C. OF A. (CRI) NO.21/86

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

FRANK LEBETE	1ST APPELLANT
CARRINGTON MOEKETSI MASOABI	2ND APPELLANT
AND	
REX	RESPONDENT

HELD AT:

MASERU

CORAM:

BROWDE, JA
KOTZÉ, JA
LEON, JA

JUDGMENT

BROWDE J.A.

The accused in the Court below were Frank Lebete (Accused No.1), Thabang Moejane (Accused No.2) and Carrington Masoabi (Accused No.3). They were charged as follows:

"In that upon or about the 17th December, 1984 and at or near Maluti Mountain Brewery, Maseru

/...

Township in the district of Maseru the said accused one or other or all of them did unlawfully and intentionally steal 950 cases of beer and 108 cases of brandy theproperty or in the lawful possession of Ian Frasers Ltd., a company lawfully registered under the Companies Act of 1967

and

In that upon or about 4th January 1985 and at or near Mazenod in the district of Maseru the said accused, one or other or all of them was or were found in possession of 950 cases of beer in regard to which there was a reasonable suspicion that they had been stolen and was or were unable to give a satisfactory account of the possession and was or were guilty of the offence of contravening the provisions of Section 343 of the Criminal Procedure and Evidence Act of 1981."

All the accused pleaded not guilty to the charges but were found guilty by the Court *a quo* as follows:

(i) Accused No.1 guilty of the charge of theft of the 950 cases of beer in the main charge.

(ii) Accused No.2 guilty as charged in the main charge as amended. (The amendment related to the number of cases of brandy).

(iii) Accused No.3 guilty of receiving the 950 cases of beer referred to in the main charge well knowing them to have been stolen.

Accused No.2 did not appeal but the other two accused appealed to this Court both against their convictions and sentences.

It is common cause that 950 cases of beer were stolen from the complainant on or about the 17th December, 1984. The crime was apparently perpetrated by persons who took the beer into their possession and instead of delivering it to Ian Fraser Ltd., appropriated it to themselves. There was evidence that the two persons concerned were Accused Nos.1 and 2 but Accused No.1 (the first appellant) denied his participation and gave evidence to the effect that on the 17th and 18th December, 1984 he did not leave his office where he was employed by Ian Frasers Ltd. in Maseru.

The sole question at issue in the appeal of the First Appellant is whether or not he was properly identified by the Crown witnesses as one of the persons who, on the 17th

December, 1984, arrived at the Maluti mountain Brewery to take possession of the 950 cases of beer. The evidence on which the Crown relies is that of P.W.1 DAVID RAKOUANE, P.W. 14 Checha Ralikhomo and P.W.18 'Matli Hlalele. P.W.1 stated that on the day in question he was approached by one Maretha who asked him to assist accused No.1 and 2 by taking them in his vehicle "to carry their property". He acceded to that request and as a result he took the two accused to the Brewery. His evidence is fully set out in the judgment of the Court *a quo* and I do not think it necessary to repeat it in detail. It appears, however, that the person identified by P.W.,1 as the first appellant, was with the witness until they reached the brewery - the exact time of such arrival was not established but it was some time in the morning - and that after a period, the length which was also not established with any precision, he left for Maseru. Thereafter, so the evidence went, he returned at about 3 p.m. The beer was loaded and they left the brewery premises. Counsel for the first appellant in his able argument before us, has levelled certain criticisms against the way in which the Crown attempted to establish his client's identity in the trial Court. He pointed to the fact that the witness, P.W.1, gave his evidence some eighteen months after 17 December, 1984 and that alone considerably reduced its cogency. P.W.1, so the argument went, did not know the first appellant well and consequently

without a properly constituted identification parade there must be a doubt as to the reliability of his identification. In my view there is substance in this submission. The Crown was aware that the first appellant's defence was an alibi and consequently the need for an identification parade should have been obvious. There then followed the failure to call as a witness the woman Maretha who, as I have mentioned, obtained the services of P.W.1 to convey the two persons to the brewery. If she was available to the Crown, which is not clear on the record, it would have been appropriate in my view to draw an adverse inference against the Crown on the basis that her evidence would not have supported the Crown case.

