CRI/T/3/2001
IN THE HIGH COURT OF LESOTHO

In the matter between:
REX
LEBUA LETSIE

Mr. Leppan : For Crown
Mr. Fosa : For Accused

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi on the 29th day of October 2002

1. The Accused was charged with one count of bribery. It was alleged that:

> "..... Upon or about the 9th day of November 2000 at or near Maseru Magistrates' Court premises in the district of Maseru, the said accused who at the material time (was) a public prosecutor holding the rank of Chief Public Prosecutor attached to Maseru Prosecution office and as such a State Official, did unlawfully and intentionally corruptly accepted from one.'MAMATING NCHANYANA, the amount of M500.00 (Five Hundred Maloti) as consideration for declining to prosecute and or withdraw or cause to be withdrawn, demise' charges and/or destroy evidence in respect of the charge of Rape, Housebreaking and a

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> contravention of the Internal Security General Act 1984, against a relation of the said 'Mamating, viz NCHANYANA NCHANYANA, who at the time of acceptance of the said bribe was detained in gaol at Maseru Central Prison on allegation of the aforementioned crimes committed by the said detainee NCHANYANA NCHANYANA."

Accused pleaded not guilty after protest from her Counsel that there was no full compliance with a request for further particulars to the charge requested earlier. Indeed as I concluded there had been no need to reply to such particulars much as the acts alleged were charged in the alternative and the Accused clearly knew the case to meet in order to plead. I have agreed with Mr. Leppan that the charge could still even be amended and that it be amended to say that the Accused "corruptly
agreed to accept....." as considerations....." which amendment or
findings were permissible under sections 158, 161 and 198 of the Criminal Procedure and Evidence Act 1981 (CP&E) The background to the case was a simple one.

2.1 It was the arrest of the said Nchanyana Nchanyana which led to the involvement of his sister Mamating Nchanyana who became (PW 1) in these proceedings. It was a concern of PW 1 about her brother who was languishing in prison since about July 2000 that led her to seek to assistance of the Accused before Court. In addition there was information

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that Nchanyana Nchanyana was ill which PW 1 had confirmed. Nchanyana Nchanyana had been charged with rape, housebreaking and theft. There was another charge. A third charge. Cash bail deposit had been fixed for the other two cases but not for the third. Accused and PW 1 met and discussed things. After that conversation was born the allegations that Accused faced. Unwittingly (PW 1) enlisted the aid of the police officers as several police officers would testify as to how they dealt with money intended for entrapment of the Accused. There would be the evidence of PW 1 and a number of police officers as we have on record.

2.2 Before Accused and PW 1 met in August 2000 PW 1 had attended at the Accounts section of the Magistrates Court where at that time, files for this cases were not found. This led her to come on the following day. It was discovered or she was informed that the case was prosecuted by the Accused as the records there showed.

2.3 PW 1 then went to the Accused's office. The latter confirmed that she was the one who was going to prosecute PW l's brother's case. PW 1 explained that she had come about the cases of her brother. Accused explained that Nchanyana Nchanyana had been granted bail in two cases and the third one had had not had bail granted. PW 1 went back home.

When PW 1 was at home she met one gentleman by the name of Sepiriti to whom she explained her brother's situation. Sepiriti said they should see Accused on the following day. When they arrived on the following day they found Accused already in Court. She came out after some time after being informed that she had visitors.

2.4.1 Accused explained that in one case Nchanyana was given a bail of M300 in one of the three cases. The second one had been fixed at M200. The third case had had no bail fixed therefor. The other case remained with no bail having been granted to the accused. The witness then said:

> "Accused said we should before she could assist us she advised us that we should pay bail in both matters and with the third one we should first pay a sum of five hundred Maloti."

(Eaba 'm'e Letsie ore hore a tle a re thuse re tlameha re patale chelete ea beile pele eno e 'ngoe a ka lokolla nyeoe eno ha re ka ra fana ka five hundred).

HL What did she say about the third case?

PW 1 That if we give her a sum of R500 she will cancel the case. (Are ha re ka ra mo fa Five Hundred o tla "cansella" nyeoe.)

HL What words did she use?

PW 1 She said she would.....something which shows that the case will
not proceed at all. It was the words which showed that she would eventually not proceed with the case.
(O ile a re o tla.....ntho e bontsang hore e ke ke ea hlola e
tsoela pele ho hang.) '

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CC Can you ts you stand there remember her exact words?"

PW 1 I do not recall her exact words My Lord, but it was words which showed that she would not eventually proceed with the case." (Ha ke sa a hopola hantle. O ne a bontsa hore case eno ha e sa tla ba teng ho hang).

CC What were the M500 for?

PW 1 They were going to pay bail for the two charges which was already ordered. (Ana e ne e le a patallang li case tse se ntse li fanoe.)

CC And she said you must pay another M500 (A re u patale five Hundred Rand e nngoe.)

PW 1 We would bring another having cleared the first.
(E ne e le hona re tla e tlisa ha re se re clearile e nngoe.

CC The third sum that she mentioned the M5000 what was that for? (Ena enngoe, makholo ana a mahlano a ne a bua ka one, a re le a patale e le a boraro e ne e le sebakeng sang?)

PW 1 That she would dismiss the case.
(Eo ho nong ho thoe re e patale? A hore u tlilo qhala nyeoe eno.)

CC If you paid the R500 what did you think would happen to your brother?
(Ha u se u lefile maluti ana a makholo a mahlano u ne u nahanne hore ho tla etsahala eng ka khaitseli ea hau?)

PW 1 He will be released. (O tla lokolloa.)

CC Will he be prosecuted thereafter?
('Me na kumor'a moo u ntse a tla qosoa?)

PW1 No
(Aa ee)

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CC What did you say to her when she made this suggestions? (Ha a etsa tlhahiso e ho uena u ile ua etsa joang?)

PW 1 I agreed My Lord.
(Re ile ra lumellana.)

2.4.2 PW 1 added that she knew what she was agreed to was wrong. It was around October 2000. I have rendered this testimony in the way it appears or recorded for the simple purpose of showing how elaborately the matter was extracted from the witness and after that how demonstrable was the state of mind of the Accused if PW 1 was to be believed. She was not cross examined by Accused's Counsel.

