CRI/A/52/81

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

LEKOKO QHOBANE Appellant

v

REX Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 25th day of February, 1982

The appellant was convicted of theft of M175-38 the property of the Produce Marketing Corporation. He was cautioned and discharged but ordered to repay the sum to the Corporation. This had been paid.

He is appealing against his conviction.

The standard of English of the record of proceedings is perhaps on the poor side and I have not been able to follow the events precisely. What has been established seems to be this:

The appellant was said to be a "cashier" employed by the Corporation at Leribe. His duties included the buying of wheat or other produce from the farmers of the area on behalf of the Corporation. He used to receive from the Corporation a cheque made out in his own personal name. He would cash it in Leribe pay the farmers in his area and submit to head-quarters return sheets known as "Weekly Summary of Produce Buying" in which he would show what produce was bought, the amount paid, and the "cash on hand" at the close of the week. The appellant's paper work was in order and the Corporation had no complaint. Exhibit A shows that appellant declared that on 24th April 1980 he had M175.38 "cash in hand".

The "Regulations" of the Corporation were not produced

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in evidence as an exhibit. The only evidence that could have brought home the appellant's conviction was that of Mr. Brathe the Chief Financial Officer of the Corporation who read a passage from the regulations which the appellant allegedly offended which the magistrate did not record.

Although Mr. Brathe kept a diary of his movements this was not available at the trial and had to give the dates from memory. His memory was evidently very hazy.

The "Facts" upon which the magistrate relied to convict the appellant are not supported by the evidence of the main witness as it appears on the record. That evidence must of course include his answers to questions put to him in cross examination. The exhibit (A and attachments) that were produced also form part of the evidence so that the only conclusion that can be drawn was that sometime at the end of April or early May 1980 the appellant did not have in his possession M175.38 in cash which he is supposed to have had in a box measuring 12 x 6 and told Mr. Brathe that he could not produce it because the police siezed his bank savings book which contained more than sufficient funds to cover the M175.38.

I am prepared to accept the inference that the police acted on the information given to them by PMC against the appellant in that he is mixing the Corporation's money with his own.

The appellant was in fact the holder of cash: cash which, on any spot check, should be in the small box provided for the purpose. It would seem that on a previous occasion appellant did not have "cash in hand" in the cash box during an inspection tour made by Mr. Brathe. This may well have been the occasion in March when the appellant explained to Mr. Brathe that at weekends he does not keep the money in the cash box in the depot but in his bank account at Leribe. He explained that the depot had been broken into. It was not absolutely clear by the way that there was a safe at the depot in which the cash box could be securely kept. Mr. Brathe seems to have accepted the explanation and advised the appellant that in that event what he should do at weekends was

(a) to go to the bank manager with the cash left with him and deliver it to him against a receipt, and

/(b).....

(b) produce the receipt on Monday to the manager and get the cash.

When on the 24th April the appellant did not send back to headquarters the M175.38 they informed the police.

Mr. Maqutu's contention is that the loose arrangements of the Corporation were such that as long as the appellant had sufficient funds to meet his commitments to the Corporation intent to defraud or to steal could not be proved beyond reasonable doubt more particularly because the explanation the appellant advanced of the breaking into the depot was accepted by the Corporation's Financial Controller who advised him to adopt another course (above described) which he may not have had the time to put into action since the police siezed his own savings book.

Now mixing personal money and trust money may indicate an intent to defraud or to steal but in the extraordinary circumstances of this case the inference was not irresistible. It follows that the appellant though foolish and unwise should have been given the benefit of the doubt. He was justified in appealing against the "caution and discharge" for the stigma of being a thief will haunt him all his life.

The appellant, if I may add, was not immediately suspended from his duties but continued with his work as usual (see his returns of 30th April and the 1st May that are filed immediately after Exhibit A). From this additional fact it is clear that though the Corporation regarded his actions as irregular they did not regard them as necessarily criminal. Naturally the Court is not bound by what they think, but it is not safe to allow this conviction to stand.

The appeal must accordingly be allowed.

T S Cotran

CHIEF JUSTICE

25th February, 1982

For Appellant : Mr. Maqutu
For Respondent: Mr. Peete