

CRI/T/44/2000

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

- 1. REFILOE MOKALANYANE**
- 4. ANDREAS van der MERWE**
- 5. MOKHERANE TSATSANYANE**

JUDGMENT ON MITIGATION

Delivered by the Hon. Mr Justice M.L. Lehohla on the 15th day of May, 2001

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The Court has been told that all the above accused have no previous convictions.

With regard to accused 1 the plea raised in extenuation concerning his youth was once more raised in the plea in mitigation.

The next important point raised which is common to all accused is that they were arrested in 1995 but the trial only started in August 2000.

In regard to accused 1 the argument relating to his imbecility was once more raised but the treatment accorded this aspect of the matter during the extenuation phase of this proceeding will suffice.

Another aspect the learned Counsel for accused 1 pleaded with the Court to bear in mind is that accused 1 has cooperated with the police during investigations. Further that no evidence suggests he was uncooperative. I agree with this submission.

I have in part already dealt above with aspects touching on accused 4. He is said to be a diabetic in need of constant medical attention. Further that he has kidney problems treatable only in South Africa. The Court is indeed sympathetic but if custodial sentence is necessary then it will be up to the state to see what to do to let the accused get benefit of advanced medical treatment only available in South Africa without on the one hand frustrating the ends of justice in this Kingdom.

Indeed concerning this accused *Mr Lesuthu* painted a rather pathetic picture of a man who is virtually a vegetable in contrast to the visual appearance of a robust panel beater who is rosy about his gills. He is said to have a nasal problem since

having been assaulted by police while in detention. Further that he has a phobia for prison life such that the last couple of days he remained there pending sentence led to the deterioration of his physical health. Thus it was suggested the present day prison congestion would lead to his possible death there. He indicated that accused 4 was arrested on 3-7-95 and remained in custody till 25-10-96 when he was released on bail having spent 18 months in custody. This is an important point worth bearing in mind.

Mr Mahlakeng Counsel for accused 5 indicated that accused 4 and 5 have been found not guilty in all counts. I agree.

He pleaded that because they have been found guilty of a lesser offence their sentences be proportionately lighter. It was suggested that even though the offence accused 5 has been convicted of is theft the nature of the offence he is convicted of is not such that he went out of his way to go hunting for a vehicle to steal. On the contrary evidence led shows that the vehicle came into his possession. No evidence showed attempt to obliterate identity of the vehicle, it was submitted.

I think here learned counsel is confusing the operation of the statute under

which accused 5 and 4 have been convicted with a charge under specific terms of the then operative Revision of Penalties (Amendment) Order No.10 of 1988 since repealed. This law during its term of existence specified minimum punishment in respect of robbery, theft of stock, theft of motor vehicles etc all of which were common law offences with the exception of stock theft which was then governed by stock theft proclamation.

Since section 185(1)(d) read with section 343 of our Criminal Procedure and Evidence Act deals with all other invisible methods of committing theft it is not prudent in my view to submit virtually that a particular accused didn't set out steal but rather that a product of theft landed in his lap. The operation of the above sections is intended for a myriad of just such instances where a thieving mind counts not its blessings for receiving ill-got gains.

I however will take into account the fact that in giving evidence accused 5 in his own way embarked on trying to investigate the death of 'Mamolulela Mofolo.

It is common cause also that during the period 1994 to 1995 the country was suffering from lawlessness. But in my view the fact that there is lawlessness does not

entitle anybody to interfere with the rights of law-abiding citizens. In fact there is a need to discourage, by operation of law if only to indicate to those, so inclined that the game is not worth the candle. Clouded minds of citizens who gravitate towards mischief during times of crisis cannot be allowed to make a merit of wallowing and indulging in crime with impunity.

Having listened to all the arguments I feel I would be failing in my duty if I should impose sentences other than custodial even although the accused are first offenders all. Where applicable I am persuaded to suspend part of the custodial sentences though.

As I stated above I will also take into account the fact that accused 4 has spent 18 months in custody before being granted bail pending this trial.

With regard to accused 1 the Court is keenly aware that the two murders were committed in the course of a robbery. This on all counts aggravates his offences.

In the circumstances the least sentences proposed are as follows :

Accused 5 is sentenced to six years' imprisonment in respect of common

law theft of a motor car. Half of this sentence is suspended for two years on condition that he is not found guilty of an offence of which dishonesty is an element, committed during the period of the suspension.

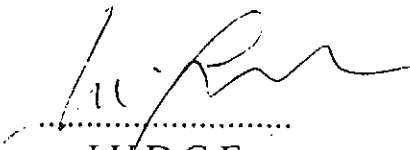
Accused 4 is sentenced to 6 years' imprisonment half of which is suspended for 2 years on condition that he be not convicted of a crime involving dishonesty committed during the period of the suspension. The unsuspended period of 3 years is reduced by 18 months spent in jail before being granted bail; thus leaving accused 4 with effective sentence of 1½ years to be served.

Accused 1, - in Count I is to undergo twenty-five years' imprisonment

- in Count II he is to undergo twenty-five years' imprisonment to run concurrently with sentence in Count I
- in Count III he is to undergo six years' imprisonment to be served on expiry of sentences in Count s I and II.

These sentences will run together with whatever sentence he is presently serving.

My assessors agree.


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JUDGE
15TH May, 2001