CRI/A/16/2001

IN THE HIGH COURT OF LESOTHO

In the matter between

JABU KHOPTJOA APPELLANT

and

REX RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs Acting Justice A.M. Hlajoane
on 3rd Day of April, 2002

The Appellant had been tried at the Magistrate's Court Leribe, charged with three counts of Housebreaking with intent to steal and theft. He pleaded guilty to the first two counts and not guilty to the third count.

The Public Prosecutor accepted the pleas to the first two counts

and outlined the facts. The accused admitted the facts and was found guilty as charged on both counts. The accused happened to be a first offender and was thus given chance to put his plea in mitigation of sentence. A sentence of two years imprisonment for each count was given and both sentences were to run consecutively. It is against that sentence that the appeal is lodged.

The main ground for appeal has been that the Magistrate has failed to give reasons for the stiff sentence she imposed, thus resulting in a grave irregularity. Counsel for the Respondent concedes that in fact an irregularity occurred as Magistrate gave no reasons for her sentence.

The question now that has to be asked is whether such irregularity was so grave as to warrant the acquittal of the appellant? To answer this question one has to look at the facts of the case and other factors surrounding the sentences that have been imposed.

The Appellant was charged with three counts of housebreaking

with intent to steal and theft. He pleaded guilty to the first two and was convicted and sentenced.

On count one the following property was stolen after the accused had broken the door and gained entry;

(i) Television set

(ii) Tempest Radio

(iii) 5 Litres of Relaxer

(iv) Watch.

Out of that property only the television and watch were recovered. No explanation was given about the remaining items not recovered.

In count two , the door and the back window were opened to gain entry and the following property stolen;

(i) Tempest Radio

(ii) 9 pairs of shoes

(iii) 1 pair of trousers

and only one pair of shoes was recovered as the Appellant was wearing them when he was arrested and the complainant identified them. Also the Tempest Radio was found. No explanation was ever given about the remaining property which has not been recovered. The offences were committed to two different complainants at different dates and places. Not all the property has been recovered and Appellant volunteered no information according to the record, as to what in fact happened with the other property.

The Appellant when so sentenced to two years on each count, and sentences being made to run consecutively, was aged but 20 years. There are numerous decisions of this Court which show that, in passing sentence on a relatively youthful accused, there are factors which have to be taken into consideration;

1. That sentence is pre-eminently a matter for the trial Court.

2. That an appellate Court should not lightly interfere with the discretion of the trial Court if judicially exercised.

3. That the youth of an offender is only one of many factors that should be taken into account in assessing sentence.

4. That a first offender should not expect a guarantee that a custodial sentence will not be imposed. *See* **Makhetha Mphutlane vs Rex 1980 (2) LLR 338.**

It used to be the practice obtaining at the Magistrate's Courts that where an accused has pleaded guilty to the charge and accepted an outline of facts in passing sentence it was not mandatory to give reasons for sentence. Reasons would only be given where such accused person has noted an appeal. Even at present, the practice still stands. But in our present appeal the Magistrate gave no reasons for her sentence even after the appeal has been noted.

The case of **Matia and Another vs Rex 1979 (1) LLR 139**, is for the proposition that, there is no rule of law that a first offender is entitled as of right to special privileges. Being his first offence is merely one factor amongst others that the Court ought to take into account. That his individual interest must be weighed against for example the nature of the offence, protection of the public and the prevalence of the crime of

which he has been convicted.

I have already shown that I subscribe to the principle that the question of sentence is pre-eminently a matter within the discretion of the trial Court, but it would be hard to believe that such discretion has been judicially exercised in the absence of any reasons for the sentence given. Regard being had to given relevant considerations, the Court would be in a position to say yes, the discretion has been judicially exercised, and this must *ex facie* appear on the record. **S. vs Anderson 1963 (3) S.A. 494**

The Appellant at the trial stage in his plea in mitigation of sentence showed that, he was a student at Maputsoe and doing Form C. That both his parents were still alive but unemployed. He is the eldest and has three other siblings after him. The one coming after him was the only one attending school, whilst the other two born 1987 and 1997 respectively have never been to school. His grand mother is the one paying for his fees. Appellant was 26 years old last year. He had also

pleaded guilty thus saving the Court's time.

The Magistrate never indicated on the record whether she considered the plea in mitigation by the accused. The Court of Appeal also showed its displeasure in the case where the trial Judge failed to take into account some of the relevant considerations in passing sentence. See **Motenatena vs Rex 1995-96 LLR and LB 267**. The trial Judge in passing sentence had only remarked thus "drinking having been found to contribute extenuating circumstances, the accused is sentenced to 16 years imprisonment."

There had been no indication on record that the trial Judge considered some two relevant considerations of accused in exercising his discretion, that of being a first offender and also his tender age. The sentence was altered by suspending six years conditionally.

The Crown, being the Respondent conceded that it was irregular for the Magistrate to have disregarded the plea in mitigation in her

sentence but shows that no miscarriage of justice resulted therefrom. On the other hand the Respondent submits that the Magistrate took all the circumstances of the case into consideration, I don't know where the Respondent gets the idea that there was such a consideration, yet the record is silent. He is making a naked assumption.

In the absence of an indication from the record that the trial Magistrate considered the mitigation by the accused, I am not loathe to say that there has been a miscarriage of justice. It was the fundamental entitlement of the appellant to have known why such sentence was given, and why such sentences were made to run consecutively.

In the result, the sentences in count 1 and 2 are altered to read;

> Two years imprisonment on each count and the sentences to run concurrently.

There has been one other important aspect of this case. The charges against the appellant were three and after pleading guilty to the first two and not guilty to the third, no separation of trials was ordered

nor any pronouncement on that count. The Appellant never raised that on appeal except by just making a remark in passing through his counsel without persuing it any further.

I will *mero motu* deal with that aspect and remit the case on that count alone to the trial Court to make a pronouncement on it.

A.M. HLAJOANE
ACTING JUDGE

For Appellant: Mr Nathane

For Respondent: Mr Molokoane