C of A (CRI) No. 7 of 2001

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

REX Appellant

and

JULIA 'MAPHAMOTSE LEBINA First Respondent
MAJAKATHATA LEBINA Second Respondent

Held at Maseru

CORAM
Ramodibedi, J.A.
Kumleben, J.A.
Plewman, J.A.

JUDGMENT

RAMODIBEDI, J.A.

[1] The two appellants who are husband and wife were charged in the High Court (Maqutu J sitting with two assessors) with twenty-four counts of the crime of theft, alternatively fraud amounting to M196 347-96.

[2] It is the Crown case that between the period 19 November 1990 and 21 December 1992 the respondents were part of a

crime syndicate that stole monies from a compulsory savings scheme (the Scheme) in the Treasury Department of the Government of Lesotho (The Treasury).

[3] It is alleged that the First Respondent was the moving spirit in the syndicate and that she abused her trust as senior accountant in the Treasury by procuring cheques from the Scheme payable to the names of persons not entitled to receive such payments.

[4] It is further alleged that the First Respondent directly, and the Second Respondent through the medium of the former, would hand over the stolen cheques to the persons who would in turn deposit them into their own bank accounts where they were met with payments by the Government. Thereafter such persons would return the funds to the First Respondent for sharing the ill-gotten monies with her.

[5] The other alleged *modus operandi* was for the "persons" referred to in paragraph [4] to hand over the stolen cheques to the Second Respondent who would in turn deposit them into his own business account referred to as "Downtown Café" where they were met with payment by the Government.

[6] At the close of the Crown case the First Respondent elected not to testify while the Second Respondent testified in his own defence and thereafter the defence closed its case without calling witnesses.

[7] The First Respondent was convicted on six counts namely counts 1, 10, 18, 20, 21 and 22 amounting in all to M45 533-54. These counts, as I observe, relate to the monies allegedly

received by the First Respondent directly from various individuals. She was sentenced to twenty-four months imprisonment.

[8] For his part the Second Respondent was convicted on twelve counts namely counts 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14 and 16. Once more I observe that these counts related to the monies allegedly received into the account of "Downtown Café" admittedly under the control of the Second Respondent. He was sentenced to eighteen months imprisonment.

[9] The Crown has appealed to this Court principally on two grounds namely that since the First Respondent was the prime mover in the scheme and was also undoubtedly in control of the cheques in question the Court *a quo* erred in not convicting her on counts 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14 and 16 as well and that the sentences imposed on the two Respondents were so unreasonably lenient that no reasonable court could have imposed them.

[10] At this point it is no doubt opportune for me to say something about the record of proceedings in this matter. Notwithstanding several warnings of this Court in such cases as *Mayothola Motlatsi v Director of Public Prosecutions 1999-2000 LLR&LB 23*, *R v Molibeli T□osane 1999-2000 LLR&LB*

78 and *Phakiso Seate v R 1999-2000LLR&LB 426* about unsatisfactory records of proceedings, I regret to say that the record in this case is a step backwards. It is somewhat cryptic and contains several flaws which have made our task very difficult. By way of random examples, there is no certificate of the Registrar of the High Court as to the correctness of the record, witnesses are not numbered (the numbering in this judgment is for the convenience of the Court), several pages in the record are incomplete and simply bear the trade mark "indistinct" thus suggesting that no attempt was made to reconstruct the record which is for that matter replete with misspellings of names of people and places as for example Khubetsoana is spelt "Kgobatswane", Mr. Phafane is spelt " Mr. Pafani", Mapetla is spelt "Maphetla", Motseoa Potsane is spelt "Motsewa Potswane", Maphamotse (First Respondent) is spelt "Mapumotso", Ha Matala is spelt "Hamadala". It is clear, as it seems to me, that the person who prepared the transcript in this matter had no inkling of Sesotho language or Sesotho names. Lastly there are no reasons attached for sentence in the matter.