2.4.3 PW 1 after the said agreement went home. She met Sepiriti on the following day and proceeded to Accused's office. Accused was in Court. She was summoned to come . They went into the interview room where further discussions ensued. They agreed about M500 PW 1 went home thereafter.

2.4.4 It was beginning of November 2000 when PW 1 had M300 with which she went to Magistrates Court. It was too early in the morning and the Accounts section had not opened. She handed over the M300 to Accused to deliver to the accounts section because PW 1 would be late for work.

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This money Accused put in her bag and then into an office filing cabinet which had been locked. She unlocked and then locked the cabinet again. Accused I asked for the balance of the money for the other case. PW1 said she thought it was wise to deliver the sum while she would look for a further M200. She was in her office with the witness and Accused in the latter's office. Accused had then asked about where the M200 was because the two cases together add up to M500. PW 1 explained that she gave Accused the M300 because the accounts office was not yet open. She asked Accused who was dealing with the case to pay on her behalf.

2.4.5 The witness then left for work. Along the way she met one Batlokoa (PW 8) who was a friend of hers. She informed PW 8 that she had just come from the magistrates court. Then she met Accused who was prosecuting Nchanyana Nchanyana's (PW l's brother) case. That bail had been granted in two cases and in the third it shad not been fixed. The witness needed M200.00. She testified as follows:

PW 1 In fact I told him that I had a shortage of M200 and sum of M500 which I am supposed to give Accused. (I lantle beile ka re ke hloka chelete e M300 ho qetela Account joale le Five Hundred eo ke tlamehang ho e fa 'm'e Letsie).

HL What was the Five Hundred for, what did you say?

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PW 1 That I was going to give it to Accused so that he could dismiss the case which was not bailable My Lord. (E ne e le eo ke ilo e fa 'm'e Letsie hore a tsebe ho qhala nyeoe ena eo ea sa fuoang beile.)

2.5.1 Back to the meeting with PW 8. PW 8 promised that he would look for the money from his sister. PW 1 gave PW 8 her work telephones. While the witness was at work PW 8 phoned her. He said he had not been able to acquire the funds from his sister but that there was someone who promised that he would assist him.

2.5.2 PW 8 had later looked for the PW 1 as he said to the witness and had himself testified. PW 1 was absent. They later met in Thaba-Bosiu at the witness home on an evening. He was accompanied by three gentlemen who were travelling in a van. She did not know their occupation. PW 1 and PW 8 had a discussion. The two agreed that he would give the witness Ml00 on the following day near the Government Complex No.3 at around 7.30 am.

2.5.3 PW 1 did meet PW 8 as arranged. PW 8 was with one gentleman who had accompanied him on the previous day. PW 8 then instructed the other gentleman to give over M100. It was reported that the gentleman was the person who had promised to lend PW 8 the amount of money. It was

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M100. The money was made of an M50, two R20 and one M10 note. It was in Maloti Currency.

2.6.1 After receiving of the money PW 1 and the two gentlemen proceeded on to the Magistrates Court. They headed to Accused's office into which PW 1 entered while the two gentlemen remained outside. She found Accused present. PW 1 gave Accused a sum of M250 including the M100 from PW 8 because the witness still had her own M150 The M200 was for completing the first M300 to make it M500 altogether. The M50 was for medical fees for Nchanyana Nchanyana (the witness' brother). The Accused said she was on her way to Leribe and would come on the following Monday. M50 was for medical fees of the witness brother which would be delivered later.

2.6.2 The witness was not sure that sending over the money to the awaiting-trial prisoners or others was a proper thing to do but she did not suspect anything because they had in the past sent goods to her brother. Accused then said thai the witness must by all means arrange for the M500 which the Accused had requested because she must speak to the magistrate with whom they were dealing with the case. That was for the third charge.

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2.7 After the money was received by Accused she put it in her handbag and put in the filing; cabinet which had been locked. She unlocked it. She put back the bag into the cabinet. The witness was not sure if the Accused locked the cabinet because she left after the cabinet was unlocked. She did not recall clearly what she did with the handbag.

2.8 When still being led in chief the witness recapped to say that there was something which the Accused said on the first occasion when she gave Accused M200. She said that all the bail deposits amounted to M500 and that the witness should remember that besides the M500 she was still obliged to pay up the M500 which she needed which they will share with the person with whom they are prosecuting the case. The witness did not know the other person the Accused was referring to but she believed that it was someone Accused was working with. She left M250 which included the Ml00 received from PW 8; on the last occasion. She had then gone back to work

2.9 On that last day something else happened during the course of that day as PW 1 had testified further. After an hour after she had arrived at work she was told that she had visitors. When she got out she met some two ladies and two gentlemen who showed her their identity cards. They

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were police officers. They asked her whether there were someone who gave her an amount of money during the morning. She agreed. It was R100 as she answered. They asked what it was for. She explained that the money was for the Accused to pay bail for the witness' brother. They said the witness was not telling the truth and Accused had already been arrested about that money. PW1 said part of the money had already been changed. They asked whether she had some money with her. She agreed. She showed them M100 - notes altogether. They used a scanner (camera-like machine) through which the invisible writing on the notes was revealed. It was altogether an amount of M100 which they screened. There were notes on which it was written "police trap". It was the two M20 notes and one M10. It was altogether M50. After that they directed the witness to police headquarters.

2.10.1 When they arrived at the police office PW 1 found Accused present.
She was asked what was happening about the money. She explained that her brother was arrested M500 was needed for cash bail deposit and that Accused said she wanted a further M500 after which she would dismiss or "destroy" the case. She was asked further whether it was for bribery or for cash bail deposit. She told them insistently that the amount paid was for cash bail deposit and

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the amount for bribery was still to be paid.

2.10.2 I took it to be a serious indictment against the Accused and formidable item for corroboration that the Accused did not confront PW 1 and put forward her side of the story. I bore in mind Accused's calibre that she was an experienced prosecuting lawyer. At least she should have denied that a third case existed or that the initial payment having been received had been forwarded to the Accounts Department. She was made to listen to a tape recording made at Thaba-Bosiu when the witness and PW 8 were having; a conversation which recorded everything including what Accused had promised to do to assist the witness about the problem of the witness' brother. The witness was thereafter instructed to go to the magistrate to give a statement. They went to police headquarters where she was released on condition that she would later be called through summons to Court. She ended up giving a statement of confession before a magistrate. It was about two years before she testified in this Court.

