CRI/A/61/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

EZAEA MOHLOKI
'MANEO LEBOEA
'MASEABATA LEKHOOA

v

REX

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 26th day of February, 1996.

This is an appeal against conviction and sentence on a charge of robbery. I dismissed the appeal on conviction and upheld one on sentence. I quashed the sentence of ten years' imprisonment on each of the appellants and in its place imposed eighteen (18) months' imprisonment on each of the appellants.

I promised to give reasons later. These are the reasons.

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Appellants pleaded guilty to a charge of robbery. The summary of facts which the accused accepted as correct are the following:

Appellants pleaded guilty to a charge of robbery. The summary of facts, which the accused accepted as correct, are the following:

(a) The complainant had a lot of money which was in a plastic bag kept in her bra. (It was about M1500.00).

(b) Second Appellant, a relative of complainant, had borrowed M50.00 from the complainant. When she went to change money in a cafe, she was seen by the three appellants taking a lot of ban notes from her bra.

(c) The three appellants together with others not before Court conspired to rob complainant of her money when she went home.

(d) The appellants followed her as she went home. It was between 4 and 5 p.m. She was walking alone.

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(e) Complainant was suddenly caught by somebody from behind. This person covered her eyes with his hands, covered her with a blanket and then put a hand across her mouth. She felt a hand fondle her breast, removing a plastic bag containing her money.

(6) When her attacker had released her, she saw it was Nkhane Mosao who ran to the three accused who were standing about 200 paces from the scene.

(7) The police were informed and they subsequently arrested the three accused who produced a total of M420.00 which was marked exhibit 1.

The three appellants in mitigation of sentence confirmed all these facts but stated that they co-operated with the police and produced what money they still had.

The *Minimum Penalties Order* of 1988 which has since been repealed was criticised by the Courts. It took away all discretion from the courts and provided for the mandatory imposition of a 10-year sentence regardless of the surrounding circumstances.

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All elements of robbery are present although this is a borderline case.

I am satisfied that this sentence induces a sense of shock. It is for this reason that I dismissed the appeal on conviction but could not allow the sentence to stand. Both the Crown and appellants' Counsel agreed that conviction should stand but the sentence should be quashed and another one imposed in its place.

I therefore sentenced all three appellants to eighteen (18) months' imprisonment.

I wish, however, to draw attention to the following disturbing features.

(1) Crown and Defence Counsel this week did not appear on the day the appeals were to be heard.

(2) The accused in all appeals could not be served. They do not seem to realise that they are obliged to prosecute their appeals.

I need only say that it is discourteous for Counsel not to appear on the date of hearing. There are all sorts of

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problems that legal practitioners and the Courts themselves encounter. Both the Bench, the Bar and the Side-Bar owe each other a duty not to waste each other's time. They have to treat each other fairly and with a spirit of co-operation.

It is therefore essential for the Bench to release legal practitioners, prosecutors and Crown counsels at the earliest possible time if their cases cannot be heard for one reason or another. If the Bench will be absent (where possible) it is obliged to let legal practitioners, prosecutors and Crown Counsels know in advance. Where there are witnesses, they should be stopped if possible.

Extreme discourtesy to the Bench (or any discourtesy for that matter) can be deemed to be contempt of Court. This power should never be abused and contempt should not easily be inferred. Yet if Crown Counsels, legal practitioners and prosecutors make it a habit to absent themselves from cases without prior notice, a belief could easily grow that Courts are being treated with contempt. So far, Courts have chosen not to believe this. If this behaviour persist courts might be obliged to maintain discipline.

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In civil cases, Courts can order costs *de bonis propriis* on one or both of the litigants attorneys or counsels. In criminal cases Courts might have to use the criminal sanction in order to stop this growing frustration of the criminal justice machinery. Law and order and the respect of the Bench have to be maintained.

If a legal practitioner wishes to withdraw from an appeal, he is obliged to bring the litigant before the Registrar. He should not withdraw at the last minute in the absence of the litigant when he has given his address as the address of service in the Notice of Appeal. There is a growing feeling that the ease with which bail is granted to convicted offenders is used as a means of avoiding serving sentences. Because legal practitioners give their addresses as addresses of service of the notices of hearing of these appeals, they should not just abandon the appeals they lodged at will by withdrawing in the absence of the appellant and without prior and sufficient notice to the Court.

This Court accepts blame for this situation because criminal appeals were not being heard, consequently Magistrates were obliged to grant bail liberally. Convicted offenders cannot claim bail pending appeal as of

right because they are no more just suspects.

When an accused has pleaded guilty to a crime, his presumption of innocence is even less evident. Yet in the past, because appeal took three years to be heard, Magistrates were obliged to grant bail pending appeal (where sentences were challenged) because most offenders would have completed their sentences by the time their appeals were heard. It is time for a change. Judges are now seven where they used to be three. There is still a shortage of Judges, but the situation has vastly improved.

Magistrates have to begin to slightly modify their attitude to the granting of bail pending appeal. There is still the problem of shortage of typists to type appeal records. This also causes a lot of delays. The Ministry of Justice is beginning to attend to this problem. We shall urge the Ministry of Justice to attend to this problem.

Where bail has to be granted pending appeal (as it will have to be in a fitting case), the Magistrate must put a condition that the appellant should report himself to the Clerk of Court once a month, to ensure that the

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appellant does not become untraceable when he is wanted to prosecute his appeal. The Registrar of the High Court has already issued a circular to this effect. I associate myself with that circular.

W.C.M. MAQUTU
JUDGE

For the Appellants: Mr. M. *Teele*
For the Crown : Miss N. *Mokitimi*