C of A (CRI) No 9 of 1996

IN THE COURT OF APPEAL OF LESOTHO

In the matter between

DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

MPHO KHOANYANE First Respondent
RAMABILIKOE MASHAPE Second Respondent

Held at
MASERU

Coram:
BROWDE JA
KOTZÉ JA
VAN DEN HEEVER JA

JUDGEMENT

VAN DEN HEEVER JA;

In April 1993 Michael Moketa, Mpho Khoanyane and Ramabilikoe Mashape were charged in the Magistrate's Court at Maseru, as accused members 1, 2 and 3 respectively, with receiving or dealing with counterfeit currency in contravention of section 4 of Proclamation 32 of 1937 as amended. I refer to them in what follows according to that capacity and by those numbers. Accused No. 1 was acquitted, the other two convicted. Accused No. 2 was sentenced to M5000.00 or three years, accused no 3 to 5 years' imprisonment without the option of a fine.

The latter two appealed to the High Court of Lesotho against both their convictions and sentences. Maqutu J upheld the appeal of each against their convictions, making it unnecessary for him to deal with the sentences which the magistrate had imposed.

The present appeal is brought by the Director of Public Prosecutions against the decision of the High Court, on leave granted, somewhat reluctantly but nevertheless, by the court of second instance. The complaint by the prosecution is that the learned Judge erred in law -

"1. ...by placing undue regard on PW4 as a 'single witness' when he was not such a witness

2. ...by substituting his own views for that of the trial magistrate, which views are based on speculation and not on proved facts of the case

3. ...when he speculated on possible several lacunae in the Crown case which, coupled with the 'possible dishonesty' of PW4 as a witness (another speculation) led to the upholding of the appeal by reason of benefit of doubt"

A fourth ground advanced, is that the judgment is bad in law in that it is equivocal.

The case presented by the Crown in the court of first instance may be summarised as follows.

On 11 February 1993 the police received a tip-off on the strength of which they confronted accused no 3 when he arrived by car at Bonhomme House. They asked to search this car, which he had been driving. Asked, he said there were only books in the boot. It contained two boxes, tied with string, with no label or inscription indicating that they had been consigned either to or by anyone. More specifically, neither the names "N.Z.Book Publishers" or "Mashape" nor "Butterworths" appear on the boxes. They contained counterfeit RSA R50 notes with a face value of almost one million Maloti. (The boxes and their contents were exhibits before court). It was common cause that accused no 1 was merely a passenger who had been offered a lift by accused no 3 in the vicinity of the Kuena Book Store. His acquittal was inevitable. Accused no 3, a bookseller, told the police that he had gone to Mabathoana Book Depot "to collect his books from accused 2. The two boxes had been given to him by accused 2." Accused no 2 was accordingly also fetched, questioned, and in due course charged. A story was put to the first police witness on behalf of accused no 2 in cross-examination, that differs in material respects from the defence evidence presented when she and accused no 3 ultimately testified:

"Although she does not live there, she normally leaves her stuff with a shoe-maker who works nearby... She did so in

respect of these boxes as usual.... **The next morning she called Mr Mashape and asked him to collect his parcels**" (emphasis added)

Apart from the police evidence, the Crown led the evidence of two further witnesses: Ms Mabatho Tau, employed in the Kuena Bookshop near Mabathoana High School, and David Mokopane Likhoeli,(PW4), employed as a nightwatchman by the same concern but a cobbler by day. Ms Tau merely testified that accused no 2 used to live near the bookshop, often dropped into the shop for a chat or to use the telephone, and did come in on the 11th February wanting to use the telephone but could not do so since it was out of order. Mr Likhoeli, PW4, told the court that on the night of the 10th February accused no 2 brought two boxes, tied with string, to the shack where PW4 repairs shoes by day. She asked him to keep them in the shack for her since it was raining and on her verandah they would get wet. She told him what they contained but since she spoke English he did not understand what she said. She collected them, one by one, from him the following day. She was alone. He himself was fetched by the police and taken to the charge office later that day. There he saw accused no 2 in the passage. She said he was not to tell the police that the boxes were hers.

The relevant defence evidence may be summarised as follows.

