

IN THE HIGH COURT OF LESOTHO

In the Appeal of

TEBOHO SEHOLOHOLO

v

R E X

J U D G M E N T

Delivered by the Hon Mr Justice B K. Molai  
on the 15th day of June, 1984

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The Appellant appeared before the Subordinate Court of Leribe charged with the crime of Theft Common on the following allegations

" In that whereas at relevant times the said accused was employed by the Lesotho Government as Executive Officer in the Ministry of Interior, stationed at Leribe District Administrator's office and being a servant of the Lesotho Government, the said accused was entrusted with care of money which came into his possession on account of his employer the Lesotho Government, the said accused did during the period between the 26th day of February, 1977 and 25th day of March, 1978 and at or near Hlotse Reserve, in the district of Leribe, unlawfully and intentionally steal the sum of money amounting to R3,430 the property or in the lawful possession of the  
/Lesotho .

Lesotho Government, and did thereby create general deficiency and committed the crime of Theft Common "

The proceedings started on 14th February, 1979 as Preparatory Examination during the hearing of which the depositions of a large number of witnesses were recorded and the appellant reserved his cross-examination. At the conclusion of the Preparatory Examination, the appellant was committed for trial by the High Court on a charge of Theft Common. However, in terms of the provisions of S.90 of the now repealed Criminal Procedure and Evidence Proclamation No 58 of 1938, which was in force at the time, the Director of Public Prosecution remitted the case for summary trial by the Subordinate Court. The charge was then put to the appellant who pleaded not guilty, decided that the reading of the evidence/depositions of witnesses who had appeared at the proceedings of the Preparatory Examination should be dispensed with and did not wish to cross-examine any of the witnesses. The crown then closed its case after which the appellant also closed the defence case without leading any evidence. The case was then postponed for judgment

It transpired that during the time when the trial magistrate was preparing judgment, part of the record of proceedings disappeared in his office. Faced with this predicament, the public prosecutor made an application, which was allowed by the trial magistrate, that the

/proceedings . . .

proceedings be converted into a Preparatory Examination. The appellant was subsequently re-committed for trial.

The Director of Public Prosecution, however, returned the case for summary trial by the trial magistrate. In the mean time, the missing portion of the record of proceedings was recovered from one of the legal practitioners who had apparently taken it in error while he was appearing in connection with some civil matters before the trial magistrate in the latter's office. Following the second directive of the Director of Public Prosecution that the appellant should be summarily charged before the subordinate court, the charge was again put to the appellant who apparently adhered to his original plea of not guilty. The Court was again told that the reading of the depositions recorded at the Preparatory Examination should be dispensed with and the defence did not wish to cross-examine the witnesses. The Crown then closed its case. After the crown had closed its case the defence also decided to close its case without leading any evidence. The Court had, therefore, only the evidence adduced by the Crown to work on.

The trial magistrate considered the evidence and convicted the appellant as charged in the amount of R1,828.22. A sentence of 12 months imprisonment was imposed. The appeal is against both the conviction and sentence on the following grounds

" 1 The conviction was against the evidence and the weight of evidence

2. The learned magistrate erred in convicting the appellant when his trial had been converted, wrongly, it is submitted, into a Preparatory Examination twice.
3. The sentence was excessive."

The question of whether or not the magistrate's conversion of the remitted proceedings into a Preparatory Examination and the subsequent re-committal of the appellant for trial by the High Court was an irregularity, may be disposed of right away Section 91 of the repealed Criminal Procedure and Evidence Proclamation, supra, provided

" Any case remitted to a subordinate court under any provision of the last preceding section shall be tried by such court in all respects in accordance with the relevant provisions of Parts IX, X, XI, XII, XIV, and XV of this Proclamation and also in accordance with and subject to the law governing such court, and any conviction and any sentence imposed in respect thereof shall be subject to review or appeal as prescribed by such law." (my underlining)

I have underscored the word "shall" in the above quoted section to indicate my view that once the director of Public Prosecution had remitted the case in terms of the provisions of Section 90 of the Criminal Procedure and Evidence Proclamation, supra, it became imperative upon the subordinate court to proceed with the trial and there could have been no discretion whether or not to convert the proceedings into a Preparatory Examination and re-commit the appellant for trial by the High Court. See

/also ...

also Swift on the South African Law of Criminal Procedure (1957 Ed.) at p 127 and the cases therein cited where the learned author has this to say, in part, on the subject.