I shall return in due course to this aspect.

[11] The upshot of all this is that slovenly records as the one we have had to grapple with here not only bring the whole justice system into disrepute but may very often lead to miscarriage of justice. Fortunately this last scenario does not arise here.

[12] With that prelude I turn more fully to the salient facts. In this regard the Crown relies principally on the evidence of PW1 T□eliso Mosebekoa, PW2 Khomo Ramotsei, PW3 Masebatho Florence Masuku, PW4 M. Mapetla, PW5 Mapeete Setala, PW6 Makholu Anna Pholo, PW7 Malesiamo Motsoasele, PW8 Rantalali Matsepe and PW9 Inspector Pita in support of its contention that the First Respondent should also have been convicted on counts 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14 and 16. Before analyzing the evidence of those witnesses it is convenient, I think, to refer to the admitted facts in so far as they are relevant to this appeal.

[13] It requires to be noted that at the trial the defence made the following crucial admissions in terms of Section 273 of the Criminal Procedure and Evidence Act 1981:

(1) That the payees reflected on the cheques were not employed at the various Government Departments or parastatals as the Scheme contemplated.

(2) That the payees as reflected on the cheques in question were not contributing to the Scheme and could therefore not benefit from claims lodged with the Scheme.

[14] The witnesses PW1, PW2, PW3, PW4, PW5 and PW8 were introduced as accomplices. They all gave damning evidence against the accused (Respondents). I shall confine myself to the salient features of such evidence in so far as this appeal is concerned bearing in mind also that the Respondents have themselves not appealed against both their convictions and sentences.

[15] In a nutshell PW1's evidence established that in January 1991 he was employed by the Respondents to install electricity in their café. He charged them M1700-00 for this. He was told in advance that since the Second Respondent was not working, payment would be settled by the First Respondent who was employed. Indeed the latter duly gave him a cheque in the sum of M5 945-42 referred to on count I. He queried the amount as it was larger than his entitlement but the First Respondent instructed him to return the balance to her after he had cashed the cheque. He complied and took his M1700-00 while the First Respondent got away with the balance.

[16] In cross-examination PW1 revealed that he actually received M1700-00 twice making a total of M3400-00. He had not disclosed this to the police in his statement because he was frightened since the Respondents threatened him with death if he revealed it.

[17] PW2 testified on counts 10 and 24. It was his evidence that the First Respondent gave him the cheques referred to on counts 10 and 24. He explained that this was because he had "problems" and so did the First Respondent. He was "running short of finances" and wanted to send his children to school. The First Respondent on the other hand informed him that she wanted her brother's children to have money because they were left alone.

[18] It is the evidence of PW2 that according to the arrangement she had with the First Respondent he was supposed to go and encash the cheque at Lesotho Bank and share the proceeds with her. This he did and regarding the cheque referred to on count 10 he actually took the cash to the First Respondent at her residential place. In a nutshell they shared the proceeds of the cheque. Similarly the cheque referred to on count 24 was encashed by PW2 and he shared the proceeds thereof with the First Respondent at the latter's residential place as arranged.

[19] Under cross-examination it emerged that PW2 was actually related to the First Respondent who is his maternal aunt. In my view this is a factor that tends to reduce the risk of false incrimination.

[20] PW3 was employed as a supervisor in the Ministry of Agriculture at the material time. Although she was called mainly on count 18, I observe that her evidence clearly covers all the counts insofar as it establishes the *modus operandi*

against First Respondent and, if I may add, the learned Judge *a quo* overlooked this factor. I shall deal with this aspect more fully later.

[21] PW3's evidence establishes that the First Respondent was brought up at her family as her parents were working there. On 10 October 1990 the First Respondent gave her the cheque referred to on count 18. It bore the witness's names and she was specifically instructed by the First Respondent to take it to the bank and encash it after which she was going to get half of the money.

