CRI/T/54/92

IN THE HIGH COURT OF LESOTHO

In the matter between :

R E X

v

VICTOR MAKEKA
LEFA MOLOI
MOKHETHI NKHOMO

SENTENCE

Delivered by the Honourable Mr. Justice T. Monapathi
on the 4th day of May 1995

My Assessors have told me that this is one of the rare cases in which this aspect of sentencing has been extensively debated. One of the reasons why there had to be such a debate was the fact that Counsels were very forthcoming in bringing about aspects on sentencing which I have found very useful. Indeed even this morning there has been a lot of submissions which I find very helpful and which I will consider in this judgment even though done ex-tempore.

Indeed this aspect of sentencing is a very problematic one in all the criminal proceedings because what we do as

/...

Judges is not just to mete out a sentence, but we must think about it and give reasons for it. Because we have to consider the accused person as an individual. You also look at the crime and also look at the interests of the society and the interests of the general public, because their interest is that the people who have offended against the law must be punished. In the crime itself you look at the seriousness of the crime. The more serious it is the more the community expect the Court to demonstrate. When one looks at the accused himself one looks at the circumstances of his family, his children, his work and so forth. That you must consider because it is out of these things that one may then be able to reason out how merciful one can be as a Court. These are mitigating factors.

This two Accused people have got different ages. Accused 2 is a fifty two years old man. He has got so many responsibilities toward his children, the number of which has been given at about seven. We have already discussed the fact that if he was in regular employment he would be entitled to retire next year or this year, and would also have his benefits. Although some of his children have reached majority but there are still a few he ought to maintain. Accused 1 is a forty years old man, he is not a youth. He is a mature person. He has got dependents. He has had problems to do with his employment and his wife and

his family. These I have considered. Some of these aspect, I have commented about in my judgment. Some of this he has commented about in his evidence in mitigation. This I have taken cognizance of.

These crimes with which these accused persons are charged with are serious crimes. They are sophisticated crimes. They are what is called white collar crimes. This I have considered. And I must concede that it has worried me. It is such a crime that the Courts do not look at with pleasure. These accused persons have held responsible positions at work. Both of them have been policemen and prosecutors. They held responsible positions in the society. They ought to set examples. This I have considered in that: "Nothing upholds the law as the punishment of persons whose rank is as great as their crimes." - Cardinal Richeleau. These kind of crimes with which the accused are charged and the types of positions that these accused person held attract the eyes of the community. That is, the community wants to see what the Courts will do when seized with cases such as this one. So that the aspect of what the Courts do is very important.

I have considered that the roles of the two accused persons have not been the same. One has contributed more, one has contributed less. This is reflected in the fact

that with respect to A 2 I found him guilty of forgery and uttering, whereas with A1 I found him guilty of uttering. I am persuaded by the judgment of P. K. MAHASE CRI/T/75/89, 7/07/92 (Unreported) that this different charges that is forgery and uttering ought to be dealt with separately by way of sentence. There ought to be a sentence for forgery and there ought to be a sentence for uttering. But the two sentences can be considered as one. See generally the illuminating remarks of Lehohla J in that Mahase's case on sentence at pages 41-52.

Indeed both these accused are first offenders. This is a situation in which Mr. Sethathi has stated that if possible, such first offenders need not be imprisoned. It is because a first offender merely by a fact of being a first offender appears not to be a person who is prone to offending against the law. Because for a man to be convicted may have been caused by so many things. May be caused by poverty or pressure of his equals or friends. Or it may purely be of accidental circumstances. May be a result of some provocation. But then sometimes it is a product of sheer greed; where there is absolutely no need for an accused person to have been involved in a criminal enterprise. But the policy of the Courts not to send people to prison is based on the realization that at prison these accused persons will meet hardened people. And

people who are likely to change the Accused's good ways, and make them hardened persons, when it is not necessary. It is the policy of the Courts in proper caces not to encourage that always people should be sent to prison. Prisons are places of punishment.

