CRI/A/72/86

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

NTJANYANA MOSEBETSI Appellant

Vs

R E X

JUDGMENT

Delivered by the honourable Acting Chief Justice Mr. Justice J.L. Kheola on the 15th day of October, 1986

The Appellant appeared before the subordinate court for the district of Mohale's Hoek charged with the crime of contravening section 16(1) of the stocktheft Proclamation No. 80 of 1921 as amended. It was alleged that on the 9th day of April, 1986 and at or near Ha Khojane in the district of Mohale's Hoek the accused was found in possession of a horse and that there were reasonable grounds for believing that the accused was in unlawful possession of such horse and had obtained it unlawfully and the said accused is unable to give a satisfactory explanation of such possession. To this charge the appellant pleaded not guilty but was found guilty as charged and sentenced to six (6) months' imprisonment.

The evidence of Trooper Mathaba was to the effect that on the 8th April, 1986 he received a report from Khojane's village. As a result of that report on the 9th April, 1986 he proceeded to Khojane's village on patrol. On arrival in the village he invited one Habofanoe Phosholi (P.W. 2) to accompany him and to show him thehome of the accused.

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They found a grey mare which had fresh earmark superimposed old ones. The fresh earmarks were those of the accused. The fact that this was a grown up horse but had fresh earmarks aroused suspicion in the mind of the policeman. He then asked the accused to explain or to account for his possession of the horse.

The accused explained that the horse was the progeny of his livestock. He had kept it at Thaba-Putsoa so that his father-in-law could not see it. His father-in-law was in the habit of claiming "bohali" for his daughter whenever he saw that he (accused) had some animals. I may digress here to point out that the allegation by the accused regarding his father-in-law is obviously untrue. There is evidence by his own chief (P.W. 1) and (P.W.2) that the accused owns some goats, cattle, donkeys and one horse all of which are openly kept in the village. If his father-in-law is as bad as he wants the court to believe why has he not claimed all these animals.

The evidence of P.W.1 and P. W. 2 was that they did not know the horse but knew all the livestock of the accused. His own son, Thabo mosebetsi (P.W.3) did not know the horse and saw it for the first time when the accused brought it home and asked him to help him in the earmarking. The chief was not invited to come and witness the earmarking as it is practice in all the villages in Lesotho that when a villager acquires new stock he must invite his chief. when he marks such stock.

Although the appellant had originally appealed against both conviction and sentence, the appeal against the conviction was withdrawn on the 15th October, 1986 and I was addressed on sentence only.

Mr. Mda for the appellant raised a number of grounds to show that the sentence was too severe in the circumstances of this case. I do not propose to deal with them all but I shall pick and choose only those that appear to be more relevant.

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The first is that the appellant is a first offender. The way a first offender has to be treated was correctly summarized by Mofokeng,J. in the following words in Mojela V. Rex 1977 L.L.R. 321 at p. 324 - 325:

> "It is true that a first offender cannot as a matter of right expect that his sentence will be suspended. Indeed, depending on the circumstances of a case the court may be compelled to impose a sentence of imprisonment (sometimes a very long sentence of imprisonment). But whenever possible, however, a first offender should not be send to prison. Ordinarily a suspended sentence will be beneficial to the accused. Sending a first offender to prison and for a short period does not benefit the first offender nor the community. Administratively it is more of a nuisance than benefit because the authorities concerned with reformation of the offender have absolutely no time to perform their special task. Instead, the first offender only has time to mix with undesirable characters in prison to his detriment and that of the society. It is generally acceptable in this modern age to assist the first offender, wherever possible, not to send him to prison especially for a short period".

I entirely agree with the learned judge. The learned magistrate was entitled to take into consideration the fact that "offences involving theft of stock are such a menace in this community". However, that was not the only factor that he had to take into consideration; he had to take into account the reformation of the accused. Sending the accused to prison without the option of fine would do more harm than good for the reasons stated in Mojela's case (supra).

It is a pity that in the present case the learned magistrate seems to have considered the interests of the community by imposing a custodial sentence without at the same time considering the harmful effect mixing with hardened criminals would have on the accused.

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For the reasons stated above the sentence imposed by the learned magistrate is substantially different from what this court would have imposed and was probably due to the misdirection on his part by considering only one factor.

The sentence imposed by the learned magistrate was set aside and substituted with a sentence of M250.00 or 6 months' imprisonment.

J. L. KHEOLA

ACTING CHIEF JUSTICE

31st December, 1986

For Defence: Mr. Mda

For Crown: Mr. Seholoholo