

IN THE HIGH COURT OF LESOTHO

In the matter between:-

HALEMAKALE MOLAPO MOTSOENE Appellant

and

R E X

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 8<sup>th</sup> day of August, 1990.

The appellant was charged with theft of seventy (70) bags of beans the property of the Government of Lesotho and he was found guilty of the theft of twenty-seven (27) bags of beans and sentenced to two years' imprisonment of which six months' imprisonment was suspended for three years on conditions. In count 2 the appellant was charged with theft of M100-00 the property of Mafeteng Government Hospital. He was acquitted.

The appellant is now appealing to this Court against both conviction and sentence. He bases his appeal on the ground that

the Crown has failed to prove theft.

A detailed summary of the evidence can be found in the reasons for judgment of the court a quo.

It is common cause that during the period between June, 1984 and June, 1985 the appellant was the district coordinator of the district of Mafeteng. He and the local drought relief committee were charged with the distribution of food donated for the relief of indigent and needy people.

The first witness called by the Crown in the court a quo was Peter 'Nau Khali who is the deputy head of the Logistics department - a department commonly known as the drought relief programme. The major function of his department was to receive foodstuffs donated from outside the country and to distribute them throughout the country to the needy people. In the districts the foodstuffs were received by the drought relief clerks, or in their absence by the district coordinators or people designated by them. In August, 1984 Peter N. Khali came to Mafeteng and reported himself to the appellant and the drought relief clerk, Majane Shale. They told him that there were sixty bags of beans left over at Tsakholo and ten bags of beans left over at Mochielis. He gave instructions that the beans at the abovementioned stores be brought to Mafeteng store and be distributed to the people who were short supplied at the distribution points in the normal way. The beans were brought to Mafeteng and stored at the Food Management Unit (F.M.U.) store. Mr. Khali's evidence was that the procedure

was that the appellant should work with the drought relief committee to decide to whom the food should go. He categorically denied that the appellant had a discretion to sell the donated food and apply the proceeds to alleviate the plight of the needy people. The donation had to go to the donee as it was. However, he conceded that a person who had received the donation could exchange it for other commodities or even convert it into cash.

The evidence of Ishmael Zachura was that he is a director of a business known as Zachura Brothers. During March, 1985 the appellant telephoned him at his house and offered to sell to him more than twenty bags of beans at M45-00 per bag. The appellant said he needed money. Ishmael Zachura says that he made a counter offer of M35-00 per bag. The appellant said that he would ask in Maseru for how much he could sell the beans and at the same time said Mr. Zachura could send his truck to fetch the beans. He sent his driver to fetch the beans. When he later came to his business premises he found twenty-seven bags of beans and he was not satisfied with the quantity of the beans as he observed that each bag weighed less than seventy kilograms. He contacted the appellant and they both went to business premises but on their arrival the beans were no longer there.

It is common cause that the beans had been removed by Lt. Ramonate and kept at the charge office because he suspected that they had been stolen.

Mahomed Ishmael Zachura is the managing director of Zachura Brothers. He is the son of Ishmael Zachura. One day he had a talk with the appellant at Zachura supermarket about a deal the appellant had made with his father over beans. As the deal had already been made by his father and the appellant, he did not have much to say or do except to provide for transport to fetch the beans from the store. The appellant telephoned the man at the store and told him to release the beans to a Zachura driver. The driver went and brought the beans. Thereafter the beans were seized by the police.

The appellant testified that at the meeting referred to by Mr. Khali it was decided that he, as the district coordinator, should see to the disposal of the beans that were left over at Tsakholo and at ha Mohlehli as soon as possible because a report had already been sent to the donor countries that the drought relief food had all been distributed to the needy people. He says that the twenty-seven bags of beans were removed from the Government store and taken to Zachura supermarket for storage per his instructions. The idea was to hide them so that the donor countries could not find them in the Government stores as a report had been made to these countries that the supplies of beans had been used up.

