

IN THE HIGH COURT OF LESOTHO

In the Appeal of

MOTLALENTOA MATSUMUNYANE

Appellant

v.

R E X

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola  
on the 21st day of April, 1986

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The appellant and one Thahanyane Tayob were charged with two counts which read as follows

Count 1

"That the said accused are guilty of the crime of contravening Section 6(1) (a) (i) read with (4) of Precious Stones Order No.24 of 1970.

In that upon or between the 8th December, 1982 and the 19th January, 1983 and at or between Mokhotlong Reserve and Mofolaneng in the District of Mokhotlong, the said accused, each or other or all of them did wrongfully, unlawfully and intentionally buy, deal in or receive by way of barter, pledge or otherwise, either as a principal or agent, any rough or uncut diamonds without licence or authority issued in terms of this order to deal in two rough or uncut diamonds as a buyer or seller.

ALTERNATIVELY -

That the said accused are guilty of the crime of contravening Section 6(c) (1) read with (4) of Precious Stones Order of 1970.

/In that.....

In that upon or between the 8th December, 1982 and the 19th January, 1983 and at or between Mokhotlong Reserve and Mofolaneng in the District of Mokhotlong, the said accused each or other or all of them did wrongfully, unlawfully and intentionally have in their possession power or control any rough or uncut diamonds, unless they are persons exempted under paragraph (a) or (b).

COUNT II

That the said accused are guilty of the crime of theft.

In that, whereas upon or about the 8th December, 1982 the said accused were employed by the Employment Bureau of Africa Limited in Mokhotlong as their representative, to pay over to Branches of the Employment Bureau of Africa Limited in Mokhotlong and on or about the 8th December, 1982 and at or near Lesotho Bank in Mokhotlong, received into their possession from Lesotho Bank the sum of M15,000.00 the property of the Employment Bureau of Africa Limited, which amount the accused because of their duty has to pay over to Branches of the Employment Bureau of Africa Limited in Mokhotlong, yet the accused, not regarding duty to pay over the said money to the Branches of The Employment Bureau of Africa Limited in Mokhotlong, but on the contrary did, on the 8th December, 1982 and at or near Mokhotlong Reserve in the District of Mokhotlong the said accused did wrongfully, unlawfully and intentionally steal, appropriate and convert the same money to their use."

The appellant and his co-accused pleaded not guilty to both charges. Evidence was led and at the end of the Crown case the co-accused was acquitted on both counts. The appellant's application for discharge at the end of the Crown case was apparently granted on count 1 and refused on count 2. At the end of the trial he was found guilty of the theft of R14,955 and sentenced to two years' imprisonment. The appeal is against both the conviction and sentence.

The following facts are common cause

- (a) The appellant was a representative of Teba in Mokhotlong and charged with the responsibility of drawing money to the tune of R20,000 to pay remittances submitted by miners,
- (b) On the 8th December, 1982 he drew a cheque for R15,000 at Lesotho Bank in Mokhotlong but he was charged a commission of R45 which reduced the amount to R14,955,

/(c).. ..

- (c) No money was found in the cupboard or wardrobe when it was broken open,
- (d) The appellant unearthed a sum of R4,500 at his home while he was in police custody,
- (e) Two rough and uncut diamonds were found by the police in the possession of appellant's co-accused.

'Maliengoane Letsela (P W 2) told the court that In November, 1982 the appellant came to her at Letseng-la-Dera1 and asked her to sell him some diamonds. She told him that she had none but promised to get some for him. On the 7th December, 1982 the appellant again came to her inquiring if she had not yet got the diamonds. She told him that a certain Vincent had diamonds and she promised to bring them to Mokhotlong on the following day. On the 8th December, 1982 she came to Mokhotlong accompanied by Vincent, Vincent's wife and one 'Maphilemon Sekhosana (P.W.3). They were travelling in the vehicle of Vincent. When they came to Mokhotlong bus stop Vincent gave her two diamonds and told her that one weighed 10 carats and the other 5 carats. The price of the two diamonds was R10,000. From the bus stop she was accompanied by P.W.3 Vincent and his wife remained at the bus stop.

They proceeded to the office of the appellant at Teba. The appellant was not in the office. On their way from the office they met him at the offices of the Rural Development. P.W.2 told the appellant that she had brought his parcel. He took them to his house where the two diamonds were shown to him and their price was reported to him. He left saying that he was going to the bank. After a short while he came back carrying a yellow envelope and opened it and emptied it of its contents. She then noticed that the contents were five bundles of M10. The appellant told her that each bundle had notes amounting to R2,000 and that the five bundles made a total of R10,000. He put the bundles back into the envelope and gave it to her. She gave him the two diamonds. They left appellant's home and met Vincent at Morojele's cafe. He instructed her to

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take the money to the vehicle She went to the vehicle followed by Vincent and put the money in the vehicle.

They returned to Letseng-la-Dera: in Vincent's vehicle. Vincent gave her two cases of beer as her reward.