" Where once the case has been remitted, the magistrate must proceed with the trial and he cannot convert the trial into a preparatory examination and recommit the accused for trial ..."

It would appear, therefore, that on the above cited authorities the answer to the question whether or not the magistrate's conversion of the remitted proceedings into a Preparatory Examination and the subsequent re-committal of the appellant for trial by the High Court amounted to an irregularity must be in the affirmative and the Director of Public Prosecution rightly returned the proceedings to the Subordinate Court to proceed with the summary trial as previously directed. However, the important question was whether the irregularity was fatal to the proceedings. The guiding principle here is whether the appellant was prejudiced in his defence by the irregularity. In his reasons for judgment, the trial magistrate took the view that even if the conversion of the remitted proceedings into a Preparatory Examination and the subsequent re-committal of the appellant for trial amounted to an irregularity such an irregularity did not in any way prejudice the appellant.

I must say I also fail to see how in the circumstances of this case the irregularity could have prejudiced the appellant, particularly so because the Director of Public

/Prosecution ...

Prosecution in fact declined to indict the appellant and returned the proceedings to the subordinate court to proceed with the summary trial and the trial accordingly proceeded in accordance with the provisions of section 91 of the Criminal Procedure and Evidence Proclamation, supra. I am prepared therefore to share the view taken by the trial magistrate that as it did not prejudice the appellant, the irregularity was not fatal to the proceedings. The second ground of appeal cannot, therefore, be allowed to stand.

The evidence adduced before the trial court disclosed that at all material times, the appellant was a public servant in the Government of Lesotho engaged as an Executive Officer in the Ministry of Interior and attached to the office of the District Administrator in Leribe. As such he was in charge of the account books in that office. His responsibilities included, inter alia, the selling of stray stock by auction sales and the depositing of the proceeds thereof with the Sub-Accountancy on behalf of his employer, the Lesotho Government. There was also evidence that from February, 1977 up to March, 1978, the appellant had been conducting a series of auction sales in various places within the District of Leribe.

The procedure of conducting these auction sales was briefly described as follows. The animals were sold by the appellant for cash to the highest bidder. When the buyers paid money, the appellant received it and issued them with receipts acknowledging the amounts that had been paid. The receipts were issued from a general receipt

book in triplicate. The original was handed to the person who had paid the money. The duplicate remained in the receipt book to be detached by the receiver of revenue (for onward transmission to the National Treasury in Maseru) when the appellant made payment at the Sub-Accountancy and after verifying that the amount of cash collected and deposited by the appellant tallied with the amount reflected on both the duplicate and the third copies in the receipt book. The third/last was a fast copy which remained in the receipt book.

There were two methods in which the appellant could deposit the cash he had collected. He could either deposit it with the Sub-Accountancy or with the bank. If he had deposited the money with the bank he would take a copy of his bank deposit slip (not cash) and present it together with the receipt book to the Sub-Accountancy. The receiver of revenue at the Sub-Accountancy would then check whether the amount shown on the copy of the bank deposit slip was the same as the sum total of the amounts reflected on the duplicate and triplicate/<sup>copies</sup>in the receipt book. If he deposited direct with the Sub-Accountancy the receiver of revenue would check the actual cash brought by the appellant against the amounts reflected in the duplicate and triplicate copies in the receipt book. In either case if the sum total of the amounts reflected in the duplicate and triplicate copies in the receipt book tallied with either the amount shown on the bank deposit slip or cash brought by the appellant a general acknowledgement receipt would be issued to the appellant.

