

CRI/A/32/96
IN THE HIGH COURT OF LESOTHO

In the appeal of:
NATHNAEL BESETSA Appellant
vs
REX Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice B.K. Molai on 29th day of September, 2000.

This is an appeal from the Subordinate Court of Mokhotlong. The appellant (herein after referred to as an accused) appeared before a Magistrate with First Class Powers charged with a crime of theft, it being alleged that on or about May 1987 and at or near Mokhotlong in the district of Mokhotlong he received a cheque to the tune of R1,503.50 which was a donation to a society known as "Mokhatlo oa Lithuso ho bakhachane". The accused encashed the cheque but unlawfully and intentionally used the money for his own purposes without the permission of the society thus

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committing the crime of theft.

When it was put to him, the accused pleaded not guilty to the charge. At the end of the trial, the accused was, however, found guilty as charged and sentenced to a fine of R2,000.00 or serve a term of two (2) years imprisonment in default of payment of the fine. The appeal is against the conviction only, on a number of grounds which can, however, be summed up in that it is against the evidence.

It was common cause from the evidence that, when their time to give birth approached, pregnant women from remote areas in the district of Mokhotlong came to the government hospital in the district. On arrival they were not immediately admitted in hospital. They had, therefore, to wait in the vicinity of the government hospital until the moment for them to deliver arrived. However, there was no place for them to be properly accommodated whilst they were waiting for their time of delivery and, consequently, admission into hospital.

To alleviate the problems of pregnant women in the district of Mokhotlong, a society, named "Mokhatlo oa Lithuso ho bakhachane", was, in 1974, formed in the district. The accused, as the President of The Society, was a member of the executive committee thereof. The other members of the Committee were Chief Semousu Mohale (Chairman) who testified as P.W.3 in the Court a quo, Stephen Sefeane (Deputy Chairman), Lepekola Tsehlana (Secretary) who testified as P.W.4 at the trial, Mosa

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Lemphane (Assistant Secretary), Matsupane Mosese (Treasurer) and Motsoari Mosoang (Member) who testified as P.W.1 in the Court below. Following its establishment, the society embarked on a project whereby a building to accommodate needy pregnant women from the

remote areas in the district of Mokhotlong was to be erected in the vicinity of Mokhotlong government hospital.

In as far as it is relevant, P.W.I testified that after the society had embarked on the project, the accused informed the committee that he had met a certain American lady by the name of Mrs. Rose who promised that, on her return to her country, she would raise funds with which to assist the society in its project. The funds would be sent to the committee through K. Nolan Store at a place called Tlokoeng. Later on, the accused again informed members of the committee that he had received, from Mrs. Rose, a cheque to the tune of R1,503.50 which was the donation she had promised to the society. However, the accused did not bring the money to the committee. He in fact even stopped attending the meetings of the committee.

In his testimony, P.W.I told the Court that, later on, the committee learned that the accused, who was a civil servant engaged in the Ministry of Public Works, was due to be transferred from Mokhotlong to Qacha's Nek district. The Committee tried hard to call upon the accused to come to the meetings and hand over the donation from Mrs Rose but to no avail. The evidence of P.W.I was in that regard corroborated by P.W.4 and P.W.3.

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According to P.W.I and P.W.4 they even personally met the accused and requested him to come to the meetings of the committee and hand over the money from Mrs. Rose. However, the accused's reply was that he was busy preparing for his transfer from Mokhotlong to Qacha's Nek district. Accused, however, promised to leave the money with his wife who would hand it to the committee. The committee did request the accused's wife, who was incidentally also a member of the society, to come to the committee meeting and hand over the money from Mrs Rose. According to P. W. 1 and P.W.4 the accused's wife did come to the committee meeting but explained that the money had been deposited into a bank account which was operated by the accused. She was, therefore, unable to hand the money to the committee, as requested. The evidence of P.W.I and P.W.4 was, in that regard, corroborated by P.W.3.

