IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CRI) No.5/2012**
CRI/T/13/2008

In the matter between:-

MOTLATSI LILLO MOTSAMAI

V

REX

CORAM: SCOTT, JA
HOWIE, JA
HURT, JA

HEARD: 2 OCTOBER 2012
DELIVERED: 19 OCTOBER 2012

SUMMARY

Criminal Law – bribery – accused closing case without testifying Crown evidence sufficient to call for an answer – conviction accordingly unassailable.

JUDGMENT

HOWIE, JA

[1] The appellant, a public prosecutor, was charged in the High Court with bribery. There were two alternative charges. The Crown adduced the evidence of four witnesses. The appellant closed his case without giving evidence. The trial Judge (Mahase J) found that bribery had been proved as charged but due to an oversight found the appellant guilty on all three counts. He was sentenced to 3 years imprisonment.

[2] The appeal is concerned only with the conviction for bribery, it being common cause that the erroneous extension of the conviction to include the alternative counts is of no materiality to the appeal. Save for the need for a formal correction of the terms of the conviction, the alternative counts are thus irrelevant.

[3] The Crown evidence commenced with the testimony of Francina 'M'alisebo Khosi ("the complainant') who testified to the following effect. She had been charged with stock theft in the Leribe Magistrates Court and was due for remand on 16 August 2007 when she was approached by the appellant. He was the prosecutor in that case. He said that it was a very serious matter and that she would be imprisoned for a long time but that if she paid him M6000.00 she would not be jailed. When she said she did not have so much money he said she should demand it from her relatives. She and the appellant eventually agreed that she would pay him M3500.00. She was nevertheless summoned for trial.

[4] The summons was served by Trooper Lechato (PW4). The complainant told him what the appellant had

demanded. He arranged for her to meet with the Police Commanding Officer in Leribe who, in turn, arranged to trap the appellant. The complainant would call the appellant on a speaker telephone so that her conversation with the appellant could be heard. The call was made. The complainant told the appellant she had only M2950.00. He told her to bring it to him but not to his office. After some discussion a meeting place was agreed. She and four or five members of the Police Service went there to effect the trap. She had been told that she should hand over the money, which the Commanding Officer had provided in an envelope, in a manner that would be visible to the police observers. (The envelope in fact contained only M50.00 in real money, the balance of the contents consisting of simulated banknotes).

[5] The complainant met the appellant as planned and after handing him the envelope she immediately left the scene.

[6] The other two witnesses for the Crown were Nthabiseng Metsing, a Policewoman (PW2), and Detective Trooper Thamae (PW3), both members of the group that accompanied the complainant.

[7] According to PW2 the complainant was to signal to the police onlookers that the money had been handed over, which she would do by touching her head. After the handover she gave the sign and departed. PW2 said she saw the appellant walk away but after he had gone only a few paces he threw the envelope down. She, PW3 and another member of the police group, Trooper Seisa, then arrested the appellant. Seisa also

recovered the envelope which still contained the real and simulated notes.

[8] PW3 testified that as he and Seisa walked past the complainant and the appellant who, having met at the agreed locality, were engaged in conversation, he greeted the appellant. Shortly afterwards he saw the complainant take out the envelope and saw the appellant receive it. PW3 and Seisa thereupon turned back towards where the appellant had last been. Although he seemed to have disappeared behind a truck, they eventually apprehended him.

[9] PW4, also a member of the police group, saw the complainant and appellant meet and the envelope being handed over. After they parted, the appellant had proceeded only a short way before he threw down

the envelope. This happened just before he was apprehended by PW3 and Seisa.

[10] The Crown witnesses were subjected to vigorous cross-examination by Mr. Ntšene, who also appeared on appeal. He highlighted some aspects of their evidence that were absent from written statements they had made as prospective prosecution witnesses, some discrepancies between their written statements and some discrepancies between their respective oral versions. (For convenience, "the discrepancies argument".)

[11] Counsel also put the appellant's alleged version to the Crown witnesses. I say "alleged" because, as already mentioned, the appellant did not testify. Nevertheless, what was put on the appellant's behalf contained the

implied admission that he did meet the complainant at the place referred to in the Crown evidence, that her purpose was indeed to pay him money so as to escape her further involvement in the prosecution and that the envelope was indeed thrown down.

[12] It could perhaps be said to be a measure of the impact of the discrepancies argument that the trial Judge held, in a judgment discharging the appellant at the end of the Crown case (set aside by this Court on 22 October 2010) that the prosecution had failed to establish a prima facie case. The Judge also held – remarkably, one might justifiably add – that there was "no iota" of evidence that the appellant solicited a bribe or that the complainant made a telephone call to him from the police offices. The latter findings were clearly wrong and what impressed the Judge as discrepancies

concerned mere detail of little importance. That is particularly so as they were not held to have been the consequence of dishonesty.

[13] In the judgment which followed on closure of the defence case the Judge convicted the appellant, having recorded that she was not persuaded that the credibility findings in her earlier judgment should be altered. On appeal, counsel for the appellant said that on that basis the conviction had necessarily to be set aside. The answer to that submission is that such findings pertained to matters that were immaterial to the central issue. Given what was, as already explained, common cause when regard is had to the admissions implicit in defence counsel's cross-examination, and bearing in mind that it was never suggested that the police witnesses were not present at

the scene, it is plain that the central issue was whether the complainant set out to bribe the appellant or whether the criminal initiative came from him.

[14] How the complainant would have persuaded the police to assist her if she was the initiator is hard to understand. Moreover, it would not have helped her to escape prosecution to have the appellant arrested. He would simply have been replaced as prosecutor.

[15] The discrepancies argument involves features that are readily explicable by reference to the two year interval between the events and the trial and are typical of differences one sees in the respective accounts of honest, disinterested witnesses. Had the complainant and the police witnesses conspired to present a false case – as was optimistically contended by counsel for

the appellant – one would have expected far greater testimonial correspondence. There was plainly a prima facie case against the appellant which called for an answer.

[16] Then, finally, there is the appellant's Achilles heel. He was the only person who could contradict the complainant on the central issue. He chose to exercise his right to silence. He did so to his detriment. A prima facie case becomes conclusive where it lies exclusively within the power of the other party (here, the appellant) to show what the true facts were and he fails to give any explanation: S v Boesak 2000 (3) SA 381 (SCA) at 396. That case correctly states the position in South Africa (see S v Boesak 2001 (1) SA 912 (CC)) and also, in my view, the position in this Kingdom.

[17] It follows that the conviction for bribery is unassailable and that the appeal must be dismissed. It is so ordered. It is also ordered that the conviction is altered to read: "The accused is accordingly found guilty of bribery as charged."

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C T HOWIE
JUSTICE OF APPEAL

I agree: _____

D G SCOTT
JUSTICE OF APPEAL

I agree: _____

N V HURT
JUSTICE OF APPEAL

For the Appellant : Adv. P.S. Ntšene
For the Crown : Adv. T. Matooane KC