

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

|                |            |
|----------------|------------|
| LIJANE NTHUNYA | Appellant  |
| v              |            |
| REX            | Respondent |

J U D G M E N T

Delivered by the Honourable Acting Judge, Mr. Justice M.L. Lehohla,  
on the 18th day of August, 1986.

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The above Appellant is appealing against sentence of twenty-four (24) months' imprisonment imposed by the Subordinate Court, Mafeteng.

He was charged with theft of a wheel-barrow and a pump.

He pleaded guilty and accepted the facts as outlined by the Public Prosecutor. I need not make a summary of those facts as what concerns me is the propriety or otherwise of the sentence imposed.

The Crown conceded that the sentence is rather harsh in this case and submitted that in his judgment, the learned Magistrate seems not to have taken into account the fact that:

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- (a) The accused pleaded guilty and thereby showed remorse.
- (b) The accused was a first offender.
- (c)

There is no indication whether the type of crime accused was convicted of is prevalent in the Mafeteng district.

It is not clear what influenced the Magistrate to impose this rather severe sentence albeit that it is noticeable that theft of Government property is on the increase generally.

The record does not show if Appellant's personal circumstances were at all taken into account before imposing sentence.

PHOHLO vs REX GRI/A/22/86 unreported and cases cited therein. All that is reflected under mitigation is N.T.S. I suppose that is an abbreviation for "Nothing To Say". But even if accused had nothing to say, nothing is reflected as showing what probing was made by the learned Magistrate regarding whether he is married, has children or dependants and his means of livelihood; for example.

The record reveals that all the stolen property was recovered. Nowhere does it appear cognition was afforded to this factor by the Court a quo. Accordingly, I agree with the Crown's submission that this factor should have influenced the Court a quo to impose a more lenient sentence.  
PHOHLO supra.

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Furthermore, I am not unmindful of Nthongoa & Another vs R 1980(1) LLR 196 at 197 where it is laid down that the passing of sentence is pre-eminently the discretion of the Trial Court. But that discretion must be exercised judiciously and not arbitrarily.

In Mójela vs. Rex 1977 LLR at 321 Mofokeng J. stated that in imposing sentence.

"..... it is the duty of the Trial Court to consider all relevant factors and not to adopt a passive role".

That Appellant is a first offender is an important factor that should have been taken into account in passing sentence for in the words of Mofokeng J.

"A first offender should not be sentenced to imprisonment without the option of a fine unless he is convicted of a very serious offence."

Much as it is reprehensible theft of a wheelbarrow and a water pump cannot pass for a "very serious offence".

As the factors I have pointed out above seem not to have been taken into account, I felt that it is fitting that this Court should consider this sentence afresh in view of the additional facts stated by the Appellant that he is the sole bread winner. He has three children who are of tender age and he has to provide for their schooling and clothing. He earns very little where he works.

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Appeal against sentence is upheld. The sentence of 24 months' imprisonment imposed by the Court a quo is set aside and in its place is imposed the following: Appellant is setsentenced to six months' imprisonment or a fine of M120.00.

M.L. LEHOHLA  
A C T I N G J U D G E

18.8.86.

For Appellant : No Appearance

For Respondent: Mr. Mokhobo