IN THE HIGH COURT OF LESOTHO

In the Appeal of:

'MABATHO MASUPHA

v

REX

JUDGMENT

Delivered by the Hon. Acting Mr. Justice J.L. Kheola on the 6th day of August, 1984

The appellant was charged in the Subordinate Court of Berea with the crime of theft; the charge reads:

> " In that whereas during the period or between the 1st day of March, 1982 and the 2nd day of April, 1982 the said accused was employed as an assistant Sub-Accountant in the Berea Sub-Accountancy and as such was a servant of the Government of Lesotho and entrusted with the custody and care of money which belonged to the said employer or which money came into her possession on account of the said position she held in the Sub-Accountancy, the said accused did during the aforesaid period at Teyateyaneng in the district of Berea unlawfully and intentionally steal some of the said money causing a general deficiency in a sum of R124.81, money belonging to and in the lawful possession of the Government of Lesotho."

The appellant pleaded not guilty but she was found guilty and sentenced to pay a fine of R180 or six months' imprisonment

/ in default .....

in default of payment of the fine.

The trial court found the following facts to have been proved:

1. That the appellant was an Assistant Sub-Accountant in the Berea Sub-Accountancy, assigned with the duties of a cashier between the 1st day of March, 1982 and the 2nd day of April, 1982.

2. That to effect payments she had always been given an imprest drawn from the bank. During the month of March 1982 banks were on strike and it was not possible to draw cash from the bank in order to pay the claimants. With the arrangement and consent of the Sub-Accountant the appellant borrowed cash from the revenue collection divisions of the sub-accountancy. She borrowed a total amount of R1847.41.

3. That to reimburse the Sub-Accountant, who was short by the amount borrowed, a cheque for R1847.41 was made and the appellant drew the money on the 31st March, 1982.

4. This amount was kept in the Sub-Accountant's safe till the appellant deposited R1722.60 into the bank and set aside R124.81 which forms the ground of the charge.

5. The report of Mr. Maluka Mapetla, the collector and inspector of revenue shows that the appellant explained to this witness that she had set aside or put aside the amount of R124.81 when she was going to deposit the amount of R1722.60 into the bank.

6. That when the appellant was instructed by the Sub-Accountant to go and deposit the amount of R1847.41

/she did ....

She did not tell him of any shortfall, even though she had counted the money herself before issuing the deposit slip.

7. That the Sub-Accountant had not counted the money even though it had been in his custody in his safe in an unsealed canvas bag.

8. That the appellant and the Sub-Accountant trusted each other to the extent that the former always kept her imprest in an unsealed canvas bag in the safe of the latter.

9. The appellant did not have her own cash box unlike other revenue collectors whose money was counted on being handed to the Sub-Accountant as the day's collections.

Although the trial court has given a fairly accurate summary of the facts found to have been proved by the evidence led before it, I must point out that there is no evidence that the appellant set aside R124.81 at the time she was going to deposit R1722.60 into the bank. In other words, the time when she set aside the amount of R124.81 is not disclosed by the evidence. The collector and inspector of revenue testified that the appellant said she put aside the amount of R124.81 from the other and when they asked her what had happened to the money after she put it aside, she said she did not know what happened to it. This explanation appears in the report of the collector and inspector of revenue which was handed in as an exhibit'A' at the trial. It also appears on page 11 of the proceedings when the witness was cross-examined by Mr Maqutu counsel for the appellant.

/The trial .....

The trial court held that the explanation made by the appellant was an admission of the fact that this amount which is a short fall, was actually set aside or put aside and the appellant only entered the sum of R1722.60 in the deposit slip when she was instructed by the Sub-Accountant to go and deposit the money she had borrowed from the revenue collecting divisions. It also held that the admission had been voluntarily made and that the appellant did not deny in her evidence that she made the admission. That the appellant had failed to explain away her explanation to the inspector of revenue, and this coupled with the fact that the appellant opted to enter R1722.60 instead of R1847.41 in the deposit slip, the trial court drew the inference that the appellant had the intention to steal the money when she set it aside.

