

IN THE HIGH COURT OF LESOTHO

In the matter between

TLOTLISO DUMA

APPELLANT

and

REX

RESPONDENT

**JUDGMENT**

Delivered by the Honourable Mrs Acting Justice A.M. Hlajoane  
on 25 Day of April, 2002

The Appellant in this case had appeared before the Resident Magistrate Berea charged with the offence of theft common; it being alleged that he wrongfully, unlawfully and intentionally stole eight (8) mixed school reading books the property or in the lawful possession of the Principal of St. Agnes High School on the 4<sup>th</sup> February 2002 or there about.

The Appellant had pleaded guilty to the charge and the Public Prosecutor, after accepting the plea outlined the facts of the case. The facts briefly stated were that, one Mrs 'Mabatho Letšaba, the Principal of the school is the custodian of the

books of St. Agness High School. She left for lunch on the day in question leaving the books properly packed in the office, and upon coming back from her lunch, she noticed that the books had been disturbed. Out of those books 102 books were missing and the list and names of each book was given. Immediately she noticed she reported the matter to the head of the school and to the police.

On the 5<sup>th</sup> February, which was the next day, police received information which led them to the accused. Police met the accused, introduced themselves to him and cautioned him. Accused then gave them some information which led them to one Moroe at Motse Mocha. Moroe was found and accused asked him to produce the books he had given him and he complied. The books that were given back by Moroe were 8 in number and the titles of the eight books was given. The books were siezed and Accused cautioned and charged of theft.

At the end of the trial the accused was found guilty and sentenced to seven (7) Years imprisonment. It is against that sentence that the Appellant has now appealed . The argument on appeal being that the sentence passed is too harsh, taking into account that the Accused has pleaded guilty thus showing remorse. It is submitted by the Appellant that the Magistrate in sentencing the Accused did not exercise his discretion judicially in that he placed little weight to;

- (a) The fact that the Appellant pleaded guilty, did not waste Court's time and showed remorse.
- (b) The accused was a first offender.
- (c) The accused's family and other personal circumstances.
- (d) The nature and gravity of the offence
- (e) The sentence is too severe and induces a sense of shock

What transpired in this case is that the Accused pleaded guilty to the theft of eight books for which he was charged, but the Public Prosecutor in his outline of facts disclosed that 102 books were stolen. In passing sentence the Magistrate took into account the fact that only eight books out of 102 have been recovered, relying on the summary by the Prosecutor. The 102 number of books factor influenced the Magistrate in assessing his sentence. Clearly this was a very material misdirection on the part of the Magistrate which calls for the interference by this Court.

Numerous decisions have repeatedly shown that sentence is a matter pre-eminently in the discretion of the trial Court, **Matia and Another vs Rex 1979(1) LLR 139**. This Court therefore may not in the absence of a material misdirection by the trial court substitute the trial Court's sentence simply because it prefers its own sentence thus usurping the discretion of the trial Court. I have already shown

that has been a material misdirection in this case and this Court is therefore free to consider the issue of sentence afresh. The trial Court did not therefore exercise its discretion judicially.

The Respondent submits that a plea of guilty does not necessarily show remorse, but that it is more likely to have been tendered just to save face and embarrassment. **Rex vs Makosholo** [unreported]. But the case of **Mphutlane vs Rex 1980(2) LLR 338** is for proposition that there is no rule of law that a first offender is entitled as of right to special privileges. The Accused being a first offender is merely one factor amongst others that the Court ought to take into account. Accused's individual interest must be weighed against, for example, the nature of offence, (my own emphasis) protection of the public and the prevalence of the crime of which he has been convicted.

I have underlined the nature of the offence, in the last cited case by the Respondent for the point of emphasis. This takes us back to the misdirection by the trial Court of having based his assessment in sentencing the Accused on 102 books instead of 8 books.

The other point has been that, the fact that a plea of guilty was tendered

should have weighed heavily on the mind of the Magistrate. It was not enough to have just recorded that Accused pleaded guilty without recording what benefit accrued to Accused out of such plea. That plea of guilty saved Court's time of going through a lengthy trial, and above all it was a clear indication of how remorseful the accused was. The record also shows that Accused cooperated fully with the police in their investigations. **Meyer and Other vs Rex 1977 LLR 313**. All those factors in addition to the fact that Accused was a first offender with no previous convictions entitled the Accused to be given a lenient sentence. **Rex vs Rabie 1975(4) S.A. 862** is for the proposition that, punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to circumstances.

The Court in passing sentence seemed to have overlooked some other important considerations. It was conceded that, well the books were for educating the students but overstressing that factor might blind the Court from other relevant considerations. There is nothing on record to indicate that the Court *quo* considered Accused's personal circumstances. Accused showed he was a mere technician at the school, married with one child, that his wife is not working but still attending school thus making him the sole bread winner.

It would have been something if the Accused fell within the category of people holding positions of trust. Examples of such cases being **Rex vs Makalo Khiba CRI/T/60/78** which was theft of L.E.C money and sentenced to 7 years imprisonment 3 years suspended conditionally. ‘**Mamakoae Mokokoane vs Rex C of A (CRI) 1 of 1995** involving theft of Government funds amounting to M91,000 and sentenced to 6 years imprisonment. In both these cases, the Accused held positions of trust.


In passing sentence the trial Court also showed that, a serious view was taken of the fact that within a space of three days, several housebreaking cases involving books and stationery had been received by the Court. In its effort to uproot that habit the Court imposed the Sentence of seven years for theft of 8 books. Investigations did not point at the Accused relating to those other crimes.

I have come to the conclusion that the Court in passing sentence based its discretion on the facts not proved that Accused was accountable for the disappearance and non recovery of the 94 books, which was not what the Accused has pleaded guilty to, let alone the fact that that was not what he was charged with. The sentence did not fit the crime charged. The eight books have been recovered.

The appeal therefore succeeds to the extend that the sentence is considered

to have been too harsh. The sentence of seven years imprisonment is set aside and substituted by one of M400.00 or ten months imprisonment ½ of which is suspended for a period of two years on condition that the Accused is not found guilty of a similar offence during the period of suspension.

By way of advice, it had not been shown whether or not when the Principal so left for lunch left anyone in the office, but in future may she find it advisable to lock the office whenever she attends to other businesses for safety of the school property.



**A.M. HLAJGANE**  
**ACTING JUDGE**

For Appellant: Mr Phoofolo

For Respondent: Ms Ntene