2.10.3 PW 1 was shown, with the Court's permission, her original Sesotho statement allegedly made to the magistrate. It was in order to make

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a recollection of events from which Crown Counsel had not received instructions. The purpose was primarily to refresh the witness memory. Mr. Fosa did not have any objection. The witness reiterated that the amount actually paid was for cash bail deposit. The other amount agreed upon was still to follow. Accused would then dismiss or "destroy" the charge. Because the police intervened the latter did not happen. She would still deliver the M500 promised had it not been for police intervention.

2.11 The above constitutes a summary of PW l's evidence except where as shown the extracts made were verbatim. The above summary was the evidence upon which Defence did not cross-examine on. Mr. Leppan submitted that the evidence was damning.

3.1 PW 1 was declared an accomplice a short while after she had commenced her evidence. I warned her accordingly. Her evidence as I agreed ought to be approached with caution for good reason as it later transpired. It was not disputed that a certain total amount of money of M550 was received by the Accused. Incidentally no official receipt of any amount was produced as DW 3 Mrs Lephoto Accounts clerk testified, despite that she alleged she received the.M300 . This will be shown to be significant

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later on in the judgment The amount of M50 had a reason for its payment about which Accused and PW 1 agreed.

3.2 That PW 1 evidence was not challenged became momentous. Its significance could not have initially been sufficiently gauged by the defence as I suspected. That it became unchallenged was after communication between Mr Fosa - Defence Counsel and Accused. Mind you Accused was a former police officer and had more than ten years experience as a public prosecutor. Mr. Leppan would remind the Court of this on several occasions. It was for a good reason.

3.3 PW 1 referred to three (3) cases involving her brother. Two of these had cash bail deposit fixed for them while the other had not yet had bail fixed for it. It was this last case for which she agreed with Accused that it will not have to proceed because she would cancel it and make it not to continue on payment of M500 for its dismissal. It meant that the accused (PW l's brother) would be released. They agreed. They agreed for payment of a further M500. It was then that she went home and was to secure the funds. Then things unravelled as already stated herein before.

4. In pursuance of the charge the Crown led nine other witnesses and in

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paying out the first M300. It was then that she must have also spoken of the M500 needed for bribery. This PW 8 confirmed. Batlokoa (PW 8) promised to give PW 1 M100 which she gave to PW 1 on the day of the trap. It is PW 8 who got in touch with police presumably on the informal ion given to him by PW 1 who was his friend. PW 8 gave certain informal ion to PW 2.

7.1 PW 2 recieved information on 10th November 2002. He came to possess certain information from Senior Inspector Moeketsi about information from PW 8. Assembled were Sgt Nyane, Policewoman Motsepe, Policewoman Makhakhe, Trooper Fosa and another officer. It was resolved to set up a trap at the magistrate court "against" Accused.

7.2 In order to set up the trap money notes amounting to M100 were identified and marked with invisible pen marker that could only be identified by a special laser scanner. Four money notes were so marked namely, M50 note (C 344501) M20.00 Maloti note (F819867) M20 and M10 note (A 112561). It was these notes that were given to PW 1 by PW 8. They were then

passed on to Accused by PW 1, unknown to the latter that the notes were marked. She had already paid her an amount M300.

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8.1 PW 1 then proceeded to the Court at about 7.30 when she and Accused came in Accused's office. It is there where Accused was given M250 to "make it M500. It was to cover M300 to make it M500. PW 1 gave Accused M550 altogether. The Accused would agree with the magistrate. They work together with magistrates as PW 1 said she was informed by Accused. This was the agreement between Accused and PW 1.

9.1 As said before PW 1 was declared an accomplice witness who was cautioned in terms of section 236 of the Criminal Procedure and Evidence Act 1981. It followed therefore that being an accomplice, her evidence needed to be approached with the requisite degree of caution. Having done so and if satisfied a Court properly convict on this evidence. See R v Thilke 1918 AD 373.

9.2.1 Even though the evidence of PW 1 went unchallenged and since the Crown case substantially rested on this accomplice's it is perhaps pertinent to deal with the law relating to such evidence. I was referred to section 239 of the Criminal Procedure and Evidence Act 1981 which provides that:

> "Any Court may convict"any person of any offence alleged against him in the charge on the single evidence of any

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> accomplice, provided the offence has, by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of the court to have been actually committed."

9.2.2 The trier of fact is warned that:

> "The caution Court or jury will often properly acquit in the absence of the other evidence connecting the accused with the crime if no rule or practice requires it to do so. What is required is that the trier of fact should warn himself of the special damage of convicting on the evidence of an accomplice for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped by reason of his inside knowledge of the crime to convince the unwary that his lies are the truth."

See Schreiner J in R v Ncanana 1948(1) 399 A-J at 405. The learned judge warns that the special danger is met by corroboration or proof aliunde. The need is however reduced if accused is proved a liar or fails to contradict or explain that of the accomplice. I would instantly observe that the present was a classical case where the evidence of an accomplice "damning in its nature" was neither challenged. Perhaps the Defence concluded that PW 1 was a lying witness. Even if it were to be so the salient question would be to what extent. And furthermore when the evidence of the other witnesses is taken in its logic or consistency whether or not it corroborates the accomplice's witness in the necessary respect

even if it was not on all the evidence or on all the issues.

9.3 The need for exercising caution over an accomplice's evidence is to ensure that even if the section is satisfied, there is some further guarantee that the right man has been brought to trial. See Schreiner J in R v Mpompotshe and Another 1958(4) SA 471(A) at 476E. Finally another reason for approaching an accomplice testimony with care is to be found in S v Hlapezula & Others 1965(4) SA 435 at 440D-E.