The evidence of P W.3 is substantially the same with that of P W 2 except on two points she says that the envelope which contained the money was brown while P W.2 said it was yellow, she says that P W.2 gave the envelope to Vincent at Morojele's shop while P.W 2 said she put the envelope in the vehicle.

At the trial the appellant elected to give a sworn statement which has been summarized by the learned magistrate in the following words which I regard to be a correct summary

"He testified that he drew a cheque for M15,000 less a commission of R45 from the Lesotho Bank with the intention of assisting a trader who usually paid miners' remittances at Tlokoeng and often ran short of cash to pay the remittances. He called on the trader who advised him that he had encountered no problems in paying the remittances and advised him to make calls on Fridays not Wednesdays. He arranged with the trader that he would visit him on the 17th December, 1982.

He returned to his office and locked the money in a safe. On the 17th December, 1982, he again drove to Tlokoeng and called on the trader who gave him the remittances he had paid. Instead of reimbursing the trader for the amount of paid remittances, he returned to his office and issued him a cheque and put the money back into the safe. He said his intention was to go to Tlokoeng on the 24th December, 1982. But before he drove to Tlokoeng he suddenly remembered that he had been authorised by the head office to entertain the staff with a party at the Teba residence. He then removed the money from the vehicle and locked it in a wardrobe at the residence. He also locked the house as the party was going on and all the staff enjoyed the party to their hearts' content. As the party was going on he arranged with the Clerk called Tsehlana to see him before the party was over so that they could lock the money in a safe at the Teba Offices, but he could not find him when the party was over. After the party dispersed he went to his home out in the country having in his possession the keys for the wardrobe, safe and the house. He returned to work on the 27th December, 1982 and discovered that the wardrobe key was missing and that Tsehlana had not reported for duty as previously arranged with him. He waited for Tsehlana and the Teba guests who were due to arrive on that day at the residence until 5 p.m. in vain. He then decided to go back to his home and came back to work the next day. He also found the wardrobe key at his home

/The next.....

The next day he checked at the residence but found that the guests had still not arrived. When he returned to the residence but before he arrived there, he met his girlfriend at the bus stop and the latter asked him to take her half way. He then parked the vehicle of Teba at the residence and put the wardrobe key under a queen stove after which he locked the house and returned to his girl. He accompanied her to Mapholaneng. As he was waiting for transport to Mokhotlong he drank beers and only managed to get transport to Mokhotlong at 8 p.m. and arrived in Mokhotlong at 10 p.m. He decided to put up at the residence which he found lit and the generator motor was running. Nobody answered his knock but he observed that the vehicle from the Republic of South Africa was parked outside. He went for further drinks at Tsehlana's place. Tsehlana also told him that the guests he was expecting had arrived and he (Tsehlana) had opened for them with a duplicate key.

Tsehlana also told him that the manager from Maseru would be coming to Mokhotlong the next day and wanted to be met at the airfield. On the 29th December, 1982 the accused went to the residence and asked one of the guests to give him the keys for the vehicle from the room in which he had slept and he did so. He did not look for the wardrobe key even though he was aware that the residence was occupied by strangers. In the evening of the same day he decided to go to the residence to remove the money from the wardrobe, but he found that the guests were no longer there and he returned to his home. On the 30th December, 1982, he again checked the residence for the guests but found that they were still not there. He sought the advice of one Khabele as to what he should do as he had kept some articles at the residence and the guests were no longer available. Khabele advised him to wait for them. He left the message with the engine operator requesting the guests to see him before they left and they did promise to see him but never showed up.

Later when he called at the residence he found the key entrusted to the guests in the kitchen door hole and the guests themselves were not there. He looked for the wardrobe key but could not find it until he decided to write a letter to his manager in Maseru expressing fear that as the key of the wardrobe was missing he was not sure that the money was still available in the wardrobe. P.W.4 flew to Mokhotlong and forcibly opened the wardrobe but found no money "

The learned magistrate found that the explanation given by the appellant was far from being reasonably possibly true. He found that it was totally false and rejected it. His findings are being challenged on a number of grounds. Mr. Pheko, counsel for the appellant submitted that the learned magistrate erred in finding that the appellant gave P.W.2 in the presence of P.W.3 a sum of R10,000 in as much as neither of these witnesses was certain as to the amount received. Although the

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money was not counted note by note, the appellant told the witnesses that each of the five bundles, which the witnesses saw consisted of M10 notes which amounted to M2 000. The witnesses saw that the bundles were each made up of M10 notes. In my view the learned magistrate was justified to come to the conclusion that the five bundles of M10 amounted to M10 000 and that in a way the money was counted in the presence of the two witnesses.

