CRI\T\44\95

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

1. MOITSUPELI JEFFERY LETSIE
2. PUSETSO MOORE MAKOTOANE
3. DANIEL NKANE MATEBESI

JUDGMENT ON SENTENCE

Delivered by the Hon Mr. Justice M.L. Lehohla on the 9th day of February, 1996

Yesterday at the conclusion of the main trial the Court heard ex parte statements in mitigation in respect of the accused by their respective counsel. At the conclusion thereof the learned DPP sought to respond to the addresses in mitigation.

It was observed by respective counsel that the act of the DPP's response was brow raising as they maintained that it casioned something unusual in practice albeit that no objection had really been raised. But in C. of A. (CRI) 7 of 1989 Naro Lefaso vs Rex (unreported) at p.11 Schutz P. referring to the fact that the appellant had not given evidence in extenuation of the murder crime he had been convicted of, but rather relied on the oratory of his counsel said :

> "During the course of the appeal there was considerable debate about the status, if any, of the argument referred to above, and in particular as to whether the Crown had accepted it as being factually correct. The debate ended inconclusively. I would stress that in a matter as vitally important as extenuation, if the defence counsel wishes to rely on

> an ex parte statement not based on sworn evidence he should ascertain clearly whether the Crown admits its factual correctness. If the Crown does not, defence counsel must consider whether he will lead evidence or not. Needless to say I am not referring to an argument which seeks to derive inferences (that extenuate) from proved facts, but an argument that asserts facts as facts without proof of them themselves".

In South Africa the State's response to addresses in mitigation is something that is covered by legislation. In the years that I have served in various capacities in the High Court of Lesotho I have seen this practice being followed; though rarely. On the basis of Schutz P's remarks; bearing in mind that there hardly exists, to all in intents and purposes, any dividing line between a plea in mitigation and a plea in extenuation coupled with the judicial notice that I take of the practice, I do not think an answer by the Crown to a plea in mitigation of sentence is something that a Court allows as a favour or privilege to the Crown. The practice is unusual in the sense that I say it is rare.

The Crown indicated that none of the accused has any previous convictions. That is a factor that I wish to take in mitigation of sentence.

Mr Sello for accused 1 indicated from the outset that he was under no illusion about the seriousness of the conviction for theft of public funds. He compared the figure involved in the theft in respect of a country like Lesotho with figures which exceed it a thousand fold in South Africa, and submitted that by any stretch of imagination, for Lesotho the amount involved is

substantial. I agree with this observation.

He intimated to the Court the three important objectives in sentencing namely, rehabilitation, retribution and deterrence. He eliminated the first two as inapplicable and purposeless in this proceeding; and thus devoted the thrust of his address to the last, i.e. deterrence.

He correctly submitted that deterrence cannot change as a factor to take into account in imposing sentence.

Referring to accused 1, he submitted that being a man of mild temperament and a professional he (accused 1) would find custodial sentence very traumatic. He urged that a partly or wholly suspended sentence would meet the objective of a sentence proposed for his offence.

An important point raised in accused 1's favour was that it is trite where the accused are jointly charged that in imposing sentence the Court should take into account the role played by each accused. I agree that this doesn't amount to discrimination but is based on a sound principle of the law.

Mr Sello pointed out that accused 1 has been shown to have merely facilitated the tail-end of the crime. He features where the taking of money has been effected. He hasn't participated in secreting it away. All that constitutes his role is that the stolen money somehow passes through an account of

which he is a conduit. Learned Counsel accordingly submitted that accused 1 has been caught up by events.

Learned Counsel further indicated that the fact that accused 1 desisted from finding out irregularities which attached to the use and operation of his account should be looked at as a peripheral degree of participation. He pointed out further that the fact that he desisted from finding out the movement of the funds in his account should not and cannot be construed as providing proof that he knew that the funds in question were public funds.

With regard to conspiracy it was submitted that since common purpose takes various forms accused 1 can at best be regarded as a socius or an accessory even if the Court has not so pronounced him to be.

