

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

'MALERATO MOTHABENG                      Appellant

v

R E X                      Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 8th day of August, 1983.

On 2nd October, 1981, the appellant appeared before the Resident Magistrate of Maseru charged with the crime of theft on the following allegations:

"Whereas at all relevant times the said 'Malerato Mothabeng was employed as a Community Development Assistant and was as such an employee and entrusted with the custody and care of the money belonging to the Government of Lesotho, the said 'Malerato Mothabeng did during the period between 1st March, 1981 and 31st July, 1981 and at or near Maseru Reserve in the district of Maseru unlawfully and intentionally steal a sum of money amounting to M1,875-00 the property of the Government of Lesotho."

She pleaded guilty to the charge. The public prosecutor accepted the plea and the provisions of Sec. 240 (1) (b) of the Criminal Procedure and Evidence Act 1981 were invoked.

The facts, and these were admitted as correct by the appellant, disclosed that at the material time

2/ the appellant ....

the appellant had been employed by the Lesotho Government for two years and deployed as a Community Development Assistant in the Ministry of Rural Community Development and Co-operatives. One of appellant's responsibilities was to handle Government monies and pay Government employees working on the roads. Between the period 1st March, 1981 and 31st July, 1981 money totalling to the amount of M1,875.00 was given to the appellant to pay the road workers. Appellant took the money but did not pay the workers. She instead used the money for her own personal interests. That she was not authorised to do by her employer, the Lesotho Government.

On this evidence the appellant was convicted and charged. The trial court imposed a sentence of 2 years imprisonment, the whole of which was suspended for 2 years on condition that during the period of suspension the appellant made good the amount of money involved. The appellant was quite happy with the conviction and the sentence imposed by the trial court.

However, the proceedings were subsequently sent for review by the High Court in terms of the Subordinate Courts Proclamation No. 58 of 1978 (as amended) of which Section 67 provides:

"All sentences in criminal cases in which the punishment (including detention in a reformatory, farm colony, refuge, rescue home or other similar institution) in the case of a Resident Magistrate's Court imprisonment for any period exceeding eighteen months or a fine exceeding five hundred rands (or in the case of a Resident Magistrate's Court presided

by a Senior ....

by a Senior Resident Magistrate imprisonment for a period exceeding two years or a fine exceeding one thousand rands) or in the case of Subordinate Courts of First Class for any period exceeding six months or a fine exceeding one hundred rands and in the case of Subordinate Courts of Second and Third Class for any period exceeding three months or a fine exceeding fifty rands or any whipping (save in any case in which a male child under the age of eighteen years has been sentenced under the Criminal Procedure and Evidence Proclamation) 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.'

On review, the proceedings came before Rooney, J. who confirmed the conviction but was apparently somewhat disturbed by the order of the trial court suspending the whole sentence. He set it aside and substituted therefor an order couched in the following terms :

"The order suspending the sentence of imprisonment is set aside. Accused is committed to prison. This order is made without prejudice to accused's right of Appeal."

The effect of removing the suspension order was that the sentence of 2 years imprisonment imposed by the trial court became effective. The judge had in effect varied the sentence and made it more severe than it had originally been. With that, the Appellant felt aggrieved. She, therefore, appealed to the High Court against the effective sentence of 2 years imprisonment i.e. against the severity of the sentence.

When the appeal came before the High Court, the salient question for determination by Cotran, C.J. sitting with Mofokeng, J. was "whether or not an appeal lies to the High Court" in the circumstances of this case. That question was answered in the negative. As it was later pointed out by Goldin, J.A. writing

4/ a majority . . .

a majority judgment in 'Malerato Mothabeng v. Rex  
C. of A. (CRI) No. 3 of 1982 p.3 (unreported).

"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 contradictory and subsections (1) and (2) thereof as 'mutually destructive'"

That section reads :

"8 (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 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."