[22] It is PW3's evidence in a nutshell that she did as instructed and the money was shared between herself and the First Respondent as promised. She testifies that the First Respondent explained she was "giving" her the money because she was helping her since they were related and she knew her problems.

[23] In cross-examination PW3 stuck to her guns and was unshaken.

[24] The evidence of PW4 is crucial. She was a driver at the Ministry of Information and Broadcasting. She is PW3's sister and she too testifies that the First Respondent was brought up in their family. She too was handed a cheque by the First Respondent. This is the cheque referred to on count 21.

[25] In my view, I do not think that there can be much doubt that PW4's evidence is damning against the First Respondent and it actually covers all the counts insofar as it relates to the

alleged *modus operandi* of the First Respondent. In this regard she says that the latter told her that there was a way in which "cheques" could be available and that she would hand them out "so that we could cash them." It is her evidence that the First Respondent told her that she was looking for a way in which she could build a house. She did subsequently build such a house.

[26] The *modus operandi* of the First Respondent as testified to by PW4 corroborates the evidence of PW1, PW2 and PW3. Once more the First Respondent instructed PW4 to deposit the cheque into her bank account and that "when the money is ready we should share it."

[27] PW5 was an assistant clerk at the Sub-Accountancy responsible for Government revenue collection. She was "friends" with the First Respondent and she confirms the latter's *modus operandi* in that she handed her a cheque under similar circumstances as those testified to by PW1, PW2, PW3 and PW4. Significantly this took place at the Respondents'

residential place.

[28] In a nutshell PW5 testifies that she explained her problems to the First Respondent as they were co-workers. The First Respondent "indicated that there was a way in her work where she was employed, a way of making cheques of this kind." This damning evidence, I observe, was not challenged in cross-examination and must therefore be accepted as the truth especially as there is no gainsaying evidence by the First Respondent.

[29] Relying on the principle promulgated in *Rex v Ncanana 1948 (4) S.A. 399 (AD) at page 405 – 406*, the learned Judge *a quo* duly cautioned himself against the danger of convicting on the evidence of the accomplice witnesses referred to above. In accepting their evidence he took into account the following factors:

(a) that the risk of wrongful conviction was reduced by the fact that the First Respondent did not give evidence in rebuttal after the crown had adduced a *prima facie* case against her.

(b) that the accomplice witnesses corroborated each other in as much as the offences were the same and the *modus operandi* used by the First Respondent was the same.

[30] In my view the approach of the learned Judge *a quo* cannot

be faulted. But before concluding the matter it is necessary to refer to two more Crown witnesses whose evidence is equally damning against First Respondent namely PW6 'Makholu Anna Pholo and PW7 'Malesiamo Motsoasele.

[31] PW6 is a senior auditor with a B.Com. degree from the National University of Lesotho (NUL). She has been an accountant since 1979 and her daily routine work was to audit the financial books of the Government including its various departments and parastatals.

[32] It is PW6's evidence that during 1994 she did an investigation into the Scheme. In that regard she asked the First Respondent about the whereabouts of the register for compulsory savings cheques. The latter told her there was no such document but referred her to the cheque list. One Mokhoabane however told PW6 that the register in question existed and produced it.

[33] The next step was for PW6 to ask the First Respondent for a list of contributors to the Scheme. The latter obliged and PW6 discovered that not all the people who "received" the cheques were contributors. This apparently aroused her suspicion and with the permission of the Auditor-General she embarked on a "hundred percent check" on all parastatals.

[34] PW6's investigation revealed rampant theft of money from the Scheme covering all the 24 counts in question. Fictitious payees were used to steal such monies including the five accomplices referred to above.

[35] More importantly, it was the evidence of PW6 that the First Respondent was "one of those people who signed for the

cheques in the register" as acknowledgement that she received them.

[36] PW6 confirmed that the amounts appearing on counts 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15 and 16 were deposited into the Downtown account held by First Respondent's husband namely the Second Respondent. It is necessary to note here that the defence actually made a formal admission that the account in question belonged to the Second Respondent.

