

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

TSEBO MPHAHAMA            Appellant

v

REX                            Respondent

J U D G M E N T

Delivered by the Honourable Acting Judge, Mr. Justice M.L. Lehohla,  
on the 4th day of August, 1986.

---

On 4th August, 1986, the above appeal was scheduled for hearing before me. The appeal was upheld the Crown having indicated in both its submissions and heads of argument that it did not oppose the appeal against both conviction and sentence.

The Appellant was charged in the Court a quo with the crime of fraud, it being alleged that "Upon or about 30th day of November, 1982 and at or near Passport Office in the District of Maseru, the said accused did unlawfully and with intent to defraud, misrepresent to various Passport officials that a certain Seboka Mokuena was one Lethena Mokuena and by means of the said misrepresentation was issued with a passport to the prejudice of Lesotho Government, whereas the said accused at the time she made the said misrepresentation well knew the said Seboka Mokuena was not Lethena Mokuena."

/...

The Crown called five witnesses three of whom i.e. P.W.1 Moshoeshoe Molapo, P.W.3 Mamotebang Moeketsi and P.W.4 Taane Phakisi were working at the Pitso Ground Passport Office where Appellant was working at the alleged time of the commission of the offence charged. P.W. Makori Makakole was the Assistant Manager (Manageress) attached to the Passport Office headquarters. P.W.5 Sgnt. Mohlahatsa was the investigating officer into the alleged offence.

At the close of the Crown case an application was made for the discharge of the accused on the grounds that she hadn't a case to answer. The learned Magistrate in her ruling found that the Crown had established a prima facie case, and thus turned down accused's application. Through accused's Counsel the defence thereupon closed its case and led no evidence in rebuttal of whatever material or factors the prima facie case was based.

The accused was consequently convicted as charged and sentenced to three months' imprisonment. It was against both conviction and sentence that an appeal was noted by Mr. Nthethe on behalf of the Appellant.

The appeal is based on the grounds that the Court a quo (a) erred in holding that the offence of fraud had been proved beyond reasonable doubt;

(b) misdirected itself in holding that the "document is the evidence of what it is" despite the fact that the offence was fraud;

/...

and that (c) the 3 months' imprisonment without the option of a fine is shocking.

The facts in brief indicate that P.W.1 with the persuasion of the Appellant authorised the taking of passport sized photos for the benefit of Lethena Mokuena who had lost his passport. This occurred despite P.W.1's protests that she would not take the money for such photos because as it was after 3.00 p.m. and the cashier had closed she would not be able to hand the money to the latter. It appears the Appellant undertook to take the money with a promise to pay it the following day to circumvent the obstacle pointed out by P.W.1. The following day P.W.1 was not able to balance books for moneys received the previous day in respect of Lethena Mokuena's passport. On checking the loss/<sup>report</sup>forms which had to be compiled in the event of processing documents relating to lost passports P.W.1 discovered that a green page 1 was clipped onto Lethena's forms. She compared the photos on the loss report forms with the green passport page 1 and discovered that the photos shown did not relate to the same person i.e. Lethena. While the photos on the loss report form reflected the likeness or picture and names of Lethena Mokuena, the photo on the green page 1 bearing Lethena Mokuena's names bore the picture of Seboka Mokuena.

It appears, and this is common cause, Appellant had issued the passprot bearing Seboka Mokuena's name to Lethena Mokuena despite the glaring differences in pictures of these Mokuenas who are known to P.W.1 as brothers.

/...

While under cross-examination this witness asserted that before shooting photos, what she considered first was to be satisfied that there is an authorised application form and money ready for payment by the applicant, she departed from her stand and conceded that she shoots photos when she sees a coupon shown to her by counsel. To the question:-

"I put it to you that you are not telling the truth that you only consider whether the form has been authorised before you issue a photo-graph .....? She replied: I admit it is not true, because there are exceptional cases as I have stated above."

This concession made by P.W.1 is on all fours with Crown Counsel's submission in respect of Appellant's lack of strict adherence to conventional practices, that as Mr. Lenono put it, "Although the conduct of the Appellant was not procedural, as a matter of practical convenience such conduct has in certain similar cases been adopted, indeed authorised." This is further fortified by P.W.4's answer to the question at Page 33 that "Looking at things I believe accused issued this passport without following the procedure .....?" which was "yes".

It has been clear to me from the evidence given that Appellant had charged M3 for Lethena's passport. Exhibit "A" - Receipt 5807 shows clearly that if Appellant had intended to "sell" the passport to Lethena for the amount charged i.e. M3 she could not have required Lethena to pay that money into Revenue Office. On Page 33 P.W.4 in reply

/...

to the question "Can you say Government has lost anything as a result of the issuing of this Passport ....?" says "No."

