C. of A. (CRI) No. 4 of 1980

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

BRIAN ALEXANDER FORRESTER Appellant

v

R E X Respondent

HELD AT MASERU

Coram:

SCHUTZ, J.A.
VAN WINSEN, J.A.
MARAIS A.J.A.

J U D G M E N T

Schutz, J.A.

By now this matter has a somewhat lengthy history. Originally the appellant was convicted by the Senior Resident Magistrate, Maseru on two counts of fraud (counts 2 and 3) and was sentenced to a fine of M80 on each count, or in the alternative to eight months imprisonment on each count. An appeal to the High Court against conviction and sentence was dismissed by the learned Chief Justice on 13th March, 1980. An application for leave to appeal against the conviction was then made direct to this Court. It was struck off the roll in January 1981 on the ground that, in the case of second appeals, in terms of section 8(1) of the Court of Appeal Act 10 of 1978 an application for leave to appeal cannot be made to this Court unless such an application has been made to the High Court and has been refused. Thereafter an application was made to the High Court, which was refused on 3rd March, 1981, on the ground that there was no reasonable prospect of success on appeal. A further application to this Court was then launched only on 30th April, 1981. In terms of section 2(2) of the Court of Appeal Rules 1980 that application should have been brought within 21 days of the refusal of leave by the High Court so that, again, the matter is not in order. An application for condonation was filed simultaneously with the application for leave to appeal. The explanation for

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the delay this time is that it was the appellant's Johannesburg counsel, who had been briefed to consider what steps should be taken after refusal of leave by the High Court, who drew attention to the 21 days period. The appellant's attorney goes on to state that the reason for not bringing the application timeously was his error, he being under the impression, not having re-read the rule before dispatching the papers to counsel, that the appellant had six weeks to bring an application. In due course I shall return to the question whether this further failure to comply with the Rules should be condoned.

A further factor falling to be considered in the application for leave to appeal is whether the appellant has reasonable prospects of success on appeal. It is unnecessary for me to set out the facts at great length, particularly because they have been most carefully analysed by Cotran C.J. in his judgment dismissing the appeal.

The substance of count 2 is that the appellant, intending to defraud his employer the Lesotho Electricity Corporation (hereinafter L.E.C.) and/or the Lesotho Government and/or the Royal Palace, misrepresented to L.E.C.'s storeman, one Masenyetse, that a document which he produced to Masenyetse was an order form authorizing the latter to book out materials to the Royal Palace, whose L.E.C. job number was J.9102, whilst he knew that the materials were to be delivered to his own house (actually the property of L.E.C.) and so induced Masenyetse to the prejudice of L.E.C. or the Lesotho Government to so book out the goods. The appellant was employed by the L.E.C. as the Commercial Engineer. In support of this charge the Crown called Tankiso Lepheane, a L.E.C. wireman. The appellant instructed him to do certain work at the appellant's house, and gave him a paper (Exhibit E - now regrettably lost, like all the other exhibits) which had been written by the appellant, and which bore the job number J.9102. It was proved that this was the job number having application to the Royal Palace, that the proper job number for L.E.C. houses was 6, a non-revenue producing account, and that the appellant well knew these facts. Tankiso took the paper to Masenyetse who refused to deliver the articles requisitioned. Masenyetse deposed that Tankiso "wanted to be issued with material with which to work at accused's house". He refused to give Tankiso the materials because the job number was that of the Royal Palace and he required Tankiso to get the correct job number. If he had not asked Tankiso where the materials were

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going he would have thought that they were going to the Palace, which would then have been charged. The appellant being absent, Tankiso went to a subordinate of the appellant's one Smith, who told him to use the correct job number, 6. Masenyetse then issued the materials to Tankiso, who worked at the appellant's house for two days, installing certain of the materials. The appellant then instructed him to stop work and return the remaining materials to the store, which he did.