[37] The evidence of PW7 is equally damning against the First Respondent. She was a financial controller at the time with vast experience in accounting matters. At one stage she served for 13 years both in New York and Washington at the Lesotho Mission to the United Nations.

[38] The evidence of PW7 establishes that she conducted an investigation into the procedure followed at the Scheme. This was fully explained to her by the First Respondent herself as the supervisor of the compulsory savings section and the following facts are accordingly common place namely that:-

(a) there was a system of checks and balances in both the computer section and the compulsory savings section.

(b) the supervisor (First Respondent) after verifying the correctness of information about an individual would <u>authorize</u> the computer section to go ahead and issue a cheque.

(c) Thereafter payment would be made but only "via" First Respondent.

(d) From the computer section the cheque would be handed over to First Respondent.

(e) From the First Respondent the cheque would be picked up by an <u>authorized</u> person from the parastatal in question on behalf of the payee.

(f) The register of cheques was kept by First Respondent and signed by payees.

(g) First Respondent had access to compulsory savings cheques because she accepted such cheques from the computer section, kept them in the safe and gave them out to the payees.

[39] PW8 Rantalali Matsepe also gave evidence as an accomplice. He testified that he was employed as a radio announcer in the Ministry of Information and Broadcasting. Although he gave evidence on Count 23 this witness corroborated all the other accomplice witnesses on the First Respondent's *modus operandi*. In this regard it is his uncontested evidence that at the material time in question he had financial problems which he related to PW4. The latter promised to meet someone from the Treasury. She did as promised and after some days she came back with a cheque bearing the witness's names in the amount of M7 971-17. This is the cheque referred to on Count 23 dated 19 November 1990. He took the cheque and deposited it into his account at Lesotho Building Finance after which he withdrew M5 000-00. He took

this cash to PW4 for the purpose of sharing it with the "lady who wrote the cheque" at the Treasury as per prior arrangement.

[40] It is worth noting that PW4 was in fact recalled and she confirmed the evidence of PW8. In particular she confirms and indeed stands unchallenged that she received the cheque referred to on Count 23 from the First Respondent with the specific instruction to hand it over to the owner thereof namely PW8. This took place at PW4's place of work and she did as instructed. It follows in my view that the first Respondent is the "lady" at the Treasury referred to by PW8 in his evidence.

[41] PW4 further confirmed that she is the one who supplied the First Respondent with PW8's names because the latter needed money. The arrangement was such that the First Respondent would write the cheque and thereafter get her share of the money through PW4. Significantly she was unchallenged in cross-examination on this damaging version. She confirms further that the First Respondent personally

"collected" the money from her place of work.

[42] Finally the Crown led the investigating officer PW9 Inspector Pita. His evidence was essentially of a formal nature and I shall not trouble to recite it in so far as this appeal is concerned.

[43] As I have pointed out in paragraph [6] above only the Second Respondent testified for the defence. The First Respondent elected not to testify. I shall deal with this aspect shortly.

[44] The approach of the learned Judge *a quo* in its judgment was to divide the counts in this matter into two categories the first being monies received by the First Respondent from various individuals and secondly the monies paid into the account of Downtown café under the control of the Second Respondent. Having done that he then held that the First Respondent was accountable for counts 1, 10, 18, 20, 21 and 22 only and acquitted her on the rest of the counts. Similarly the Second Respondent was only convicted of the counts in respect of which cheques were deposited into his Downtown account

namely counts 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14 and 16. In his own words the learned Judge *a quo* said the following:-

> "Consequently Accused 1 has not gone into the witness box to contest the evidence of PW1, PW2, PW3, PW4, PW5 and PW8 in respect of counts 1, 10, 18, 20, 21, 22, …. It goes without saying that Accused 1 had a *prima facie* case to answer as she was not only one of the people who were Government Officials dealing with Compulsory Savings funds but had definite allegations of criminal conduct leveled against her."

