CRI/A/73/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESIAMANG TSHABALALA	1ST APPLICANT
PAUL TSHABALALA	2ND APPLICANT
V.	
R E X	RESPONDENT RESPONDENT

J U D G M E N T

Delivered by the Honourable Mr. Justice G.N. Mofolo on the 24th day of November, 1995.

This is an appeal from the Magistrate's Court, Maseru where appellants being charged on two counts of fraud involving forty-seven (47) tyres appellants had pleaded guilty to the charge and been sentenced to two (2) years imprisonment.

According to facts as outlined by the Public Prosecutor, appellants who are related to each other decided to go and steal tyres from Welkom Tyres at the station (presumably Maseru station). To accomplish their mission, accused 1 an employee of Astoria obtained order forms from Astoria Bakery, filled them requesting a supply of 24 tyres.

Accused 2 had then carried the order to Welkom Tyres driving a motor vehicle GHV040Y belonging to one Thabiso Motloung who had not allowed accused 2 to use his vehicle for unlawful purposes.

On arriving at Welkom Tyres accused 2 was dressed in a dust-coat labelled Astoria on the chest, a dust coat belonging to accused 1 who is the employee of Astoria. Apparently the first batch of tyres had been removed or taken away but with the second batch the police had been tipped and accused 2 was caught red-handed by police with this batch of 30 tyres.

In the meantime accused 1 had deserted and was no longer reporting for duty. In searching accused 2's van some order forms had forged signatures. At a place in Butha-Buthe accused persons had shown the police a place where the hidden 17 tyres comprising the first batch of tyres being tyres collected and removed by accused from Welkom Tyres were found thus making a total complement of 47 tyres which, according to the Public Prosecutor, had not been used and were still new.

From the outline of facts by the Public Prosecutor, there was simulation, back-sliding, betrayal of trust and impersonation, vices associated with the heartless and unscrupulous under-world. As for the theft itself, it was a scam of enormous magnitude enough to have crippled the complainant company had appellants scheme not gone haywire and their evil intentions not stopped in their tracks considering that the value of the tyres was estimated at M11,956-07

In this judgment it is to be emphasised that it was not by

appellants' change of heart that these tyres were recovered but because appellants' evil designs fell through. The fraud committed was of enormous proportions and what's more it was most sophisticated.

This country is at present predominantly unurbanised, the people are mostly simple-minded and honest and this behaviour by the appellants cannot but be frowned upon and deplored for it goes against the moral fibre of the community.

Mr. Phoofolo for the appellants has submitted that the trial magistrate has not laid the ground for the imposition of a sentence of 2 years imprisonment nor has he said why a custodian sentence is the only sentence given the fact that appellants pleaded guilty to the charge and were first offenders. Moreover, Mr. Phoofolo submitted that the sentence was not demonstrable nor does it show that factors in favour of appellants were taken into account especially in the light of the fact that all property was recovered.

Miss Nku on the contrary was of the view that while she conceded that the Magistrate should have said how he arrived at the sentence and why the sentence imposed was the only sentence, she had no doubt even had the Magistrate done so the sentence, given the circumstances of the case and person of the accused would have remained the same.

In S. v. ZINN, 1969(2) S.A. 537 (A.D.) where the Judge President of the Cape had imposed a sentence of 15 years on a 58 year-old man Rumpff, J.A. on appeal found:

> "The over-emphasis of the effect of the appellant's crimes, and the underestimation of the person of the appellant constitutes, in my view, a misdirection and in the result the sentence should be set aside: - p.540F.

An extract from Voet, vol.1 p.57 (Gane's translation, vol.2, p.72) on the duties of a Judge in imposing sentence goes like this:

> "It is true, as Cicero says in his work on Duties, Bk.1 ch.25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is also true that it would be desirable that they who hold the office of Judge should be like laws, which approach punishment not in a spirit of anger but in one of equity."

In the same note :

> "among the faults of Judges which are most harmful are hastiness, the striving after severity and misplaced pity."

As to additional duties of a Judge by the same author :

> "He must be watchful to see that no step is taken either more harshly or more indulgently than is called for by the case."

and :

> "In trivial cases indeed Judges ought to be more inclined to mildness, but in more serious cases to follow the severity of the laws with a certain moderation of generosity."

Concerning the interest of community in sentences imposed by courts Schreiner, J.A. had this to say in R. v. KARG, 1961(1) S.A. 231(A.D.) 236:

> "It is not wrong that the natural indignation of interested persons and of the community at large should receive some

recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that, if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands."

Also, in R. v. MZIMARA, 1964(4) S.A. 257(R) quoting R. v. MTOTELA, 1963(2) S.A. 706 Beadle C.J. is quoted as having said when the Act provides for the alternative of a fine instead of a sentence of imprisonment, the courts before sentencing an accused to imprisonment should always consider whether in a particular case a fine might not be a more appropriate punishment.

The case of CERKIC, 1968(2) S.A.541 (C.P.D.) is in point. In this case the appellant had made a fraudulent claim to the insurance company claiming that his motor car and a number of accessories had been stolen when these things had not been stolen. He was found guilty and sentenced to 9 months imprisonment.

On appeal the appeal court while it appreciated that this was a serious matter in that it was a deliberate attempt on the part of the appellant to defraud the insurance company and that the act of the appellant required a whole series of actions on appellant's part starting with the removal by him of articles from the car with the assistance of friends, salting them away to avoid detection. The court found that the fraud was well planned and executed and one could not take a light view of this particular offence.

The question was, as van Winsen J. posed it:

> " whether the Magistrate has imposed a sentence which this court, when comparing it with the sentence it would under the circumstances have imposed, could say that the disparity between the two sentences is such that it felt compelled to interfere."

Setting aside the sentence the learned Winsen J. concluded:

> " I think that this is par excellence a case where, if it is possible, the imposition of imprisonment should be avoided. My own view is, for the reasons I propose to indicate, that such a suspension or such avoidance of imprisonment is possible in this particular case. I think if the sentence is suspended, either with or without fine, that act would act as a deterrent as far as this particular person is concerned. I have no reason to think that he, being a young man of 26 years of age with a clean record, is not likely to be deterred by such a suspension.

In R. v. NDHLOVU, 1967(2) S.A. 230(R) quoting R. v. DEFU (1962 S.R.) Young J. is to have said:

> " I think the time has come when the power of imprisonment should be exercised more sparingly than has hitherto been the case: that imprisonment should be reserved for serious cases, that is, cases where there are serious economic or security implications, cases where there are previous convictions, or cases which, for one reason or another, require strong deterrent action ."

Needless to say appellants are respectively 33 and 36 years old and in the prime of their lives. One cannot but associate oneself with the enlightened and progressive remarks of the learned Winsen J. and Young J. above.

I alter the sentence imposed by the learned Magistrate and instead impose a fine of M2,000-00 each or alternatively 2 years

imprisonment each half of which is suspended for a term of 3 years on condition that appellants are not found guilty of an offence involving dishonesty during the period of suspension.

In the result the conviction is confirmed and the sentences are altered and substituted with sentences I have imposed above.

S.N. MOFOLO

JUDGE

24th November, 1995.

For the Appellant: Mr. Phoofolo

For the Crown: Miss Nku