At page 4 of the decision in 'Malerato Mothabeng v. Rex, CRI/A/75/82 (unreported) the learned judges are recorded as having considered the effect of the two subsections to section 8 above along the following lines .

"Is S.8(2) an independent and integral subsection that gives an accused, in such plight as in the present case, an absolute right to appeal against severity of sentence, or is the subsection to be read in conjunction with and subject to the requirements of S.8(1)? The marginal note to the section speaks of 'second appeals' but an occurrence under S.8(2) is not a 'second appeal' properly so called. The subsections are mutually

5/destructive in ....

destructive in our opinion but it is for the Court of Appeal to decide on interpretation. If leave to appeal is needed, we are prepared to grant it, for there is a point of law involved, but if no application is made for leave to appeal or if no appeal is noted to the Court of Appeal within the time specified by the Rules, then the appellant must be committed to prison to serve her sentence."

The appellant did note the appeal to the Court of Appeal and in interpreting Section 8, Goldin J.A. in a majority judgment had this to say :

"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 by the High Court in its appellate jurisdiction. Section 8(2) is clearly intended to be used for the purpose of section 8(1) and not to deprive an accused 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." - vide 'Malcrato Mothabeng v. Rex, supra, at p. 3 (unreported).

In the circumstances, the Court of Appeal allowed the appeal and remitted the matter to the High Court for its decision.

As has been pointed out, the appeal is against the severity of sentence. It is based on the following grounds :

"The sentence of two years imprisonment without an option of a fine is too harsh

6/ considering ....

considering the fact that at the commission of the offence, the appellant was pregnant and that at the time of her conviction she had a newly born baby who is an invalid.

2. A suspended sentence was more appropriate considering the fact that the appellant was still very young and was first offender who showed remorse and cooperation throughout the investigation of her crime and at her trial.
3. The court should have considered as a mitigating factor the fact that the appellant is also liable to repay the whole amount forming the subject matter of the charge."

Most of the facts that this court is invited, in the grounds of appeal, to consider as mitigating factors were raised before the trial court and are clearly reflected in the record of proceedings. There can be no doubt, therefore, that the judge who read through the proceedings on review was aware that they had played an important part in influencing the trial magistrate to suspend the sentence of 2 years imprisonment that he had imposed. However, the judge clearly took the view that the offence against which the appellant had been convicted was too grave to warrant a suspended sentence. Indeed, in a similar case Fano and Another v. Rex 1980(1) LLR 146 at p. 148 Mofokeng, J. had this to say on the subject, and I entirely agree.

"The theft of Government's property is rampant. This court has had an occasion to warn people who steal government's property about the serious view in which this court regards such conduct. That was in the case of Monkhi v. Rex, CRI/A/34/77, (unreported) at p. 12. That warning has gone unheeded. It is the primary duty of every court in this land

7/ to mark .....

to mark their determination to discourage any idea that Government property can be stolen with impunity. The courts in this country are determined to do all they can to discourage it. The courts are therefore, determined to punish severely any one who steals government's property."

In the circumstances, the reviewing judge was, under the powers vested in him by S.69(2)(b) (1) of the Subordinate Courts Proclamation No. 58 of 1958, entitled to correct, as he did, the sentence imposed by the trial magistrate. That section reads :

"If, upon considering the proceedings aforesaid, it appears to the reviewing officer or the judge, as the case may be, 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 -

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

I take the view that the removal of the suspension order from the sentence imposed by the trial magistrate was, not only within the reviewing judge's discretion vested in him under provisions of S.69(2)(b)(1) of the Subordinate Courts Proclamation, (supra), but also justified in the circumstances of the present case.

8/ I am not ....

I am not, therefore, prepared to interfere and the appeal is accordingly dismissed.

However, in the discretion of this court, it is ordered that the appeal deposit be refunded to the appellant.

B.K. MOLAI.  
JUDGE.

8th August, 1983.

For Appellant : Mr. Ramodibeli  
For Respondent : Mr. Kabatsi.