As far as P.W.1's evidence is concerned Counsel has criticised the way in which he identified the first appellant in Court. He referred particularly to the following:-

(i) "C.C. (Crown Counsel) Now, Ntate, do you know the accused persons -look at them - this is A1 - do you know him?

P.W.1 Yes

(ii) C.C. With whom did you have business or dealings?

P.W.1 The two accused in the dock."

Counsel has submitted that this is unsatisfactory since a witness who is called upon to identify a person whose identity is at issue should not be led in evidence to identify that person in the dock in the manner in which the first appellant was identified. At least one might expect the prosecutor to say such words as "Do you see the person in this Court?" That the identification in the Court was unfair to the first appellant is, I think, illustrated by a further extract from the evidence in which P.W.1 is questioned as to why he identified the first appellant as the person who went to the brewery on 17 December. He said,

"P.W.1 I say that you are the person involved in this matter because you are one of the accused persons in the dock."

Counsel has contended that the opportunity for identification on the day in question was not as good as it appears on the surface. P.W.1 was driving the vehicle and therefore, of necessity, had to concentrate on the road. Thereafter the first appellant was present at the scene, on

P.W.1's own version, only sporadically - that there must have been vehicles coming and going,people moving about and, above all, no particular reason for P.W.1 to observe the features and any identifiable characteristics of the first appellant. There seems to me to be some substance in these submissions. A further point of merit is that P.W.1 could not identify a further person he had allegedly seen that day because, as he put it, there had been a lapse of time of one year since he had seen him. When one considers that P.W.1 stated in evidence that he had not seen the first appellant between 17 December, 1984 and the day of trial i.e. 7 May, 1986 one must, I think, seriously doubt the reliability of the identification. Mr. Mdhluli, who argued this aspect of the appeal on behalf of the Crown with his usual ability, contended that P.W.1's evidence did not stand alone. He supported the learned Judge *a quo*'s finding that P.W.1's identification of first appellant was corroborated by P.W.18 who was the security checker at the Brewery at the relevant time. An analysis of this evidence given by this witness shows however that

(i) He saw first appellant only from "some distance away."

(ii) When asked if he had given an invoice to first appellant his reply was to the effect

that he gave it "to the customer".

(iii) That beer had been taken by the first appellant and accused number 2 on several occasions and he could not positively say that he remembered the 17 December, 1984 specifically. All he could say in regard to the first appellant's presence at the Brewery at the relevant date was that he remembered the invoice which gave rise to trouble a few days after the event.

(v) He differs from P.W.1 regarding the movements of accused 2. P.W.1 said that accused 2 remained in the truck all the time, whereas P.W.18 said that accused 2 it was who was with him, away from the truck, and who signed the documents.

(vi) He was generally vague about things. For example, he could not even say whether there was a driver in the vehicle in which the accused 2 and the first appellant came to the brewery and he was extremely vague if not evasive about how many times he had seen the first appellant prior to 17 December, 1984.

In the circumstances I am inclined to agree with Mr. Sooknanan that P.W.18's evidence cannot be regarded as corroboration on the question of the identification of the first appellant.

As far as corroboration of the identification by P.W.1 is concerned the last string to Mr. Mdhluli's bow was P.W.14 Checha Ralikhomo. This witness was declared to be an accomplice. The effect of his evidence is that he accompanied the first appellant to fetch cases of brandy from the Brewery on an unspecified date and that subsequently he was given two sums of money by the appellant, the first a sum of R10 accompanied by a suggestion that if asked he should deny transporting liquor and the second the sum of R50 to pay his rent because he was out of work. It will be readily observed that P.W.14 in no way corroborated the taking of the beer nor does his evidence appear to bear on what occurred on 17 December. Consequently his evidence, too, is of no assistance to the Crown.

Consequently, the evidence of P.W.1 effectively stands alone and does not, in my view, stand up to the test required for that degree of reliability which is needed to prove first appellant's guilt beyond reasonable doubt. See in this regard,

in which it is pointed out that it is necessary to satisfy a Court in any particular case that an identification is reliable and trustworthy as distinct from being merely *bona fide* and honest.

I should also point out that the learned Judge appears to have rejected the alibi evidence of the appellant because he believed the Crown witnesses. That is the wrong approach. Before an accused's version is rejected it must itself be evaluated and assessed in the light of the impression made by the accused and the question whether his evidence may reasonably possibly be true. To say "I believe the Crown witnesses ergo the accused is lying" is an approach which has often be criticised by our Courts.

