

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 extempore.

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

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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 cases 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 stand by 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

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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,

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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 exercise 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