CRI/A/29/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

THABANG SEKHONYANA	APPELLANT
V	
THE DIRECTOR OF PUBLIC PROSECUTIONS	RESPONDENT

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu, on the 13th day of February, 1995.

On the 13th February, 1995 I dismissed Appellant's appeal on conviction on Counts 1 and 2. And partially allowed his appeal on sentence by reducing his time imprisonment as follows:

Count 1 Appellant is sentenced to 9 months' imprisonment

/...

Count II. Appellant shall serve three years' imprisonment.

Both sentences to run concurrently.

These are the reasons.

Appellant was charged with five counts involving theft and contravening Section 9(1)(a) of *Act No.17* of 1966 on Arms and Ammunition. He was acquitted of the last three counts on the indictment consequently they are of no interest to us in this appeal. We are concerned with counts 1 and 2, in them Appellant is charged:

Count I : That the said accused is charged with the crime of THEFT.

In that upon or about the period between 1-9-92 and 30-9-92 and at or near Hlotse Reserve in the district of Leribe, the said accused did unlawfully and intentionally steal two firearms the property or in the lawful possession of Lesotho Government.

/...

Pistol and S.L.R.

Count II : That the said accused is charged with the crime of ARMED ROBBERY.

In that upon or about the 18th day of January, 1993 and at or near ha Ramapepe in the district of Leribe, the said accused did unlawfully assault Molefi Khantsi and by intentionally using force and violence to induce submission by Molefi Khantsi did take and steal lfrom his person or ahispresence out of ahis immediate care andprotection, certain property to wit motor vehicle YBX 25967 (van) his property or in his lawful possession and did rob him of the same.

On Count 1 the greatest problem that the Appellant has is that he did not give any evidence rebutting that of Crown witnesses. There was evidence that two firearms, a pistol and an SLR, were stolen from the Lesotho Government. P.W.18 Nkoane Letuka was a tenant of the parents of P.W.5

/...

Mohau Letseka. He says Appellant says Appellant left property in a bag at the home of a lady called "Nurse". This was a bag. P.W.18 later collected that bag. It contained a fire arm. He later informed Appellant he had taken that fire arm. The police later took it away from P.W. 18's room in his absence. He later reported himself to the police.

P.W.4 and P.W.5 came with a man who was handcuffed looking for a fire-arm. During the search P.W.4 says the man who was handcuffed said they should look under the mattress. They found a firearm. The man told the police that the firearm belonged to Nkoane. The evidence of P.W.5 who was present is to the fact that this firearm was found during a search of the house by the police. Nobody had said they should lift the mattress. P.W.5 says the man that was handcuffed is the Appellant. P.W.14 states that the firearm that was found under the mattress of P.W.18 was an SLR rifle. P.W.14 says that SLR rifle is government property.

It seems to me that the Appellant ought not to have closed his case when there was such evidence against him in

respect of the SLR rifle. P.W.18 may be a single witness who unequivocally connects Appellant to the theft in that it came in P.W.18's possession through the Appellant. It would have helped had Appellant given evidence. The fact that the police say Appellant took them to P.W.18's house though not proving he is a thief, is a link which on its own could not lead to his conviction. Similarly the fact that the gun was found where Appellant had taken the police would similarly on its own not lead to his conviction. But once P.W.18 actually said the firearm was Appellant's property and that Appellant brought it in a bag and left it at the house of "Nurse", this changed the picture completely. Then, the Crown case can be said to definitely require rebuttal if Appellant wants it to be disbelieved.

The learned Magistrate was obliged to caution himself on the dangers of relying on the evidence of a single witness before convicting on the evidence of a single witness. See *Rex v Mokoena* 1956 (3) 81. It is not enough for the Court merely to say it cautioned itself of the dangers of convicting on the evidence of a single witness. What we look for is whether such evidence was in fact approached with caution.

/...

The trial Court was alive to the fact that at places the evidence of many of the Crown witnesses was far from perfect. It therefore relied on the evidence of P.W.18. The learned Magistrate then said of the evidence of P.W. 18:

> "This court considers the dangers inherent in this type of evidence. That of quasi accomplices. It is trite law that evidence of accomplices has inherent dangers which the court has to worry about. In Lesotho our criminal procedure prescribes that a single and uncorroborated evidence of an accomplice may suffice to sustain a conviction provided the accomplice is worthy of credit. He has proved to be a truthful witness, he remains unshaken that the fire-arm is the property of the accused....."