To sum up, therefore, I am of the view that the conviction of the first appellant cannot stand and that his conviction and sentence should be set aside.

I turn now to consider the appeal of the second appellant. In order to justify his conviction for receiving stolen property well-knowing it to have been stolen the Crown was obliged to prove the three elements of the offence viz.,

(i) That the property was stolen,

(ii) That the property was stolen from the complainant and,

(iii) When he took possession of the property the appellant knew it was stolen.

The first two elements are common cause i.e. the theft from the complainant of 950 cases of beer. The only remaining issue is, therefore, whether the second appellant received the beer and knew it was stolen.

Mr. Masoabi, the third appellant, appeared before us in person, and attacked various aspects of the judgment of the Court *a quo*. He particularly pointed to the following passage in the judgment:

> "The beer was received (by the appellant) at an unusual place and time and from a person who would ordinarily not own such property. In this regard I refer to the owner of the cafe, Mr. Moleko or and (sic) A1 and A2 because it is not clear from whom A3 received the beer (A3 being a reference to second appellant). The evidence is that A1 and A2 stole the beer from M.M.B. and took it to Mr. Moleko's cafe. Whether they sold the beer to Mr. Moleko who in turn sold it to A3 is not clear from the evidence. However, that is not material and the Court has come to the conclusion

> that he received it from any one of them or from all of them".

Mr. Masoabi has submitted that because there was doubt about how he obtained the beer and from whom, he should, on that point alone, have been discharged. I cannot agree with that. The sole question, as I have already said, is whether the beer received by second appellant was stolen from the complainant and whether, when he received it the appellant knew it was stolen. The evidence regarding the first part of the question was not seriously disputed i.e. that on 17 December, 1984 the admittedly stolen beer was taken from the premises of the Brewery and off-loaded at a restaurant at Ha Masana. During argument I understood Mr. Masoabi to concede that. Thereafter, and according to, *inter alia*, the evidence of P.W.5 Edward Likotsi very large quantities of the beer, if not all of it, was at the instance of second appellant loaded on to a truck and taken to second appellant's house at Masianokeng. According to this witness the operation was commenced after sunset and went on deep into the night. The second appellant was present throughout. It was he who directed the loading from the store-room at the restaurant on to the truck and it was he who supervised the unloading at his house and the packing of the numerous cases of beer into the rooms there. When the rooms were fully packed with beer the appellant ordered that

the witness and other helpers "close the back windows with sacks .... There were two windows because the beer was packed into two rooms."

Now the second appellant has admitted being found in possession of the beer - in fact when W.O. Polanka was called to give evidence regarding the finding of the beer second appellant interjected and said

> "To save time I may indicate to the Court ... that if the witness is going to give evidence that he found 374 cases of beer at my farm, that is admitted, and that I said they were mine, that is the position ...."

There remains, therefore, only the question of second appellant's knowledge that the beer was stolen. In this regard the Crown relies entirely on circumstantial evidence which in resumé is the following:-

> The appellant supervised the nocturnal removal of hundreds of cases of stolen beer from the store-room of a restaurant - an unlikely place from which so much beer could legitimately and in the ordinary course of events be purchased. He then stored them at his own premises and made sure they could not be seen from outside. Thereafter, so the evidence went, P.W.1 was brought to him in his

ostensible capacity as the Attorney of Maretha (she it was who allegedly introduced the first appellant and accused two in the Court below to P.W.1). P.W.1 testified that second appellant said to him, "You should never say you ever took any beer from Maluti Mountain Brewery" and "if you can say that you have taken the beer from Maluti Brewery you will remain alone and the boys will be released". Then there is the evidence of one Koloko (P.W.2) who testifies that he assisted in the removal of the beer from Ha Masana to Masianokeng. Thereafter he was called to the office of second appellant who got him to sign a document which subsequently turned out to be an affidavit with the false allegation in it that he, the witness, had collected 377 cases of beer for the second appellant from Makhotsa Liquorama Bottle Store.