In her evidence at the trial the appellant said that she withdrew from the bank the amount of R1847.41 in order to reimburse the Sub-Accountant whose books of account were showing a deficiency of that amount as loan to her (appellant). The money was kept by the Sub-Accountant for 3 days. On the 2nd April, 1982 the Sub-Accountant instructed her to go and deposit the money into the bank. The money was still in the canvas bag in which she had brought it and she counted it and found that it amounted to R1722.60. She made a deposit slip for R1722.60 and took the money to the bank. She said that she took it for granted that the money was still as it was when she gave it to the Sub-Accountant on the 31st March, 1982. She could not remember the exact amount of money she had withdrawn from the bank because she used "to deal with

/other ....

other businesses."

The defence of the appellant, as I understand it, is that on the 2nd April, 1982 when the Sub-Accountant instructed her to take the money (1847.41) and to go to the bank and deposit it, she believed that the money was still as it was when she gave it to the Sub-Accountant. She did not suspect that he had tampered with the money because she and the Sub-Accountant trusted each other so much that on previous occasions she kept her imprest in an unsealed canvas bag in the safe of the Sub-Accountant but she never encountered any shortages. It must be stressed that this money (R1847.41) was not just any amount of money that comes to the appellant in the normal course of her daily routine, it was an amount of money she must have been very familiar with. When she borrowed this money she recorded in her books of account; when the money had to be repaid she and the Sub-Accountant sat down and drew a cheque which she countersigned; she went to the bank and collected the money. She cannot be heard to say that two days later when she made a deposit slip for the money she had borrowed she had completely forgotten what amount was involved. I entirely agree with the trial court that she was the first person to have drawn the attention of the sub-accountant to the fact that the money in the canvas bag no longer corresponded with the amount she had put in the bag. The trial court took into consideration the additional factor that when her books and those of her senior were checked and the shortage was discovered the appellant explained that 'she put aside' the amount of R124.81 but she did not know what

/happened .....

happened to it. Mr. Maqutu has argued before me that when the appellant said she put aside the money she was referring to the whole amount of R1847.41 and that there had been a misunderstanding. I disagree. I am supported in this view by not only the report made by the inspector but by what appears in the cross-examination of the inspector at pages 10-11 of the proceedings:

"Q. You did not ask the Sub-Accountant about R124.81 because he was involved?

A. We asked him about it, and it was he who called the person involved.

Q. What did the accused say in regard to that amount?

A. She said she put it aside from the other and we asked the whereabouts of it since she had put it aside and she said she does not know what happened."

Whatever interpretation one may put to the statements quoted above it is clear that the witness was referring to the amount of R124.81. It is significant that immediately after eleciting these answers from the witness Mr. Maqutu totally abandoned that line of cross-examination even before he put to the witness what his client would say about the alleged explanation. Again in her sworn statement the appellant did not deny that she made the explanation that she set aside R124.81 and did not know what happened to it. As she did not explain why she had to set aside this money I am of the opinion that the trial court was justified to draw the inference that she stole it. Mr. Kabatsi counsel for the Crown submitted that if anybody else had removed away part of the money whilst it was in the safe, the appellant would have

/been ....

been the first person to show some surprise and ask about it. It was his submission that she did not show surprise simply because she knew what had happened to it. She had stolen it. I tend to agree with this submission as I earlier pointed out that the appellant must have been very familiar with this particular lump sum of money and must have noticed at once when she took it back to the bank that there was a shortage.

I agree with Mr. Maqutu that this case is not one of general deficiency falling under Section 267 (2) of the Criminal Procedure and Evidence Act of 1981 because the books of account of the appellant were in order and showed no deficiency. The Sub-Accountant's books of account were the ones which showed a general deficiency but the cause of this short-fall was traced to have been the appellant's failure to deposit all the money that was in the canvas bag. It has been argued that the Sub-Accountant did not count the money when he instructed the appellant to go and re-deposit it and that the actual amount in the bag was R1722.60 reflected in the deposit slip which the appellant prepared. This argument loses its force when one takes into account that the appellant said she put aside the money which forms the subject matter of this charge. The appellant merely acted as a messenger for his 'boss' but decided to put aside part of the money she was supposed to deposit into the bank. That was theft simpliciter. Section 267 (2) supra, does not create a new offence of theft but merely makes it easy for the Crown to prove theft where books of account show a short-fall. There was therefore no prejudice to the appellant arising from the

/fact .....

fact that the charge-sheet was drafted in that manner because the evidence clearly showed what the appellant is alleged to have done.