In his evidence, P.W.3 told the Court that, as the accused had hinted that the money from Mrs Rose would come through K. Nolan store at Tlokoeng he, on behalf of the committee, detailed P.W.I to go and investigate at the store whether such money had, in fact, ever arrived there. That was confirmed by P.W.I who told the Court that he did go to K. Nolan store at Tlokoeng where he met and explained his mission to the manager of the store. P.W.I told the Court that according to the store manager, in May 1978 the accused came to his shop and encashed a cheque in the amount of R1,503.50 which cheque was drawn in the name of Thuso ho bakhachane. Thereafter P.W.I returned and reported to the committee which again instructed him to go and report the matter to the police. P.W.I was in that

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regard corroborated by P.W.3, the Chairman of The Executive Committee. In their evidence P.W. 1 and P.W.3 assured the Court that the accused was not permitted to use, for his own purposes the cheque, in the amount of R1,503.50, which he had received as a donation to their society.

Tebelo Mashologo testified as P.W.2 and told the Court that he was, at the material times, the manager of K. Nolan store at Tlokoeng. However, in 1988 he went on retirement. P.W.2 remembered that one day, whilst he was the manager at the shop, the accused brought to his office a cheque to the tune of R1 ,503.50 which he wanted to cash. The cheque had been drawn in the name of a society for pregnant women of which society the accused claimed to be the President. According to him, P.W.2 did assist the accused to cash that cheque which came from a foreign country. P.W.2 specifically denied the suggestion that the accused used the R1,503.50 he gave him for the cheque to buy building material at his shop.

P.W.5, Detective Warrant Officer Selete, testified that he was a member of the Lesotho Mounted Police service based at the Police Headquarters, here in Maseru. However, in 1983 he was stationed at Mokhotlong Police Station in the district of Mokhotlong. P.W.5 further told the Court that on 1st July 1983 he was on duty at his duty station in Mokhotlong when he received information from P.W.I. Following that information, he proceeded to Tlokoeng K. Nolan Store where he met and interrogated P.W.2, the manager of the store. According to the witness, P.W.2 gave him an explanation and handed over a document on which was

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written a list of the cheques that had been cashed at his store. Amongst the list of the cheques was the one for the amount of R1,503.50. P.W.5 took possession of the document. He subsequently handed a certified copy thereof as exhibit "A" and part of his evidence at the trial. According to exhibit "A" cheque No. 073381, in the amount of R1 503.50 and payable to "ntlo ea bakhachane", had been cashed at P.W.2's store on 16th May 1978.

P.W.5 told the Court that on the information he had received from P.W.I and P.W.2 he met and advised the accused about the results of his investigations. The accused made an explanation following which he (P.W.5) cautioned and charged him with the crime of theft as aforesaid.

On his defence the accused testified, on oath, and told the Court that, after "Mokhatlo oa Lithuso ho bakhachane" society of which he was admittedly the President had embarked on a project whereby a building to accommodate pregnant women in the vicinity of Mokhotlong government hospital would be erected, he successfully applied, from the American, Embassy, for funds to finance the project. The accused conceded that he did, in due course, receive the cheque in the amount of R1 ,503.50 payable to "N. Besetsa for ntlo ea bakhachane" According to the accused the cheque came from France through the American Embassy in Lesotho. He denied, therefore, the evidence that the cheque came from Mrs Rose.

It is worth noting that, according to exhibit "A", the cheque was payable to "ntlo ea bakhachane" and not to "N. Besetsa". In any event, the

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accused did concede that the cheque was the property of the society and not his personal property.

The Court a quo before which all witnesses appeared and testified, found that the truth was in the evidence of P. W. 1 corroborated by P. W.3 and P. W.4 that the accused had told the committee that the cheque had come from Mrs Rose and rejected as false, therefore, the accused's version on this point. It seems to me that if the cheque did come from France

through the American Embassy, as he wished the Court to believe, the accused would have said so to the committee. That being so, there was no way P.W. 1, P.W.3 and P.W.4 who were admittedly members of the committee could have invented the name of Mrs Rose as the person from whom the donation of R1 ,503.50 had come. In the light of all this, I am unable to find fault with the finding of the Court a quo.

In any event, the accused went on to testify that, after he had received the cheque in the amount of R1,503.50, he went to K. Nolan store at Tlokoeng where he used it to buy roofing material for the house which his society was building for the needy pregnant women in the vicinity of Mokhotlong government hospital. According to the accused, the American Embassy had appointed him to represent them at the ceremony of handing over the roofing material to the society. As he was preparing to move from Mokhotlong to Qacha's Nek district on transfer, the accused requested P.W.4 to collect, from K. Nolan store at Tlokoeng, the roofing material he had paid for at the store and keep it in his possession until the walls of the house for

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pregnant women had been completed when he would then come from Qacha's Nek to Mokhotlong to hand it over to the society, on behalf of the American Embassy.