The Crown also led evidence from one David Masoabi (P.W.12) who testified that he too assisted in the removal of the beer from the restaurant. He stated that he heard the appellant, during the course of the removal, say that the beer belonged to his clients who had been arrested. Later, at the offices of the appellant, the latter told the

witness to say, if asked, that Koloko was collecting mealie stalks as fodder at Ha 'Masana and not beer. Then there is the uncontested evidence of P.W.5 Likotsi that on Christmas day of 1984 he assisted the appellant in selling a load of beer taken from appellant's house to a football match. Finally there is the evidence of three police officers who found 376 cases of beer at appellant's house at Masianokeng and that, in claiming the beer to be his, the appellant said he was going to use it at a thanksgiving feast which he intended to hold for his ancestors. He claimed to have bought the beer in small quantities over a period. At that time he was in possession of an invoice which he was apparently using to check the beer which was being inspected and counted by the police. The invoice was the original of an invoice being used by the police and the appellant claimed that it (the invoice) belonged to his clients who were charged with the theft of the beer.

The appellant stated in evidence that he had purchased the beer from a bottle store - this was, in my opinion, properly rejected by the learned Judge after his careful and comprehensive analysis

of the evidence. He rightly, in my judgment, rejected the appellant's assertion that he had purchased the beer for the feast since the appellant sold beer not only at the football match but also in a substantial quantity to P.W.4 Ms. Lieng who runs a restaurant, below the current market price. The suggestion that the appellant merely exchanged beers with this witness was quite correctly, in my view, rejected by the trial Judge.

I have not referred to all the evidence which was led by the Crown and which was properly taken into account by the Court *a quo* in convicting the appellant. I have, I think referred to enough of the circumstances to justify the conclusion that whereas individually each circumstance may not appear to have great significance, when taken together they are decisive. In Rex v de Villiers 1944 A.D. 493 in dealing with circumstantial evidence, Davis A.J.A. (as he then was) said:-

"As stated by Best, *Evidence* (5th ed., sec. 298):-

> "Not to speak of greater numbers; even two articles of circumstantial evidence - though each taken by itself weigh but as a feather - join them together, you will find them pressing on the delinquent with the weight of a millstone ... It is of the utmost importance to bear in mind that, where a

> number of *independent* circumstances point to the same conclusion the probability of the justness of that conclusion is not the *sum* of the simple probabilities of those circumstances, but is the compound result of them."

See also Evans' *Pothier on Obligations* (2.242), and Wills, *Circumstantial Evidence* (7th ed., p. 46). The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

In my judgment the circumstantial evidence against the second appellant was overwhelming and proved beyond reasonable doubt that at least the 376 cases of beer found on appellant's premises were received by him well-knowing them to have been stolen.

Although there is a strong suspicion that second appellant was the receiver of all the stolen beer I think that the leap from finding only 376 cases to the conclusion that the appellant received all the 950 cases cannot be made with the necessary degree of certainty. Consequently I am of the view that the proper verdict should have been that

the appellant received 376 cases of beer well-knowing them to have been stolen.

This brings me to the question of sentence. I have little sympathy for the appellant. As a practising Attorney he must have known that if there were no receivers in this sort of case there may well be no thieves. It is for this reason that receiving is so seriously viewed by the Courts and why, no doubt, Kheola J. took such a serious view of the matter. In fact there is something to be said for Mr. Lenono's submission that if anything the sentence of 3 years imprisonment of which one year was conditionally suspended for 3 years was lenient. Nevertheless because I have found the case proved only in relation to a very materially reduced quantity of beer, I think it would be just if the sentence was also reduced. I think that justice will be done if, instead of suspending 1 year of the sentence, this Court suspends 18 months.

In the result therefore,

(i) The appeal of the first appellant is upheld and his conviction and sentence are set aside.

(ii) The appeal of the second appellant succeeds

to the extent that the conviction of the Court *a quo* is altered to read:

"the accused is found guilty of receiving 376 cases of beer knowing them to have been stolen";

and

(iii) The sentence imposed by the Court *a quo* is altered to

"Three (3) years imprisonment of which 18 months is suspended for 3 years on condition that during the period of suspension the accused is not convicted of any offence involving dishonesty committed during the period of suspension."

.....
J. BROWDE
JUDGE OF APPEAL

I agree .....
G.P.C. KOTZÉ
JUDGE OF APPEAL

I agree .....
R.N. LEON
JUDGE OF APPEAL

/...

Delivered at Maseru This 22nd Day of January, 1994.