

IN THE HIGH COURT OF LESOTHO

In the Appeal of

EMMANUEL MOKUOANE THABANE Appellant

v

R E X Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 23rd day of May 1984

The appellant was charged with and convicted of theft of M3,663.48 the property of "Teba" a Mine Labour Organisation. He was sentenced to pay a fine of M1,000 or to undergo imprisonment of 4 years in default of payment. The appeal is not against sentence. The fine has in fact been paid. It is against conviction. Nothing, however, prevents the appellate tribunal (if satisfied about the conviction) from varying the sentence once it is seised of an appeal even though the appeal is against conviction only (s.73 (4) and s.69 (a)(b) of the Subordinate Courts Proclamation). It is not necessary for the Crown to apply formally for the enhancement of sentence nor is it necessary for the Court to inform the appellant that he or she will be called upon to show cause why a sentence should not be enhanced though it is desirable to do so in doubtful cases. A good lawyer should explain this risk to his client before agreeing to embark on frivolous appeal.

Crown Counsel, in her heads of argument, correctly summarised

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the basic facts that emerged at the trial, viz,

1. That the appellant was the accredited representative of Teba and was authorised on behalf of Teba to enter into contracts with various firms or companies to renovate and improve Teba's premises at Leribe including the installation of an electric pump
2. That during a period of time subject matter of the charge the appellant contracted with two firms, Golden Construction and Ficksburg Corporation respectively to undertake repairs and renovations on the premises and the installation of a water pump
3. That the appellant, on the strength of receipts he produced to the cashier of Teba, was paid various amounts of money in settlement of the work undertaken.
4. That the appellant had employed Ficksburg Corporation to install the pump at a cost of M856 52 and that he did pay them this sum, but that
5. He produced to Teba, and was paid, on the strength of a receipt procured from Golden Construction the sum of M4,520 for the job of installing the same pump when in fact he paid only M856 52 and not to Golden Construction who did, and were paid for other work, but to Ficksburg Corporation

The evidence of witnesses from Golden Construction, if believed, indicates that the receipt obtained from the firm for M4,520 which he presented to Teba was done through appellant's fraud and their own negligence. If the false receipt from Golden Construction was obtained by the appellant through one of the partners of the firm fraudulently cooperating with him, that will

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not exonerate the appellant from criminal liability because he (a) knew that Ficksburg Corporation did the installation of the pump (b) knew they were paid for it, M856.52, and (c) knew that Golden Construction have also been paid for the jobs they have done which did not include installation of the pump.

The appellant in fact elected to remain silent and in my judgment all questions on cross examination directed at discrediting Golden Construction partners or Ficksburg Corporation officers cannot be of avail

The submissions in Clause B of the heads of argument are misconceived. Theft has been proved and it occurred in Leribe where the appellant fraudulently presented Teba with the false receipt on the strength of which he obtained the M4,520 less the amount he actually paid of M856.52 to Ficksburg Corporation

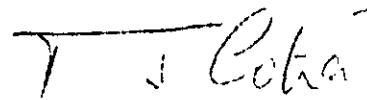
The learned Magistrate's (Mr.Mphafi's) sentence is incongruous and inappropriate It is no deterrent to "fine" a thief about one quarter of the amount of money that he stole It is a pat on the back. Four years imprisonment "in default of payment" is putting wool over the eyes of an appellate tribunal or the public by making it sound as if it was a reasonable and harsh sentence when it is not in fact. The fine was paid with alacrity. The Magistrate gave no reason for such a curious sentence.

I confirm the conviction. I quash the sentence of a fine and substitute therefor 18 months imprisonment 12 months of which will be suspended for 3 years on condition that the appellant refunds to Teba all the amount he has stolen. If he so wishes

/the fine

the fine of M1,000 can be paid to Teba in reduction of the amount he has to refund and in diminution of the sentence he has to serve if he fails to comply with the condition of suspension.

Will the Registrar see to it that this appellant is now committed to prison in accordance with this judgment.



CHIEF JUSTICE

23rd May 1984

For Appellant Mr. Pheko
For Crown Mrs. Bosiu

Mr. Pheko The sentence is clear but it is not clear if the appellant is given time to settle the whole amount before the suspended sentence becomes operative I need time to consult my client as this sentence was not expected.

Court Very well

Later.

Mr. Pheko What happened was that Teba owed the appellant arrears of salary, leave pay, bonus and his own pension contributions. This amount has not been paid to him and was set off against what the trial Court found he stole. He has four children and has divorced his wife and now he must go to prison.

/After

After prison he will have to seek work and may not find it for some time. I pray that whatever is found to be owing to Teba be paid by instalments of M150 per month before the suspended sentence becomes operative. In fact I ask, in view of the fact that no opportunity has been given to us to say anything on the matter, that the whole sentence be suspended, because someone will have to look after the children, on condition that appellant repays the balance of the amount within a certain period. He is a first offender.

Court I know he is a first offender but giving him a chance to repay is no deterrent I believe that a prison sentence is imperative. It is the only way to stop this menace. Why is it that people start thinking of **their** children after they commit an offence but not before?

Mr. Pheko It happened and he is sorry

Court It may be I ought to change the condition of suspension in the circumstances and let the complainant pursue its civil remedies rather than help it by making compensation for its pecuniary loss a condition for the suspension?

Mr. Pheko Yes they are a private concern and they have already recouped themselves M1,389 97 leaving a balance of M2,273.55 yet to be paid. I have

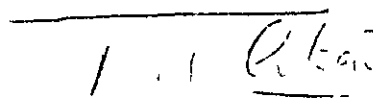
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been conducting negotiations with Teba on the appellant's behalf and I have correspondence. Sooner or later he will have to repay

Court Can I change the suspended condition of the sentence I have already pronounced?

Mr. Pheko Yes now that you know that Teba have taken action and are capable of taking further action in the civil courts to recover their money. Your condition can be recalled I submit and substituted by the usual one

Order The sentence I pronounced, viz, 18 months imprisonment of which 12 are suspended for 3 years to stay but the condition of suspension is now altered to read "On condition that the appellant be not convicted of an offence involving dishonesty during the period of suspension".


CHIEF JUSTICE
23rd May 1984