

IN THE HIGH COURT OF LESOTHO

In the appeal of :

JAMES SEKALAKA

Appellant

V

R E X

Respondent

J U D G M E N T

Delivered by the Hon. Justice M.P.
Mofokeng on the 30th day of June 1983

This is an appeal from the Court of the Acting Chief Magistrate. The appellant, together with two persons who have not appealed, were charged on two counts: Firstly, it was alleged that each or one or other or all of them unlawfully and intentionally stole a cheque leaf No. 523718 the property of the Barclays Bank and in the possession of the Accountant and brought the said cheque leaf to Leribe. They thus committed the Crime of Theft. Secondly, it was alleged that each or one or other or all of them unlawfully and with intent to defraud, misrepresented to Nkopane Monyane, the Manager of Lesotho Bank, that a certain cheque No. 523718 was genuine and as a result of the said misrepresentation, they opened an account of R7,800.00 out of that cheque having been given account of R7,800.00. They withdrew an amount of R5,200.00 and as a result of the said misrepresentation induced the said Nkopane Monyane to the loss and prejudice of the Lesotho Bank to pay the amount of R5,200.00 to them and

/yet the said...

yet the said accused, at the time when they made the aforesaid misrepresentation they well knew that the said cheque was not a genuine document. They, therefore, are alleged to have committed the offence of fraud.

To these charges they pleaded not guilty but were all found guilty and sentenced as follows:-

On First Count : Each R30.00 or 3 months imprisonment suspended on certain conditions.

On Second Count : Thirty (30) months imprisonment each.

The appellant now purports to appeal only against his conviction. However, the notice of appeal is quite clear and it states:

"THE REASONS FOR APPEAL ARE AS FOLLOWS

- 1 -

The learned Magistrate misdirected himself by making an inference that the Applicant committed the crime of theft.

- 2 -

The sentence is severe, taking into account the evidence and facts.

- 3 -

Conviction is unwarranted taking into account the fact that there is no evidence, that it is the accused who stole the cheque leaf from Barclays Bank."

/It has....

It has long been decided in this Court that the appellant cannot change his grounds of appeal at will. If there is to be any departure from this rule it must be sanctioned by the Court alone. There is also the general rule that once an appeal is noted, the Court is entitled to consider the question of sentence as well. To put in another way, a Legal Practitioner is not entitled as of right to add to the grounds of appeal and he may not do so after the expiry of the periods laid down by the Rules of the Subordinate Courts Proclamation. Whether the appellant should be allowed to do so is entirely in the hands of the discretion of the Court. These must, however, be an explanation why it has become necessary to amend the ground of appeal. (R v Mohamed, 1954(3) S.A. 317 (C); R v Kruger and Others, 1954(3) S.A. 816(c)).

In this judgement the appellant will be referred to simply as accused 1.

The general principle is that theft is a continuing offence i.e. it is committed by whoever comes by the stolen property well aware that it was. A cheque leaf was stolen from Barclays Bank in Maseru and after the elapse of a period amounting to more than a year it is found in the hands of accused 2 who is obviously being jointly assisted by accused 1 (appellant) and accused 3. They actually introduced him to the Bank Manager of the Lesotho Bank, Hlotse (Leribe) in order that not too many questions and thorough investigations are asked or carried out. A clear manifestation of their intention. It seems that Counsel

/for accused 1

for accused 1 now says the manager of Lesotho Bank did not know accused 1. The former says in his evidence and he was never shaken :

"I know accused 1 and accused 3. I have known accused 1 for two (2) to three (3) years. On 5.3.1982 accused 2 came to my office they were opening a current account Accused 1 was merely accompanying accused 2 as his younger brother. Accused 1 explained that accused 2 was his brother."


In my view the holding of an identification parade, under these circumstances, was redundancy. (See R v Dladla, 1962(1) S.A. 307 A.D. at 310). However, the Manager at such parade, did point out accused 1 without any difficulty.

Accused 2 had a cheque drawn on Barclays Bank Maseru, and said he had got the money when he closed his savings account at Barclays Bank, Rustenberg. The amount of the cheque was R7,800.00. He also made a cash cheque for an amount of R5,200.00 and took the money. After exchanges between the banks it was found that the cheque deposited by accused 2 with the assistance of accused 1 and accused 3 was a "false cheque". It is interesting to read the explanation given by accused 2 under oath, in Court, in trying to protect accused 1. It is incredible. Who ever heard of a person being forced to imitate the writing on a cheque?

The evidence is so overwhelming that the three accused acted jointly. It is, therefore, idle for accused 1 to say he lacked the necessary intention required in law. It is true that there was a close association between accused 1 and accused 2 that did not automatically make

/accused 1

accused 1 guilty of theft if accused 2 alone appropriated the cheque leaf with the intention to steal. Accused 1 might have had culpability in regard to the theft committed by accused 2 but that is insufficient to convict him for theft. Conduct is always a requirement for liability, (Visser & Vorster: General Principles of Criminal Law through the cases, 1982 Ed. p.435; Burchell & Hunt, 363). In this case the conduct of accused 1 before the Manager of the Lesotho Bank speaks loud and clear. He is, therefore, guilty of the crime of theft not because of the doctrine of common purpose. It is not usually relevant on principles of criminal liability to formally conduct crimes like theft.


J U D G E.
30th June, 1983.

For the Appellant : Adv. Mlonzi

For the Respondent : Nku (Ms)