/According ...

According to the evidence, at the relevant period, the appellant followed the second method i.e. he deposited the cash collected with the bank and then took only the bank deposit slip to the Sub-Accountancy. The amounts reflected on his bank slips always tallied with the sum total of the amounts reflected on the duplicate and triplicate copies in the receipt books except perhaps on one occasion when a comparison showed that the amounts did not tally and there was a surplus of R27.28 That amount was, however, received and acknowledged by the receiver of revenue

P W. 37, L/Sgt Sekonyela, told the trial court that following a certain report on 15th June, 1979 he set out to look for people who had been buying animals at the auction sales run by the appellant. He met only some of the people and they were subsequently called as witnesses to testify before the court.

Some of those people testified that although they were issued with bewyses covering the animals, they had bought at the auction sales, the appellant never gave them any receipts for the amounts they had paid for the animals. Their evidence was therefore not very useful to the court for the simple reason that their receipts were not available. Others, however, told the court that besides the bewyses the appellant also gave them original receipts which were produced as exhibits in court They confirmed that their original receipts correctly reflected the amounts they had paid to the accused. Those original receipts were still in their custody when P W 37 came and took possession of them. Their evidence was in that

/ regard . . .



regard confirmed by P W 37 who told the court that he subsequently obtained from the appellant the general receipt books from which the original receipts had been issued. He compared the amounts reflected on the original receipts and their corresponding triplicate copies in the receipt books. He found that the amounts reflected on the original receipts did not tally with the amounts reflected in their corresponding triplicate copies. According to the figures reflected on the original receipts the amount of revenue collected by the appellant amounted to a total of R3,893.50 while the figures <sup>on the</sup> /corres-  
ponding Triplicate copies reflected that an amount of only R2,037.50 had been collected. According to these entries there was, therefore, a general deficiency of R1,856

The original receipts and their third copies in the receipt books were also examined by P.W.39, J.M. Morolong, the Chief Inspector of Revenue attached to the National Treasury in Maseru. He confirmed P.W. 37's evidence that a comparison of the amounts reflected on the original receipts with the amounts reflected on their corresponding triplicate copies in the receipt books showed that the amounts on the triplicate copies were less than the amounts reflected on their corresponding original receipts.

P.W. 39 told the court that when he went to Leribe he had taken with him the duplicate copies kept at the National Treasury in Maseru and originating from the office of the District Administrator - Leribe. On comparing the amounts reflected on the duplicate copies with the amounts reflected on their corresponding triplicate copies in the receipt books

/he found

he found that they were the same. However, when comparing the amounts reflected on the original receipts that he had found in the possession of PW.37, he noticed that they did not tally with the amounts on their corresponding duplicate and triplicate copies. The amounts reflected on the original receipts were bigger than the amounts reflected on their corresponding duplicate and triplicate copies and according to him there was a general deficiency of R1,855.50 and not R1,856 as stated by PW.37 i.e. a difference of .50c. As it will be shown later in this judgment, it would appear that the trial magistrate accepted the evidence of PW.39 on this point.

The evidence of PW.38, S.J. Lekoatsa, was that from 1977 to 1979 he was the District Administrator in Leribe during which period he worked with the appellant as the latter's immediate supervisor. He, therefore, knew appellant's signature very well. He was positive that the signature on the original receipts exhibited before the trial court and their corresponding duplicate and triplicate copies was that of the accused. There can be no doubt, therefore, that the receipts were issued by the appellant.

In my view, those receipts were records of account of which the accused was clearly in charge. Their examination apparently revealed that there was a general deficiency.

On this evidence, the learned trial magistrate was satisfied that the appellant had, in the course of his duties as a public servant in the Lesotho Government received the amount of money reflected on the original receipts.

/He had .....

