

C. OF A. (CRI) NO.5 OF 1992

IN THE LESOTHO COURT OF APPEAL

In the matter of:

PETER K. MAHASE

v.

REX

Held at:

MASERU

CORAM:

STEYN, JA
LEON, JA
VAN DEN HEEVER, AJA.

JUDGMENT

STEYN J.A.:

The Appellant appeared in the High Court on the following charges:

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"COUNT 1

- (a) In that, upon or about the 26th day of January, 1987, and at or near the Lesotho Foreign Mission to the European Economic Community, Brussels, the said accused did unlawfully, falsely, and with intent thereby to defraud and to the prejudice of the Government of Lesotho, forge an instrument in writing, to wit, a transfer order instructing the Bank of Brussels Lambert in Belgium to transfer and credit to the bank account of the accused with the same bank the sum of 188,602 Belgian Francs which said amount would be debited to the account of the Lesotho Mission to the European Economic Community, by adding the figure "1" before the figure "8" of the sum of 88,602 Belgian Francs after the said transfer order had been examined and approved by the Chief Accounting officer to the Lesotho Mission to the EEC and thereby altering the amount 88,602 Belgian Francs on the transfer order to 188,602 Belgian Francs on the transfer order to 188,602 Belgian Francs.

- (b) In that, upon or about the 26th day of

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January 1987, and at or near the Bank of Brussels Lambert, Brussels, the said accused did unlawfully, and with intent thereby to defraud, and to the prejudice of the Lesotho Government, offer, utter and put off the said document to the Bank of Brussels, Lambert aforesaid, he the accused, when he so offered, uttered, and put off the aforesaid instrument, well knowing it to have been forged.

ALTERNATIVELY:

COUNT 2

In that upon or about the 26th day of January, 1987, and at or near the Lesotho mission to the European Economic Community, Brussels, Belgium, the said accused, did unlawfully and intentionally steal the sum of 100,000 Belgian Francs which according to the exchange rate then prevailing converted to M5,458.00, the property of the Government of Lesotho.

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COUNT 3

(a) In that upon or about the 25th day of May, 1987, and at the Lesotho Foreign Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully, falsely and with intent thereby to defraud and to the prejudice of the Government of Lesotho, forge an instrument in writing, to wit, a transfer order instructing the Bank of Brussels, Lambert in Belgium to transfer and credit to the bank account of the accused with the same bank the sum of 391,467 Belgian Francs which said amount would be debited to the account of the Lesotho Mission to the European Economic Community, by adding the figure "3" before the figure "9" of the sum of 91,467 Belgian Francs after the said transfer order had been examined and approved by the Chief Accounting officer to the Lesotho Mission to the EEC and thereby altering the amount of 91,467 Belgian Francs on the order to 391,467 Belgian Francs.

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(b) In that, upon or about the 25th day of May, 1987, and at or near the Bank of Brussels, Belgium, the said accused did unlawfully, and with intent thereby to defraud, and to the prejudice of the Lesotho Government, offer, utter and put off the said document to the Bank of Brussels Lambert aforesaid, he the accused, when he so offered, uttered, and put off the aforesaid instrument, well knowing it to have been forged.

ALTERNATIVELY

COUNT 4

In that, upon or about the 25th day of May, 1987, and at or near the Lesotho Foreign Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully and intentionally steal the sum of 300,000 Belgian Francs which according to the exchange rate then prevailing converted to M16,145.00, the property of the Government of Lesotho.

COUNT 5

- (a) In that upon or about the 23rd day of July, 1987, and at or near the Lesotho Foreign Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully and with intent thereby to defraud and to the prejudice of the Government of Lesotho, forge an instrument in writing, to wit, a transfer order instructing the Bank of Brussels Lambert in Belgium to transfer and credit to the bank account of the accused with the same bank the sum of 293,055 Belgian Francs which said amount would be debited to the account of the Lesotho Mission to the European Economic Community, by adding the figure "2" before the figure "9" of the sum of 93,055 Belgian Francs after the said transfer order had been examined and approved by the Chief Accounting officer to the Lesotho Mission to the EEC and thereby altering the amount of 93,055 Belgian Francs on the transfer order to 293,055 Belgian Francs.

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(b) In that, upon or about the 23rd day of July, 1987, and at or near the Lesotho Foreign Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully, falsely, and with intent thereby to defraud, and to the prejudice of the Lesotho Government, offer, utter and put off the said document to the Bank of Brussels aforesaid, he the accused, when he so offered uttered, and put off the aforesaid instrument, well knowing it to have been forged.

ALTERNATIVELY

COUNT 6

In that, upon or about the 23rd day of July, 1987, and at or near the Lesotho Foreign Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully and intentionally steal the sum of 200,00 Belgian Francs, which according to the Exchange rate then prevailing converted to M10,753.91, the property of the Government of Lesotho.