Accused no 1 told the court he had seen accused no 3 about ten paces from the Mabathoana Bookshop, about to get into his car. Accused no 3 and no 2 had been talking to one another. Accused no 3 offered no 1 a lift into town.

According to accused no 2, she saw a Butterworths Kombi at the Book Centre, after five, when it had already closed. The two occupants of the Kombi left five boxes destined according to their labels for the Kuena Book Centre, and two on which were written "N.Z Book Publishers", which she knew to be owned by accused no 3. She instructed PW4, and he agreed, to take charge of the seven boxes. He and "a boy that he works with" carried them into his place of work, where he also sleeps. Since she had

said that she knew accused no 3 but did not know how to get in touch with him, the Butterworths representatives said they would telephone him to tell him where they had left his goods. The following day accused no 3 found her in the bookshop talking on the telephone. He told her that he had heard that she had kept his goods. She referred him to PW4, and continued with her telephone conversation. When she had done, she saw accused no 1 getting into the car of accused no 3 who, asked by her, confirmed that he had received his books from "the boy". That afternoon the police fetched her at her home. She was taken to the police station and questioned. She denied having there asked PW4 not to tell the police that the boxes were hers. Under cross-examination she

- denied that she had mentioned rain as the reason why PW4 should take charge of the boxes. He works for the bookshop, a job she had obtained for him
- knew of no reason why PW4 should tell lies about her
- did not know why Ms Tau had not been questioned as to whether she had received five boxes of books on the following day; nor why it had not been put to PW4 that he had received seven boxes instead of two, and why he had not been challenged about the reason given for asking him to take care of them. (What *was* put to PW4, with which he agreed, was that he could not be confident that the boxes he saw at the charge office were the identical ones given him by accused no 2; nor did he know what she did with them after removing them from his shack, or whether she was aware of their true contents)
- said for the first time that PW4 had been present during her conversation with the Butterworths men that afternoon, she having called him. That, of course, made it even more startling that her counsel had not only not tried to elicit from PW4 what would have been material corroboration of her innocence, but had not even challenged the evidence of PW4 that she had herself delivered two boxes to him at ten or eleven o'clock at night. Nor had the evidence of Ms Tau that the telephone at the book store was out of order on the 11th, been challenged by cross-examination. Nor was any explanation offered why she differed from the version put to the police on her behalf, that it was she who had contacted

accused no 3 to ask him to collect his parcels..

Accused no 3 told the trial court that he had received a call from certain Shepherd Gholo from Butterworths in Durban - no mention of a call from accused no 2 - on the strength of which he went to Kuena Book Centre - no reason given why - to fetch books for his book shop. There he met accused no 2 - on their evidence quite by chance, not by pre-arrangement - who was talking on the telephone. They discussed books which had been left with her and a young man. She called PW4 and asked him to give accused no 3 his books. PW4 brought the two boxes. They had no address on at all. Accused no 2 came out and asked accused no 3 whether he had received his books. He answered in the affirmative, left having offered a lift to accused no 1 since they were due to attend the same meeting, went to Bonhomme House where he sent accused no 1 in to call some of his staff since he himself had gout (and so could presumably not carry the boxes himself - though he must have been prepared to do so at Kuena Bookstore) but was confronted by the police before this could be arranged and taken off to the charge office.

The magistrate rejected the stories of both accused 2 and 3 as palpably false, found the police evidence to be largely common cause, and accepted the evidence of Ms Tau and PW4 as reliable. It is unnecessary to set out his reasons in detail. He points to glaring improbabilities and gaps in the defence case, for example -
that the fate of five boxes, not put to Crown witnesses, was left hanging in the air;
that a firm of publishers could leave a sizeable consignment of books in the hands of two complete strangers in a shack that has a piece of plastic for a door;
the remarkable coincidence that accused no 3 having been phoned by Butterworths and told to collect his books, should go to Kuena Book Centre - where they were not - and fortuitously find accused no 2 there who directed him to the shack, where they were;
that accused no 3 did not see fit to check what was in the

unmarked/unaddressed boxes when he took them;
that he did not express outrage that Butterworths had, instead of sending him books, sent him counterfeit money...