Appellant closed his case on count one in the face of the evidence of P.W.18. It seems when there is *prima facie* evidence against the accused as Hoffmann & Zeffertt *The South African Law of Evidence* 4th Edition page 598 sums up the position:

> "Accused is not technically obliged to give evidence but is usually under strong pressure to do so. If a witness has given evidence directly implicating the accused, he can seldom afford to leave such testimony unanswered. Although evidence does not have to be accepted because it is uncontradicted, the court is unlikely to

> reject credible evidence which the accused himself has chosen not to deny."

The Appellant closed his case on Count 1 and gave no evidence. In cross-examination when he was dealing with other counts, Appellant in passing denied the theft charged in Count 1.

The learned Magistrate analysed the unchallenged evidence against appellant conscious of the fact that the crucial evidence in the chain was that of a single witness. I do not find any grounds for faulting the learned Magistrate's conviction of Appellant on Count 1.

On Count II everything depends on credibility. The vehicle in question was seized by people in police uniform from P.W.2 who was with P.W.3 at a road block. These "policemen" pointed fire-arms at them. This vehicle used to be parked at the residence of the Appellant. He used (according to P.W.12) even to drive it although it had no registration numbers and discs. Appellant says it belonged to his friend Tsietsi Lefoka of Phamong. Whether accused did the actual stealing he was found in possession of this

/...

stolen vehicle which had been recently stolen.

P.W.14 who is the investigating officer says Appellant used to drive around in this vehicle and even parked it outside the Charge Office. It neither had a registration number or a disc. On 15th January he found the vehicle outside the house in which Appellant lived. When he asked Appellant for a "blue card" for the vehicle Appellant could not produce it. Appellant said he bought the vehicle from one Bushy in Maseru. P.W.14 seized the vehicle and charged Appellant with theft. Appellant made a written report which he signed.

Appellant denies the theft of the vehicle or that he ever said it belonged to him. The vehicle was brought by one Moeketsi Lefoka who was his visitor. He once drove the vehicle. The police according to accused seized the vehicle in his absence. In cross-examination Appellant says he did not arrest Moeketsi Lefoka because that was the job of another section of the police. It turns out the section that should have arrested Moeketsi Lefoka is the CID, which is he very section he himself was attached. Appellant then said Moeketsi Lefoka was his intimate friend.

/...

The Court that was obliged to deal with issues of credibility is the trial Court. It saw and heard witnesses. It saw their demeanour in giving evidence. I am not steeped int he atmosphere of trial, I have as an appellate Court to go by the record. See *Rex v Dhlumayo* 1948(2) SA 677. Going by the record I am unable to see where the trial Court went wrong. Everything points to the Appellant having stolen or received this vehicle. P.W.12 was not shaken in his evidence from what the record discloses. The Appellant's evidence on record is itself unsatisfactory and unconvincing.

I am therefore of the view that the Magistrate was right in convicting the Appellant. It was for that reason obliged to dismiss the appeal on conviction.

Corbett JA (as he then was) made the following remarks about appeals against sentence in the case of *S v Rabie* 1975(4) SA 855 at page 865E:

> "I, too, am not certain what I would have done, had I been the trial judge. I might have suspended the whole prison sentence but I cannot be sure that I would have done so."

In these words Corbett JA was agonising about punishment and endorsing the fact that punishment is pre-eminently a matter for the trial court. Therefore it is not easy or even correct for the appellate court to substitute its discretion for that of the trial court. As a general rule appellate courts do not interfere with sentences trial courts have imposed unless it can be shown the trial court was wrong.

When it comes to punishment, courts feel uncomfortable because they are not sure whether it will do any good. The recidivism that bedevils all attempts to reform prisoners have brought the courts to the edge of despair.

We are here dealing with a nineteen years old child. This point seems not to have had the impact on the Magistrate. Although Appellant does not fall within the definition of a child in terms of the *Childrens Protection Act* of 1980, there is no doubt he is a minor. Children are the future and hope of mankind. Whatever is done with or for children must be done with this in mind.

/...

Accused is a first offender. He was having his first job. He has botched it. Too much was expected of a nineteen year old boy. As a policeman he was expected to be the every embodiment of law, order and propriety. He has not only failed but did turn to the very crime he was supposed to protect society from. He has become a thief of motor vehicles and firearms. In fact he has become a gun smuggler. Guns are a threat to law and order if they are in the hands of irresponsible people.