[45] In my view the approach of the learned Judge *a quo* and his acquittal of the First Respondent on the counts in question as set out in paragraph [44] is unjustified on the facts and clearly amounts to a misdirection entitling this Court to determine the matter afresh. Such approach failed to take into account what has been stated at paragraphs [20], [25], [27], [28], [35], [36], [39] and [41] above namely the *modus operandi* of the First Respondent whose true effect was to cover all the counts charged. Indeed it has long been the law that similar fact evidence or evidence of design, plan, system or course of conduct is admissible to prove a charge falling within such

design or plan. See for example *R v Katz 1946 A.D. 71*, *R v Viljoen 1947 (2) S.A. 56 (A)*, *R v Maharaj 1947 (2) S.A. 65 (A)*. But above all, the learned Judge *a quo* should, as it seems to me, have found on the facts that the First Respondent was in control of all the cheques in question including those which were deposited into her husband's Downtown account.

[46] More importantly it is apparent from the learned Judge *a quo*'s quotation referred to in paragraph [44] above that he completely overlooked the evidence of PW7 which, as will be recalled, established that there was a system of checks and balances put in place as fully set out in paragraph [38] above. The evidence is indeed overwhelming that, as the supervisor, all cheques drawn from the Scheme had to be authorized by the First Respondent before the computer section could print them out. Thereafter she had access and was in full control of the cheques as well as the register thereof. It was her responsibility to hand over the cheques to the *bona fide* payees and nobody else.

[47] It follows from the aforegoing facts of this case, looked at not in isolation but in their totality, that the inference is inescapable that the First Respondent had a hand in and knew about all the stolen cheques referred to in the whole indictment. In my view this is the only reasonable inference that can be drawn. In *Mamakoae Mokokoane v Rex 1995-96 LLR&LB 125* Steyn J.A. (as he then was) writing for this Court expressed himself in the following terms which apply with equal force to the instant matter:

> ".....one has to have regard to the gross inherent improbability of her version. Appellant was the senior official in the department, charged with the obligation of ensuring the integrity of the management of the accounts. PWs 3 and 4 were her juniors and accountable to her. She was qualified and had considerable experience in the accounting field. She was the person who participated in the preparation of documents which enabled funds to be generated which "disappeared."

At 129 he added the following:

> "funds were stolen pursuant to an elaborate, carefully structured plan to defraud. Extensive documentation had to be prepared and presented via official channels, using presigned forms for a

fraudulent purpose."

Those are remarks which I am happy to adopt. I respectfully share the learned Judge of Appeal's sentiments which, as it seems to me, fit the present matter like a hand in glove.

[48] At the very least, I consider that at the close of the Crown case there was a clear *prima facie* case for the First Respondent to answer on all the counts. As I said in paragraph [45] above, and as I repeat now, it was a misdirection for the learned judge *a quo* to hold that there was a *prima facie* case against the First Respondent only in respect of counts 1, 10, 18, 20, 21 and 22. Uncontradicted evidence has clearly established, in my view, that she was the moving spirit in the whole illegal design or plan to steal money from the Scheme.

[49] As will be recalled from paragraphs [6] and [43] the First Respondent failed to testify in the matter. This, to my mind, in circumstances where direct evidence levelled against her clearly

called for an answer. It follows, in my view, that in the absence of an explanation from her the *prima facie* evidence became conclusive proof against her and that the only inference that can be drawn from such evidence is that she was involved in the illegal scheme to obtain cheques and to deposit them into the account of her husband, the Second Respondent, with the obvious intention of sharing in the proceeds in accordance with her proved *modus operandi.* See *S v Masia 1962 (2)SA 541 (A) at 546*, *S v Veldthuizen 1982 (3) SA 413 (A) at 416 G-H*, *S v Boesak 2000 (3) SA 381 (SCA) at 396*. Accordingly there can, in my judgment, be no doubt that the Crown succeeded in proving its case against the First Respondent beyond reasonable doubt and that she should have been found guilty of theft on counts 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14 and 16 a well totalling M98, 353-65.