As it has been stated, earlier in this judgment, P.W.4 specifically denied that the accused ever requested him to collect roofing material - he had paid for at K. Nolan store at Tlokoeng. He told the Court that all that the accused had told him was that his (accused's) wife would bring the R1 ,503.50 to the committee because he himself was moving to Qacha's Nek on transfer. The evidence of P.W.4 that the accused never requested him to collect roofing material from Tlokoeng store was, in a way, corroborated by P.W.2 who told the Court that the accused had never paid for any roofing material with the R1,503.50 cheque cashed at his shop. The trial court accepted as the truth, and rightly so, in my opinion, the evidence of P.W.4 corroborated by P.W.2 and rejected as false the accused's version on this point.

The accused went on to testify that, after he had been transferred to Qacha's Nek district, he resigned from the civil service and set up his own business at a place called Sehong-hong in the district of Thaba-Tseka. He was admittedly arrested and charged as aforesaid by the police at Sehong-hong.

In his argument before this Court, the accused made an issue of the facts that the cheque, the subject matter of this case, was never produced as

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exhibit by any of the prosecution witnesses. Nor was his wife called to testify as a witness at the trial. It is, however, significant to observe that the accused never disputed that, after he had received it, he cashed the cheque at Tlokoeng K. Nolan store. That being so, it stands to reason that the cheque has since returned to the person who had drawn it, namely Mrs Rose of America. It could not, therefore, have been available for the prosecution witnesses to hand it in as exhibit at the trial. There was, however, the evidence of P. W.2, supported by exhibit "A", that the accused did have in his possession cheque no. 073381 to the tune of R1,503.50 which cheque he encashed at Tlokoeng K. Nolan store and took the money. As regards the

calling of accused's wife as a witness at the trial, it is to be observed that ss. 216 (1) and 217 (1) of the Criminal Procedure and Evidence Act 1981 provide, in part:

"216.(1) The wife or husband of an accused shall not be competent to give evidence for the prosecution in Criminal proceedings....."

"217. (1) An accused and wife or husband of an accused shall be a competent witness for the defence....."

From the above cited s. 216 (1) read with s.217(1) of the Criminal Procedure and Evidence Act, 1981 it is clear that the prosecution could not have called the accused's wife to testify against him, as a Crown witness. Only the accused could have called her as a defence witness, to testify in his defence. That being the case, the accused cannot be heard to complain that his wife was not called to testify as a witness at the trial. He is the only person who could have done so.

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In the light of the foregoing, it is clear that the trial court accepted the evidence that the accused received, on behalf of "Mokhatlo oa lithuso ho bakhachane" society, cheque No. 073381 to the tune of R1,503.50. The cheque was, therefore, the property of the society and not his personal property. The accused encashed the cheque at Tlokoeng K. Nolan store and took the money. i.e he took control of the money. It was the duty of the accused to hand that money to its lawful owner, namely "Mokhatlo oa lithuso ho bakhachane" society. He never did. Instead, the accused used the money for his own purposes without the permission of the society and, therefore, unlawfully. The salient question was whether or not the accused did so amino furandi: In this regard it is to be observed that it was in 1978 when the accused admittedly took control of the money. He has, to date, not handed it over to its lawful owner, the society. Indeed, the accused now denies that he still has, in his possession, the money which he can, therefore, no longer make available to the society. The only reasonable inference to be drawn, in the circumstances, is that the moment he decided to wrongfully and fraudulently deal with it, as he did, the accused had the intention to deprive the society of its money permanently. The question I have earlier posed viz. whether or not when he took and used the R1,503.50 for his own purposes, without the permission of the society, the accused did so amino furandi must, therefore, be answered in the affirmative.

In the result, the view that I take is that this appeal ought not to succeed. It is accordingly dismissed.

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B.K.Molai
JUDGE
29th Day of September, 2000

For Appellant: In Person
For Respondent: Miss Dlangamandla