Count 3 is rather similar. The substance is that the appellant, intending to defraud L.E.C. and/or the Royal Palace and/or the Lesotho Government, misrepresented to Masenyetse and/or one Siimane (an assistant accountant of L.E.C.) that certain labour charges that had been incurred by the Maseru Club be paid for by the Royal Palace and/or the Lesotho Government knowing that the charges were payable by the Club for work done for the Club by the L.E.C. Prejudice was alleged to the L.E.C. and/or the Royal Palace. Josias Likate, an electrician of L.E.C., was called in support of this charge. The appellant instructed him to fix some lights at the Club on a Saturday, giving him the job number 9102 (which was the number for the Royal Palace and which had no application to the Club). He worked for 8 hours. As there was an objection to the colour of the lights, on the Monday he ordered white globes from Masenyetse, giving the job number 9102. The latter refused to issue the materials. The reason, as given by Masenyetse, was that Josias "said he was going to work at Maseru Club, but the job number was that of the Royal Palace". The storeman complained to the then managing director, Mr. Green, "because the material would be charged as though it had been used at the Palace and yet it had not been used there". In cross-examination, he stated that if he were given an order in which the customer was the Club, but the job number 9102, he would immediately realize that there was something wrong. If he had not realized this, the Palace would have been charge. After Josias had been refused the materials, he returned to the appellant who instructed him to leave the work. But the matter had not quite ended. Josias then put in a time sheet for 8 hours overtime. It bore the custoner's name as Maseru Club and the job number 9102. He signed the time sheet. It also bore the appellant's initials "B.A.F.". This latter fact was deposed to by the rather unreliable witness Siimane, but it was not challenged. It was also confirmed by the witness O'Hara. This latter witness also stated that the

extensions to the garage at the appellant's house (where the work relevant to count 2 was done) were unauthorized.

The appellant elected to give no evidence. Nor did he call any witnesses. On his behalf reliance has been sought to be placed on certain correspondence between him and Mr. Green. This correspondence is no longer available, as it was not available to Cotran C.J.. Apparently it was concerned with the matters convered by count 2, and the explanation, which appears to have satisfied Mr. Green, was that the wrong job number was used due to inadvertance. I agree with Cotran C.J. that even the acceptance by Mr. Green of such an explanation can be no substitute for an explanation given in the witness box, which can then be tested.

Two questions arise on each of the counts. The first is whether the Crown has established an intention to defraud. The second is whether it has established prejudice or potential prejudice.

With regard to the question of intention, and bearing in mind that the defence is that the Crown has not disproved inadvertance in the inappropriate use of the job number 9102, two factors weight against the appellant. The first is that within a relatively short space of time he misused the number three times - once in connection with count 2, and twice in connection with count 3 (the initial instruction to Josias, and also the latter signing of his overtime card). The second is that with regard both to the job at his house and the job at the Club he gave instructions, after a time, and after Masenyetse had raised objections, that the uncompleted work should be stopped. As the correct application of the job number 9102 was well known to the appellant his misuse of it creates a prima facie case, although not necessarily a strong one, that he had some improper purpose in misusing it. This prima facie case is, in my view, considerably strengthened by the two factors that I have mentioned. The resulting Crown case was of sufficient strength for it to be appropriate to take into account, as a further factor, the appellant's failure to give evidence (cf R. v. Makalo Khiba (C. of A) 1980(1) LLR 10 at 15 and R. v. Bernard Teboho Faku C. of A. (CRI) No.7 of 1979(unreported). His own state of mind was a matter peculiarly within his knowledge, which tends to enhance the significance of his failure to give evidence.

Mr. Sello for the appellant argued the question of proof

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of intention to deceive in this way. Because the storeman would act only if he had both a job number and a customer's name and because he would always observe any discordancy between the two, any attempt to bring about the debiting of a wrong account would be found to fail, so that it would have been so futile for the appellant to practise a deception by using a wrong job number as to render it most unlikely or impossible that he would have made such an attempt. Of course, he could not be cross-examined on that theory. That apart, it contains the assumption that the storeman would always be vigilant, whereas experience shows that people often are not and are often misled by an incomplete deception. But another difficulty arises for the appellant. The first document sent by the appellant (count 2) bore only the job number and not the customer's name. It is true that the storeman was told where the materials were to be used but his uncontradicted evidence is that he learned this only because he questioned Tankiso. He said that if he had not asked the question he would have thought that the goods were intended for the Palace. In other words had the storeman been less vigilant a deception could have been practised. (cf. R. v. Seabe 1927 A.D. 28 at 32). The possibility of deception is admittedly much less in the case of the two documents relevant to count 2 as they bore both the job number 9102 and the customer's name, namely Maseru Club. But we do not have any account by the appellant as to his knowledge of the efficiency of the stores procedures, or of the reason for using the Palace job number. Mr. Sello argued that the job number was really of no significance at all in identifying a customer. I have difficulty in accepting that argument. The witness Smith explained the system of allocating job numbers, particularly different classes of numbers for different classes of jobs. He also explained that once a number was allocated one of the parties who was notified was the storeman. The reason for this can only be that the storeman would be provided with a means of identification.