[50] It requires to be stressed however that as a general rule mere failure of an accused person to testify at the close of the Crown case does not automatically result in conviction or proof

beyond reasonable doubt in all cases. Indeed, as was cautioned in such cases as *R v Nyati 1916 AD 319 at p320*, *S v Masia* (supra), *S v Mehlape 1963 (2) SA 29 (AD) at p34*, the fact that an accused has failed to testify is a consideration that should not be pressed too far beyond the weight of the evidence presented by the Crown. For example it should not be used simply to cure a deficiency in the Crown case. It all depends on the facts of each case the main consideration being whether the Crown has succeeded to establish a *prima facie* case in the sense of adducing evidence upon which a reasonable man could convict. There is a wealth of authority in this regard. See for example *S v Mini 1963 (3) SA 188 (A) at 195 – 196*, *S v Kola 1966 (4) SA 322 (A) at 327 E-F*, *S v Mthetwa 1972 (3) SA 766 (A) at 769*.

[51] It remains then to deal with the question of sentence. As will be recalled from paragraph [10] above there are no reasons furnished for the sentences that the Court *a quo* imposed in respect of both Respondents. This is not only regrettable but also unforgivable. Accused persons are entitled to know the

reasons why they are sentenced otherwise such sentence might be perceived to be arbitrary and contrary to the tenets of justice. There is no record as to mitigation of sentence. We have had to rely on the reconstructed information supplied by both counsel.

[52] **The case against the First Respondent.**

As will be recalled the First Respondent was convicted on six (6) counts totalling M45 533-54. She was effectively sentenced to 24 months' imprisonment, which we gather was the sentence imposed for each of the counts on which she was convicted. All the sentences were apparently ordered to run concurrently.

[53] Now section 9 (4) of the Court of Appeal Act No.10 of 1978 provides as follows:-

> " On an appeal against sentence, the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

[54] Although sentence is pre-eminently a matter within the

discretion of the trial court there is, as it seems to me, no doubt that the amount found by us to have been stolen by the First Respondent is substantially more than that found by the Court *a quo*. The First Respondent has in effect been found by us to have stolen a total of M143 887-19, an increase of M98 353-65 over the total amount involved in the counts on which she was convicted by the trial court. It is, I hasten to say, a substantial increase which entitles this Court to consider an appropriate sentence afresh.

[55] The Crown accepts that in sentencing the Respondents the Court *a quo* took into account the following factors namely that:-

(1) The crime of this nature is prevalent.

(2) The utmost must be done to deter and prevent this type of offence.

(3) The real way to stop financial dishonesty would be through a system of proper checks and balances.

(4) The Kingdom of Lesotho has serious problems regarding auditing and the way that money is kept.

(5) Offenders should not be treated lightly.

(6) The managers of the Scheme did not have

proper control and stole from it. As a result thereof the Scheme was not properly maintained.

(7) The Government and contributors are embarrassed.

(8) Ten years was appropriate in the circumstances where a person refuses to plead guilty, and was found guilty regarding the theft of M100 000,00.

(9) A message should be sent that theft as in this matter should be discouraged.

(10) Retribution is impossible in that an individual would be punished beyond that which is required.

(11) The Respondents have a "close household" and it could not be allowed to leave the children to suffer.

(12) As a result of the family relationship a reduced sentence was appropriate.

[56] Other than the substantial increase in the actual amount stolen by the First Respondent the one further aggravating factor that the Court *a quo* failed to take into account is that she was in fact in a position of trust. In so doing he erred and once more this Court then is at large to consider an appropriate sentence.

