

C. of A. (CRI) No.2 of 1979

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

MAKALO KHIBA Appellant

v

REX Respondent

HELD AT MASERU

Coram:

MAISELS, P.
DENDY YOUNG, A.J.A.
SCHUTZ, A.J.A.

J U D G M E N T

Maisels, P.

The appellant appeared before Rooney J. in the High Court on a number of charges.

The first was that he stole a cheque form No. 1698, the property of the Lesotho Electricity Corporation, the second that he forged this cheque, the third that he stole R55,546-99 the amount for which the abovementioned cheque was made out. There were two alternative charges to the third charge, namely, theft by false pretences and fraud. These two alternative charges were numbered 4 and 5 in the indictment.

The sixth charge against him was that he stole another cheque form No. 1861, the property of the Lesotho Electricity Corporation, and the seventh that he stole R56,589 the amount for which this cheque was made out. The eighth and ninth charges alleged, as alternatives to the seventh charge, theft by false pretences and fraud.

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I should have mentioned that charged together with the appellant was one Forrester. There was no case at all against Forrester and he was discharged at the end of the Crown case. Rooney J. in a full, careful and well reasoned judgment came to the conclusion that the appellant was guilty on Counts 1, 3, 6 and 7 and sentenced him to a term of imprisonment. This appeal is against conviction only. The appellant, who was defended in the Court a quo, gave no evidence, but made an unsworn statement from the dock in which he simply disclaimed all knowledge of the offences with which he was charged.

The appellant was employed by the Lesotho Electricity Corporation as an accountant. Rooney J. found

- (1) that the appellant stole the cheque, which formed the subject of Counts 1 and 3, from his employer;
- (2) that he took the cheque, which it is common cause was forged after it was stolen, made out to Kopano and Sons Construction as payee, to the Standard Bank Ficksburg in the Orange Free State, where he had opened an account in the name of Kopano and Sons Construction, and deposited the cheque to the credit of this account;
- (3) that this cheque which was ostensibly drawn on the account of Lesotho Electricity Corporation at Lesotho Bank, Maseru, was sent by the Standard Bank Ficksburg, as collecting agent for Kopano and Sons Construction (in reality the appellant);
- (4) that the account of Lesotho Electricity Corporation at the Lesotho Bank was debited with the amount of R55,546-99, the sum for which the cheque was made out, and the Standard Bank credited therewith i.e. the cheque was paid in this way;
- (5) that the forgery was subsequently discovered and the entry reversed;
- (6) that the appellant did not withdraw any of this money from the Standard Bank;
- (7) that the appellant stole the cheque which formed the subject of Counts 6 and 7 from his employer;
- (8) that he opened an account in the name of Sons Construction at Barclays National Bank, Ficksburg and deposited the cheque which was made out for the sum of R56,489-00 to the credit of this account;

- (9) that this cheque, ostensibly made out by Lesotho Electricity Corporation and drawn on Lesotho Bank was forged after it was stolen;
- (10) that when the cheque was deposited Barclays Bank was instructed to have it specially cleared;
- (11) that this was done, the Lesotho Bank accepted it as a valid cheque, the Lesotho Electricity Corporation was debited with R56,489, and Barclays Bank was credited therewith;
- (12) that the appellant drew two cheques made payable to cash in the sums of R32,610-55 and R22,840-27 respectively on the account of Sons Construction at Barclays Ficksburg and appropriated the proceeds thereof for his own purposes.

That these findings by Rooney J. were amply justified on the direct and circumstantial evidence admits of no doubt. It would be a work of supererogation on my part to set out the facts upon which Rooney J. came to his conclusion. It suffices to say that, not surprisingly, Mr. Kuny who appeared for the appellant found himself unable to contest any of these findings of fact; especially, as the appellant, as stated above, gave no evidence, a factor which in a case of this nature may properly be taken into account against him cf. S. v. Letseke and Others 1964(4) S.A. 768 at 776 (AD) and Ndwande v. R. 1970-76 Swaziland Law Reports 386 at 389.