Indeed the modern trend is to say, if this man has gone to prison he must be rehabilitated. But then, prison serves as a deterrent, because we are still settled in our ways that if that man is sent to prison he will serve his punishment and he will improve his ways. Indeed in some countries there are some alternatives to prison. There are these things called community services, and in those countries, this different types of punishments are legislated for. So that when you sent a person to prison as a Court you are actually demonstrating to the community that Courts will punish offenders, you give them an assurance that Courts will not standby when there is criminality around. And indeed you are not neglecting the man himself, because you are thinking that he is going to be punished and he will improve his ways.

So that coming back to this question of an accused persons being a first offenders, Counsel has conceded that one of the considerations whether or not to send a person to prison depends on the seriousness of the offence. So

that in my mind that is one of those things that I have spoken when I spoke about the Accused and the crime. These accused persons have committed a serious crime. This Court cannot close its eyes to that. Indeed I suppose in their favour, the prejudice to the complainant was potential. I mean their intention was to get hold of the funds. This they did not succeed in doing. But the law strictly speaking does not view that fact as being of lesser consequence. No, the Court does not say you have committed a lesser crime. But the Court can safely say, just for the purpose of sentence, this ought to be considered. I am not persuaded by one of the judgment that this lawyers have spoken about, that because these people are white collar criminals they ought to be punished less. That judgment has completely not persuaded me. Because I would say if that is to consider it would amount to class justice. The lesser man in the society deserves as much and the same as the highest man, because there must be equality before the law.

I do agree that generally speaking these two accused stand to lose a lot of benefits. Some of the benefits such as pensions. If this occurs, it is unfortunate; because the Courts do not intend to mete out more punishment than is necessary. Where a man has had a case hanging over his head, and where it takes a long time to hand down judgment,

he anxiously expects that there will be justice meaning that there will be finality to the charge. We cannot ignore that, that this matter has taken a long time hanging over the Accused's heads. This we must consider. Indeed Mr. Sethathi has made very good submissions concerning this aspect of a fine or a suspended imprisonment or suspended part fine. Indeed he has spoken very well about where certain sentences or part of those sentences ought to be suspended. I have found that much as suspending a whole sentence can be beneficial and lenient, sometimes it can be irresponsible for the Court to do so. I have also found that imposing an alternative or option of a fine is equally lenient, where a sentence of imprisonment with an option of a fine is imposed. That in itself shows leniency. Where having imposed such sentence you also suspend part of it is even more lenient. The aspect of whether these accused persons are able to afford fines when imposed need not unduly excercise the Court's mind. It has not therefore prevented me from imposing a fine in the sentences, because I have decided to give these two accused persons very lenient sentences.

One must understand that in dealing with social problems such as this one you cannot always be as accurate as a mathematician would be. The law operates by way of estimating human behaviour. The law deals with estimates.

Human behaviour is never accurate. You have to make assessments made on pure estimates. I have considered some of the judgments referred to by Counsel, because this aspect of sentence was strongly debated, including the elegant heads of argument which Mr. Sethathi has submitted this morning, and some of the concessions the Crown Counsel has made, all in the assistance of this Court. I found this exercise extremely helpful.

I have underlined this aspect that have been committed serious offences for which the accused have been found guilty. Accused 1 Mr. Moloi has been found guilty of uttering. I will send him to three years imprisonment. I give him an option of a fine in the sum of Three Thousand Maluti (M3,000.00). Half of this I suspend. I have found the Second Accused guilty of forgery and uttering. For this I sentence him to four years imprisonment. However, I give him an option of a fine. That he may pay Four Thousand Maluti (M4,000.00). The second crime of uttering, I sentence him to four years imprisonment. I give him an option of a fine, that he may pay a fine of Four Thousand Maloti (M4,000.00). For the purpose of sentence these must serve as one. Half of this I suspend. The sentences are very lenient.