Perhaps the last-mentioned improbability can be approached from a different angle: I myself find it inconceivable that a supplier of illegal goods would entrust them to an innocent courier without having ensured that they would be passed on to the (guilty) person for whom they are intended. Accused no 3 was on his own evidence as well as that of accused no 2, the person for whom these two boxes were *to his knowledge* intended, since he took charge of them without his name being on them. The only reason why both he and no 2 tell the imaginative story of the unorthodox Butterworths delivery-men, is to try to lay some foundation for a claim that they had no idea that the contents of the two boxes which both of them handled, she to arrange storage and he to take possession of them, were anything other than books which he co-incidentally was expecting. That story bears within it the seeds of its own destruction. To accept it as reasonably possibly true, necessitates acceptance also that the supplier of the counterfeit money was not only deliberately donating his product to someone who had no use for it, but enabling the recipient to put him, the supplier, in gaol by following back the trail via Butterworths and/or the registration number of the Kombi, and/or the five other cartons of books - had those been anything more than a figment of the imagination of the accused.

It was suggested in cross-examination that some unknown person could have exchanged genuine Butterworths boxes in the shack for boxes containing the counterfeit money. The glaring improbability just mentioned becomes even more so on such version. Accused no 3 testified only in December of 1993. There was no suggestion that Butterworths had billed him for books delivered ten months earlier which he had not received.

The judgment on appeal is based on a number of serious misdirections. I deal only with those raised by the notice of

appeal.

Why the learned Judge faulted the magistrate for not having considered PW4 with the caution appropriate to a single witness, escapes me. The main facts to which he testified were common cause between him and the defence; and what turned out not to have been common cause had not been challenged. I have already mentioned salient aspects of these deficiencies in the defence case. In any event the judgment is self-contradictory, as witness a statement like:

"This scrutiny should... have... been applied to the evidence of PW4, the single Crown witness because on his evidence (*inter alia)* accused 1 was acquitted and the two appellants found guilty".

The appellants were certainly not found guilty on the single evidence of PW4: included among the *alia* is the police evidence according to which accused no 3 was caught red-handed, and implicated accused no 2 as the person from whom he had received the incriminating exhibits. She admitted that she had been the intermediary through whom delivery had been effected. And their "explanation" is so wildly improbable that that in itself contributes towards their conviction.

The evidence of Ms Tau was dismissed as insignificant: "I am surprised that the trial Court sought some corroboration out of it". Her evidence was not challenged at all by the defence. It is material since it contradicts that of both the accused, that no 3 found no 2 in the bookshop on the 11th, talking on the phone, from where she directed him to PW4 as the person then still in possession of the boxes intended for no 3; since the telephone was according to Ms Tau out of order. It also contradicts what had initially been put as the version to which no 2 would testify, that it was accused no 2 who telephoned no 3 to ask him to collect his parcels.

The learned Judge accepted that PW4 "would seem reliable if

his evidence is not viewed with caution"; and not surprisingly found that the evidence indicated that there "is perhaps more to (the) activities (of accused no 2) than meets the eye" and that the story of accused no 3 "that the parcels (from telephonic information) originated from Butterworths Booksellers is just as suspect". Despite this, he held that there was a gap in the Crown case in that it "was obliged to check whether (accused no 3) is a customer of Butterworths and if indeed (he) had ordered goods from Butterworths"; and had also failed to follow up, as it should have, the "explanation" by accused no 3 that Shepherd Gohlo of Butterworths had telephoned him.

