

IN THE COURT OF APPEAL

OF BOTSWANA

Criminal Appeal No. 27 of 1984

In the matter between:

DAVID PULE	Appellant
vs.	
THE STATE	Respondent

Mr. L. A. Maine for the appellant  
Mr. W. G. Manchwe for the Respondent

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J U D G M E N T

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Coram: O'Brien Quinn C.J.  
Aguda J.A.  
Kentridge J.A.

O'BRIEN QUINN, C.J.:

This is an appeal against the sentence of one year's imprisonment of which six months were conditionally suspended for a period of two years passed by the Acting Chief Magistrate at Gaborone on 23rd February 1984 which was confirmed by the High Court on 5th September 1984 when Hannah J. dismissed the appeal against the Acting Chief Magistrate's decision.

The appellant was charged and convicted of stealing by a servant contrary to section 282 as read with section 271 of the Penal Code (Cap. 08:01) and the appellant pleaded guilty to stealing P113,32 between 13th February and 15th February 1984 from his employers the Botswana Distributing Company (Pty) Ltd. The appellant was a salesman and, on receipt of money for goods sold, entered the correct

amounts on the top of the receipts which he gave to the customers but, by leaving out the carbon papers, he was enabled to fill out the second and other copies with lesser summons which he did and pocketed the difference on six occasions. The learned trial magistrate considered the offence to be serious and to be an abuse of trust and passed a sentence of one year's imprisonment of which six months were conditionally suspended for two years.

On appeal to the High Court it was argued that the sentence was excessive in view of the fact that the appellant was a first offender, the value of the goods stolen was negligible, the appellant was a young man who had pleaded guilty to the offence and that compensation had been made to the complainant.

In the High Court the mitigating factors were required and were listed as follows in the judgment:

- (1) appellant was a man of previous good character;
- (2) he was gainfully employed at the time of the offence;
- (3) he cooperated with the police and pleaded guilty;
- (4) the total sum stolen was not very large.

The aggravating factors were stated to be that the appellant stole from his employers, that he committed a series of acts of dishonesty as part of a preconceived plan and that the total sum involved, although not large, was not insignificant.

Emphasis was placed in the decision of Mahomed, J. in State v. Mabongo 1978 BLR 72 where it was held that it is undesirable to send a young offender to jail for a short period. The learned Judge in that case said:-

"Sending a first offender to jail should generally be avoided if a non-custodial sentence would serve to afford the community adequate protection, depending of course on the seriousness of the crime and the circumstances of the particular case S. v. Kulati 1975(1) S.A. 557 at 560."

He also said:

"The modern trend is that short term imprisonment should not be resorted to. S. v. Shange 1967(2) S.A. 81, S. v. Sakobula 1975(3) S.A. 565, S. V. Shrinidi 1974(1) S.A. 481.

Hannah J, in his judgment accepted that this should be the general policy of the Courts, but said that such policy cannot, unfortunately, always be followed and held that, in the case of theft by an employee, where the character and circumstances of the offender were the only factors to be placed in the balance custodial sentences would rarely be necessary and that Courts have to be alert to the need to deter others.

In conclusion Hannah J said:

"It is all too easy for employees to dip into their employers' tills and if those with dishonest inclination should think that they will get away with mere monetary penalties or suspended sentences they will more likely than not succumb to the temptation."

On appeal against this decision it was again argued that Mabongo's case applied and that Hannah J had erred in law by not considering the undesirability of imposing short terms of imprisonment and that the trial magistrate did not sufficiently take into consideration the usefulness of a suspended sentence as a deterrent. It was also argued that the High Court had not taken into consideration<sup>at</sup>/all that the amount, the subject of the charge, had already been repaid by the appellant. A fine and a suspended sentence, it was contended, would meet the case.

In considering the arguments put before this Court it is agreed that the imprisonment of first offenders, particularly young first offenders, should, wherever possible, not be resorted to but that, following what Aguda CJ (as he then was) said in Visser v. State 1974(1) BLR 68, it is not an immutable principle of law, and the circumstances of each case must be carefully examined.

The practice of the High Court has been, since 1978, (see Seleka and Mothai v. State Criminal Appeal No. 85 of 1978 (unreported)), in suitable cases and where the circumstances warrant it, to pass sentences of imprisonment, even on first offenders, but to suspend the greater portion thereof, which statement of the law was approved. / State vs. Fanyani /In Phillimon, Review Case No. 128 of 1983(unreported).

However, in this instant appeal it would seem that a letter from the appellant's employer was handed into the High Court during the original appeal, the purport of which letter was that the appellant had paid back all the money.

misappropriated, but unfortunately, no mention of this fact was made in the judgment as a mitigating factor.

Further, it is understood from the appellant's Attorney that the appellant is now a taxi-driver and owns a vehicle and that he is willing to pay a substantial fine.

These later matters were not, I understand, brought to the notice of the High Court.

Having, therefore, carefully considered the arguments put forward on behalf of the appellant and taking account of the repayment of the money stolen and the fact that the appellant is now in gainful employment, having been sacked from his original employment, I consider that the circumstances are such that greater hardship would now be worked on the appellant if he were to be sentenced to a term of imprisonment even if the greater portion of the sentence were to be suspended.

Having carefully considered the options open to this Court, and having taken full account of the sentencing policy of the Courts in Botswana which is to keep young first offenders out of jail wherever possible by the total suspension of any sentences passed on them, but that, where the circumstances warrant the suspension of a term of imprisonment even on a young first offender the term of imprisonment passed should be such that the greater portion thereof is suspended for a suitably long period, it is considered that, in the circumstances of this case, where the appellant is now employed, has paid back what he stole, which was quite small in the first place, is a first offender with