Having taken into account Mr. Sello's argument, and the factors already mentioned, I am of the view that in the circumstances the failure of the appellant to advance any explanation which could be tested hardens a Crown case of substantial cogency into proof beyond reasonable doubt.

On the question of petential prejudice I think that the matter is quite adequately dealt with by Cotran C.J. :

"I think it is clear that the risk of harm involved

> not only the possibility that the non-proprietary rights of the L.E.C. were being infringed in the sense of impairment to its reputation for wrongful (sic) invoicing if the false representation escaped the storeman's or accountant's notice (see R.v.Seabe 1927 AD 28 at 33) but also the risk that a third party could have been (not necessarily would have been) invoiced for costs, whether of labour or material, which they have not in fact incurred. As Schreiner J.A. said in R. v. Heyne 1956(2) S.A.604 (A.D) at 622
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> > 'the false statement must be such as to involve some risk of harm, which need not be financial or proprietary, but must not be too remote or fanciful, to some person, not necessarily the person to whom it is addressed'".

I would qualify Cotran C.J.'s statement only in one respect and that is by pointing out that in count 3 the Royal Palace is included as one of the persons prejudiced, whereas in count 2 that is not done, so that prejudice may not in that case be found in relation to the Royal Palace.

Some of the factors to be taken into account in considering a condonation application such as is now before us are set out by Van Winsen J.A. in Koaho v. Solicitor-General C. of A. (CIV) No.3 of 1980 as follows :

> "This Court has a discretion - to be judicially exercised - to grant the relief sought and in deciding whether to exercise such discretion in applicant's favour it will have regard inter alia, to the degree of delay in approaching the Court for condonation, the adequacy of the reasons advanced for such delay, the prospects of applicant's success on appeal, and the respondent's interest in the finality of the judgment (see United Plant Hire(Pty)Ltd v. Hills and Others 1976(1) S.A.717 (AD) at 720 E-F".

These factors must be weighed one against the other (United Plant Hire case at 720 G).

The factors that I take into account are the reason advanced for the delay in bringing the condonation application and prospects of success. As to the delay, it was occasioned by a failure to look at the Rules. A similar failure led to this matter being struck off the roll by this Court earlier this year. There must come a time when practitioners cannot expect continuing indulgence by this Court. I would not, however, refuse condonation solely on this ground in this case. What weighs with me particularly is that in my opinion the prospects of success on appeal are poor. I would therefore refuse to grant the condonation application.

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This conclusion makes it unnecessary to consider the Crown's contention that the grounds of appeal are ones of fact and not of law, and therefore such as may not be relied upon in a second appeal to this Court under section 8(1) of the Court of Appeal Act 1978. I would, however, indicate that if a respondent considers that there is an objection of this kind to granting leave to appeal, the point should be argued, in the first instance, in the High Court when leave is sought from that Court.

The question of sentence is not before us, as it cannot be in view of the terms of Rule 8(1). I would, however express my indorsement of the views of Cotran C.J. that in the circumstances it was rather petty to have brought the prosecution and that a nominal fine might have met the justice of the case.

The order I propose is that the application for condonation of the late application for leave to appeal should be refused.

Signed: W.P. Schutz
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W.P. SCHUTZ
Judge of Appeal

I agree Signed: L.de V. van Winsen
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L.DE V. VAN WINSEN
Judge of Appeal

I agree Signed: R.M. Marais
.....
R.M. MARAIS
Acting Judge of Appeal

Delivered this 3rd day of July 1981 at MASERU

For Appellant: Mr. Sello
For Respondent: Mr. Muguluma