Nor did the Court *a quo* consider the fact that the First Respondent was not only the prime mover or the leading light in the whole pre-planned illegal scheme but she also denied her involvement and thus showed no remorse.

[57] After a full consideration of all the facts of this case it seems to me that the sentence passed against the First Respondent was manifestly inadequate and disproportionate to the gravity of her conduct.

[58] In my view, and all things being considered, the justice of the case requires that the First Respondent be sentenced to eight years' imprisonment on each count and that they should run concurrently.

[59] **The case against the Second Respondent**.

The Second Respondent was effectively sentenced to eighteen months' imprisonment for having stolen Government money totalling M98,353-65. The Crown submits that this sentence is so unreasonably lenient that no reasonable court could have imposed it. It seems to me that there is merit in this contention. The learned Judge *a quo* appears to have overemphasized the Respondents' personal circumstances and their "household relationship". In doing so he failed to give full or sufficient weight to the following aggravating factors:

(a) that the Second Respondent was a party to an elaborate illegal scheme to steal Government funds

over a period of some two years during which they corrupted other persons as well. A substantial amount of M98 353-65 was directly traceable to him.

(b) That the motive of the Respondents was clearly one of pure greed.

(c) That the Respondents showed no remorse in the matter. The Second Respondent in particular did not only deny his involvement in the illegal scheme but he also had the audacity to go into the witness box to present a fabricated defence.

[60] It is also common cause that one Pulane Caroline Mokone who participated in the illegal scheme in question with the Respondents was sentenced to eight years' imprisonment of which three were suspended conditionally for stealing M104,106-61. In this regard it is no doubt useful to bear in mind the principle laid down by this Court in *Lepoqo Seoehla Molapo v Rex 1999-2000 LLR&LB 316 at 321* per Steyn P in the following terms:-

"However, in determining sentence the following factors must in our view also be taken into account:

(1) Offenders who have the same or similar degrees of moral guilt and involvement in the commission of a crime, should, in the absence of circumstances that justify discrimination, be

> treated equally. The Court's impartiality and fairness could be seriously questioned if marked disparities between offenders whose moral guilt is indistinguishable from one another were to occur. The fact that the appellant's co-conspirators were each sentenced to 2 years imprisonment and that the appellant's guilt is certainly no greater than theirs is therefore a compelling factor in determining his sentence."

[61] In *Mamakoae Mokokoane v Rex* (supra) the accused was effectively sentenced to six years' imprisonment for stealing Government money totaling M91 200-00 (spread over 6 counts of M15 200-00 each). This Court confirmed the sentence on appeal on 19 January 1996.

[62] Although no two cases can ever be exactly the same it is salutary for courts to strive for a measure of uniformity in sentencing wherever this can reasonably and justly be done. Otherwise the kind of disparity in sentencing as demonstrated by the Court *a quo* in this case will no doubt bring the whole justice system into disrepute.

[63] All things being considered I have come to the conclusion that the appeal must succeed and that the sentence recorded by the Court *a quo* be set aside and replaced with one of five years' imprisonment on each count. All the sentences to run concurrently.

[64] In sum therefore the Court orders as follows:

(1) The appeal succeeds to the extent that the acquittal of the First Respondent on counts 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14 and 16 by the High Court is set aside and substituted with a verdict of guilty on all those counts.

(2) The sentence of 24 months' imprisonment in respect of the First Respondent is also set aside and substituted with one of eight years' imprisonment on each count. All the sentences to run concurrently.

(3) The sentence of 18 months' imprisonment in respect of the Second Respondent is set aside and substituted with one of five years' imprisonment on each count. All the sentences to run concurrently.

_____

M.M. Ramodibedi
Judge of Appeal

I agree: _____

M. Kumleben
Judge of Appeal

I agree: _____

C. Plewman
Judge of Appeal

Delivered on the 11th day of October 2002.

For the Appellant: Adv H. Louw
For the Respondents: Mr. Lesuthu