9.4 I may instantly comment at the onset that the true value of the events that happened after PW1 and Accused agreed after the first payment of M300. The events may not necessarily be an execution of the bribery or furtherance of the bribery. They may be for something else for example to continue or act as corroboration that there had in fact been agreement between PW 1 and Accused. It may perhaps even be that the police trap was bad or botched. But what value it does have like other events is by proving that there was an agreement between PW 1 and Accused. That the defence may have felt that it amounted to nothing more may have been one of the underlying reasons why PW l's evidence was not contested. It may have been anticipated that there would thereafter be no proof of an act of bribery thereby misunderstanding or mistaking the true

value of PW 1 's evidence as it stood. Or the defence could have perceived conflict or contradictions in the evidence of PW 1. A close look will reveal otherwise. May be even an unmotivated cross-examination would have revealed real contradictions if there were any. That no cross-examination was attempted had the effect that Accused's version was not put to PW 1. For the failure to put the accused's story to a witness see Phaloane v Rex 1980-84 LAC 72 at 77 F-J, 78 A-C.

9.5 On the above reasoning I agreed with Mr. Leppan for the Crown that Crown witnesses evidence was generally credible and convincing and pointed presumably to a prior dishonest agreement between PW 1 and the Accused. For example why is this coincidence of the so called plot by PW 8 and police officers that sought to entrap the Accused if the Accused did not have an agreement that sounded substantially as PW 1 has put it. That is to say PW l's deposits (as she said) were intended to exceed M300 and M200 since there was agreement about a third case. Mind you, quite belatedly, the defence sought to wish away the third case by putting Exhibit "C" and "H" to show that there resulted a conviction in relation to two cases or counts namely Assault GBH and rape, that is to suggest that there was no third case. Why would PW 1 imagine or fabricate as to the existence of a third case? And why was her testimony not challenged

about the existence of a third case? It cannot therefore be to the Accused's advantage. I disagreed with Mr. Fosa that since we have not been told where the third case all about it ended. As I concluded there should have been such a case. Probabilities do not point otherwise.

9.6 Mr. Leppan submitted that the evidence of the Crown witnesses was generally credible and convincing and pointed out persuasively to a prior dishonest agreement between PW 1 and the Accused. This conclusion also enjoys admirable support from probabilities. I respectfully agreed. This is to bo said about all the police witnesses who confronted the Accused in one way or the other. I would even add to this the evidence of Chief Public Prosecutor, Buang Mothae (PW 9). Before this witness, while the opportunity presented itself, the Accused never made any explanation seeking to indicate that she came by the monies, sought by the police, legitimately. PW 9 was the best person, if police presence threatened the Accused, to have been given a modicum of an exculpatory statement. As will be repeated later the Accused fared badly in suggesting that there was a threat of assault or otherwise by the police officers. If at all anything can be said in that regard, it is that she was threatened by the enormity of her act, the repercussions or the consequence of the exposed agreement or the scheme as the Accused must

have, in her guilty mind, suspected was fully known.

9.7 I will pause, at this juncture, and ask a simple question. The question being against the background that PW 1 had become an unwitting participant to the so called trap. What difference does it make to the attitude or state of mind of the Accused if the police witnesses who went about that trap had misunderstood the marked money to be for a bribe. That is if the situation had been that the police understood that the first payment of M300 was towards the bribe and the second M200 was added to the bribe to make a total of M500. As against what PW 1 unquestionably said (as the transcript shows) that there would be payment of M300 cash bail deposit and of the first case and M200 cash bail deposit of the second case and finally that M500 would be paid later towards destroying/cancelling/dismissing the third case? What difference would the two scenarios make if the underlying state of affairs was that both scenarios in any event accorded with the unchallenged evidence of PW 1 that the Accused entered into an agreement with PW 1 to accept a bribe which Accused either received or waited to receive in the future.

9.8 I looked for the alleged contradiction by PW 1. I have looked closely at

the evidence of PW 1 in relation to the possible scenarios that she paints in her evidence being either that M500 paid was for bribe or M500 bribe was to l>e paid "in the future". What seems to stand out and which I believed was that the M500 for bribe money was still to be paid "in the future" in exchange for doing away with the third case. It is said the witness was not frank but that is not how she looked in the witness box. I looked at her demeanour. She was truthful. She may have looked jittery, and excited. Only that. So that no aspect which was said to indicate that she was not candid was not forthrightly pointed out by either side. She was not demonstrated to be a liar. That it was suggested at anytime that her evidence was not satisfactory can only have been cause by panic on the part of the Crown that the witness insisted that the payment of actual bribe money was to be in the future. I did not observe anything indicating that her discharge from prosecution ought not to be supported.

9.9 As a matter of law, nevertheless, the mere fact that a witness even an accomplice witness had lied in one respect does not automatically attract a rejection of all the evidence. See S v

Millar 1972(1) SA 427 at 429 as quoted by late the Honourable MP Mofokeng in Criminal Law and Procedure Through Cases (1985) at page 145.

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10.1 This scheme about the entrapping of the Accused was as near as possible to a work in the James Bond - 007 novel series in its execution. This case is unfortunately not really about such dramatics. Policewoman Motsepe (PW 5) and Policewoman Makhakhe (PW 6) were detailed to confront Accused about the money she had just received from PW 1. This was after signal given by other police personnel who were nearby. The two officers identified themselves as police officers.

10.2 On realizing that these youngish ladies (one of them could be mistaken for a 16 year old scholar) were police officers the Accused urinated. It was after they identified themselves as police officers. She requested to be forgiven. This she repeated. She commented that the confrontation will result in her losing her job and that her children will no longer be able to attend school. The question would be why did she react in this manner? It was submitted that the inference from this evidence was irresistible in showing the Accused to have had a guilty state of mind. The defence was not able to suggest a good reason why the Accused would behave in this matter. Mr. Fosa sought support from S v Ernst 1963(3) SA 666 which I found distinguishable in many respects. One example being that it dealt with interpretation of a statute. But in so far as the case speaks of a state of mind of state official who corruptly "received or agreed to receive" a

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fee the statement on page 667 F-G it quite accurately states the test as follows:

> "The existence of that intention and state of mind can be proved (or negatived) by any of the usual kinds of evidence and inferences relating thereto."

I will accordingly view the said behaviour of the Accused from that angle and draw a necessary inference.

10.3 Accused did other significant things. She had stashed the marked notes in the midst of a sum of about M4,390 in notes which she reluctantly retrieved out of her bag which was locked in the drawer cabinet. She had initially denied that she had received any money from PW1 on that day. In addition Accused failed to mention at any stage that the money given to her was to pay bail for PW l's brother. Most of the evidence of the two officers was unchallenged. Of supreme importance Accused should have made this explanation when the Chief Public Prosecutor (PW 9) and one of the senior police officers were present if the two junior police officers had intimidated her. Mind you PW 9 was called immediately and one senior officer (Moreki) followed and PW 5 and PW 6 "ala James Bond" after a signal or summoning by one of the officers.