An important point raised was that Courts take a serious view of people who break trust by taking funds in their trust for self-enrichment. Thus it was pointed out accused 1 is not in that category. He worked as an Engineer in the Ministry of Home Affairs where he was not entrusted with safe keeping of any public funds. Yet he finds himself cast in the unfortunate mould of being involved in theft of public funds exceeding Two Million Maluti. It was pointed out that accused 1 is not shown as having received any remuneration or benefit for his involvement.

Thus if sent to jail he will spend the whole jail term pondering on how it came about that he found himself in that forbidding environment.

I was asked to take into account the fact that accused 1 is fairly young and married and that he has recently become a father. Thus it was prayed that he be given a chance to turn over a new leaf. It was urged that if courts adopted the attitude recommended the effect would in itself be rehabilitative.

Mr Sello finally urged that as this is a case deserving of custodial sentence with an alternative of a fine it would be desirable and beneficial if part or the whole of that sentence were suspended.

With regard to accused 2 Mr Phafane having stated that the accused is a professional in the civil service whose past has been unblemished, urged that the accused's personal circumstances be taken into account when considering what suitable sentence to impose.

He strongly sought to persuade the Court that no good purpose would be served by sending accused 2 to jail in that the public would not be able to retrieve the funds adjudged to have been lost to the community as a result of the crime committed.

He referred to the fact that the accused is more than

likely going to be surcharged in terms of the Finance Order of 1988. What is more the Criminal Procedure and Evidence enjoins that a conviction secured against him shall have the effect of a Civil Judgment.

He submitted that it wouldn't be in the interests of the State or the 2nd accused if he is not given a chance to restore to the State what he has taken. Moreover he has children two of them minors attending school at Maseru Pre School at the cost of no less than M5,000 per term. He submitted that an entirely custodial sentence without an option of a fine would not be appropriate.

He relied heavily on the Judgment of this Court in CRI\T\75\89 R.vs Peter Kenene Mahase (unreported) p 43 where he as well as Mr Nthethe cited a passage saying :

> "Authorities are legion in this regard and point all to the necessity to view the accused's circumstances in a new light and weigh factors affecting him very carefully. Paramount among such considerations is the caution not to resort to imprisonment where other forms of punishment could fit the crime committed without thereby compromising the accused's chances of reform and ability to respond to deterrence. Hence the plausibility of the attitude in such circumstances to favour the merits of suspension wholly or in part of the sentence to be imposed. I am fully in agreement with the attitude adopted in Peregah vs Rex 1944 NPD that the magistrate who considered that a suspended sentence is not a deterrent had misdirected himself on a crucial and important matter of principle in sentencing".

Mr Nthethe on his part incorporated the arguments and submissions advanced in respect of accused 2 and associated himself with them by asking that those submissions be treated in

his case as if specifically traversed on behalf of accused 3. I welcome this as a time-saving method of approach.

He urged the Court to be merciful and pointed out that accused 3 has never had the bad luck since joining the Treasury in 1973.

He urged that the Court should treat him like it would a first offender as against a recidivist.

The Court was told that the accused has four children aged between 5 and 10 attending various schools ranging from Winterton Private School in Natal, Rainzarchy a Prep School in Ladybrand, English Medium school Mohale's Hoek at a cost of R1,500 per term in respect of one; R750 per child per term in respect of two and M450 per term in respect of the other.

Accused 3 has an aged parent who is very frail. He also has dependants who require his support. These are his spendants in accordance with the Sesotho custom and practice of extended families.

Mr Mdhluli demurred at the fact that the accused didn't give oral evidence in mitigation but instead relied on their respective Counsel's power of persuasion.

