CRI/S/1/86
CRI/S/2/86
CRI/S/5/86
CRI/S/3/86

IN THE HIGH COURT OF LESOTHO

In the matters of:-

R E X

vs

TSOTANG RANKAE
TUMELO SEFOLI
KHAKETLA KHAKETLA AND ANOTHER
MKE KOBA-TSOENE

J U D G M E N T

Delivered by the honourable Acting Chief Justice Mr. Justice J.L. Kheola on the 19th day of December, 1986.

In all the four cases mentioned above the accused were convicted by a magistrate of second class powers and committed for sentence by this Court in terms of section 293 of the Criminal Procedure and Evidence Act 1981.

In the first case the accused pleaded guilty to a charge of childstealing. The facts were that at about 6.30 p.m. on the 10th August, 1985 the victim, Thapelo Masihlela (aged one year) was sleeping with his elder brother in a bedroom while their mother, Matsepiso was cooking in the kitchen. The accused stealthily entered into the bedroom and carried away Thapelo. He was seen passing near the home of the complainant with something concealed under his blanket. When he was asked by one Motlatsi Setsabi what he was concealing under his blanket he kept quiet. When Motlatsi

/.....

tried to search him, the accused put the child down and fled. The child was taken to the chief's place where he was later identified by his mother.

In the second case the accused was found guilty of assault with intent to do grievous bodily harm. The facts found to have been proved by the learned magistrate were that on 20th February, 1986 the complainant was drinking Sesotho beer at the home of 'Mamongolo. Accused arrived there and asked the complainant to give him some tobacco. The complainant said he did not have any tobacco. The accused then asked him to give him some dagga. He refused and pointed out that he never shared dagga with him (accused). The accused left and asked one Rethabile Mongolo to fetch his stick from his home. Rethabile fetched the stick and gave it to the accused.

It was already late at night when the accused entered into the house and found the complainant asleep. He struck him on the head with the stick. The complainant rose and caught hold of the accused. A struggle followed and they pushed each other until they got out of the house. They both fell down. The accused stabbed the complainant on the belly and on the thigh with a knife. The complainant kicked him and the knife fell down. The accused walked away but continued to throw stones at the complainant. The stab would on the stomach was so large and deep that the bowels were exposed and came out. The complainant was admitted into hospital for seven days.

In the third case the accused were charged with the theft of stock. They pleaded guilty to the charge. The facts were that on the 9th February 1986 the accused stole the complainant's ram valued at about M300. On the 10th February, 1986 when they were arrested they had already got rid of the meat, probably by selling it to the villagers. Only the head and legs were found in the latrine pit.

/.....

In the last case the accused is a youth of 19 years of age. He was convicted of housebreaking with intent to steal and theft. The articles involved were a television set, a portable radio, a record container and fifty records. Entry had been made through the pantry window. The crime was committed on the 7th June, 1986 and they were recovered only a few days later at Lakeside Hotel where the accused was trying to sell them.

In all these cases the learned magistrate committed the accused for sentence by the High Court on the ground that in her opinion greater punishment ought to be inflicted than her powers of M250 or 12 months' imprisonment. She took into account the seriousness of the offences and the prevalence of some of them in her district. With all respect to the learned magistrated I entirely disagree with her that there was any justification in committing all the accused for sentence by this Court. Had it not been because some of the accused had been in prison for over a year before they appeared before me for sentence, I would have returned the cases to the magistrate concerned with the order that she must pass the proper sentence.

The learned magistrate seems to have completely forgotten the basic factors that a judicial officer must take into consideration before passing sentence or resorting to section 293 (supra) . I shall attempt to point out only a few of such factors.

The first factor is that the accused is a first offender. All the accused in the cases mentioned above were first offenders. Although there is no law that a first offender should not be sentenced to a custodial sentence without the option of a fine where he has committed a serious offence, in practice the courts seldom send a first offender to prison without the option fo a fine.

/.....

In my opion the offences with which the accused were charged were not serious enough to entitle the learned magistrate to resort to section 293. Take as an example the case of a youth of 19 years of age who has committed housebreaking with intent to steal and theft. He was a first offender and all the articles he stole were recovered almost immediately after the commission of the offence. Did the learned magistrate seriously feel that sentencing such a youth to six months' imprisonment would not be enough? In my view even whipping in terms of section 308 of the Criminal Procedure and Evidence Act 1981 would still have been a sufficient punishment under the circumstances of the present case.