T. MONAPATHI
JUDGE

For the Crown : Mr. Sakoane

For the Accused : Mr. Sethathi

Gentlemen Assessors : T. Moletsane and G. Motsamai

CIV/APN/346/91

IN THE HIGH COURT OF LESOTHO

In the Application between :

JEREMIA CHAKE MAIEANE — APPLICANT

v

CHIEFTAINESS 'MAPIUS M. HLASOA — 1ST RESPONDENT
and
THAPELO SEPHULA — 2ND RESPONDENT

Before the Honourable Chief Justice B.P. Cullinan

For the Applicant : Mr K.K. Mohau
For the Respondents : Mr S. Peete

Judgment

Cases referred to :

(1) Leihlo vs Lenono (1976) L.L.R. 171;
(2) Lefojane vs Regina (1960) L.L.R. 99;
(3) Molapo vs Liketso (1991-93) L.L.R. 235.

The applicant avers that he has all along been "a customary Chief and or headman of the village of Ha Maieane, Tsime, Butha-Buthe district." The first respondent, however, since she took over the chieftainship of Tsime in 1981 from her ailing husband. Chief Mopeli Hlasoa, has refused to recognise the applicant as Headman of Ha Maieane, and has instead recognized the second respondent us such. The Court has granted a rule nisi in the matter calling upon the respondents to show cause why *inter alia*

they should not be "restrained from disturbing and or interfering with the Applicants' Headmanship of his area except for lawful cause. "There are other prayers ordered under the rule, but they are, I consider, covered by the terms which I have quoted. The order under the rule covering such terms, operated as an interim interdict with immediate effect.

It is clear that Chief Mopeli Hlasoa recognized the applicant as Headman. On 4th July, 1980 he wrote to the applicant thus :

> "Headman Jeremia Chake,
>
> I greet you amidst storms Chief. Chief please inform ..... to report here on Tuesday 8/7/80 to answer charges laid against him by ..... for ..... . He should bring his witness along with him.
>
> Yours
>
> (Signature) Mopeli Hlasoa
> Chief of Tsime"

In September, 1981 the first respondent took over as Acting Chieftainess of Tsime. She avers that since then "I have never worked with him (the applicant) in that capacity (of Headman), instead I have always recognized the second Respondent as Headman of Ha Maieane." That obviously led to much friction. On 2nd September, 1985 the first respondent wrote to the District Secretary requesting him "not to accept the names of the purported Headmen of Tsime whose names have been submitted to you

because I as Chief of Tsime, have not appointed them."

Your names followed, including that of the applicant and one Mafa Potomane. The first respondent also observed in her letter that, "Those whom I appoint, you do not accept."

On 20th September, 1985, however, the Principal Chief of Butha-Buthe, M.K. Mopeli, decided a claim in his court as to the Headmanship of Ha Maieane thus,

"MONEUOA VS JEREMIAH CHAKE

CLAIM: THE RIGHTS OF CUSTOMARY HEADMANSHIP OF HA MAIEANE

I have heard the evidence of both sides together with statements made by both parties and I have found the evidence of the family given on behalf of Jeremiah Chake to be very strong and it states that your Moneuoa your father belongs to the Lehloara and even your mother still resides there presently and I find the rightful customary headman of Ha Maieane to be Jeremia Chake. This is the decision."

Apparently the first respondent resisted that decision, as two years later, on 21st September, 1987, the Principal Chief of Tsime wrote to the Chief of Tsime in the following terms:

"The Chief of Tsime,
Tsime.

I greet you Chief,

Chief,

I hereby order you to publicly announce JEREMIA MAIEANE as the headman of Ha Maieane. This is according to the decision of the
Principal Chief of 1985.

This should be done within five days. This order should be complied with without mistake.

I will be grateful for your understanding."

That order was apparently not complied with. It seems the applicant thereafter issued proceedings against the first respondent in the Court of The Principal Chief. The latters decision in the matter on 16th December, 1988, reads thus :

"The Chief of Tsime is advised of my decision of the 20/09/1985 in which one Moneuoa Tefo was suing Jeremia Chake the headmanship of Ha Maieane and in which in accordance with the evidence of the family the Principal Chief made a decision to confirm Jeremia Chake to the headmanship of Ha Maieane.

