

CRI/A/20/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

STEPHEN MATSELA NKHASI
MOTLALEPULA CHABALALA

APPELLANT
APPELLANT

v.

R E X

RESPONDENT

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice G.N. Mofolo,
on the 2nd November, 1995.

The appellants were charged in the Leribe Resident Magistrate's Court on the 2nd August, 1995 it being alleged that both accused

did unlawfully and intentionally steal the sum of money amounting to M3,578-00 the property or in the lawful possession of Aslam Hamekar.

They had been found not guilty, acquitted and discharged by the Court a quo.

It was against the finding of the learned Resident Magistrate that the Crown had appealed to this Court.

Amongst some of the reasons the Senior Public Prosecutor raised were the following:

1.

There was enough evidence against the accused.

2.

There is evidence that the accused voluntarily pointed out the monies to the police.

3.

Money was found from awkward places - that is in the leg of the table .

4.

Accused 2 had said to the police that the properties that is the jacket, the hat and the blanket were his he gave them to accused 1 at the time or during the course of the offence.

When this appeal was about to be argued Mr. Thetsane for the Crown indicated that he had no intention of supporting the appeal and was accordingly withdrawing it. It was a clever decision. I dismissed the appeal and intimated that my reasons would follow.

From the record of proceedings it appears that P.W.1 Tlhoriso Taelle had testified that police had come to his home in company of accused 1 and had asked for permission to search accused 1. Permission being given accused 1 had asked his wife to produce money which he had instructed her to keep and in his (P.W.1's) presence a sum of about M3,000-00 had been counted.

P.W.2 Aslam Hamekar and complainant had told the court that a bag containing M3.589-00 had been snatched away from him and the next thing

I saw a plastic bag on the floor and the bag in that plastic bag had gone missing.

He had then raised an alarm shouting: tsotsi, tsotsi and he had seen a man running away and two of his men had given chase. After a few days he had been called to the police who

'showed me about two thousand maloti plus in cash

Questioned by Accused 1 P.W.2 had replied:

O. So you know me.

A. No.

O. Did you ever see me at all anywhere in the streets?

A. He does not look familiar to me so I do not know his face as I deal with many customers.

Questioned by accused 2 he had replied:

O. Did you know me when I worked for you?

A. Yes.

O. Since I worked with you did you know me as a rascal?

A. I do not know that but you worked normally with me.

O. Until I deported (presumably departed) with you did I work well with you?

A. Yes I never found anything wrong with you.

P.W.3 Sgt. Lerotholi testified he had gone to appellant 2's home where appellant 2 handed him a sum of M1,013.16 from underneath the leg of a kitchen table. Appellant 1 had also handed him a sum of M1,474.41 and P.W.1 had identified the bag into which he had put the money.

In the course of cross-examination by appellant 2 P.W.3 had said that

P.W.2 reported that it was the boy who worked for him who stole his money.

Both Appellants had given evidence in their defence and the learned Resident Magistrate had found both appellants not guilty and acquitted them. Primarily the Magistrate had found appellants not guilty because they had not been positively identified as men who snatched P.W.2's money.

Now, with regard to the Senior Public Prosecutor's 1st ground of appeal, it will be seen that on the contrary there was no evidence against the appellants for P.W.1 did not identify the culprit who snatched his bag. It appears for a conviction the Public Prosecutor relied on the evidence of P.W.4 Sgt. Lerotholi who, on being cross-examined by accused 2 to the effect:

- O. Please give court evidence showing that I have stolen it.
- A. P.W.2 reported that it was the boy who worked for him who stole his money.

We already know that this was not P.W.2's evidence and it appears Sgt. Lerotholi being cornered preferred to lie to court. And this is what the Public Prosecutor in his reasons for appeal called 'enough evidence!' I find this untenable.

Regarding the 2nd ground of the Public Prosecution reason for appeal, it was held in R. v. Nhleko, 1960(4) S.A. 712 (A.D.) that:

'The burden rests upon the Crown to prove that any statement of accused which it tenders was freely and voluntarily made and, if there has been violence before the statement, it must satisfy the trial Judge that the violence did not induce the statement, either because it did not have an inducing tendency in the first instance or because that tendency had in some way ceased to operate.'

Noticeably, it was both accused's defence that they were tortured and assaulted resulting in the production of the money. It cannot therefore be said that the production of the money by the appellants was a voluntary act on their part.

It was also held in Nhleko's case above that evidence on a charge of murder that the accused had identified a certain point as the place where he deposited a body or the body, is inadmissible. Not without cause because it depends to whom the accused was speaking or pointing out. In this case the accused purportedly pointed out to a peace officer making the pointing out in the circumstances inadmissible.

In the State v. Gwevu and Another, 1961(4) S.A. 536 (E.C.D.)

it was held:

'When the state wishes the court to draw an inference of guilt solely from a pointing out by an accused, then the evidence of pointing out must be satisfactory in every respect beyond suspicion. It must be such that it is beyond reasonable doubt that the only inference which can be drawn is that the accused had knowledge of the exact position of an implicatory spot because he took part in the commission of the offence.'

The penultimate and bottom line of the above quotation is of importance. In this case there was no shred of evidence that accused 1 participated in the commission of the crime while accused 2 was falsely implicated by P.W.3 whose testimony did not tie up with that of P.W.2. Concerning the 4th ground of appeal by the Public Prosecutor concerning accused 2's clothing, this did not take the case any stage further as accused 2 was not identified wearing the clothing complained of during the commission of the crime.

P.W.3 Sgt. Lerotholi compounded this case and seriously compromised the crown case by attributing words and statements to P.W.2 which this witness did not testify to as for example, in addition, by saying:

'P.W.2 identified the said bank money bag as one in which he had put his money.'

I accordingly dismissed the appeal and ordered that the appeal deposits be refunded appellants.

~~G.N.~~ MOFOLO

JUDGE

2nd November, 1995.

For the Crown: Mr. Thetsane

For Appellants: In Person