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10.4 The two junior officers told their evidence in a straight forward and candid manner. They intended to tell the whole truth. It is correct that in the understanding of this officers if it

was not what they were told or a presumption that the money (M200) that was paid over was actually for bribe. I would find that this appeared to be inaccurate. Anyway it did not seem that it was brought about by any intention to fabricate. Mr. Leppan suggested that much discrepancy between PW 5 and PW 6 can easily be explained by effluxion of time but more significantly by the fact that PW 6 was absent from the office for a while in order to summon Inspector Moreki (PW 2).

10.5 The misunderstanding on the part of the young officers about what the money was for could even have emanated from the police headquarters where the scheme about delivering the marked notes through PW 1 was hatched. I did not feel inclined to say that it was a bad trap or a good one. Suffice to say that as a result of the following up of the marked notes as Mr. Leppan submitted the unlawful state of mind on the part of the Accused was made palpable and was revealed for what it was. Accused's side of events had to be quite impressive for a formidable body of evidence which the Crown case had become. This I say having heard both versions.

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10.0 Accused testified to say that the policemen demanded M500 from her after PW 1 had paid over M250. They threatened to assault her. The M50 was for medical attention of Nchanyana Nchanyana while the M200 was for the second cash bail deposit. There had been nothing wrong in receiving money for cash bail deposit and for onward transmission to Accounts clerks. It was something that was done quite often and above board. She could not have done anything wrong in receiving such deposits. Indeed as she said she received money from PW 1 but it was never for bribery nor had there been any agreement between Accused to take payment or receive bribery for the third case. She alluded to there being no such third case nor that she had anything to do with such third case.
10.7 Accused found nothing wrong with intending to assist PW l's brother by delivering the medical fees. She said it was an accepted practice and had been done many times before.

10.8 Accused wanted to point a picture of where there had been conspiracy, ganging up and fabrication of evidence to suit certain purposes e.g. PW 9's loathing or hatred of her. All these had been unknown to the Director of Public Prosecutions (PW 10) nor had there been a report of any

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animosity between the Accused and PW 9 (Mrs Mothae). It ultimately boiled down to where several people including PW 8 and PW 9 must have sat down to scheme and manufacture the evidence or facts that brought about the charge against Accused. Included in this, as the Accused contended was the police who were instigated, as Accused suggested, by PW8.

10.9 This theory about conspiracy, even much as it took inordinately long to discuss in Court, was difficult to believe. Accused was not telling the truth when all things were considered. For example how would PW 9 Mothae have known that PW 1 would speak to PW 8 who in turn would contact the police. I placed a lot of weight on the fact that PW 1 herself did not even know about PW 8's liaison with the police.

10.10 Much as I believed that the questions of whether public prosecutors were allowed to receive and transmit deposits, and whether they could ferry monies to prisons were peripheral

therefore I would discuss the matters no further. I would rather say that it is clear that although public prosecutors are not permitted by their terms of reference to do those things, they appear to do it occasionally as PW 9 (Mothae herself) must have at one time done it demonstrably. But they were clearly not allowed

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to do that. I found it difficult why the Accused could not just admit that which they did in practice was not allowed by the rules. Prosecutors are not allowed to handle money. Why did the Accused put her job at risk this time? She herself confessed that her job was in jeopardy,

10.11 While there was little value in Director of Public Prosecution's evidence there was even less value in DW2's (Tshabalala's) evidence than to show that Accused was not candid in one of these things, namely that public prosecutors are not authorized to handle people's moneys.

11.1 I concluded that Accused's version was palpably false beyond a reasonable doubt. I did not believe her that that PW 5 and PW 6 demanded from her M500 nor threatened her in her offence. Moreover, as per the evidence of Mothae (PW 9) the allegation that the young policewomen threatened to assault this Accused is most improbable. She could have called on for help or reported this to her senior PW 9. I tended to agree of the unlikelihood of senior prosecutor being threatened by junior police officers in her own office at a magistrate's Court d. It defied belief. My suspicion would even be that it was awe inspiring for those junior officers to have been called upon to confront the Accused. They can only have been motivated by the knowledge that their seniors were

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around and not far, if not their sense of duty.

11.2 I did no! find much to say in favour of the Accused when she was cross-examined. Of course the questioning just became so thoroughly painstaking that when it took effect signs of distress from the Accused became unmistakable. Nor did I expect much against the evidence of PW 1 in which the whole thrust and completeness of the case (subject to corroboration by PW 5 and PW 6) was. The evidence of the two young police witnesses apart from finding the marked notes as I instantly record further directly and indirectly implicates the Accused. That much was palpable through the remarks of the Accused herself.

11.3 Accused had started confidently in her evidence-in-chief. Accused was however evasive and contradictory under cross examination. She became loud and shrill when the question of her inability to challenge the evidence of PW 1 was raised. What also made her greatly uncomfortable was to realize that she could not make a good story about alleged threats and assault by PW 5 and PW 6. She realized that.

11.4 I observed that as the heat was on "when the shoe began to pinch" Accused became sweaty and distinctly restless. She took an inordinately

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long time to answer simple questions. At times she ignored answering questions if not being stubborn and aggressive. She was repeatedly asked to answer questions. The Court had to

intervene. I agreed that her demeanour was therefore poor and unconvincing. Her showing was unsatisfactory as witness and it is a factor which must count against her.

11.5 I may merely repeat for the sake of emphasis that the Accused was in dire straits that the question of conspiracy could not count for anything. It had not been suggested to Crown witnesses. It was clearly an afterthought inasmuch as no link could be established or such a strong motive to incriminate the Accused much as Accused suggested that PW 8 had promised to get even with her while she had been performing her official functions. I thought this was a red herring. This conspiracy theory added much to make the Accused an unreliable witness. This added to massive improbabilities in the Accused's version.

