

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C OF A (CRI) N0.13/2008
CRI/T/163/2007**

In the matter between:

PONTŠO LEBOTSA

APPELLANT

AND

THE CROWN

RESPONDENT

CORAM: GROSSKOPF, JA
SCOTT, JA
GAUNTLETT, JA

HEARD: 6 OCTOBER 2009
DELIVERED: 23 OCTOBER 2009

SUMMARY

s.21(3) of Corruption and Economic Offences Act, 1999 and s.36(1) of Finance Order, 1988 – elements of offences – public officer acquitted of corruption but convicted of unauthorized expenditure – appeal and cross-appeal dismissed and exemplary sentence confirmed.

JUDGMENT

GAUNTLETT, JA:

[1] The appellant is the Principal Secretary of Justice in Lesotho, and by virtue of that office, the chief accounting officer in the Ministry of Justice (“the Ministry”). She appeals against her conviction on a charge of contravening s.36(1) of the Finance Order, 1988 (“the Finance Order”), and the imposition of a fine of M10 000.00 or five years imprisonment. The Crown has cross-appealed against her acquittal on a main charge of corruption in terms of s.21(3) of the Prevention of Corruption and Economic Offences Act, 1999, as amended (“the Corruption Act”).

[2] The charges relate to the appellant’s conduct in ordering an information technology system for the Ministry.

[3] The essential facts are that the appellant was impressed with a particular information technology system on offer by Telecom Lesotho in late 2006, and conveyed to that company’s chief operations officer her wish to acquire it for the Ministry. On 27 February 2007 she ordered it. It was however not budgeted for

in her Ministry's budget, nor (in the absence of a tender or limited tender or waiver, for which the Finance Order provides) did she apply to the Finance Ministry for special arrangements to make the purchase. She was advised by her Financial Controller that in these circumstances the order was legally impermissible. The appellant however pressed on regardless and ordered the system. When the contract was concluded on 28 February 2007, no form of authorization existed and no provision existed in the Ministry's budget for it. In dealing with the cross-appeal by the Crown against the appellant's acquittal on the main charge, I shall return to consider certain of these main facts more closely.

[4] The appeal, counsel for the parties agreed, involves four main contentions of law. The first is that the alternative charge (so counsel for the appellant argued) was defective by reason of the inclusion of a reference to s.29 of the Finance Order. This was said to create "one highly prejudicial, jumbled up, composite charge which failed to meet prescribed standards".

[5] I cannot agree with counsel for the appellant. The charge is explicitly one of contravening s.36(1) of the Finance Order. The fact that this is followed by the words “read with ... section 29” does not detract from that. All this does is to specify that the latter contains the statutory provision the appellant is alleged to have disregarded. Charges are commonly framed in that way. As counsel for the Crown pointed out, this is not an instance where a charge refers to two different sections each creating a different offence, which are then rolled up in the same charge in such a way that it is impossible to ascertain on a reading of the charge which offence is in contention (cf **R v Sheshe** 1951 2 SA 108 (T)).

[6] The second basis on which counsel argued the appeal should succeed is that the trial court erred in not ordering the Crown to provide further and better particulars relating to the fair

and reasonable price of the information technology ordered by the appellant.

[7] Section 154 (1) (f) of Lesotho's Criminal Code provides that no charge shall be held to be insufficient "for want of the statement of the value or price of any matter or thing that is not of the essence of the offence". Whether or not the system was reasonably priced was not determinative of the alternative charge. This has two bases in the alternative to each other: procurement "for more than a fair and reasonable price or without authority ..." (emphasis supplied). It was clear from the outset that the latter was the Crown's case. The trial court had a discretion to exercise in ordering further particulars (s.157 of the Code). Given this fact, and the lack moreover (as the Crown indicated in its response) of any knowledge by the Crown of the value in question, there is no basis to interfere in the court's refusal of the request for the particulars as to the value of the system.

[8] The third legal attack by the appellant on her conviction on the alternative charge is that the Procurement Regulations, 2007 (to which reference was also made in the charge) had not yet come into operation. This was not a defence canvassed at the trial, but it was raised in the notice of appeal. In his heads of argument counsel for the Crown in response gave notice of an application to amend the alternative charge by substituting “1973” for “2007” - thus relying on the previous regulations still in place. At all material times counsel for the appellant was hard put to point to prejudice arising from the amendment, and we accordingly allow it.

[9] The 1973 regulations are in substantially the same terms. The appellant’s conduct was in conflict with these too, in respects which are not necessary to detail. This defence too, then, is without merit.

[10] The fourth attack is that the Crown's inability to specify, in relation to the main count of corruption, which other party obtained an undue advantage from the appellant's conduct, and the precise nature of any such advantage, should have had the effect that the alternative count should have been quashed. The argument is elusive. Firstly, the alternative charge is just that: an alternative charge. Its fate is not determined by that of the main charge. Secondly, the attack in any event misrepresents the clear language of the charge: s.21(3) of the Corruption Act refers to undue benefit of the public officer in question (here, the appellant) or any other person. Any benefit does not have to be simultaneously that of the public officer and a third party.