Mr. Sapire, counsel for the appellant, submitted that the appeal be upheld because the Crown had failed to prove its case because the delivery of the beans to the business premises of Zachura Brothers even if it took place on the instructions of the appellant does not amount to theft because:

- (a) It was not proved that such delivery was contrary to the instructions of the Board which was the owner of beans.
- (b) It is unlikely if the accused even intended converting the purchase price to his own use that he would have sold the goods on credit.
- (c) There is no evidence as to what happened to the purchase price.
- (d) The evidence of the Zachuras as to the statements by the accused even if accepted in preference to the accused's own statement are inconclusive and do not lead to the only conclusion that the accused delivered the goods with the intention of converting the purchase price to his own use.
- (e) Their evidence properly speaking of the instructions of the Board and on the contrary there is substantial evidence that the Board felt compelled to dispose of the beans as it had already informed the donors that the distribution thereof had taken place.

The court a quo believed the evidence of Ishmael Zachura and Mahomed Zachura that the appellant took the beans to their premises not for storage but for sale. That he told the Zachuras that he was financially embarrassed. It rejected the appellant's version that the beans were taken there for storage. I have no quarrel with that finding because it was mainly based on a finding on credibility of the witnesses and failure to put to the Crown witnesses, particularly the Zachuras, that the beans were taken to their business premises for storage only.

The learned Chief Magistrate criticized the defence counsel for having failed to put their defence to the Crown witnesses and referred to well known case of Phaloane v. Rex 1981 (2) L.L.R. 246 at pp. 251-252 where Maisels, P. said:

"I must confess that I am totally unimpressed by Mr. Erasmus's argument and explanation on this point. Rooney J. remarked, correctly in my opinion, that the general and accepted function is to put the defence case to the Crown witnesses, not only to avoid the suspicion that the defence is fabricating, but to provide the witnesses with the opportunity of denying or confirming the case for the accused.

Making due allowance for certain latitude that may be afforded in criminal cases for a failure to put the defence case to Crown witnesses, as to which see the remarks of Davis A.J.A. in Rex v. M. 1946 A.D. p. 1023 at 1028, it seems to me that as MacDonalld J.P. held in S. v. P. 1974 (1) S.A. 581 it is important for the defence to put its case to the prosecution witnesses as the trial court is entitled to see and hear the reaction of the witness to every important allegation. And as Claasen J. put it in Small v. Small 1954 (3) S.A. 434:

"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case of defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."

I agree with the learned Chief Magistrate that it is most surprising that the defence failed to put their entire defence to the Crown witnesses. I cannot blame him for having refused to accept the defences 'which as it were, came up at the eleventh hour when P.W.2 was no longer in the witness box and in a position to refute them.'

In the South African Criminal Law and Procedure, Vol. II by Hunt, the learned author has this to say at p. 572:

"The mere fact that the initial receipt of the article was innocent makes no difference. Suppose, for instance, X innocently buys stolen goods. If X's state of mind subsequently changes and he deals with the property, he commits theft. It is submitted that in these cases a touching or movement of the property after bona fides turns to mala fides is not necessary. If X lies about his possession of the property, or even if he simply retains it once his state of mind has changed, there is a sufficient contrectatio. Because X already has control, it would be an absurd fiction to require a fresh contrectatio. His omission is in the circumstances a sufficient dealing with the property. The real problem in such cases is to determine whether X has intent to steal.

In those innocent receipt cases in which the owner or possessor actually hands the property over to X - for example the trust money cases - it is of course not enough that X, having formulated an animus furandi, remains inactive, for the owner has permitted his possession. He must actively deal in some way with the property."

In the instant case the appellant was entitled to remove the beans from the Government store for a specified purpose of donating it to indigent or needy people. He claims that as a political appointee he had very wide discretion to deal with the donated foodstuffs. I agree that he had wide discretion but he was not entitled to sell the donated food for his own benefit. The evidence which has been accepted by the court a quo, and rightly so in my opinion, indicates that when the appellant removed the beans or had them removed through his agent, his intention was to sell them to Zachura Brothers because he needed the money for his own benefit. Having formulated animus furandi, the appellant did not remain inactive; he removed the beans and handed them over to the buyer.