The second factor to be considered is the imposition of imprisonment without the option of a fine. If the judicial officer feels that the fine would not be suitable in the circumstances of the case, she would be entitled to sentence even the first offender to imprisonment without the option of a fine. For instance, in one of the above cases the offenders stole a ram worth M300. The learned magistrate was of the opinion that imposing a fine of M250 or 12 months' imprisonment would mean that the accused made a profit of M50. She was aware of the remarks made by Mofokeng, J. in Rex v. Maselloane Lebajoa Review Order 29/82. A distinction must be made between a case where the accused has stolen cash and the cases where property valued at a certain amount of money is stolen. In the case referred to above the learned judge was dealing with a case in which cash amounting to M930 had been stolen. The magistrate sentenced the accused to a fine of M200. In that case the accused was allowed by the lower court to make a large profit of over R700.

In the instant case we are dealing with people who stole a sheep valued at M300; there is no evidence that the accused persons got M300 when they sold the meat of the sheep and it is most unlikely that they got even half of that amount. Since they were in a great hurry to get rid

/.....

of the meat their prices must have been much lower than the prices at the butcheries so that they could attract many buyers. The learned magistrate misunderstood the judgment of the late Mofokeng, J. if she understood it to mean that where an accused has stolen a sheep or any goods valued at more than M250, which is the maximum of her jurisdiction, she must resort to section 293. She must bear in mind that in sentencing a thief, she is not awarding damages to a complainant. In any case if she was of the opinion that a fine was not suitable she ought first to have resorted to a custodial sentence without the option of a fine other than commit the poor accused for sentence by this Court.

Thirdly, the age of the accused must be taken into consideration and the learned magistrate must make a finding as to the age of the accused in terms of section 293. The accused must be above the age of 18 years. In the case of the youth who was alleged to be 19 years old the learned magistrate ought to have made a finding. The other accused were obviously above the age of 18 years, nevertheless she still had to make a finding.

The factors mentioned above are only a few that the learned magistrate ought to have considered before taking the drastic procedure prescribed under section 293. The other thing which caused me some concern is an element of irresponsible conduct on the part of the learned magistrate. She easily commits people for sentence by this Court and after that she does not make sure that the records are typed timeously and sent to the High Court within a reasonable time. In the childstealing case the accused spent thirteen (13) days in custody awaiting sentence. In the other cases the accused spent between three (3) months and seven (7) months in custody before the records were prepared and sent to the High Court. It is the duty of the magistrate who commits an accused person for sentence by this Court to ensure that the record is typed within a

/.....

reasonable time. In a number of committal cases that have come before me the accused had been in custody for periods longer than the term of imprisonment I would have imposed for the offence. For that reason I have had no alternative but to give a suspended sentence.

I have carefully read and considered the evidence in the four cases mentioned above and have come to the conclusion that the accused were properly convicted. I accordingly, find them guilty as charged.

In CRI/S/1/86 the accused was sentenced to "Twelve (12) months' imprisonment suspended for three (3) years on condition that during the period of suspension the accused shall not be convicted of kidnapping committed during the period of suspension.

In CRI/S/2/86 the accused was sentenced to twelve (12) months' imprisonment.

In CRI/S/5/86 each accused was sentenced to a fine of M200 or 6 months' imprisonment.

In CRI/S/3/86 the accused was sentenced to Twelve (12) months' imprisonment suspended for three (3) years on condition that during the period of suspension the accused is not convicted of any offence involving dishonesty committed during the period of suspension.

I must appeal to all magistrates to regard committal for sentence as the last resort when all the options have been thoroughly and seriously considered. As early as 1982 this Court had started warning magistrates that the High Court should not be turned into a sentencing machine. (Rex v Thabo Mafaesa CRI/S/4/82). It is the duty of all senior magistrates to allocate cases to their junior magistrates. Senior magistrates should not give serious cases to junior magistrates. A magistrate of second class

powers should never be left in charge of district because we have many first class magistrates in the districts. There was no valid reason why junior magistrates were assigned to go to Mokhotlong and Thaba-Tseka and do relief duties when first class magistrates were still available from districts other than Maseru.

J.L. KHEOLA
ACTING CHIEF JUSTICE.

23rd December, 1986.