The same decision of 20/09/1985 is therefore hereby confirmed. This is the decision and it must be respected."

Matters did not rest there, approximately one year later again, on 6th October, 1989 the matter once more came before the Principal Chief in his Court. His decision in the matter

reads thus :

"BEFORE PRINCIPAL CHIEF KUINI H. MOPELI ASSISTED BY THE EXECUTIVE OFFICER MR RAMOTSABI S. RALETHOLA AND THE CHIEF OF TSIME ON THE 6TH OCTOBER, 1989.

DECISION:

ON THE HEADMANSHIP OF HA MAIEANE AND HA POTOMANE

According to the evidence of both sides and particularly the letter of Chief Mopeli Hlasoa the Chief of Tsime dated 04/07/80 together with the oral evidence of Chief Mopeli Hlasoa the headmanship of Ha Maieane belong to the Maieane's and

it is the inalienable right of the sons of Maieane which cannot be taken away by anybody.

Therefore Jeremia Chake is the headman of Ha Maieane according to the recommendation of the Maieane family.

As for Chief Napo Potomane, there is no dispute that he is the headman and it must be respected.

It is the decision of the Principal Chief of Butha-Buthe and it must be respected."

All of the above documents were received, not as evidence of their contents, but as evidence of their making, in other words of the fact that as early as 1980 the Chief of Tsime,

Mopeli Hlasoa, recognized the applicant as Headman of Ha

Maieane and that thereafter, if not before that, the Principal Chief did likewise, that is, two successive Principal Chiefs judging by the signatures and names on the documents before me. The first respondent contests only the latter document ("annexure 'C'"), that is, of 6th October, 1989.

She contests it on the basis that,

"I had never seen this annexure 'C' before. Secondly, if it had been through Chief Mopeli's letter (of 4/7/1980) and oral evidence that applicant be appointed Headman of Ha Maieane, in 1980, than the Principal Chief would not have written annexure 'E' (letter of 21st September, 1987) in 1987"

But it is the first respondent's own evidence that she took over the duties of Chief in 1981. Indeed there is her letter of 2nd September, 1985 addressed to the District Secretary, in fact quoted above: though she did sign the letter "*for the Chief of Tsime*", it was she who apparently wrote the manuscript letter, in which she used the words, "I, as Chief of Tsime: Certainly by 1990 she was writing and signing letters as the Chief of Tsime. All of this accords with the applicants averment that,

"during the Chieftainship of Chief Mopeli Hlasoa, before he became ill and his wife, the first Respondent, acted in his office, my portion had been made very clear, but since the first Respondent assumed office of the Chief of Tsime, there has been copious and endless problems and disturbances emanating from

the Respondents ....."

The evidence, in particular that of the first respondent herself, indicates that from 1981 onwards she carried out the duties of Chief. The Principal Chiefs' letter of 21st September, 1987 was then addressed to the first respondent, and there is therefore nothing inconsistent between that document, whose admission the first respondent does not contest, and the document dated 6th October, 1989. Indeed three letters of protest written by the first respondent to the Principal Chief, on 23rd July,1990, on 20th November, 1990 and again the 20th May, 1991, confirm the fact that two successive Principal Chiefs continued to recognize the applicant as Headman of Ha Maieane.

The contests of those letters are contrary in places to the first respondents' opposing affidavit. In the letter written in May 1991 she said :

> "Further with due respect Chief, may I inform you that chief Mopeli Hlasoa was appointed headman of Ha Maieane by his grand-father, Hlasoa Molapo in 1930, and even to dates, that villages is still known as Lifefong Ha Mopeli. Secondly neither Jeremia's father nor his grand father have ever been appointed headmen of that village.
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> Further, Jeremia and one Moneuoa Tefo once appeared before Hololo Central Court disputing the Headmanship of the said village and the Court's ruling was that, since the village

belongs to Chief Mopeli, he is the only one who knows his

buggle in the village".