Courts have a broad discretion and do take the personal circumstances into consideration. The courts now find it hard to put the personal circumstances of the accused among its first priorities. The first reason for this is that the Court has to consider society as a whole. The other reason why courts do not warm up to the reformative aspects of punishment is that often does not seem to work. Offenders do not seem to reform. After promising not to commit crime, they do so again and again. In other words reformation of offenders (which is an end of society itself) does not always yield the results that society expects, despite the money invested and the risks society takes in order to make reformation of offenders

/...

possible.

In the case of young people, I am of the view that we cannot give up on them. Courts are obliged to take the personal circumstances of each child and try and give such a child a chance. We know recidism is a serious problem. But there is always a possibility or an outside chance that a child such as the accused might reform. Courts are obliged to give him such a chance.

In my view a sentence of seven years for stealing guns and a motor vehicle puts property above human beings. I feel this sentence on a nineteen years old boy not only gives me a sense of shock but numbs my senses. Even for a grown and mature man I would still find it too harsh.

One of the aims of punishment that is by no means absent in all sentences (though much criticised) is that of retribution. This end of punishment is lumped up with deterrence. When these two purposes of punishment are brought together they become to many people morally and logically acceptable. To deter the police from crime I suppose the trial Court imposed this sentence of seven

/...

years' imprisonment.

Do heavy sentences really deter people from crime? We cannot be shown any proof that they do. All we can say with certainty is that all punishment up to a point deters people from committing crime.

Some would say conviction after a public trial is a method of punishment that serves the ends of punishment just as well. Conviction itself amount to public denunciation. Nevertheless society still expects the courts through the sentences they hand down to show the degree of their abhorrence of a particular crime and the way it was committed. Therefore up to a point, a heavy sentence becomes both retributive and denunciatory. Yet righteous anger should not becloud judgment as Schreiner JA said in *R v Karg* 1961(1) SA 231.

When dealing with children's punishment in private homes, we use a far harsher language that we use in courts. As parents we cannot dare suggest to the children that we have any share in any of their deviant behaviour. But in a judicial setting we are (as a society) obliged sometimes

/...

to recognise where we failed children during their upbringing. Mr. Phoofolo's grounds of appeal point out that:

> "In sentencing the appellant the learned magistrate did not exercise his discretion judicially because he did not bother to investigate the accused's personal circumstances"

The record confirms Mr. Phoofolo is correct, the trial Court did indeed fail to investigate and comment on the personal circumstances of the accused. The question I ask myself is whether it was not Mr. Phoofolo's obligation to bring to the trial Court's attention the personal circumstances of the accused. The record does not show Mr. Phoofolo canvassed the point of Appellant's youth at all before sentence.

To remit this case to the Court below so that the Appellant's personal circumstances can be investigated would be to prolong Appellant's agony unnecessarily. I therefore propose to assume that perhaps it was not entirely Appellant's fault that has turned out so badly. Therefore he has a much reduced debt to pay to society. I

will therefore notionally deduct the society's blameworthiness from his sentence. In so doing I am fortified by what Burchell and Hunt said in *General Principles of Criminal Law* Volume 1. *The South African Criminal Procedure* (1970) at page 191 where the learned authors say:

> "But youth may mitigate sentence or warrant the imposition of a punishment of a more reformative kind than would have been imposed on an adult."

Faced with capital punishment in a murder case involving an 18 years youth Mohamed JA (as he then was) in *Vincent Thebe v Rex* C of A (CRI) No.3 of 1984 said:

> "The Court *a quo* took into account the youth of the appellant but failed to appreciate sufficiently that this was *prima facie* evidence of immaturity and that the evidence did not support the conclusion that the offence of the appellant was committed purely from inherent wickedness."

From the aforegoing it seems clear that a lot of investigations and serious thinking is called for when a court has to punish a youth.

In this case (although I am conscious of Appellant's youth) I did not give the reformatory aspect of punishment a dominant position when I considered his sentence. Nevertheless, even where deterrence and denunciation are uppermost in a court's mind, the Appellant being a youth, should not be broken. In fact it is never an end of punishment to break any offender. The police remain an important pillar in the maintenance of an orderly society. Therefore (up to a point) the sentences of our courts should reflect this concern.

It was for the above reason I have cause the Appellant to serve a total of three years' imprisonment.

W.C.M. MAQUTU
<u>JUDGE</u>

For Appellant : Mr. H. Phoofolo
For the Crown : Mr. J.R. Mofelehetsi