

IN THE HIGH COURT OF LESOTHO

In the Appeal of

SIMON MOHAPI  
PHAKALITHA MPOPO

1st Appellant  
2nd Appellant

v.

R E X

J U D G M E N T

Delivered by the Hon. Mr Justice J.L. Kheola  
on the 14th day of March, 1986

The appellants were charged with the crime of theft in the magistrates' court for the district of Thaba-Tseka. It was alleged that between the 6th and the 10th August, 1983 and at or near 'Matsooana in the district of Thaba-Tseka the said accused did each or both of them unlawfully and intentionally steal 19 (nineteen) bags of maize the property or in the lawful possession of Rasekaea Nkuru, Joel Motseare and Masibo Matobako. The appellants pleaded not guilty but were found guilty as charged and sentenced to nine months' imprisonment.

It is common cause that Rasekaea Nkuru bought seventy-two (72) bags of maize and hired Budy's truck to transport the maize to Lesobeng. The truck overturned at 'Matsooana and the appellants were sent to tow the truck back to Maseru. Rasekaea alleges that when the vehicle overturned nineteen (19) bags of maize were trapped underneath the truck and the rest were transported by animals to Lesobeng.

Lefoleiri Tlali and Leboto Rannei are employed at Collier and Yeats shop at Mantsonyane. Their testimony was to the effect that one day in 1983 the appellants passed at their place work and they noticed that they (appellants) were towing a truck carrying nineteen (19) bags. They said that they paid a special attention to the vehicle and even counted nineteen

/bags...

bags in it because it was transporting their friend's maize. They allege that they even asked the appellants not to take the bags back to Maseru because that could cause a lot of expenses for their friend.

The Crown further sought to rely on the evidence of the truck driver who testified that on the day following the accident he was on his way to Maseru when he saw the appellants towing his truck carrying some bags of maize. He estimated the number of bags to be nineteen (19). He asked for a lift to Maseru but the appellants told him that the law did not allow them to do that.

It is common cause that when the appellants arrived in Maseru and handed the truck to their master there were only four (4) torn bags of maize in it. The appellants gave evidence that when they arrived at 'Matsooana and uplifted the truck they found only four torn bags of maize. They denied that when they passed at Mantsonyane they saw Lefoleiri and Leboto. They allege that they did not call at Collier and Yeats shop and never saw nor talked to the two witnesses. However, they admit that the driver of the truck asked for a lift from them but they refused to do so because that would be a breach of their regulations.

My first difficulty in this case is that the appellants were found guilty as charged, i.e. theft of nineteen (19) bags of maize, and yet there was evidence that four torn bags were handed over to Mr. Budy. Why were they not found guilty of only fifteen bags? Did the learned magistrate come to the conclusion that mere removal of the bags from the scene of the accident amount to theft? If that is what he thought he was wrong. The appellants were not expected to leave anything of value which they found at the scene of the accident. It is common cause that the vehicle had been left unattended for almost twenty-four hours and anything could have happened to the bags. The Crown failed to prove that when the appellants arrived at 'Matsooana there were nineteen bags of maize under that truck.

The evidence of Lefoleiri, Tlali and Leboto Rannei must have been approached with caution because they did not have any particular interest

in the matter nor did they have a good opportunity to count the bags. In any case the story of the appellants was not shown to be false beyond any reasonable doubt. If there is any reasonable possibility of their explanation being true, the appellants were entitled to their acquittal (R. v Difford, 1937 A D 370 at p. 373).

For the reasons given above I am of the view that the appellants ought to have been acquitted. The appeal is allowed. The appeal fee must be refunded to the appellants.

J L KHEOLA  
J U D G E

4th April, 1986.

For Appellants - Mr. Mochochoko  
For Crown - Mr. Seholoholo