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COUNT 7

(a) In that, upon or about the 28th day of October, 1987, and at or near the Lesotho Foreign Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully, falsely, and with intent thereby to defraud and to the prejudice of the Government of Lesotho, force an instrument in writing, to wit, a transfer order instructing the Bank of Brussels Lambert in Belgium to transfer and credit to the bank account of the accused with the same bank the sum of 289,313 Belgian Francs which said amount would be debited to the account of the Lesotho Mission to the European Economic Community, by adding the figure "2" before the figure "8" of the sum of 89,313 Belgian Francs after the said transfer order had been examined and approved by the Chief Accounting officer to the Lesotho Mission to the EEC and thereby altering the amount 89,313 Belgian Francs on the said transfer order to 289,313 Belgian Francs.

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(b) In that, upon or about the 28th day of October, 1987, and at or near the Bank of Brussels Lambert, Brussels, the said accused did unlawfully, and with intent thereby to defraud, and to the prejudice of the Lesotho Government, offer, utter and put off the said document to the Bank of Brussels Lambert aforesaid, he the accused, when he so offered, uttered, and put off the aforesaid instrument, well knowing it to have been forged.

ALTERNATIVELY

COUNT 8

In that, upon or about the 28th day of October, 1987, and at or near the Lesotho Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully and intentionally steal the sum of 200,000 Belgian Francs, which according to the Exchange rate then prevailing converted to M11,050.52, the property of the Government of Lesotho.

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COUNT 9

(a) In that, upon or about the 23rd day of November, 1987, and at or near the Lesotho Foreign Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully, falsely, and with intent thereby to defraud and to the prejudice of the Government of Lesotho, forge an instrument in writing, to wit, a transfer order instructing the Bank of Brussels Lambert in Belgium to transfer and credit to the bank account of the said accused with the same bank the sum of 187,489 Belgian Francs which said amount would be debited to the account of the Lesotho Mission to the European Economic Community, by adding the figure "1" before the figure "8" of the sum of 87, 489 after the said transfer order had been examined and approved by the Chief Accounting officer to the Lesotho Mission to the EEC and thereby altering the sum of 87,489 Belgian Francs on the said transfer order to 187,489 Belgian Francs.

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(b) In that, upon or about the 23rd day of November, 1987, and at or near the Bank of Brussels, Lambert, Brussels, the said accused did unlawfully, and with intent thereby to defraud, and to the prejudice of the Lesotho Government, offer, utter and put off the said document to the Bank of Brussels Lambert aforesaid, he the accused, when he so offered, uttered, and put off the aforesaid instrument, well knowing it to have been forged.

ALTERNATIVELY

COUNT 10

In that, upon or about the 23rd of November, 1987, and at or near the Lesotho Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully and intentionally steal the sum of 100,00 Belgian Francs, which according to the exchange rate then prevailing converted to M5,637.01, the property of the Government of Lesotho.

COUNT 11

(a) In that, upon or about the 21st day of January, 1988, and at or near the Lesotho Foreign Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully, falsely, and with intent thereby to defraud and to the prejudice of the Government of Lesotho, forge an instrument in writing, to wit, a transfer order instructing the Bank of Brussels Lambert in Belgium to transfer and credit to the bank account of the accused with the same bank the sum of 393,778 Belgian Francs which said amount would be debited to the account of the Lesotho Mission to the European Economic Community, by adding the figure "3" before the figure "9" of the sum 93,778 Belgian Francs after the said transfer order had been examined and approved by the chief accounting officer to the Lesotho Mission to the EEC and thereby altering the amount 93,778 Belgian Francs on the said transfer order to 393,778 Belgian Francs.

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(b) In that, upon or about the 21st day of January, 1988, and at or near the Bank of Brussels Lambert, Brussels, the said accused did unlawfully, and with intent thereby to defraud, and to the prejudice of the Lesotho Government, offer, utter and put off the said document to the Bank of Brussels Lambert aforesaid, he the accused, when he so offered, uttered, and put off the aforesaid instrument, well knowing it to have been forged.

ALTERNATIVELY

COUNT 12

In that, upon or about the 21st day of January, 1988, and at or near the Lesotho Mission to the European Economic Community, Brussels, Belgium, the said accused did unlawfully and intentionally steal the sum of 300,000 Belgian Francs, which according to the exchange rate then prevailing converted to M16,592.47, the property of the Government of Lesotho."

The appellant pleaded not guilty. Extensive evidence was led by the State in substantiation of these charges. The appellant declined to give evidence. He was convicted on six of the main counts and sentenced to an effective cumulative sentence of 4 years' imprisonment.

The only question that arises in this appeal is the question of the sufficiency of the evidence on which the appellant was convicted.

