CRI/A/13/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAMAKHETHA JOYCE 'MATLI Appellant

and

R E X

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. KHEOLA
on the 30th day of April, 1990

The appellant was charged in Count 1 with theft of a cheque leaf and the sum of M5000-00 and in Count 2 with theft of M538-22; all the property or in the lawful possession of Roger Binns. She pleaded not guilty to both charges but was found guilty as charged on both of them and sentenced to 36 months' imprisonment and 6 months' imprisonment respectively. She appeals against both conviction and sentence on a number of grounds with which I shall deal at a later stage.

It is common cause that the appellant was employed by the Outwardbound Centre as a secretary. Her duties included typing, the keeping of books of accounts and general office administration.

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Although she had no authority to sign cheques she had access to cheques books. Cheques were signed by Roger Binns who was the director of the Centre. Sometimes the cheques were signed in blank in order to enable the lady, who worked in the kitchen at the Centre, to fill the correct particulars and the exact amount of money spent after making her purchases of groceries from a store.

It is common cause that cheque number 319911 for the amount of M538-22 was properly signed by Mr. Binns for the purpose of buying groceries. Spar Supermarket, from which groceries were bought, refused to accept it on the ground that it was made payable to "Cash" instead of to Spar Supermarket. The cheque was returned to the Centre and another cheque was drawn and made payable to Spar Supermarket. The second cheque is number 319912 and for the same amount of M538-22. The returned cheque had to be cancelled as soon as it was replaced by another cheque. It seems that this was not done until it was allegedly misappropriated by the appellant. She denies this and alleges that Mr. Rogers Binns gave it to her as a loan because at the time she borrowed money, there was no petty cash.

The cheque in Count 1 for the amount of M5,000-00 was signed in blank by Mr. Binns. It is common cause that the particulars were filled by the appellant. She made it payable to "Cash" and was cashed by her at the Maputsoe branch of the Bank. She alleges that she was sent by Mr. Binns to go and cash it for him. This is denied by Mr. Binns.

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The evidence of Mr. Roger Binns is to the effect that on the 17th June, 1987 the appellant came to him and asked for leave to go and see a doctor because she was not feeling well. Leave was granted. On the following day she brought a sick leave certificate covering the period from the 18th June to the 25th June, 1987. She did not return to work on the 26th June. Mr. Binns says that a few days later he received a letter from a firm of attorneys styled N. Mphalane and Company. In that letter the attorneys purported to be representing the appellant. The letter wqs handed in as an exhibit together with the two cheques mentioned above but they are now missing from the file. Mr. Mphalane was kind enough to show the Court a copy of the letter. The gist of its contents is that the appellant reported that she had taken the cheque in Count 2 without the permission of Mr. Binns and she had utilized the amount for her own benefit. She had intended to refund the money but she had some problems and asked for some extension.

Mr. Binns says that on receipt of the above letter, he and his wife checked the books of account of the Centre, and they found that there was a cheque for M5,000-00 for which they could not account. He went to Maputsoe and found that the cheque in question had been cashed by the appellant. He reported the matter to the police because the appellant was not authorised to cash that cheque. He denied that he asked the appellant to cash it for him because he wanted to make a big present to his friend who was getting married in August, 1987. He also denied that he lent the appellant the amount of M538-22 by authorising her to utilize the returned cheque because they had no petty cash at the relevant time

The appellant's version is that on the 17th June, 1987 Mr. Binns instructed her to draw a cheque for the amount of M5,000-00. She complied and Mr. Binns checked it before he signed it. She denies that it was signed in blank. He then gave her the cheque to go and cash it for him. She cashed it and gave the whole amount to Mr. Binns. He had told her that he was going to make a big present to a friend who was going to get married.

At the time she was going on sick leave she asked Mr. Binns to lend her an amount of M500-00 from the petty cash. As there was no petty cash, he allowed her to take the returned cheque referred to above. She has denied that she instructed her attorneys to say that she took the cheque without permission.

In his judgment the learned Resident Magistrate states that after her sick leave expired, the appellant did not go back to work nor did she apply for extension. He asks whether or not the behaviour of the appellant is consistent with that of a person who had borrowed money. He further states that if a person has borrowed money from another person and time for payment has come, the normal thing for the debtor to do is to go to that person and tender payment or to negotiate an extension of time. The appellant decided to go to her attorneys. The learned Resident Magistrate found her behaviour to be extraordinary and formed the opinion that the appellant was afraid of meeting Mr. Binnes and that could not be without cause.

I have no reason to critise the finding of the court a quo. I find it most improbable that appellant could go to the extent of paying a lawyer to write letter referred to above instead of going to Mr. Binns to explain her difficulties. She has not explained why she did not go back to work after her sick leave. There is no evidence that her leave was extended by her doctor. She cannot be telling the truth that she was still ill after the expiry of her leave because she did not report this to Mr. Binns. In her attorneys' letter she is alleged to have said she was on sick leave. The letter is dated the 8th July, 1987 and she was definitely no longer on leave on that day because her leave had expired on the 25th June, 1987. The only reason why she was unwilling to go back to work seems to be that she knew that she had stolen money and was afraid to meet Mr. Binns.

