

IN THE HIGH COURT OF LESOTHO

In the matter of

R E X

v

TEBOHO MOHAPI

**Review Case No. 55/2002
Review Order No. 4/2002**

**C. R. NO. 172/2002
In Mafeteng District**

ORDER ON REVIEW

5th August, 2002

The learned Chief Magistrate has forwarded the record of proceedings in this matter and requested that it be placed before a judge for review. The learned magistrate's concern had nothing to do with the "accused" having not been dealt with as "a child" or the Court having not sat as a children's court. (See section 2 and 5 of Children Protection Act No.6 of 1980) It was something else. It was that: "The JTC authorities have expressed their problems about handling a detainee of that age." This was confirmed by Mr. Moteoa and Mrs Khati of the Prisons Service.

Indeed detention of young offenders is receiving a curious attention of the Department of Prisons in the Ministry of Justice. This is so despite overwhelming constraints and inadequacies. See the following Lesotho Prison Service monographs:

- (1) **Strategic Framework Towards Improved Corrections in Lesotho.** A Human Rights based Approach on the care, Safety and Security, Humane Treatment, Training, Reformation, Rehabilitation and Reintegration of Offenders into the Society, as Law-Abiding and Self-Supporting Citizens, on page 9 under "J-Juvenile Justice Basic Guiding Principles.
- (2) **Penal Reform** - September, 2001, on page 2 under "5. Alternative ways of Dealing with juveniles.
- (3) **Fundamental Human Rights in Prisons or Protection of Persons Subjected to Detention or Imprisonment.** (International Human Rights Documents Protecting Fundamental Human Rights of Prisoners) at page 11 under "16 Children's Rights."

As Dr. I Kimane says in **Community Based Care for the Children in Need**

of **Special Protection and Care** (An issue paper commissioned by Child Legislation Reform Project, Lesotho Law Reform Commission, May 2002 at page 17):

“The JTC is to all intents and purposes a prison, yet in reality even children who are not in conflict with the law have also been admitted to it on a regular basis.” (My emphasis)

The case involves a twelve (12) years old boy who has been sentenced to be detained at the Juvenile Training Centre (JTC) “for a period not exceeding 3 years.” The boy who I called “Master Teboho Mohapi” was brought before me on two occasions. He looks shorter and smaller for a child of 12 years old. One would suspect that he could not be beyond 10 years old judging from his size and appearance.

Section 26 of the Children’s Protection Act specifically prohibits punishment by imprisonment. Lisebo Chaka-Makhooane in **Administration of Justice** (“An issue paper submitted to the Law Reform Commission - Child Legislation Reform Project - February 2002) says at page 11:

“In practice many Courts sentence children for a term of

imprisonment (3 years) under the guise of JTC. This facility is meant to qualify on an approved school where juveniles should undergo a period of training and rehabilitation. Pursuant to section 29 of CPA, JTC is supposed to be supervised by Chief Probation Officer while section 30 mandates that every approved school shall be classified according to the discipline and training required by children to be detained herein. The situation envisaged by section 29 and 30 respectively does not exist.”

See generally **Children in Institutional Care** (A paper submitted to the Law Reform Commission) by 'Matora Ntimo-Makara.

Master Teboho Mohapi was convicted on two counts of housebreaking with intent to steal and theft for which he was sentenced as already shown.

The learned Chief Magistrate was bold to say the arrangement for review was done at his instigation after consulting the trial magistrate. Master Teboho Mohapi's case had also affected the concern of the JTC's authorities and the Probation Officer Miss Seithati Motsamai although for different reasons. I noted that Probation Officers have a social workers training and background.

When attention was brought to the JTC's officials and Miss Motsamai that

the matter was allegedly reviewable merely because the JTC's officials were not accustomed to and equipped to handle a child of that age, Miss Motsamai, on her part, replied as follows:

While Mafeteng police had been troubled by the recurrence of cases reported to them about Master Teboho Mohapi's criminal conduct they had approached the Public Prosecutor and the magistrate through the Probation Office to say that the background of Master Teboho Mohapi had to be investigated. The learned magistrate proceeded with the case despite those overtures. I agreed therefore that a review had to be instituted against the above background. The story turned out to be more sordid.

On the 12th June 2002 there were present before me in my Chambers Mrs Motsamai (Probation Officer), Mr. Moteoa (Prisons Department), Mrs M Khati (Prison Service), Master Teboho Mohapi and Miss L Kali (Deputy Registrar). It was noted that the learned trial magistrate was not provided with relevant and sufficient information in the absence of a report by a probation office. Secondly Mafeteng police had shown concern about "a small boy of about 12 years of age who was involved in a number of cases of theft on different occasions.

Again before the 12th June 2002 Miss Motsamai confirmed that she had had

a look around the circumstances of the family of Master Teboho Mohapi but she opined that more had to be done in that regard. Unfortunately when he approached the presiding magistrate the said sentence (for detention by the JTC) had already been passed.

