

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOEKETSI MOTSOARI

V

R E X

J U D G M E N T

Delivered by the Hon. Acting Mr. Justice
J.L. Kheola on the 3rd May, 1984.

On the 28th October, 1983 the appellant appeared before the Resident Magistrate of Leribe charged with the theft of a motor vehicle belonging to Reisisi Mokoena. He pleaded guilty to the charge and was sentenced to 3 years' imprisonment. He now appeals against sentence only. His grounds of appeal are that

"the trial court failed to take into account the personal circumstances of the appellant, i.e. his age was not considered by the court, he is a first offender, he is the sole breadwinner of his family, he has a small child aged only five months."

I shall give a very short summary of the facts of this case before I can consider the grounds of appeal in detail. The vehicle is an E20 combi with registration No. FMM501T. On the evening of the 14th October, 1983 the complainant parked his vehicle outside the house at Maputsoe. At night when he got out of the house he

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discovered that his vehicle was missing. On the following day the vehicle was found in Maseru in the possession of the appellant. It was still intact except that the number plates had been removed and the ignition system had been tampered with because the appellant had to disconnect certain wires in order to start the engine.

Mr. Ramodibeli for the appellant submitted that the learned Resident Magistrate failed to take into account that the appellant is a young man of only 21 years of age and that a long term of custodial sentence would do more harm than good to him. He referred me to the case of S. v. Van Niekerk 1981 (3) S.A. 239 in which it was held that "imprisonment for a first offender on a charge of fraud is not unusual. Account must be taken of the circumstances under which the offences were committed. Where a Court, in the imposition of sentence, has to do with a person who is a "first offender" or has a "clean record," such a person can be either a "fallen angel" or "an incorrigible rogue." All that can be contended in the interest of the latter is that he has not yet been punished by the court for his crimes or has not been warned. In the criminal career of every person it is of the greatest importance how it came about that he committed his first crime. For the purposes of an appropriate sentence and his rehabilitation thereafter it is of material importance to investigate the matter and to consider carefully the accused's explanation thereof." It was contended on behalf of the appellant that he had been a fallen angel and that a sentence of three years' imprisonment

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was too harsh. The trial Court did take into account that the appellant was a first offender but went on to say that car theft was not only a very serious offence but was also committed with such "monotonous repetition" that the courts must impose deterrent sentences.

I entirely agree with the trial Court that a first offender should not be under the impression that he will not be sentenced to a custodial sentence. The Court is entitled to take into account the frequency of that particular offence in its area and that is exactly what the trial Court did.

There is no doubt that many magistrates fail to make any investigation into the personal circumstances of the accused before passing sentence. The present case is a typical example of that. After the verdict was pronounced the prosecutor informed the Court that the accused had no previous convictions. The record reads: "In mitigation: Pray for clemency."

Sentence: Three years' imprisonment."

Clearly the trial court made no inquiry about the personal circumstances of the appellant because if it had done so the record would reveal that. The proper procedure is that where an accused person is not represented by a legal practitioner the Court must make the investigation by putting questions to the accused in order to find out why he committed the offence and then consider an appropriate sentence for him in the circumstances. It should not be taken for granted that the age appearing on the charge sheet is the correct age because that may

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have been estimated by the investigating officer who may be wrong. The accused must be asked his age and if the Court disagrees with him further evidence must be led or the Court's estimation is final if no evidence is available; he must be asked whether he is employed or not; his family background in general. This investigation is very important because the rehabilitation of the accused is a factor which must be taken into account as well as the interests of the society.

I agree with Mr. Ramodibeli that there is nothing in the record of the proceedings to show that the trial Court considered the age of the appellant. He is a fairly young man of 21 years of age and I have a feeling that if the Court considered his age it would probably have imposed a less severe sentence than the present one. I may mention here that the Crown did not support the sentence and they referred me to the case of Nthongoa and Another v. Rex 1980 (1) L.L.R. 196 in which the consistency and equality of sentences was emphasised. It was submitted that the general average sentence in car theft cases is 2 years' imprisonment. See Khabo Molati v. Rex CRI/A/27/81 unreported, Charles Makotoko v. Rex CRI/A/12/81 unreported. I agree with this submission but I must point out that two years' imprisonment is the maximum term of imprisonment a magistrate of First class powers may impose. Some magistrates may be reluctant to commit people for sentence by the High Court because in the past this Court appeared to be discouraging such

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procedure. See Rex v. Ramalefane 1981 (2) L.L.R. 355. In other words, it may be that 2 years' imprisonment has become the average sentence simply because the magistrates' jurisdiction is limited.

Taking into account the age of the appellant; the fact that he is a first offender; that the vehicle was recovered only a day after it was stolen and still intact and the fact that the appellant pleaded guilty to the charge, the sentence of 3 years' imprisonment appeared to me to be too severe and substantially different from what I would have imposed. For the reasons I have stated above the sentence imposed by the trial court is set aside. A sentence of fifteen (15) months' imprisonment is imposed.

ACTING JUDGE.

3rd May, 1984.

For the Appellant : Mr. Ramodibeli
For the Crown : Mr. Kabatsi.