I shall now deal with some of the points raised before me by Mr. Maqutu. Regarding the alleged previous inconsistent statement he has submitted that the trial court erred in holding that the statement was undenied although it was in essence totally contradicted by the appellant. I do not agree that by giving a statement which conflicted with her previous statement the appellant denied that she made that earlier statement. The sort of denial that was expected of her was to say in no uncertain terms that she never made such a statement or admission. If during the investigations an accused person makes a statement to the police or to the inspector of revenue and later abandons that statement at the trial and gives another statement which is directly in conflict with the previous statement, the trial court may come to the conclusion that he or she is a lier and convict him or her if, there is enough evidence to justify a conviction. The trial court was perfectly justified to refuse credence to the appellant by giving two conflicting statements on the same subject. The trouble with the defence is that at the trial almost the entire cross-examination was directed at showing that the possibility was that the money was stolen by the sub-accountant but the proved facts did not prove this. You cannot prove that X is not a thief simply by attempting to prove that Y is a thief. See Nthati v Rex 1981 (1) L.L.R. 35. In their all out attempt to put the blame on the sub-accountant the defence forgot that the appellant had previously made a very damaging statement that she "put aside" the stolen money.

For what purpose did she separate this money from the rest?

It has also been contended that the alleged statement should have been put to the appellant and she ought to have been given the opportunity of explaining or excusing the inconsistencies. I was referred to the cases of Gatebe v R. 1961 (1) P.H., H. 103 and S. v. Jeggel 1962 (3) S.A. 704. I do not think that the two cases are relevant to the issue under consideration in the instant case. In Gadebe's case a Crown witness "turned in his statement". The public prosecutor informed the Court that the witness had previously made a statement which was inconsistent with what he said in Court. The witness had to be impeached under a procedure similar to ours described in Section 274(2) of the Criminal Procedure and Evidence Act of 1981.

In Jeggel's case the complainant was cross-examined by the defence counsel but it was never put to her that she had previously made a statement inconsistent with her evidence in Court. When the defence called a witness whose evidence showed that the complainant had made a previous inconsistent statement, the Court held that such evidence would lose weight because no ground had been prepared for it. In the present case the very first Crown witness (the inspector) made it quite clear that the appellant made an admission that she had put aside the missing money and that was the basis of the Crown case. It was the defence that had to put it to the Crown witness that the appellant will deny that she ever made such a statement or that she had meant that she put aside the whole amount of R1847.41. I have earlier in this

judgment shown that the interpretation suggested by Mr. Maqutu that the appellant meant R1847.41 is most untenable.

It is true that the public prosecutor did not ask the appellant to explain her previous inconsistent statement but he did cross-examine the appellant at length to show that the statement she gave in Court was either improbable or not true that she could not remember how much money she had borrowed. It is true that failure to cross-examine may prevent a party from later disputing the truth of the witness's evidence. In particular, if the prosecution wishes to contend that the accused's evidence should be rejected, it should cross-examine to give him the opportunity of dealing with the case against him. But this is by no means an absolute rule. The point upon which the witness is to be contradicted may be so obvious that it is not necessary to put it to him in cross-examination, or his story may be so wildly improbable that cross-examination would be a waste of time. See Hoffmann : South African Law of Evidence, 2nd edition, page 324. I am of the opinion that the fact that the appellant had made a previous statement inconsistent with the statement she made in Court was a point so obvious that there was no need to cross-examine on it. The appellant was represented at the trial and before this Court by one of the most experienced lawyers in this country and there can be no question of any prejudice to her. She knew very well what statement she had made to the inspector of revenue and was well aware that her subsequent statement in Court was in conflict with the first one.

/The appeal ....

The appeal is dismissed.

J. L. KHEOLA
ACTING JUDGE

6th August, 1984

For the Appellant : Mr. C. Maqutu

For the Crown : Mr. Kabatsi