That being the case Mr. Kuny did not challenge the correctness of the verdict on Counts 1 and 6 which related to the theft of the cheque forms. He contended however, that on the facts found by the learned Judge a quo, the crime which the appellant committed in relation to the proceeds of these cheques which had been forged was that of theft by false pretences. The learned Judge a quo was of the opinion that the appellant could indeed have been found guilty of theft by false pretences on the alternative Counts to 3 and 7, i.e. Counts 4 and 8 but because he found the appellant guilty on the main counts, i.e. Counts 3 and 7 and because to use his words "the remaining charges cannot be left in the air without resolution" he returned a formal verdict of not guilty on Counts 4 and 8.

/Mr. Muguluma

Mr. Muguluma in a powerful and able argument on behalf of the Crown submitted the appellant was indeed guilty of theft as charged under Counts 3 and 7. Mr. Kuny argued that the appellant was on Count 3 in a position where he could have drawn the proceeds of the cheque at Standard Bank Ficksburg as a result of his having falsely pretended to the Standard Bank at Ficksburg that the cheque deposited by him there was a good and valid cheque. So too, it was contended, with reference to Count 7, that the appellant falsely pretended to Barclays Bank at Ficksburg that the cheque deposited by him there was a good and valid cheque and in this case he drew at Barclays Ficksburg against this cheque as stated above two cheques for substantial amounts which were paid to him. Upon these facts Mr. Kuny contended that the crimes committed by the appellant in relation to these cheques were committed in the Orange Free State and the Courts of Lesotho had no jurisdiction to try the appellant in respect thereof. Alternatively and additionally he argued that even if the Courts of Lesotho had jurisdiction, the High Court had acquitted the appellant of theft by false pretences and it was not open to this Court, because of this acquittal, notwithstanding the powers conferred on it by section 10 of the Court of Appeal Act, to alter the convictions to Theft by False Pretences. In the view I take of this matter it is not necessary to deal with this last point.

That theft by false pretences is always theft simpliciter admits of no doubt. Cf. Ex Parte Minister of Justice : in re R. v. Gesa 1959(1) S.A. 234 at 239 (A.D.); Dalrymple, Frank & Feinstein v. Friedman & Another 1954(4) S.A. 649 at 664(W); R. v. Collins 19 EDC 163. Hunt South African Criminal Law Vol. II says at p. 758, after analysing the law on this subject,

"theft simpliciter can legitimately be charged where the owner's consent has been induced by false pretences, but such charge sheets should, in order to avoid prejudice to the accused, usually specifically allege the false pretence."

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In the present case it was made abundantly clear to the appellant how it was alleged he stole the money and he suffered no prejudice as a result of the failure specifically to allege a false pretence. But in my judgment, there is no doubt that this is a case of theft simpliciter. Theft consists in an unlawful contrectatio with intent to steal of a thing capable of being stolen. Cf Hunt op cit p. 566. That money is capable of being stolen, even where it is not corporeal cash, but is represented by a credit entry in books of account appears to be clear cf. S. v. Graham 1975(3) S.A. 569 (AD); R. v. Milne & Erleigh(7) 1951(1) S.A. 791 at 877 (AD); S. v. Solomon 1953(4) S.A. 518 at 522 (AD). As was said by Greenberg J.A. in an unreported case of Rex v. Manuel (A.D. 28th March 1950) referred to with approval in Graham, Milne & Erleigh, and Solomon supra,

"Under our modern system of banking and paying by cheque or kindred process, the question of ownership in specific coins no longer exists in cases where resort to that system is made".

The appellant's agents, albeit innocent agents, i.e. Standard Bank and Barclays Bank, presented the cheques for payment in Lesotho. It matters not that the appellant himself did not present these cheques in Lesotho cf. Hunt op cit p. 572(V) and authorities there cited. The entries debiting the Lesotho Electricity Corporation in the books of the Lesotho Bank and crediting the Standard Bank and Barclays Bank, as collecting agents, were made in Lesotho. In this way thefts were committed and these thefts were committed in Lesotho. It was there that the unlawful contrectatio took place. This indeed was what Mr. Muguluma argued and in my judgment correctly argued. It follows from what I have said that the points raised on behalf of the appellant cannot be upheld and that this appeal must be dismissed.

(Signed)

I.A. Maisels.....
I.A. MAISELS
President

I agree (Signed) J.R. Dendy Young.....
J.R. DENDY YOUNG
Acting Judge of Appeal

I agree (Signed) W.P. Schutz.....
W.P. SCHUTZ
Acting Judge of Appeal

Delivered this 10th day of January, 1980 at MASERU.