That letter does not of course constitute evidence of its contents. Nowhere in her opposing affidavit does the first respondent refer to the village in question as other than Ha Maieane. Again, nowhere does she refer to the portions involved as that of a *'phala'* (bugle). As Mofokeng J. observed in Leihlo vs Lenono (1) at page 174.

> "A phala is nothing else but a village head. This position, moreover, is not hereditary. A phala is a servant of the superior headman or chief and he can be dismissed at any time (see Duncan, *Sotho Laws and Customs*, 1960 Ed. P.55)"

Throughout the opposing affidavit the first respondent refers continually to the first involved as that of "Headman of Ha Maieane". Quite clearly Chief Mopeli Hlasoa did not regard the applicant as a bugle. He addressed his letter of 4th July, 1980 to *"Ramotse (Headman) Jeremia Chake" and then proceeded twice to address him as "Chief". Again, the first respondent herself in her correspondence with the District Secretary and the Principal Chief, continually referred to the post as that of Ramotse (Headman), as did the Principal Chief himself.*

At this stage I observe that the word "Chief" is used in the

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Throughout the opposing affidavit the first respondent refers continually to the first involved as that of "Headman of Ha Maieane". Quite clearly Chief Mopeli Hlasoa did not regard the applicant as a bugle. He addressed his letter of 4th July, 1980 to *"Ramotse (Headman) Jeremia Chake" and then proceeded twice to address him as "Chief". Again, the first respondent herself in her correspondence with the District Secretary and the Principal Chief, continually referred to the post as that of Ramotse (Headman), as did the Principal Chief himself.*

At this stage I observe that the word "Chief" is used in the

Chieftainship Act to describe "a Principal Chief, a Ward Chief and a Headman and any other Chief." I have difficulty in

appreciating the import of the words, "any other Chief," but in any event they serve, if nothing else, to emphasise the fact that a Headman is regarded as a Chief. That no doubt is why the applicant was so addressed by the Chief of Tsime. It will be seen that under sections 10 and 11 of the Chieftainship Act that appointment to the post of Chief, or Headman, is a matter of hereditary succession : see Lefojane v Regina (2) per Elyan J. at p. 102 & Leihlo v Lenono (1) per Mofokeng J. at P.176.

In this respect the applicant, in his replying affidavit, states that.

"I inherited my headmanship from my parents and grand parents who were headmen long before the 1st Respondents acted for her husband. Before she acted, I had already been working in this capacity with Chief Mopeli, her husband."

Mr Peete points to the fact that the applicant has not produced any Gazette to show that he, or his father, have, under the Act, been recognized as a Headman : he submits that the onus is upon the applicant to show that he is a gazetted Headman and it is not for either of the respondents to show otherwise : he submits in particular that the appointment previously held by the applicant was no more than that of a bugle, which could be terminated at any time by the immediate Chief, that is, the Chief

of Tsime, under the direct authority contained in the provisions of section 5 (4) of the Act.

But that, as Mr Mohau submits, in contrary to the case made out by the first respondent in her opposing affidavit, and indeed by the second respondent, who has contented himself with swearing an affidavit in which he deposes that "I hereby verify that whatever she says about me in her affidavit is true and correct", namely, that he was appointed Headman in place of the applicant. The point is, that the first respondent conceded in her opposing affidavit that at one stage the applicant was Headman of Ha Maieane. It seems to me that thereafter she is estopped from submitting, through her Attorney, that the applicant held the post of no more than a bugle. In her opposing affidavit she overs.

> "It is true that at one stage during the Chieftainship of Chief Mopeli Hlasoa applicant worked as a Headman of Ha Maieane having been appointed by Chief Mopeli, but when I started acting as Chief of Tsime. Applicant had abondoned his duties and in his place second Respondent had been appointed. The evidence pertaining thereto had been given by Chief Mopeli Hlasoa in CC 77/85 Hololo Central Court dated the 14th March, 1986."

The applicant contests the allegation that he had "abandoned his duties". The first respondent did not annex the proceedings