IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

MONGALI MOLAHLEHI

Review Case No. 79/2002
Review Order No.6.2002

C.R. NO. 330/2001
In Thaba-Tseka District

ORDER ON REVIEW

6th August 2002

This matter came on automatic review.

The above Accused was charged before the magistrate of Thaba-Tseka. The Accused was charged and convicted on his own plea on the following charges. And in each count the Accused was sentenced as shown respectively.

Firstly, accused was charged with the crime of Common Theft for which he was sentences to 6 months imprisonment or a fine of M600.00.

Secondly, Accused was charged with the crime of Attempted Murder for which he was sentenced to 5 years imprisonment without option of a fine.

Thirdly, Accused was charged with having contravened section 3(1) and 3(2) (a) of Internal Security Act No.12 of 1966 (as amended by Act No.4 of 1999) and sentenced to 6 months imprisonment or a fine of M600.00.

Fourthly, Accused was charged with the crime of Attempted Murder for which he was sentenced to 5 years imprisonment without option of a fine.

The learned magistrate further ordered that the first and the third sentence be served concurrently. In doing so he did not indicate whether they would commence before or after the second and the fourth sentences.

It is with regard to the first and third sentences (that is those that carry options of fines) that there are queries as presently shown. The learned magistrate had not thought out the fines well and as a result they appear farcical in the circumstances. The rhyme and the reason in the questionable sentences is lost in the following way.

Supposing the Accused was to pay the fines and elects to do so, what

would be the benefit and effect because he would still remain in prison by virtue of the two other sentences? This obviously goes against the principle that a sentence of a fine is imposed by a presiding officer with a genuine desire, and in order to enable an accused to take advantage of and to pay the fine and gain his liberty. Not all authorities agree on this point.

The intention on the part of a judicial officer does not appear to be genuine and it cannot be said to have taken the personal circumstances of an accused if it virtually impossible to advantage of such a sentence. D P van Der Merwe in **Sentencing** (service 6, 1996) at page 440 says that personal circumstances of the accused is one of "the elementary criteria of punishment". A sense of substantial justice is not demonstrated on the part of the presiding officer if that sentence of a fine indicates that it was imposed as a matter of form. For the view that a too rigid approach is undesirable: See **S v Van Rooyen** 1994(2) SACR 823(A).

The second most prominent anomaly is the order made by the learned magistrate that the two sentences with alternatives of fine be served concurrently. This does not make any practical sense. It is not clear whether the sentences should be served before or after the two other sentences. This is obviously problematic on principle or practice. Moreover a sentence of imprisonment with option of a fine is not a sentence of imprisonment. See

section 301(2) of the **Criminal Procedure and Evidence Act 1981.** See similar section 342(2) of the Criminal Procedure Act 51 of 1977 of the Republic of South Africa and the commentary thereon in **S v Lalsing** 1990(1) SACR 443(H) at page 445 (whole), **S v Mngadi** 1991(1) SACR 313(T) and **S v Ntantana** 1991 (1) SACR 114(A). That is therefore a good reason to partly vary the two sentences that have options of fines.

The combination of a sentence of a fine in one count that is defeated in its execution by a sentence in another count has been criticized in **Mathaba v Rex** 1980 (1) LLR 83 where it was said per Rooney J. at page 84:

> "This is in accordance with common sense. If the accused in this case pays his fine his term of imprisonment will not be reduced. On the other hand if he does pay he will not suffer any prolongation of his detention."

My criticism is therefore in good company of the above pronouncement.

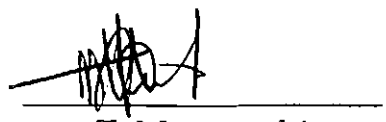
I was mindful of the principle that a sentence of imprisonment which is imposed with an option of a fine is regarded as more lenient than one that is without one. I was however forced to impose what would appear on principle

to be harsher and would be regarded (correctly) as enhancement of the sentences in those questionable counts. This is so despite the fact that the proceedings were still endorsed as being in accordance with real and substantial justice. It was furthermore without notice to the Accused. See **S v Boshoff** 1991(1) SACR 221(T) And where (in the instant case) furthermore still, the learned magistrate having been neither lenient nor harsh but only having gone wrong on account of the queries that I have pointed out. The queries in substance amounted to challenging the manner in which the presiding officer has used his discretion as manifested by the breaches of principles or employment of wrong principles as above shown.

What all this says is that sentencing is normally a difficult process at the stage of disposing of criminal proceedings that needs concentration and application in order to weed out anomalous situations.

The sentences were accordingly varied to read:

"Count I, 6 months imprisonment with no option of a fine and Count III, 6 months imprisonment with no option of a fine". The above sentences to run concurrently together with Counts II and IV.



T. Monapathi
Judge
6th August, 2002

copy: The Magistrate Thaba Tseka
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