It seems to me that the appellant formed the intention to steal when he negotiated the sale with Ishmael Zachura and that when the beans were removed from the Government Store and handed over to the Zachura Brothers theft was complete. I do not agree with Mr. Sapire that not even attempt to steal was proved because the purchase price had not been handed over to the appellant and that he had not yet misappropriated the money. In my view the appellant stole the beans and not their purchase price. The intention to steal was proved and there was also proof of contrectatio.

The drought relief committee of which the appellant was the chairman never authorized him to sell the beans and to use the proceeds for his own benefit. They authorized him to dispose of the beans in the usual way of distributing them to needy people. The committee did not draw up a list of recipients but left that to the discretion of the appellant (See the evidence of D.W.3 Banford Khomo at page 92 of the record).

The defence of the appellant was not that he intended to sell the beans and then apply the proceeds to the plight of the needy people. His defence is that the beans were taken to Zachura business premises for storage only. The learned Chief Magistrate rejected this defence and pointed out that Zachura Brothers could not be so generous as to provide free transport and free storage of the beans unless they were going to make a gain or profit. This remark confirms the evidence of the Zuchuras that their transaction with the appellant was a commercial exchange.



They refused the offer of M45-00 and made a counter offer of M35-00 because they wanted to make a profit and that seems to be the reason why they used their own truck to transport the beans free of charge.

It was submitted on behalf of the appellant that the learned Chief Magistrate erred in accepting the evidence of Ishmael and Mahomed Zachura as, on their version, they were assisting the appellant in what they should have at least suspected was an offence. They therefore had a motive to misrepresent the situation in order to exculpate themselves from what they may have considered to be a "dangerous" situation. That is most unlikely because had the food been brought to their premises for storage, as the appellant alleges, the situation would not have been considered dangerous by them and they would have told the police so. The appellant would have explained to them why the beans were being removed from the Government store. I do not see how they could inculpate themselves by telling the truth that the beans were there for storage only. I reject the suggestion that the two Zachura brothers were accomplices or accessories after the fact because they could be charged under section 344 of the Criminal Procedure and Evidence Act of 1981. In my view the sale of beans to a trader in Lesotho cannot be covered by section 344 because the majority of Basotho are farmers who often sell large quantities of maize, beans and potatoes or wheat etc. It would be an impossible task for a trader to make inquiries everytime a farmer comes to his shop. There are certain kinds of articles which are not usually sold by ordinary farmers about which a trader may be expected to satisfy himself in terms of section 344, but such articles will certainly not include farm produce except livestock about which the seller is expected to produce a certificate issued by his chief. Most

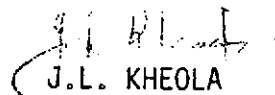
civil servants, especially the most senior ones, are heavily involved in farming and produce things like beans, maize, wheat etc. on a very large scale. There was nothing suspicious or unusual about the appellant having 27 bags of beans and storing them in a Government store under his control.

The sentence imposed by the court a quo is not at all excessive and does not arouse a sense of shock. In passing the sentence the court a quo said:

"On sentence the court was alive to the fact that the accused was the most senior official in the district; he was charged with the responsibility of co-ordinating, supervising and overseeing all Government departments in the district and to set a good example; he had to win the confidence of the public in the administration which was then in power and ensure that the machinery of Government ran smoothly; but he forwent all these responsibilities and stole beans destined for the most needy people in the country. This is an example of corruption at its zenith and no court of law could tolerate this kind of behaviour by the most highly placed official in the district. I therefore considered it my duty to impose a sufficiently deterrent sentence and, in my view a considerable custodial sentence with a portion of it suspended met the justice of this case."

I agree with those remarks.

For the reasons stated above the appeal is dismissed.

  
J.L. KHEOLA

JUDGE

8th August, 1990.

For the Appellant - Mr. Sapire  
For the Crown - Mr. Lenono.