

IN THE HIGH COURT OF LESOTHO

CRI/APN/246/2013

In the matter between:

MOTLALOE MONGALI

APPLICANT

And

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 19th September, 2013
Date of Judgment : 19th September, 2013

Summary

*An appeal against the Magistrate sentence that a 15 years of imprisonment which she had imposed upon the appellant should run consecutively with the other sentences imposed upon him by the other individual Magistrates – The appellant thereby having to serve a total imprisonment duration of 23 years – The consecutive running of the years having been considered and imposed **mero muto** by the Magistrate – The counsel denied the opportunity to address the court on the consecutivity or the concurrence running of the years – No reasons advanced by the Magistrate for opting for the former – The sentence radiating a **prima facie** indication that it is disproportionate and shocking – Nevertheless, the appeal taken against the 15 years imprisonment – consequently, the order for the sentences to run consecutively set aside and substituted with the one that they should operate concurrently.*

CITED CASES

Rex vs Motlalo Mongali CR/213/2012.

Rex vs Pule Tsoaeli and Anor CRI/S/18/1987

Nthongoa and Another v Rex

STATUTES

Criminal Procedure and Evidence Act No. 7 of 1981

MAKARA A.J

[1] The appellant who at the time of his conviction and sentencing was 23 years old has approached this Honourable Court by way of an appeal against the content of the sentence imposed by the Magistrate of district of Maseru in **Rex vs Motlalo Mongali CR/213/2012**.

[2] In this case, the appellant had seven separate charges preferred against him by the prosecution. It is common cause that the offences were not interrelated, but that each of them constituted a separate and independent standing. The substance in each charge was that the appellant had on separate instances and dates committed an offence of house breaking with intention of stealing and committing theft in each of the 7 houses where the crime took place.

[3] The matrix of the sentences imposed upon him by each of the presiding magistrates is as follows:

CR/195/12: Five (5) Thousand Maloti or Four years imprisonment

CR/196/12: Four (4) years imprisonment

CR/197/12: Fine of Two Thousand Maloti or two (2) years imprisonment

CR/198/12: Eight years imprisonment without an option of a fine

CR/213/12: Fifteen (15) years imprisonment to run consecutively with any other sentences

CR/214/12: Five (5) years imprisonment or Ten (M10,000) Thousand Maloti.

[4] The respective magistrates who had presided over the first 6 cases did not explain whether or not each sentence would operate concurrently or consecutively. In the comprehension of this Court where there is uncertainty as to whether the sentence should run concurrently or consecutively, as was the situation in the cases referred to above, it should assume an interpretation which would be favourable to the sentenced person. This interpretational approach was prescribed for in the case of **Rex vs Pule Tsoaeli & Another CRI/S/18/87** at page 2 where Cullinan C.J. postulated the law in these terms:

“It would seem therefore that the learned Magistrate had in mind to impose a sentence of two years’ imprisonment on each count, to be served consecutively it would appear that the learned trial magistrate did not consider the question of her discretion under section 301(2), as she made no reference to such discretion. As I see it therefore, this court is at large in the matter of such discretion.”

[5] The foundation of the present appeal relates to the content of the sentence imposed by the Learned Magistrate in **CR/213/2012** and transcends into her procedural approach in arriving at the sentence. The magistrate has sentenced the appellant to 15 years imprisonment with no option to pay fine. She further, acting *mero motu*, took into account her personal knowledge of the previous convictions and the sentences thereof which her colleague in the same court had individually imposed upon the appellant over similar offences.

[6] It has to be highlighted that the subject of the previous convictions and sentences had not, in any manner whatsoever,

been introduced to the Court by the counsel, and subsequently addressed accordingly to render necessary legal assistance to the court.

[7] The learned magistrate had, having considered the history of the previous convictions and sentences upon the appellant, decided to make an order that her 15 years custodial sentence should operate consecutively with the rest of sentences determined by the other magistrates.

[8] The simple arithmetic calculations reveal that the appellant has, as the result of the sentencing approach taken by the magistrate (against whose sentence the appeal has been dodged) been scheduled to serve 23 years of imprisonment. Whilst this creates some sense of shock to the court it is however, realized that the grounds of appeal in the matter do not attract its jurisdiction to disturb the sentence and correspondingly that the appellant hasn't prayed for that. Thus in keeping with the Court of Appeal decision in **Morolong** that the court should confine itself to the litigant's prayers, it accordingly refrains from disturbing the sentence.

[9] The court is in accordance with the stated grounds of appeal confined to consider the correctness or otherwise of Magistrate's decision regarding the concurrency or consecutiveness of the running of years of imprisonment which she had ordered against the appellant.

[10] In addressing the identified assignment presented before the Court, it is primarily recognized that sentencing is pre-eminently a matter for discretion of a trial court. This has been elucidated in **Nthongoa and Another v Rex** (reported in **Criminal Procedure Book by M.P. Mofokeng p. 197**). This notwithstanding, the sentence must be seen to have been purposeful, sound in substance and procedurally arrived at.

[11] It transpires to this Court that the magistrate has *ex facie* the record of the proceedings not indicated her reasons for the imposition of the sentence without its partial or conditional suspension or option to pay fine. Most significantly for the purpose of this appeal, she has not in any manner, whatsoever, justified her decision that the appellant should be subjected to a rather extremely harsher punishment, in which he would effectively stay in prison for 23 years.

[12] It was procedurally imperative upon the magistrate to have invited the counsel to address her on the question of whether or not her sentences should run concurrently or consecutively. The paradox in any event is that the crown had advised her that the appellant had no previous convictions.

[13] Advocate Thaba drew to the attention of the Court that by the dictates of **section 301 of Criminal Procedure and Evidence Act 1981**, if the Court is aware that the accused is already undergoing sentence, the latter punishment shall, unless directed otherwise run consecutively. The legal perception of this court in this

regard is that much as the section has an inbuilt self-executing effect concerning the consecutiveness of the running of the sentences, the trial court, must nevertheless, be seen to have considered the option for the sentence to operate concurrently. This would, indispensably require the court to invite the Counsel to address it on the avenue to be followed. The Crown was in the circumstances also at large to persuade the Court to follow any one of the available sentencing routes besides its *dominis litis* status. It also, has the command of the investigating officer brief relating to the facts on the ground. The defence would respond accordingly. The end result is that the Court would have a holistic and informed picture for its final determination as to whether the consecutive operation of the sentence or its alternative should be followed.

[14] In the premises, the court finds that the decision of the Learned Magistrate that her sentence should run consecutive in relation to the others imposed by her colleagues is substantively and procedurally defective. The result is that this court set aside the Magistrate's Order that the sentences should run consecutively and substitutes it with an Order that the sentences should operate concurrently. This is automatically indicative that the appellant will henceforth serve 15 years imprisonment.

**E.F.M. MAKARA
ACTING JUDGE**

For Appellant : Adv. S.S. Tsabeha
For Respondent : Adv. S.V. Thaba