The logic is clearly faulty. Accused no 3 as a bookseller probably is a customer of Butterworths. He may even have ordered books from that firm about this time. He certainly did not receive books on this occasion, nor as already stated is there any suggestion that he has been billed for books he did not receive. Whether or not Butterworths employs someone by the name of Gohlo is also irrelevant. If Gohlo did phone accused no 3, it could not have been to tell him about a consignment of books abandoned to strangers which turned, *mirabile dictu,* into counterfeit money before he collected the boxes as he says he was asked to do. The learned Judge also seems to have required direct evidence that the two who appealed knew that "the fishiness of these boxes" consisted in the fact that they contained counterfeit money, not anything else. The inferential reasoning is again faulty. Where their conduct was suspicious and their evidence untruthful, there is no need to speculate that they might have thought they were dealing with drugs, or unwrought gold, or any contraband other than the goods which according to the evidence they *did* handle. Moreover, had accused no 3 been found with the money in his hands, he could have told exactly the same fairy tale as he in fact came up with, just taking it one step further: he expected books, and discovered to his immense surprise that the boxes left after hours by Butterworths contained false money. And if the police were supposed to wait until he passed on the money or part of it to others, they may have waitwed too long and had no case at all.

The learned Judge ultimately based his rejection of the magistrate's findings on speculation, not testimony. That he was not entitled to do. He said:

> "What worries me is that during the cross-examination of PW1 it was suggested that the appellants were framed. Of course, the appellants could not have proof. This lingering suspicion had to be excluded, unless there was some basis for excluding it. Truth is stranger than fiction sometimes. Nevertheless, how did the police get this information? Of course, they are not obliged to disclose. The possibility that (accused no 3) was framed and even received a phone call from his framers and the police were then tipped-off is not at all fanciful. When the accused is facing a problem, it is not unusual to panic, cut a sorry figure and even lie. As already stated, he lies at his own risk of course. The trial Court must nevertheless be mindful of these realities.
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> The failure to check the boxes by a businessman with staff who normally do it for him may be negligent but such negligence has been known to occur. The people who left the boxes with (accused no 2) are suspicious characters just as the information the police got is suspect. Why should the police target (third accused's) car? It was precisely to overcome that instinctive suspicion that attaches to informants and the information that the police had got that the police ought to have only taken action when (accused no 3) began to help himself to the contents of the boxes of the counterfeit currency or did something that revealed his actual or possible knowledge.
>
> I have come to the conclusion that... the appellants should have been given the benefit of the doubt"

In the first instance, the suggestion in cross-examination was hardly that accused no 3 had been framed, merely that he, as a public figure who was involved in the elections, probably "has a lot of friends as well as a lot of enemies". I know of no rule of either logic or law which necessitates one's regarding police informers as persons possibly using elaborate plots to thwart the law, instead of assisting the police with the truth to help uphold the law. Neither of the appellants themselves suggested that anyone may have had such designs; and accused no 2 would in any event not fall within the allegedly vulnerable class: she was not an election candidate, but must have been also targetted by the informer; who must have been a Machiavellian schemer with inordinate good fortune to be able to pull off such a successful

trick; which led the appellants into a morass of lies instead of the indignant reaction one would have expected from innocents caught by surprise.

The test propounded by the court of second instance was one not demanded by the law before a conviction should follow. The law does not and cannot require proof beyond **all** doubt, merely that there be no **reasonable** doubt of the guilt of an accused. (Cf. S v Glegg, 1973 (1) S.A.L.R 34 (A)). To upset the conviction on the strength of a "lingering suspicion" or doubt based on mere speculation, was to err in law. It follows that the appeal of the Director of Public Prosecutions against the reversal of the judgment of the magistrate must succeed.

That leaves the question of the sentences. The appellant asked that we should merely restore those imposed by the magistrate. That, too, would be to err in law. The appellants appealed against both their convictions and sentences, and this court cannot by-pass the court of second instance which did not find it necessary to deal with the question of sentence at all. That part of the appeal would appear to have had a better prospect of success than should have been accorded to the merits. Judging by the remarks on record as to the poor quality of the imitation notes, it seems that the prospects of the counterfeits damaging the economy were fairly slender. Nor does any foundation seem to have been laid in the evidence that would justify the great discrepancy in the treatment meted out to the two who were convicted.

The appeal succeeds. The judgment of the court a quo substituting a verdict of not guilty for that of the magistrate, is set aside, and the magistrate's conviction of the two appellants is restored. The matter is remitted to the High Court to deal with the rest of the appeal, namely so much as concerned the sentences imposed by the magistrate.

L. van den Heever
Judge of Appeal

J. Browde
Judge of Appeal

G.P.C. Kotzé
Judge of Appeal.