The letter written by her own attorneys implicates her by saying that she admits that she took the cheque without the authority of the Director of the Centre. This statement tallies with the evidence of Mr. Binns that she never allowed her to take the returned cheque.

Mr. Mphalane, attorney for the appellant, submitted that Mr. Binns took advantage when he received the letter in which the appellant had directly implicated herself. He decided to cover up what he had done regarding the cheque for M5,000-00. He decided to charge the appellant with theft of both cheques.

It seems to me that when Mr. Binns received the letter it was his first time to know that the returned cheque had been used by the appellant for her own benefit. He naturally checked the books of account and made a further discovery that an amount of M5,000-00 had been withdrawn from the Bank but he could not find out how it was used. It was unusual to withdraw such a large sum of money. He naturally went to see the Bank Manager and found out that the cheque was properly signed by him and that the appellant withdrew the money. I do not find anything, in the behaviour or reaction of Mr. Binns when he received the letter, which suggests that he took advantage and decided to put all the blame on the appellant.

The submission that Mr. Binns should have been aware that one of the cheques that were given to the Kitchen lady to buy grocery from Spar was missing before he could have received a letter from the appellant's attorneys, is totally untenable. He did not suspect that there was anything amiss when the appellant went on leave. There was no reason why he could immediately check the books. In any case it is common cause that there was no proper keeping of books at the Centre. He could not have been aware of the returned cheque unless he thoroughly checked the cheque books and other books of account which show how the money has been used. The appellant was under the wrong impression that by confessing that she took the cheque without permission and that she would refund the money, Mr. Binns would not take any action against her. He would probably have not charged the appellant with theft if he had not discovered that in addition to that cheque there was yet another cheque for a very large amount of money which the appellant had unlawfully used.

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The allegation that Mr. Binns used the money for the wedding of his friends is also untenable. I do not see how if he intended to steal the money he could tell a fellow worker that he was going to use the money for that purpose and at the same time ask the same fellow worker to go and withdraw the money for him. This allegation is a complete lie and even a stupid person would not have agreed to cash the cheque.

Mr. Mphalane has submitted that the Crown case rests on circumstantial evidence and that the proved facts ought to point to only one reasonable inference that has to be drawn from them. There is direct evidence that the appellant cashed the two cheques and appropriated the proceeds and never gave them to Mr. Binns. The evidence of Mr. Binns that she never gave him the amount of M5,000-00 is direct evidence and was believed by the court a quo. There is nothing to show that it was wrong.

The finding of the court a quo was criticized on the ground that it failed to caution itself that this was a case of a single witness. Section 238 of the Criminal Procedure and Evidence Act 1981 provides that a court may convict any person of any offence alleged against him in the charge on the evidence of a single witness if such witness is competent and credible; the exceptions being perjury and treason.

In R. v. Mokoena, 1932 O.P.D. 79 at p. 80 De Villiers, J.P. said:

> "Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by sec. 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc., etc."

Mr. Binns was put under very rigorous cross-examination but answered very well and was not shaken at any stage. His bona fides are not in any doubt. It cannot be said that he had any motive whatsoever to implicate the appellant. If he had such motive he would have taken action against the appellant immediately he received the money from her because that was a clear indication that she had cashed the cheque. Why should he wait for about twenty days? He did not even know that the appellant would write the abovementioned letter.

Mr. Mphalane submitted that there is a reasonable possibility of the appellant's explanation being true and that she was entitled to an acquittal (R. v. Difford 1937 A.D. 370).

In a recent case of S. v. Jaffer, 1988 (2) S.A. 85 at p. 88 Tebbut, J. said:

> "Dealing with Singh's case Van der Spuy AJ, with whom Klopper ACJ concurred, said that the proper approach was for a court to apply its mind not only to the merits and demerits of the State and the defence witnesses, but also to the probabilities of the case. This was no ascertain if the accused's version was so improbable as not reasonably to be true. This, however, did not mean a departure from the test as laid down in R. v. Difford 1937 AD 370 at 373 that, even if an accused's explanation be improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled his acquittal."

I have considered the probabilities and have come to conclusion that the explanation given by the appellant is so improbable that it cannot be reasonably possibly true.

The appeal against the convictions in both counts is dismissed.

As far as the sentences are concerned the learned Resident Magistrate does not seem to have taken into consideration the personal and mitigating factors brought to his notice by the defence counsel. The mitigating factors appear on pages 38 to 39 of the record and immediately after the appellant had given evidence in mitigation the sentence was passed. It has been indicated by this Court in many cases that the record must show that the mitigating factors have been taken into account. In other words judicial officers must give reasons for sentence.

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Because of the irregularity committed above this Court is at large to reconsider the sentence. Taking into account all the mitigating circumstances I am of the opinion that the sentence in Count 1 is on the heavy side.

The appeal against sentence in Count 1 is upheld. The sentence imposed by the court a quo is set aside and substituted with one of two (2) years' imprisonment.

The appeal against the sentence in Count 2 is dismissed.

It is ordered that the sentences shall run concurrently.

J.L. KHEOLA
JUDGE

30th April, 1990.

For Appellant - Mr. Mphalane
For Crown - Miss Moruthoane.