11.6 This aspect of certain things not having been put to Crown witness became such a thorn on the side of the Accused. Crown Counsel dwelt on it with alacrity and constantly throwing the Accused off her tangent that she on so many occasions (and unfortunately too many) she resorted to blaming her Counsel. I agreed that it was an accurate observation that

Accused's Counsel painfully and to his credit and in a vain attempt to serve the interests of his client he had to shoulder responsibility for her failure. This was not enough as it was clear that even Counsel was surprised at some of the answers given by his client.

12. Having spoken about Tshabalala DW 2 who dealt with a peripheral issue of taking of money deposits by public prosecutors DW 3 (Mrs Lephoto's) evidence remains. Why, I thought the question of taking of money deposits was peripheral I thought it was so inarguable that a public prosecutor should by right and duty not receive such deposits for any purpose. I did not see why Tshabalala had to be called unless it was merely to show solidarity with Accused. If so that was cheeky to say the least.

13.1 Mrs Lephoto's evidence as Mr. Leppan suggested was characterized by its improbable nature. To start with the core function of an accounts clerks will always be to issue receipt immediately on receipt of moneys. I reiterate. It has to be immediate. This is more so where there will always be a reason for paying out of moneys such as cash bail deposits which are ordered in fixed amounts.

13.2 Mrs Lephoto's story was straightforwardly nonsensical. It is surely only for purpose of record that commentary on her evidence should proceed further that it already has. She says she kept the amount of M300 given to her by Accused for two weeks without issuing a receipt. When she got wind of Accused's troubles she returned the money to PW1. This was not put to PW 1. She had not told nor reported the incidence to anyone until she testified about it in this Court when to have done it earlier would have lend credence to Accused's story. She should have come out when Accused was arrested. That she did not is so mystifying that it can only merit rejection as I concluded.

13.3 So inexplicable was Mrs Lephoto's inability to have issued a receipt that it surely was nonsensical that she ever received the money is so improbable. In all things about her cock-and-a-bull story she was so cocky in the witness box. How can this Court believe that when M300 was being offered as full cash bail deposit for one case no receipt was issued and the

money was being floated amount in the witness office for a few days on the "off chance" that PW 1 would return with an outstanding M200 for another case? One of the strangest things is the Accused appearance not to have suggested this fact of Mrs Lephoto having received the cash from her to anyone. Neither to PW 9, neither to

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the police, neither to the Crown witnesses. If not why can't one think that that cash actually went towards the bribe not the bail deposit. This latter aspect seemed not to be conclusive in view of PW l's evidence.

14.1 I found that the Accused's version must yield to that of the Crown became the former was false beyond a reasonable doubt. This was indeed brought about by the incredibility of Accused to challenge PW 1 and other aspects relating to testimony of other Crown witnesses. Evidently Accused version was this kind which evolves from witness to witness with the resulting misfortune that witnesses go by and are not challenged on issue over which they should have been. The inability to put necessary questions, to witnesses characterized the Accused's defence.

14.2 As I said it cannot have been proved beyond a reasonable doubt that when PW 1 delivered the amounts of M300 and M250 respectively those amounts were actually for paying for bribery. So that I would reject the Crown's contention that the evidence of PW 1 can be resolved objectively by accepting that she lied by substituting the word bribery for bail. It cannot bo said to be clear that the M550 paid was to bribe the accused not to pay for cash bail deposit and medical fees.

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15.1 The involvement of PW 8, PW 5, PW 6 and other police officers in the way of a trap would have gone a long way to prove bribery condusiv .Uely in the following hypothetical circumstances. If having paid the initial M300 another amount of M750 would have been put forward. This would have taken care of the M300 and M200 for cash bail deposit, M500 for bribe and M50 for PW 1's brother medical expenses. Then PW 5 and PW 6 would have accurately asked for M500 from Accused without fear of obscurity or ambiguity. May be a "cure-all" would have been to involve PW 1 in the scheme. Unfortunately that is not the evidence before the Court

15.2 My finding is that the second scenario is accepted as having been proved by the Crown beyond a reasonable doubt. It is that the evidence shows that the Accused agreed to accept (having herself made the invitation) M500.00 from PW 1 in exchange for not prosecuting her brother Nchanyana Nchanyana at some future date for the third case.

16. As stated earlier I allowed the amendment to the charge sheet by inserting the words ".....agreed" after the word corruptly. The evidence of PW 1 was not challenged whatsoever. Accused would clearly suffer no prejudice, as I determined, by the amendment which would be proper under section 161 if there had been no application from amendments. 1

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found that the crime of Bribery as charged against the Accused has been proved by the Crown beyond a reasonable doubt.

17.1 Authorities from this Court and elsewhere prove that "allegations of bribery and corruption have recently enjoyed considerable publicity and government has committed itself to fighting this evil with every means at its disposal." See South African Law Commission (Working Paper) Project 75 Bribery (1990). (Working paper) Rex v Masupha Ephraim Sole CRI/T/111/99 Acting Justice Mr. Justice BP Cullinan, 20th May, 2002, R v Acres International Limited CRI/T/2/2002 Chief Justice M.L. Lehohla 17th September 2002. I found the working paper a very useful treatment of the subject.

17.2 The above sentiments find expression in the words of Mr. Justice de Klerk in the judgment in Ex parte Tayob and Another 1982(2) SA 822(T) at w88:

> "Bribery and corruption are offences which attack the framework underpinning an orderly society. It is more odious and more of a threat against an honest, open community that other 'dishonest' conduct becomes other dishonest conduct in general is not an attack against the framework supporting society which may cause it to rot and collapse but in general only threatens individual members or isolated aspects of society."

The case of S v Narker 1975 (1) SA 583 is also referred to together with the

above quotation in the working paper "and in Rex v Masupha Ephraim Sole (sentence) 4th June 2002 where several cases on bribery are quoted most instructively. In S v Narker (supra) Mr. Justice Holmes JA said at page 586:

> "Bribery is a corrupt and ugly offence striking cancerously at the roots of justice and integrity, and is calculated to deprive society of a fair administration."

The cancer must be more destructive and harmful when the accused is a state official who is at the pillar of the administration of justice. The innards of the system become corroded by the cancer. That is why the system may look wholesome from outside only to collapse at a later stage. This might have been the direction things were taking. Whether it was at an early stage is immaterial.