Amongst other concerns the Prison Officers asked whether it was possible to take or place Master Teboho Mohapi in other institution like SOS other than the JTC due to the delicateness of the boy's age. As they reiterated, according to their statistics Master Moahpi was the youngest of all inmates of the JTC ever. They never had a boy of this age before." As the officer pointed out there were no reformatory schools or even approved schools. (See section 26 and 27 of Children Protection Act No.6 1980)

It became clear that even at the stage when the matter had already been sent for review as aforesaid the Probation Officer still had to do more investigations into the family background of Master Teboho Mohapi. One indication was that Master Teboho Mohapi had at one time lived with one Mr Mosoang who was in Mafeteng at that time. One further indication was that he lived with his mother (his father having died) and a number of siblings. An investigation along this line would determine whether it was best if Master Teboho Mohapi was sent back to the care of his parents or whether he ought to

be removed from parental care. This Court therefore resolved that the matter be adjourned to the 28th June 2002 at 9.30 am pending the report by the Probation Officer.

On the 28th June 2002 all were present as before (as on 12th June 2002). A most elaborate and enlightening report was provided by the Probation Officer (Miss Motsamai). The Probation Officer had sourced information from the police, parental grandmother of Master Mohapi and neighbours.

The Probation Officer's report dealt extensively with Master Teboho Mohapi's family background, educational background, personality, offences. It also dealt with finding based on information from most of the sources, the police, and Master Teboho Mohapi's version. It ended up with remarks and recommendations. At the section on "Remarks", the probation office had this to say:

"It was also observed that the boy's behaviour is a result of lack of proper parental guidance. His mother's self esteem needs to be boosted with the assistance of the Probation Unit. She needs to be empowered through counselling on parental skills to enable her to be open-minded about child raising and life in general."

The Probation Officer was candid enough to disclose that more cases of Master Teboho Mohapi's criminal conduct were being reported. This went

together with reports that some complainants were in a threatening mood. This added to a situation of limited options which would have been available more especially this one of parental care. I was however more concerned with the Probation Officer's recommendations. She concluded that:

“Rule 18.2 of the UN standard minimum Rules For The Administration of Juvenile Justice (Bergin Rules) stipulate that: No juvenile shall be removed from parental supervision whether partly or entirely unless circumstances of her case makes this necessary: Rule 19 highlights that institutionalization is to be the last resort for a juvenile and it needs to be used for the shortest possible time. Teboho despite his age has reached a stage where close supervision is required. He needs basic intensive counselling and guidance, which lacks in his family. If he continues to live within the community, he will fail to get access to the above-mentioned intervention and his problems with the society are likely to be intensified. He will ultimately, after a short period go back home a changed person faced with anew and acceptable home environment.”

Within this kind of a studied approach by the Probation Officer a serious case

is being made as to why learned magistrates in this country will not take their time to refer deserving cases to probation officers before dealing with problems of children. However as the learned author of **Community Based Care For The Children in Need of Special Protection** pointedly says at page 17:

“Whenever the care and protection of children are concerned one expects to have the social work profession playing a central role. However, a closer examination of the CPA and other relevant pieces of legislation (e.g. the Adoption Proclamation - 1950, Girls and Women’s Protection Proclamation 1949) give no place to the profession. This is viewed as serious gap in the legislation because it gives no mandate to social workers to intervene with a purpose of promoting the rights of children.”

See also **Legal Protection of Children’s Rights in Lesotho (Constraints and Inadequacies)** by Hon. Mr. Justice M L Lehohla OMMON, at page 22. This case of Master Teboho Mohapi cried out loud for such an approach. This was even the feeling of the police officers who contacted the Probation Officer, as said before, before the case was processed. There is therefore urgent need for change of attitude.

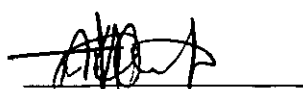
Having considered all the circumstances of the case I was persuaded that there was however no need to change Master Mohapi’s detention as ordered. And I made the following order on the 28th June 2002:

“Circumstances indicated that Master Teboho Mohapi who is 12

years of age, presently in custody of the Juvenile Training Centre in Maseru, ought to be removed from parental care "partly"". It was partly in the sense that if it appears that the rehabilitation procedures which Master Teboho Mohapi will be subjected to has worked, Master Teboho Mohapi will be released. The further observation which is also a condition, will be to consider whether or not Master Teboho Mohapi's mother has reacted positively towards counselling to be provided by the Probation Unit on parental skills. If it is in the affirmative then Master Teboho Mohapi will be released from detention. The two (2) sentences made by the magistrate are varied to read "Master Teboho Mohapi to be detained at the JTC."

With the above kind of order I thought Master Teboho Mohapi's situation stood a chance of being corrected for the better.

In reading the above materials which were submitted to the Law Reform Commission I noted a special and pervading concern which was also expressed by most people who have an intimate knowledge of the problems of detention of delinquent children. It was this. That it might mean or it means that most of the inmates of the JTC are illegally detained in the institution despite the good intentions of all concerned. If this is so it can also mean that that it is an extreme kind of embarrassment to the government and the concerned department. Consequently this situation needs to be investigated as soon as possible.



T. Monapathi
Judge

5th August, 2002

copy: The Magistrate Mafeteng
O/C Police Mafeteng
O/C Prisons Mafeteng
O/C Central Prison
Director of Prisons
Director of Public Prosecutions
C.I.D. Police Headquarters
All Magistrates
All Public Prosecutors