It was also submitted that the learned magistrate erred in holding the evidence of P.W 3 as satisfactory corroboration of accomplice evidence (P.W 2) in as much as such evidence did not implicate the appellant in the commission of the offence of which he was convicted. I am not sure that P W.2 was an accomplice as far as the theft of Teba's money was concerned. She did not take any part in the withdrawing of the money from the bank. When the appellant told them that he was going to the bank, he did not disclose that he was going to withdraw Teba's money and use it in the purchase of the diamonds. The witnesses must have thought that the appellant was going to withdraw from his own savings. I agree with the submission that as far as the sale of diamonds is concerned P.W.2 and P.W 3 were accomplices and it is highly unlikely that P.W 3 did not know the purpose of their mission to Mokhotlong. The learned magistrate was well aware of the dangers of relying on the uncorroborated evidence of an accomplice and approached it with the necessary caution.

The evidence of P W 2 and P.W.3 is corroborated by a number of independent pieces of evidence or what one may call circumstantial evidence. On the 8th December, 1982 the appellant drew a cheque for M15 000 and withdrew that amount from the account of Teba at Lesotho Bank. Out of this amount he accounted for only R45 which was deducted by the Bank as commission. The withdrawal of M14,955 on the 8th December, 1982 tends to corroborate the evidence of P W.2 and P.W.3 in showing that on that day the appellant had more than R10,000 which is the

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money he gave to P.W 2.

Another piece of evidence which tends to corroborate the evidence of P W.2 and P.W.3 is the unearthing of R4,500 by the appellant on the 14th January, 1983. The appellant's explanation that he usually keeps his money in a hole covered with a stone and bundles of wood is nothing other than a fanciful story which cannot be believed by any reasonable man. The pointing out of the money after the appellant had been assaulted by the police during their investigations is admissible in terms of Section 229 (2) of the Criminal Procedure and Evidence Act 1981. The point I am trying to emphasize here is that it was not a mere coincidence that on the 8th December, 1982 the appellant had R10,000 and again on the 14th January, 1983 he had R4,500. He had all these monies after he had withdrawn Teba's money amounting to R15,000. Why should the appellant suddenly have an amount of R14,500 after he had withdrawn Teba's money amounting to R15,000?

Another piece of evidence which tends to corroborate the evidence of P W.2 and P.W.3 is that on the 19th January, 1983 Nkitsing Moletsane (P.W.8) called at the home of Thamahanyane Tayob accompanied by the appellant. He asked Tayob to give him the diamonds sold to him by the appellant. Without any hesitation Tayob produced two diamonds which were later identified by P.W.2 as the diamonds given to her by Vincent and which were subsequently sold to the appellant. P W.8 must have gone to the home of Tayob as a result of the explanation given by the appellant

When he dug out R4,500 the appellant is reported to have said that that was part of Teba's money. This statement is inadmissible because it was a confession made to a policeman which had to be recorded by a magistrate. However, there is no indication that the learned magistrate relied on that piece of evidence. He relied on the pointing out of R4,500

/Mr. Pheko.....

Mr Pheko further submitted that the learned magistrate erred in not giving a thought to the possibility that P.W.2 in particular and P.W.3 might have been unduly influenced by the police by some threats or actual violence in the light of the assaults the appellant was subjected to by the police. The court a quo was not entitled to speculate, nor a single question was put to P.W.2 and P.W.3 that they were assaulted or influenced in any way to implicate the appellant falsely. P.W.2 is related to the appellant and it was revealed in evidence that prior to this case they had never had any quarrel. There is practically no possibility that the two witnesses were ever assaulted or unduly influenced by the police to implicate the appellant falsely.

The learned magistrate rejected the explanation of the appellant and came to the conclusion that it was false beyond any reasonable doubt. I have not been persuaded that he was wrong. The appellant withdrew the money in question for the purpose of reimbursing a trader at Tlokoeng who had, on behalf of Teba, paid some miners their remittances. He alleges that on the 8th December, 1982 he took the money to Tlokoeng but found that the trader did not have any shortage in his payments. I do not know what this means. If the trader had made any payments on behalf of Teba why did the appellant not reimburse him there and then. The appellant alleges that it was agreed that he should come to Tlokoeng on the 17th December, 1982. He took the money back to his office and locked it in the safe. He alleges that on the 17th he again went to Tlokoeng and the trader gave him the remittances he had paid. Instead of reimbursing the trader there and then he decided to take the money back to Mokhotlong and issued a cheque for the remittances paid by the trader. There was no reason why the appellant could not pay the trader in cash if money was still in his possession. The truth is that on the 8th and the 17th when he went to Tlokoeng, he had already given the money to P.W.2 and had no

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cash at all. There was no reason why he could not have paid the trader in cash as he had withdrawn the money for that very purpose.

It is also not probable that the appellant would have decided to keep that large amount of money in a wooden wardrobe in a house in which he did not live and in which there were visitors he did not know. He had a safe in his office in which he alleges that he had been keeping the money during his journeys between Mokhotlong and Tlokoeng. I am convinced that the explanation of the appellant was correctly found to be false beyond any reasonable doubt.

The appeal is dismissed

J.L. KHEOLA  
J U D G E .

21st April, 1986.

For Appellant - Mr Pheko  
For Crown - Mrs Bosiu.