The working paper refers to 1989 T. R. H.R. 383-35 where the learned, author Labuschagne distinguishes the following reasons for punishing bribery:

> "It is in conflict with the basis of democracy. Official bribery violates the relationship of trust which underlies the meaningful function of the state. Commercial bribery affects competition and bribery promotes other crimes."

The working paper starts on page 7 to comment about the definition of the

crime of bribery by saying that: "A definition of the crime should be wide enough to make provision for the interests protected thereby". In R v Chorle (1945 AD 48 at 496) Mr justice Schreiner (Judge of Appeal) stated:

> "The law of bribery is designed to protect the state against those who by those who by gifts tempt its officials to use those opportunities as such to further promote interests in slate affairs ..."

And in S v Van der Westhuizen 1974(4) SA 61(c) Mr Justice Baker approved of the author Hunt's view that:

> "It is also designed to protect the community generally against corrupt public administration."

The old definition as found in Garndener and Landsdowne South African Criminal Law And Procedure (1st Editionl919) at 735 reads as follows:

> "It is a crime at common law for any person to offer or give to an official of the state, or for any such official to receive from any person, any unauthorized consideration in respect of such official doing, or abstaining as having done or abstained form, any act in the exercise of his official function."

The words "in his official capacity" were later substituted for "in the exercise of his official duties" in later editions of the work. In the present case it was not an issue whether Accused was a state official. See S v Makhunga 1964(3) SA 513 (CPD).

The working paper suggest that since the crime of bribery is committed both by the person who gives the bribe and the person who receives it seemed desirable to formulate the crime committed by the briber and the crime committed by the bribee separately and as follows:

> "Bribery (as a briber) consists in unlawfully intentionally offering or agreeing with a state official to give any consideration in return for action or in action by him in an official capacity. (See also South African Criminal Law and Procedure Vol. II (JR Milton) 2nd Edition page 219.

And further that:

> "Bribery (as a bribee) is committed by a state official who unlawfully and intentionally agrees to take consideration in return for action or inaction by him in his official capacity."

The learned author CR Snyman in his Criminal Law (1984) at page 314 refers to active and passive bribery that is:

> "Active bribery consists in unlawfully and intentionally giving, agreeing to give or offering to give a state official any consideration in return for either future or past action or inaction by that state official in an official capacity."

Whereas:

> "Passive bribery on the other hand is committed when a state official unlawfully and intentionally receives or agrees to receive any consideration in return for future or past action or inaction in his official capacity." (My emphasis)

I would safely conclude that the latter definitions fit the facts of the

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present case. Moreover the learned author complements what I called the second scenario in the analysis of the facts where he says:

> ".....for passive bribery to be completed it is not necessary that the that the consideration stated actually have passed into the hands of the bribee, his mere acceptance of an offer is sufficient to constitute the complete crime."

This is why, in my view, the danger of misunderstanding PW l's uncontradicted evidence in as much as she said "payment would be made in the future" lies. Once the agreement was proved the crime itself was proved.

I concluded that the Crown has proved its case beyond a reasonable doubt. I would therefore find the Accused guilty as charged. My assessor agreed.

T. Monapathi
Judge
29th October, 2002

SENTENCE

Delivered by the Honourable Mr. Justice T. Monapathi on the 6th day of November 2002

I have already found this Accused guilty of bribery.

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It is worth repeating that sentencing is the most difficult part of any trial.

Counsel may make so many suggestions that the Court should give thought to in the hope that these points of view will be endorsed. The task remains a largely difficult one where one will normally be without guidelines or matrices within which to work.
The Court has listened most attentively the personal circumstances of the Accused which centre around that she will lose her job, she is a divorcee and a single parent and that the schooling of her children will suffer and that those who depend on her will be left in dire straights.

Ranged against that are other interests which are paramount and had to loom large and which are related most directly to the offence and indeed its gravity. That there were aggravating features in the crime committed is beyond doubt.

One of the aggravating features is that, despite that, Accused has not elected to go into the witness box and that she was invited to change her attitude she has shown no remorse.

Secondly, she has abused a position of trust and public responsibility. See

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Rex v Julia 'Maphamotse Lebina and Another C of A (CRI) No.7/2001 4th
October 2002 per Ramodibedi JA. For a Prosecutor and a Senior Prosecutor at that, it is difficult to imagine a more serious abuse of trust as Mr. Leppan submitted. I respectively agreed. Her colleagues, the Director of Public Prosecutions office and this High Court look upon prosecutors to uphold the law. The Accused has demonstrably failed in this trust. Indeed judging from the suggestion made that it could not be the Accused acting alone one shudders to imagine once again how much of the cancer remains in the environs of the Court where she worked.

The extent of corruption may be serious when one suspects that Accused has prevailed over other members of the magistrate's Court to attempt to assist her and show solidarity at least. Certainly with the last witness Mrs Lephoto it was an outright attempt to seek to deceive the Court with cheek and abandon. One may well surmise how deep the cancer is if the tip of the iceberg is so fearsome.

Thirdly what the Accused has done has had an adverse effect on the administration of justice and in particular what the man in the street perceived the majesty of justice in this country to be.

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What the Accused was trying to do with trying to assist PW 1, if successful, would have very well amounted to a guilty person being not prosecuted, complaints being thrown out or neglected, and police being frustrated in their investigations. The overall effect would be that the administration of justice is stabbed on its soft underbelly by a public official who is paid by government and the tax payer to do legitimate and valuable administration of criminal litigation in this country.

I accepted the Crown's fear that the Accused's conduct had the effect of setting a wrong example not only to junior prosecutors but to magistrates because dismissal of a case involves the magistrate and prosecutor working in tandem. This was even gratuitously suggested in the evidence of PW 1. In my mind this cannot be an idle threat. It boggles one's mind how tattered the system would ultimately look like when such corruption is in full throttle. It would be best to call it a disaster for absence of a better word.

When all these factors are considered even separately as the Crown suggested a fine of any nature would be distinctly inappropriate. It might very well suggest or create an impression that anyone can buy himself out of trouble. This would be perceived, I suppose, even more if a high amount of a fine was imposed. It is how invidious it becomes if one attempts to marry a fine to a

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serious crime that this perception may linger on. It is that one can buy himself out of ill gotten gains. This would be unfortunate. A suspended sentence would create the same impression or even impotence on the part of the Court.