From the concessions made by the rest of Crown witnesses under cross examination I am left with no doubt that Appellant's act of affixing a wrong photo onto a right passport was an act of technical indiscretion for which she should at worst have been reprimanded. P.W.4 who was accused's principal at the Pitso Ground Passport Office bears this out at Page 34 where she was asked in connection with Appellant's obvious mistake in authorising a loss affidavit on to it. The text is as follows:

"But I thought you said you didn't know if she pasted the photos .....? Yes.

What did you do .....? I reported to the police. What did you want the police to do ....? Reprimand her. Had she gone out of your control .....? Not that much. Did you ever take administrative measures ...? No. Why .....? Because I thought this case was one which I could not only do so. (sic)

Do you realise that you could have done so .... ? Yes."

One more factor in favour of the accused in so far as it negatives any criminal intent on her part is the absence of any legal disability on the part of Seboka Mokuena to obtain his own passport using his own names. Nowhere in the case for the Crown has it been established that because of the known fear that in his own right Seboka Mokuena could

not obtain a passport, accused's involvement in the matter was calculated to circumvent any such disability. It has not been alleged that Seboka Mokuena's application for a passport would be turned down on some lawful cause shown. It is thus impossible to attribute any criminal intent to accused. The existence of evidence showing that accused knew that Seboka could not lawfully apply for and hold a passport would be an indication of guilty knowledge on the part of the accused, and from that factor criminal intent could be imputed to her intervention and involvement in the matter. This absence is in itself fatal to the case for the Crown. The existence of all other factors pointing to the fact that she processed the application forms and finally issued the passport to Seboka Mokuena merely shows that she was remiss in her duty. While on the one hand remissness is a reprehensible form of conduct, on the other hand such conduct does not merit being visited with full vigour of criminal conviction and consequent sentence.

It has been amply shown that it was no unusual thing in accused's department to employ short cut methods such as using the telephone instead of transporting records from the three centres i.e. district, central and border post offices with the result that documents concerned never bore date stamps and requisite markings by appropriate personnel in relevant offices. I learn this irregular method is resorted to in the name of speed and "in the case where the customer comes in need of an urgent help." Page 16.

To illustrate the foregoing I wish to refer to

/...

the text on Pages 37 and 38 of the record. In this instance accused's Counsel was trying to high-light not only the existence of irregularities as they apply to the passport office generally but also the extent to which it is general knowledge that they are condoned in the name of making short work of pressures which are ever-present in the work-place situation. To illustrate this he referred/an application to for a passport in respect of one Makalo John Matebesi. He asked P.W.2:

"Looking at it can you say it was reported at Central or Local Passport Office ..... ?  
At Central Passport Office.

Why .....? Because it bears a date stamp for Central Passport Office.

Which means I am not wrong that it was authorised by Central Passport Office ...?  
You are right.

Is it not right that Regina's form has no date stamp .....? It is right.

Am i right that it is therefore not authorised by Central Office .....?  
You are right.

Where was it authorised .....? At Pitso Ground.

Are you at this juncture aware that forms are authorised at Pitso Ground Passport Office...?  
Yes.

Does it sometimes happen that an authority is sought from Central Office by telephone ...?  
Yes.

Will you agree ..... that if authority is sought by telephone a loss report form will

/...

not bear a date stamp for Central Office .....?  
certainly.

Looking at that form one can conclude that  
authority was never sought from Central Office....?  
Yes.

Are we agreed that it might be authorised as in  
Regina's case or by telephone .....? Yes.

Is it common cause that photos on item A and on  
Page 1A are dissimilar .....

Accused  
Can accused have deliberately made this mistake ...?  
I don't know.

It is a possible mistake .....? Yes."

Even if accused showed some shortcomings in some parts of the  
record what appears on Page 20 vitiates them.

It was also submitted to me by the Crown that in  
the written Reasons for Judgment the learned Magistrate  
found as a proven fact (at page 6) that "accused failed  
to check closely the photos ..... without comparing  
them with the ones pasted onto the loss report forms" but  
did not say she found it as a proven fact that Appellant  
thereby intended to defraud anyone. POLAO LETSI vs. R  
1974-75 LLR. 54.

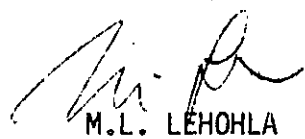
The onus is always on the Crown to prove beyond  
reasonable doubt the charge preferred against the accused.  
In the absence of a prima facie case established by the  
Crown the fact that accused chooses not to give evidence  
does not entitle the Court to return a verdict of guilty  
against him, because a priori in such a situation there

/...



would be nothing for him to answer except to run the risk of being convicted out of his own mouth. Whereas if a prima facie case exists against the accused at the close of the Crown case and accused in exercise of his right to do so refrains from rebutting evidence implicating him then such prima facie case becomes conclusive.

I am satisfied that the Appellant's appeal ought to succeed.

  
M.L. LEHOJLA  
A C T I N G J U D G E

18.8.86.

For the Appellant : Mr. Nthethe

For the Respondent : Mr. Lenono