The challenge in this respect was based on an assertion that certain documentation was "hearsay" evidence and was wrongly admitted to prove the truth of the contents thereof. The appellant was charged in the first instance with forgery. The allegation was that he had falsified certain documents and issued those documents in a falsified form. It was not necessary for the Crown, in order to prove these facts, to introduce the bank statements in order to establish that appellant had perpetrated a theft. What was relevant was that the contents of the documents had been altered and that these had been presented to the bank in their altered form. The Crown did not have to prove, in order to sustain a conviction on charges of forgery and uttering that the bank had acted upon such altered

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documents. Potential prejudice is sufficient for a conviction on a charge of forgery and uttering and this was certainly proved beyond any reasonable doubt. Although it is not necessary to find this, the Crown did in my view prove actual prejudice and bank journals are not required in order to establish this fact.

As I have indicated, there was ample evidence that the relevant documentation was altered and uttered in their amended form and no documentation was needed to be introduced in order to corroborate this evidence. Put differently, on a charge of forgery it is not imperative that the allegedly forged document should be placed before court, any more than it is necessary on a charge of murder that the corpse be presented to the judge. The document in issue is NOT presented to establish the truth of its contents - quite the opposite. Just as photographs of corpses are tendered, or evidence as to what a witness observed in relation to the deceased, nothing prevents testimony being tendered as to the condition of a document as real evidence, where the object - the document itself - is not available to be tendered in court any more than the decomposed corpse would be. There was a strong prima facie case that appellant altered the transfer orders in question.

that appellant uttered his forgeries to the bank in Brussels, and that the Embassy suffered a loss as a consequence. Where he did not himself testify in discharge of, not an onus - as suggested by the Judge *a quo* - but in respect of an obligation to rebut a powerful *prima facie* case, his conviction was inevitable.

The following facts are of particular significance in this regard:

1. He was the only person in charge of the day to day finances at the Mission in Brussels, and the keeper of the documents necessary to be able to account to Foreign Affairs in the Kingdom.
2. It was his duty to prepare the payment vouchers for out-goings, and the transfer orders issued to the bank on the strength of such vouchers, to transfer money from the account of the Mission into the account of a named beneficiary.
3. It was likewise his duty to record the *causa* for such transfer in both the voucher and the transfer order, as well as in his cash book.

4. It was then also his duty to take the transfer order to the bank, once it had been countersigned by the Ambassador or in his absence his deputy, the Counsellor.

5. The transfer orders in issue in this case, all mention him as the beneficiary and give the number of his account in the same bank as that into which money was to be transferred from that of the Embassy.

6. Transfer orders are prepared in duplicate. The bank stamps both, keeps the top copy, and hands the duplicate original to the accused who is supposed to file it for the Mission's records.

7. Appellant is supposed to remit payment vouchers, his cash book, bank statements received from the bank, and a reconciliation statement back to Lesotho. He did not remit everything required. Telephonic queries were made. He promised to send what was missing, all of which related to his own salary; but never did. There was a discrepancy between his cash book and what the bank said the

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position was relating to his salary - whether the bank was correct or not does not matter. The fact of its statement led to an investigation in Brussels. It was found that documents which should have been in appellant's file, namely the duplicate original transfer orders requesting money to be paid into his own account, were missing; for this he could give no explanation.

8. The original transfer orders were in the possession of the bank and had been "uttered" by their presentation. There also these orders were inspected. They differed from the underlying payment vouchers and what appellant had recorded in his cash book, adding to the causa for the transfer of funds (namely his salary, foreign service and children's allowances).
9. According to the evidence of one Sekoli there were no payment vouchers in appellant's files that could account for the discrepancies between salary vouchers and evenly-dated transfer orders. He added that it would have been inappropriate to include things like "tax refunds" with salaries in

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one and the same transfer order, since salary was a Foreign Affairs obligation, tax refund one of Finance (809).

10. Where appellant had to take the relevant transfer orders to the bank, each one required the bank to pay the amount in question from Embassy funds into appellant's account. I can think of nobody other than he himself who would have had either the opportunity or the inclination to add to the document signed by himself and the Ambassador or Counsellor (according to their evidence) before presenting the document. In any event the evidence is damning that the handwriting of the altered amount and narration was that of the appellant, known to his colleagues by reason of having worked with him previously.

The accused did not testify. The reason is obvious. He was guilty beyond all doubt and had no answer to the overwhelming weight of the evidence tendered by the Crown.

The appeal was in my view therefore without any merit and was, for these reasons, dismissed and the convictions

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confirmed.

There was no appeal against the sentences imposed and these were also confirmed.

J.H. Steyn
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J. H. STEYN
JUDGE OF APPEAL

I agree: *R.N. Leon*
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R. N. LEON
JUDGE OF APPEAL

I agree: *L. van den Heever*
.....
L. VAN DEN HEEVER
ACTING JUDGE OF APPEAL

Delivered at MASERU this *29th*..... day of JUNE, 1996.