The Accused has denied committing the offence charged. In this she manifestly persisted if one judges from the fact that she could have gone into the witness box and changed her attitude. It was being said she was throwing herself into the mercy of the Court . Mr. Leppan opined that if Accused had changed her mind it would affect sentence by way of a lesser term of imprisonment. But it would remain a stratagem for seeking to avoid a prison sentence that was "beckoning". Indeed Accused would have to be given credit for that but a belated change of heart is often associated with absence of true remorse. One has to judge the attitude of an accused from the start of a trial but not at the time when the bitter end is near. I thought so.

The society looks at the Courts as protectors of society itself, its highest legal and moral values and as Mr Fosa said "of the young democracy". The senior officials in the Law Office, and Justice Department look at this Court as being well poised to mete out a sentence that will deter others and root out the corruption. Bribery as a form of corruption is indeed a concern as I have pointed out in my judgment and it must be removed from under its roots by way of

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imprisonment of culprits to long periods of imprisonment. To emphasize this would bo the best way of truly seeking to protect the society.

That this kind of corruption is dangerous can easily be learned from the attitude of this Court and other jurisdictions as Court cases demonstrate. Mr. Leppan referred this Court to S v William 2000(2) SACR 396(C) where the case of S v Narker And Another 1975(1) SA 587 by Holmes JA as quoted and approved in S v Deal Enterprises (Pry) Ltd And Others 1978(3) SA 302(T). At 316 Homes JA is said to have given what he said was "a denounciatively emotive....., although accurate characterization of bribery" as follows:

> "Bribery is a corrupt and ugly offence striking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration. In general courts view it with abhorrence."

In Williams case a prosecutor had agreed to "lose a docket" in exchange for a sexual favour. Equally demonstrate denounciative words are used on page 399 of the Williams case by reference to Moral Essays by Alexander Pope and the words of Baker J in S v Van Wethuizen 1974(4) SA 61(c) at 62H-63A.

The concept of justice in this country looks to the Courts for proper service and fair administration. The ideal is not idle. That is why the Courts will and should view acts of corruption which are "calculated to deprive the society of

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its fair judicial administration.....with abhorrence."

The crime of bribery must be punished severely. If it is not "like a general flood shall deluge all; and avarice creeping on; spread like a low-bom must, and blot the sun". "See Moral Essays - Alexander Pope. This mean that if let lose bribery like all corruption will cause immense damage and havoc.

Another case referred to the Court was S v Mogotsi 1991(1) SACR 604(c) per Cloete J. It was where a first offender (like this Accused) who was a traffic officer accepted a fee of M100 from a motorist for cancelling a traffic summons. A sentence of four years of which two were suspended was imposed.

Cloete J in S v Mogotsi referred to a unreported decision of Paul v S where Streicher J used words at page 3 of the judgment which are quite instructive in a comparable case. The words were that:

> "The offences committed are very serious offences. A policeman is appointed to uphold the law and must realize that should be that to do so and should we undermine the administration of justice by taking bribes, he would be punished severely. If that is not done and the public is not assured that no such misconduct would be tolerated in the police the administration of justice will become impossible."

In the above case although it was found that there were several mitigating

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factors including remorse, it was found however that nothing less than imprisonment was an appropriate sentence. Anything less would sent a wrong message as alluded to earlier in this judgment. The suggested punishments included suspended sentences, postponement of sentences and payment of fines by instalments all of which are allowed by section 314 of the CP&E in proper cases. In the present case there was not even an apology.

Fairly enough Mr. Leppan acknowledged Mr. Fosa's contention that the fact that the Accused had been a public prosecutor who lent a hand in sending prisoners to jail would meet those prisoners if sentenced to imprisonment. That is why in South Africa there are special arrangements. It is however unfortunate that this in some case is unavoidable. So it should be in this case as I concluded.

The Court agreed with both Counsel that the fact that the Accused is single mother has those consequences whose effects will be immeasurably traumatic if she is sent to prison. This will probably call for the resources of the Accused's ex-husband and family to look after the children. As I agreed with the Crown nothing more can be done to alleviate the situation through the exercise of the powers that the Court has in the circumstances.

Mr. Leppan was agreeable to the suggestion that one of the problems that

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the Courts need to find the sense of is the difficulty of bringing about uniformity in sentences. This is even the situation in South Africa. Uniformity of sentences is an ideal for which to strive. There still are complaints in other countries about disparity in sentences even in a single country. What the Courts should strive to achieve also is to indicate that a crime is

dealt with properly in the estimation of all. I was of the view that this can still be achievable if a sentence has not been too low or too harsh.

I thought that it was not farfetched to suspect that the case was brought to the High Court because of the interest that the Director of Public Prosecutions had in it. Indeed it was serious in a number of ways. One reason suggested by Mr. Fosa was the need to avoid putting pressure on Accused's colleagues if the matter was prosecuted before a magistrate by an ordinary public prosecutor. I agreed. All in all this showed that the offence was serious.

Mr. Fosa warned that the Court should be wary of being influenced by matters not proved in this case such as that this corrupt practice could have been taking place for a long time without proof. Such would be bringing extraneous things into the court's thinking. That would be an undue influence. I can only say that 1 now suspect and merely suspect that the practice takes place and not more.

I was mindful of Mr. Fosa's request that the Court has to exercise its powers of mercy and avoid viewing things with anger. I agreed. I wondered if there was anything called "righteous anger". This Court however ought to be reminded of the words of BP Cullinan AJ in Rex v Ephraim Masupha Sole 4th June 2002 where the learned judge says at page 11-12:

"In brief, while the quality of mercy is "not strained", the Court must avoid pitfalls of "maudlin sympathy" or "permissive tolerance" in the matter.

> "Accordingly the Court's painful duty is clear: the sentence imposed by the Court must express the public abhorrence of what has transpired and in particular emphasize that Lesotho will not tolerate corruption in its midst. In this respect the sentence imposed must be such as to act as a deterrence to others in the future."

I am sure however that all things pivot around the need for the Court to effectively seek to curb a dangerous kind of a corrupt practice with the right attitude.

This Court thought that a proper punishment was certainly that of imprisonment.

The Accused is accordingly sentenced to a period of seven (7) years imprisonment without option of a fine.

T. Monapathi
Judge