[11] Despite agreeing that the foregoing four legal inquiries constitute the only issues in the appeal, counsel for the appellant thereafter introduced another. It is this. He contends that s.32 of the Finance Order provides "an administrative measure of control" of unauthorised State expenditure, which is exclusive. The

appellant's counsel submitted a note ten days after the hearing reiterating the point. It has no merit. S.33 states in terms that the imposition of a surcharge under s.30 or 32 does not preclude criminal proceedings "in accordance with any other law". Read sensibly and in its context, this simply means any other statutory provision. It does not mean that criminal proceedings instituted in terms of another section in the Finance Order - such as s.36 - are ousted. That would be an absurdity. S.36, as another provision in the same statute, is "any other law", within the sensible meaning of s.32.

[12] For these reasons the appeal is without merit.

[13] The cross-appeal is directed by the Crown against the acquittal of the appellant by reason of the Crown's failure to prove that the appellant's actions were performed (in terms of s.21(3) of the Corruption Act) "for the purpose of obtaining an undue advantage for herself or another person...".

[14] In this regard the trial court (Monapathi J) held:

“It is that specific intent that is lacking when one is unable to prove a nefarious motive for what the Accused did”.

[15] Counsel for the Crown criticized both the resort to “specific intent” and its paraphrase as “a nefarious motive”. I agree that the Finance Order requires neither (the law, it has been said often enough, is not directly concerned with motives: **Tsose v Minister of Justice** 1951 1 SA (A) at 17 G-H).

[16] What the section requires is that the actions be for a specified purpose: a matter of objective characterization on all the available facts. This is an additional requirement to that of mens rea in the form of intention (dolus).

[17] In my view, the evidence establishes no such purpose. The appellant was clearly irritated by the information technology

deficiencies of the system then operative in the Ministry. She was impressed by that offered by Telecom. The chronology of events recorded in the judgment of the court a quo points to great impatience and high-handedness on her part. She was bent on beating a financial year deadline. But I see no adequate basis to conclude that the purpose of her actions was to obtain “an undue benefit for herself or another person”, in the required sense. The achievement of a more efficient system operative through the whole Ministry was that in my view not a purpose such as to fall within the purview of s.21(3), and to form statutory corruption. “Undue” does not mean “not due”. It means improper, unwarranted, and inappropriate, in its ordinary usage (**Concise OED** (10th ed 2002 rev) 1563; see too **Black’s Law Dictionary** (3rd ed 1933) 1775). I see nothing in the context of s.21(3) of the Corruption Act to suggest that a different meaning was intended. The purpose of that Act - and of the Prevention of Corruption and Economic Offences (Amendment) Act, 8 of 2006, which extended its ambit - is to combat corruption in the sense contemplated by

s.21. In its essence, this involves a public officer permitting his or her conduct in that capacity to be influenced by some benefit, current or prospective, to himself or herself or another. Irregularity in financial administration not entailing an undue benefit is dealt with by other statutes, such as the Finance Order.

[18] The appellant was accordingly correctly acquitted on the main charge.

[19] The appellant's counsel also attacked the trial court's sentence of a fine of M10 000.00 (or five years imprisonment). The grounds of appeal asserted inter alia that the offence was "technical" (in that the unauthorized expenditure was not for the appellant's personal benefit but for the benefit of the whole Ministry); that the court's failure to deliver judgment on the date originally indicated resulted in wasted legal costs; and that the sentence was "harsh".

[20] Counsel for the appellant was able to point to no misdirection by the trial court in imposing sentence. This court may accordingly only interfere with the sentence if persuaded that it is disturbingly inappropriate in all the circumstances.

[21] In my view it is not. The court clearly allowed for several mitigatory factors by not imposing a custodial sentence, which it had the power to do. Thus, considerations such as the fact that the appellant is a first offender and she did not personally benefit from the offence in any material sense are allowed for. On the other hand, the sentence reflects the several aggravating circumstances to which the Crown drew attention. The appellant is not only in a very senior position but, as already noted, was the chief accounting officer for the Ministry in terms of the Finance Order. Irregular State expenditure is an inherently serious matter. The sum involved was significant (some M750 000.00). The appellant's conduct entailed no single error or default. She wilfully and repeatedly disregarded the warnings of subordinates;

indeed, she responded intemperately to them, and even threatened some form of reprisal. At no stage did she express remorse. Her defence to the end has been ill-judged, casting serious aspersions on others in her Ministry and the Department of Finance, and even blaming subordinates (despite her disregard for their warnings) for not rectifying matters afterwards. That the trial court in the circumstances imposed the maximum fine allowed induces no sense of shock. The factors raised by her counsel establish no adequate basis for interference by this court.

[22] In the result, the appeal and cross-appeal are both dismissed, and the conviction and sentence imposed by the trial court confirmed.

J.J. GAUNTLETT
JUSTICE OF APPEAL

I agree:

**F.H. GROSSKOPF
JUSTICE OF APPEAL**

I agree:

**D.G. SCOTT
JUSTICE OF APPEAL**

For Appellant : Mr. W.C.M. Maqutu
For Respondent : Mr. H. Woker