He had a duty to deposit all the money reflected on the original receipts with the bank or the Sub-Accountancy on behalf of his employer, the Lesotho Government. The appellant did not, however, deposit all the money reflected on the original receipt thus creating a general deficiency. The trial magistrate took into account the evidence that in some of the payment he made at the Sub-Accountancy, the appellant was found to have a surplus amounting to R27 28 which was duly received and acknowledged by the receiver of revenue. He therefore, took the view that the amount of R27 28 should be subtracted from the general deficiency of R1,855 50 testified to by P.W. 39 thus leaving the amount of R1,828.22 as a balance of which the appellant was convicted.

I am not so sure that the trial magistrate was correct in subtracting as he did the amount of R27.28 in regard being <sup>had</sup> to the fact that only a portion of the people who bought animals at the auction sales had or were issued with original receipts. Section 263 of the Criminal Procedure and Evidence Proclamation, supra, provided

" (1) At the trial of any person charged with theft, while employed in any capacity in the public service or by the Government of money or any other property which belonged to the Government or which came into such person's possession by virtue of his employment, or charged with theft, while a clerk, servant or agent, of money or any other property which belonged to his employer or principal or which came into his possession on account of his employer or principal, an entry in any book of account kept by the accused

/ or kept .

or kept under or subject to his charge or supervision, purporting to be an entry of the receipt of any money or other property shall be evidence that money or other property so purporting to have been received was so received by him

- (2) On the trial of a person charged with any such offence, it shall not be necessary to prove the theft by the accused of any specific sum of money if, on the examination of the books of account or entries kept or made by him or kept or made in, under, or subject to his charge or supervision, or by any other evidence, there is proof of a general deficiency, and if the court be satisfied that the accused stole the deficient money or any part of it."

There was ample evidence that the general deficiency was proved by comparing the entries made by the appellant on only the available original receipts and their corresponding copies i e the duplicates and the triplicate. It must be borne in mind that other original receipts were not available and the entries on them could not be compared with the entries on their corresponding duplicate and triplicate copies. The possibility that the R27 28 related to the amounts collected by the missing receipts and had nothing to do with the entries from which the deficiency was proved was high.

Be that as it may, I have already pointed out that what was of importance here was that there was sufficient evidence showing that the inspection of the entries made by the appellant in his receipt books which are records of account did establish the existence of a general deficiency. That being so, the trial court, in my opinion, rightly convicted the appellant and he cannot therefore, be heard

/to say

to say "the conviction was against the evidence and the weight of evidence"

As regards the sentence of 12 months imposed by the trial court, it must be borne in mind that the trial was before a magistrate with First Class powers whose criminal jurisdiction empowered him to impose a sentence of up to 2 years imprisonment. In his reasons for sentence, the magistrate himself conceded that the sentence he had imposed on the appellant was on the lenient side regard being had to the seriousness of the offence with which the appellant had been convicted.

On the evidence, there can be no doubt that this was a case of deliberate and systematic stealing of public funds carried out with impunity over a period of two years. In numerous decisions this court has pointed out that it takes a dim view of people who commit this type of offence and emphasised its determination to bring it to a halt. A lenient sentence, in the circumstances, will simply have the tendency to encourage a repetition of this type of offence and in no way serve the attainment of the desired end. In view of the seriousness of the offence with which he had been convicted it seems to me necessary that a commensurately serious sentence should be imposed on the appellant if only he and people of his mind were to be deterred from a repetition of the sort of conduct that had landed the appellant before the courts of law.

Under the powers vested in me by the provisions of section 329(1)(c) of the Criminal Procedure and Evidence Act, 1981, I accordingly set aside the sentence of 12 months  
/imprisonment ...

imprisonment and substitute, therefor 2 years imprisonment.

The appeal is dismissed.

B. K. MOLAI  
J U D G E

15th June, 1984

For Appellant	Mr. Sello
For Crown	Mrs Bosiu