He referred me to S. vs Blank 1955(1) SA CR 62 at 79 relating to the attitude of Grosskoff J.A. when dealing with an

appeal of an accused person reckoned to have been greedy for money and burning with ambition to get along in the world without the sweat of his brow where it was said :

> "Counsel firstly objected to the Court's statement that there has been an increase in 'white collar crime' because, counsel contended, the term has no clear meaning. I should have thought its meaning was clear enough. Certainly, the type of white collar crime committed by the appellant i.e. fraud or theft committed by a person in a fiduciary position, has, as any judicial officer or even newspaper reader knows, become increasingly and disturbingly common. I think the learned judge was entitled to take judicial notice of this feature and to have regard to it in imposing sentence. .....
>
> The reason for this must be that the commission of serious economic offences has become such an evil in our society as to require special machinery to combat it, and the Court saw it in this light."

In C. of A. (CRI) No.1 of 1995 'Mamakoae Mokokoane vs Rex the Lesotho Court of Appeal confirmed 6 years imprisonment in each of the 6 counts preferred against the appellant for similar offences as in the instant case but for the fact that the amounts were far less.

The case of Mahase relied on was in part based on a 1944 authority and in part on a still aged occurrence way back in the seventies. Yet it appears that economic crime is on the increase notwithstanding the curative measures adopted by Rooney J in CRI\T\8\80 Rex vs 'Mabonang Moahloli (unreported) at pp 1 and 2 of the Judgment on Sentence where the learned Judge said :

> "The accused must be punished severely for her own sake and as a deterrent to other Public Servants who might be tempted to follow her example".

Again in this case the accused had helped herself unlawfully to public funds for less yet she received seven years' imprisonment and in addition a M50,000 or 2 years' imprisonment in default of payment.

In Costa Saba vs Rex C. of A (CRI) 3 of 1993 the Court of Appeal was not pleased with the lenient sentence imposed by the High Court.

As to the interest that would have accrued to Government if the amount stolen had been invested my calculations show that it would have come to at least M550,000 reckoned from January 1994 to January 1996 at 12 and half per cent; in accordance with local rates as against 18% rate obtaining in South Africa where accused 3 in particular seems to have invested the stolen funds. The consideration relating to interest on the funds stolen, but lost because of theft shall be given expression to in a suitable order to be shortly included in the sentence. The Court has also had regard to Section 322(1) of our Criminal Procedure and Evidence that where loss or damage of Government property is involved, then on conviction the effect is of a civil Judgment for the payment of money. Thus the 2.2 Miilion Maluti constituting the capital amount lost to Government shall fall to be automatically treated under this section.

Regard being had to different degrees in participation account has been taken of the fact that though accused 1 said nothing that could benefit him more in the aspect of sentencing

his degree of participation is indeed less than that of his co-accused of whom accused 2 was a prime mover. This difference in degrees of participation would have to come out in the wash.

I take a serious view of the fact that accused 2 and 3 have breached a public trust and used their elevated positions to commit this very very serious crime.

I have accordingly, having carefully listened to pleas in mitigation, proposed to impose the following sentences :

Accused 1 is sentenced to 10 years' imprisonment in each of the four Counts, three years of which in each Count is suspended for three years on condition that he is not convicted of a crime of which dishonesty is an element committed during the period of the suspension. He is sentenced to an additional fine of M62,000 or 5 years' imprisonment in default of the payment of that fine irrespective of the number of counts he has been convicted under.

Accused 2 is sentenced to 10 years' imprisonment on each of the four Counts. In addition he is sentenced to a fine of R250,000 or 7 years' imprisonment in default of payment of that fine irrespective of the number of counts he has been convicted under.

Accused 3 is sentenced to 10 years' imprisonment on

each of the four Counts. In addition he is sentenced to pay a fine of R250,000 or 7 years' imprisonment in default of payment of that fine irrespective of the number of counts he has been convicted under.

Taking into account the submissions for leniency I order that the substantive terms of imprisonment without options of fine be served concurrently in each Count.

My Assessors agree.

J U D G E
9th February, 1996

For Crown : Messrs Mdhluli and Sakoane
For Defence : Mr. Sello for Accused 1
Mr. Phafane for Accused 2
Mr. Nthethe for Accused 3