

CRI\A\275\95IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOKHELE MOLEFE
MALEFETSANE MOKHATLA1ST APPELLANT
2ND APPELLANT

v

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

REASONS FOR JUDGMENTDelivered by the Honourable Acting Mrs Justice J.K. Guni
on the 12th day of June, 1995

This appeal was heard and dismissed on the 12th June, 1995.
At the time I indicated that the reasons will follow. These are
the reasons:

The two appellants were convicted on their own pleas of
guilt on the charge of theft of a motor vehicle.

The statement of agreed facts shows that the father of the
owner of the motor vehicle came home at Clarence from
Bloemfontein at about 04 hours on 9th November, 1994. On his
arrival he discovered that this motor vehicle was missing. He

telephone and reported this to the owner who was at Fourisburg. The owner in turn reported the theft to Lesotho Police at Butha-Buthe Camp Charge Office. The Police in the company of the complainant went out in search of that motor vehicle. At about 3 p.m at Ha Marakabei they saw the said motor vehicle travelling from East towards West. They followed after it. On their arrival at the vehicle they signalled the driver to stop. He did not stop. He excelerated. The chase ensued as the driver sped away. During that chase, police produced and pointed guns at the appellants. At Ha Pokane the police caught up with them. Appellants surrendered to the police. In the possession of these appellants two keys were found tied together. One key is a hand-made master key and the other is the toyota key but of a different number from that of the complainant's motor vehicle.

The appellants were sentenced to (6) six years imprisonment each.

The case was forwarded to the High court on automatic review. It was placed before the honourable reviewing judge who reduced the sentence to (3) three years imprisonment. After the case was duly reviewed the appellants nevertheless still exercised their right to take the matter on appeal as this is not precluded in terms of section 66 Subordinate Courts Order of 1988.

The grounds on which this appeal is based are:

1. That the sentence of six years is excessive.

2. That the Learned Magistrate erred when imposing sentence by considering only the question of prevalence of theft of motor vehicles.
3. That the Learned Magistrate had not considered accused's personal circumstances. e.g. that they are married and have children.

The record shows that the appellants have no previous convictions. In their address in mitigation of sentence it appears both are married men. One has one child and the other has two children. Both appellants are 28 years of age. One is Kestil Municipality employee and the other runs a shebeen at Qwa-Qwa.

It was argued for and on behalf of the appellants that had the Learned Magistrate taken into account those personal circumstances of the appellants he would have arrived at the different sentence. This court was urged to consider all these factors personal to the appellants. It was submitted that. When all these factors are considered an appropriate sentence should be a fine with imprisonment as an alternative if the appellants fail to pay the fine. At worst the court could couple that fine with wholly suspended sentence. The authority cited in support of this submission is Rex v Ndlovu 1967 (2) S.A 230. In Ndlovu's case young J observed, "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." (My underlining)

In Ndlovu's case the accused was charged and convicted of forgery and uttering an omnibus ticket. This ticket had been used. The accused had forged some entries on the ticket in an attempt to validate it. The accused uttered the said ticket to the bus inspector who was observant enough to notice that the said ticket was not completed nor signed by his bus conductors. The value of that ticket was (34) thirty-four cents. In both cases the prejudice is only potential. The motor vehicle in our case was recovered. The value of that motor vehicle is not stated in the record of proceedings. But it would be absurd to consider the value of the motor vehicle the same as that of the bus ticket in Ndlovu's case. Young J. directed that the power of imprisonment should be reserved for serious cases. Our present case is such a serious case. The economic implication or potential prejudice involved in a car theft are serious indeed.

The Learned Magistrate when dealing with the question of prevalency of this type of offence, pointed out and correctly so, that there are problems between the two neighbouring states, the kingdom of Lesotho and the Republic of South Africa as a direct consequence of these car thefts committed across our borders.

Although these appellants are first offenders, in their possession the police found tied together a toyota key which was apparently used for driving the stolen vehicle and another hand-made master key. The impression one gets from this is that the

appellants were not amateurs. The motor vehicle in question was discovered missing by the father of the complainant when he arrived at home at 04:00 hours. In his address in mitigation of sentence one of the appellants claims that they were travelling in their own motor vehicle when they were suddenly tempted to steal this motor vehicle.

Armed with their keys the two appellants went about at night, to be precise, it was during what could be termed bewitching hour. Their keys are specially made to be used for driving any or every motor vehicle. When they saw the motor vehicle in question it was not difficult for them to succumbed to sudden temptation. They seem to have been going about, if not looking for motor vehicle to steal, but at least prepare and ready to steal one if circumstances permitted. They have not bothered to explain why they were out at night. They also have not explain why they had in their possession those keys.

Mr. G.M. Kolisang persisted with his submission that the Learned Magistrate should have considered suspending part of the sentence. R v Mutizwa 1968 (4) S.A. at page 278, is the authority sited in support of this submission. The two cases are quite different except that both accused had no previous convictions. Mr. Mutizwa stole during the day time at the shop where he worked. He stole one packet of washing powder and some cigarettes. He was observed by an alert shop owner who called him to come back into the shop. He was observed going out of the shop with those items in the box by an alert owner of the shop.

He was called back to help serve the customers. He left the box outside when he returned into the shop to assist serving the customers. After helping the customers he went out again to where he left that box. The owner called him to bring that box and he did.

These appellants stole something more valuable than a packet of washing powder and some cigarettes which together were value at £9.

The trial court in Mutizwa's case accepted that his salary £14 per month was meagre. He had a wife and two children whom he struggled to support and maintain on that salary. He requested advances from his employer all the time and at the end of the month he received £4. after deductions of the advances. QUENET J.P was of the view that Mr. Mutizwa stole out of need. Nothing of the kind could be said of these appellants. They were travelling in their own motor vehicle. That shows they are the men of means. They made no mention of their earnings from their employment or other sources. e.g shebeen. They were motivated by greed and/or mischief rather than need.

The sentence of six (6) years imprisonment has already been reduced to three (3) years by the honourable reviewing Judge. Although there are no reasons given for this reduction it could be in consideration of the factors which this court is being urged to take into account for the same purpose. That is to reduce further the already reduced sentence. These appellants

have already been treated with greatest leniency. It is for these reasons that the appeal was dismissed.

K.J. GUNI
ACTING JUDGE

For Appellant : Mr. G.N. Kolisang
For Respondent : Mr Ramafole