill-conceived attempt to circumvent the High Court in a matter that clearly fell within its jurisdiction in terms of sections 66, 67 and 68 of the Subordinate Courts Act. The accused's ill-fated attempt to appeal to this Court against conviction and a sentence that had not as yet been imposed, cannot be correct. The Subordinate Court must first impose an appropriate custodial sentence as directed by the High Court and only then may the accused, if so advised, appeal against conviction or sentence or both to the High Court before any appeal can be lodged to this Court.

[34] In conclusion, it must be stated that it is conceivable that if an irregularity arises in the course of automatic review by a judge of the High Court, such irregularity may be taken on review to this Court. That would be in very rare cases. Otherwise, it is only on a point of law that an appeal lies to this Court from an order of the High Court in exercise of its revisional jurisdiction as provided in s 8 of the Court of Appeal Act.

[35] I hold that the appeal and the application for leave to appeal were both ill-conceived and must be struck off the roll.

[36] It is accordingly ordered that the application for leave to appeal and the purported appeal to this Court are incompetent and are struck off from the roll.



M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree



K E MOSITO
PRESIDENT OF COURT OF APPEAL

I agree



M MOKHESI
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: ADV C J LEPHUTHING

FOR THE RESPONDENT: L M MOFILIKOANE

