

IN THE HIGH COURT OF LESOTHO

In the matter between:

‘MASEKAKE NYOKANA

APPELLANT

and

REX

JUDGMENT

Delivered by the Honourable Mrs Acting Justice A.M. Hlajoane
on 27th March 2002

This is an appeal from the decision of the Magistrate of first class - Maseru. The accused was charged of theft common. Briefly the facts of the case were that, the complainant went with the accused who is his daughter to Central Bank. The complainant withdrew the sum of M10,200.00 (ten thousand and two hundred maloti) with the intention of depositing the money with the Standard Bank.

They both went to Standard Bank and joined the queue. Whist still on the queue, the complainant left and went outside to have a smoke and left the accused

with the money. When he came back, the accused was nowhere to be seen. He left for home after an hour without seeing any trace of the accused. When he enquired about the accused when he got home, he got the information that she came, took her clothes and left. The matter was reported to the police.

The offence was committed on the 3rd November 2000 or there about, and the accused arrested on the 28th December, 2000.

When the charge was preferred against her, the Appellant pleaded guilty to the charge and accepted the outline of facts. She was found guilty as charged and sentenced to four years imprisonment. The appeal is against both conviction and sentence.

There are two grounds of appeal. The first being that the Court which convicted the Appellant was not a proper forum and that the sentence imposed was heavy and induces a sense of shock having regard to the circumstances of the case. The notice of hearing was issued to both the Appellant himself and his counsel to inform them of the date of hearing. Appellant's counsel at least could have made his appearance. Even besides, the Appellant's home is at Tšenola here in Maseru. I therefore proceeded with the appeal in the absence of either Appellant herself or

her counsel.

The Respondent had duly filed his heads, but the Appellant filed none. On the first ground of appeal, that the Court was not a proper forum, we took it to mean that the Court had no jurisdiction. Section 59 of the **Subordinate Courts Order 1988** provides that the Court shall have jurisdiction over all offences except sedition, treason and murder. Section 3 of the same Act as amended gives the monetary jurisdiction of up to M15,000 (fifteen thousand maloti) for first class Magistrate.

~~As regards the second ground of appeal, the law and decision of this Court~~ have clearly shown that sentencing is pre-eminently a matter for the discretion of the trial Court. The Court on appeal will only overturn a decision if it feels and is convinced that the decision is unreasonable in the circumstances of the case or the severity of such sentence considered to be out of proportion to the gravity of the offence. The Court on appeal will then take it that there has been an improper exercise of discretion or a misdirection. *See Lebisa and Another vs Rex 1980(2) LLR 404.*

The Respondent concedes that even though the appellant is a first offender,

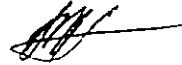
the offence she committed was so serious that it warranted a very severe sentence. **Mojela vs Rex 1977 LLR 321.** The amount involved is a lot of money, but consideration also had to be taken of appellant's relationship to the complainant. She is his daughter aged but 25 years. When the sentence was passed all the money had not been recovered.

Through complainant's private investigation he approached Court on the 5th May, 2001 with the information that the appellant had on the 20th November, 2000 deposited with NedBank an amount of M8,000 which he asked the Court to transfer to his account. The appellant did not object to the transfer instead she showed that in fact it was part of the complainant's money, her father. ~~The order for such transfer~~ was thus given by the Court.

On appeal therefore, the Court considers the fact that the greater part of the money has been recovered though this fact only came to be known sometime after sentence had been given. That coupled with the relationship of the appellant to the complainant, father and daughter. The Court on Appeal therefore feels that the change of circumstances would have influenced the Court in passing sentence.

The appeal succeeds in that the conviction is confirmed, but sentence varied

to read two years imprisonment, half of which is suspended for three years on conditions that she is not found guilty of a similar offence during period of suspension.



A.M. HLAJOANE
ACTING JUDGE

For Appellant: Ms Shale

For Respondent: Mr Monyako