CRI\S\1\93

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

SEKHAOLI MOTJEKETJE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 8th day of November, 1994

The Court has perused the record in this case. The Court noticed that you were charged with three counts of House Breaking with Intent to Steal and Theft.

The first count was to the effect that on or about 20th November, 1992 and 30th December, 1993, in the district of Mokhotlong you had unlawfully and intentionally broken into and did enter a house situated at that place belonging to Malekena Rafolatsane with intent to steal. The items of property stolen are tabulated and amount to no less than eleven in all. Some of them are really expensive items of property such as item 1 and 2 the Letlama blanket and Seanamarena costing at least M300-00 each. In fact item eleven comprises quite a number of other items at least

eight in all - making a total of at least 19 items which were stolen from that particular house.

In count two you were charged with House Breaking with Intent to Steal and Theft. This is a crime alleged to have been committed around 4th December 1992 or 27th February 1993 at Libibing in the same district of Mokhotlong.

Items stolen there were 50 kg bag of peas; 10 x 25 kg bags of mealie meal and 2 x 4 liters of cooking oil; all belonging to Libibing Roman Catholic School.

In Count III you were also charged with House Breaking with Intent to Steal and Theft, it being alleged that on 5th February, 1993 you broke into a house of one Griffith Lebeko and stole there 2 x 500g of Omo washing soap; one packet of candles and cake of breeze soap, all of these in this count amount to M7-25.

Evidence was led in the court below. Evidence relating to PW1 was not at all challenged. It is not like a man who says he was away at Linakaneng to just put two questions to wit "How much do you know me?" To which the answer was "You are my home village man and we schooled together". The next and last question was : "Is that all?" To which the answer was "Yes". There was nothing at all to put or to suggest to this witness that what he was saying was wrong because you were at Linakaneng at the time the alleged

offence was being committed. The same goes for the rest of other witnesses who supported the rest of other counts i.e. 2nd and 3rd counts.

It was never put to them that you were away at Linakaneng when the alleged offences were supposed to have taken place with the exception of PW14 who you are recorded as having said that you had told him that you had been to Linakaneng at one stage or another. But that witness denies that you ever told him anything of the sort; and what is more damning is that the things which were complained of - including the gumboots - at one stage you were seen wearing two different gumboots. PW14 explained how you came to be wearing only one gumboot which was similar to the one that was in his possession. He indicated that having been drawn to where you were in the house by the clinking of breaking window glasses, he came and seized you as you were going out through the window. He says he seized you by the gumboot which in the ensuing struggle you managed to slip out of; as a result of which he remained holding the gumboot.

Now you said you put to one of the witnesses - including perhaps PW14 - that this gumboot happened to get shod from your foot during your flight from people who had been, in a sinister manner, planted around the house where you were with PW14 who connived at their ill-disguised purpose to arrest you to no avail; and that PW14, it dawned on you later, had lulled you into enjoying

a false sense of security in that house. But what is surprising is that given the chance the following day; you didn't come to collect your missing gumboot. You waited until you were arrested days after to point out that this is your gumboot and that it went missing under the circumstances that you attempted to explain. True enough an accused person is not obliged to give any evidence before court but the court will always on considering the totality of evidence before it bear in mind the fact that certain things needed some explanation - and that is a matter of evidential burden which moves between the two poles that is the Crown and the accused - if the evidential burden has shifted to an accused person and the accused person contents himself with keeping silent then the risk of failure is cast upon him. In other words the risk of losing to the Crown where the accused is directly implicated turns into the actuality of losing. See REX vs MAQEBA CRI\T\13\90 (unreported) at p.32.

This does not detract at all from the principle that it is the Crown which bears the onus throughout to prove its case beyond reasonable doubt. But as I have stated here is somebody who says how a certain thing occurred - and it is through cross-examination that one sees that well, he has a different version to advance; and which perhaps could even be given comprehensible meaning by the accused giving evidence - but in the event that he keeps silent about that factor, then the court is perfectly entitled to come to the conclusion that because the evidential burden has not been

discharged by an accused person then the Crown has proved its case beyond reasonable doubt on the point being disputed, even if such a point is as crucial as to relate to the question of guilt or innocence. So all that I have tried to indicate above is that keeping silent - much as it is a right on the part of an accused person - entails certain risks.

As I indicated I find that all these counts have been thoroughly and perfectly proved by the Crown; and because of that I confirm the convictions secured by the court below.

With regard to sentence it has already been indicated that you have a habit of toying and trifling with the Court system. On 1st August, 1991 you were convicted of House Breaking with Intent to Steal and Theft; and sentenced to five years' imprisonment.

When you were given the benefit of early release by way of Parole system, as if to cock the snook at the courts, hardly two months after your release you committed the first of these instant offences.

I may just warn you of what might befall you if you persist in this type of behaviour. The courts have regard to what in law is called Indeterminate Sentence. Such is the type of sentence which is imposed on people who fall under the class of what are called Habitual Criminals - and it seems from what has been

indicated from these proceedings that in fact you qualify to be called a Habitual Criminal in other words you want the crime of theft to be your business. It is high time that that type of business was brought to a stop. The community is entitled to some measure of long relief from your nuisance.

You may not know; but it is a fact that at times one who deserves to be given Indeterminate Sentence is warned of that as a probable result that is to befall him if he persists in the breach of the law. But authorities show that it is not necessary to give such warning. It is not binding that in order for you to be declared an Habitual Criminal you should have been given prior warning in the occasion preceding the one at which you are to be declared a Habitual Criminal by the High Court. See R vs SWARTS 1953(4) SA 461 A.D. at 463 (B) to (C) where Centlivres C.J. said

> "I do not wish it to be inferred that it )meaning indeterminate sentence) should never be imposed where an accused has not previously been convicted before the Supreme Court or when he has not previously been warned of the indeterminate sentence. Each case must be decided on its own facts".

Maisels P. cited this case with approval in Cash Dlamini and Another vs King (unreported and unnumbered) at p.4 in Swaziland on 8-10-86.

But on this occasion I wish to just warn you accordingly that should you next time commit an offence similar to this one or any

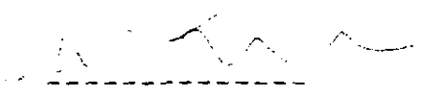
offence at all then you are going to be kept in jail until the crack of doom or until a volcano comes and destroys the prison walls surrounding you.

Another thing you indicated that you were never given any opportunity to advance your case by way of bringing your witnesses - contrary to what you are saying, it looks like the Magistrate was going out of his way to invite you to do just that. Even where the Magistrate made a mistake by letting the evidence be led until the closure in respect of a particular witness who had to hand in the exhibit at the close of the cross-examination stage he re-opened the evidence for cross-examination for you regarding the exhibits - so in that regard it looks like in keeping with your attempt to look upon courts as just things to trifle with you tried your hand with me now this time.

In Count I you are sentenced to six years' imprisonment
In Count II you are sentenced to three years' imprisonment
In Count III you are sentenced to 1 year's imprisonment.

Counts I and II are to run concurrently. Count III will run consecutively with the previous Counts and it is on record that you

have been warned of Indeterminate Sentence.



J U D G E

8th November, 1994

For Crown Miss Nku

For Defence: In person