CRI/A/68/79

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

BRIAN ALEXANDER FORRESTER Appellant

v

REX Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 13th day of March 1980

The appellant was charged before the Senior Resident Magistrate, Maseru with two counts of theft (counts 1 and 4) and with two counts of fraud (counts 2 and 3). He was acquitted on the two counts of theft but convicted on the two counts of fraud. He was sentenced to pay a fine of M80 or 8 months imprisonment in default on each count. The fines have been paid. The record of the proceedings runs into two hundred pages and since a large number of these are concerned with the evidence on the counts on which the appellant was acquitted I shall only dwell on those parts that are connected with the appeal the most pertinent evidence being that of Tankiso Lepheane (PW6), Josias Likate (PW10), David Smith (PW11), Makalo Masenyetse (PW14), Motlohi Siimane (PW19), and to a lesser extent Raphael Manesa (PW13), Gerald Khojane(PW24) and Noel O'Hara (PW25). It is necessary for a proper understanding of the facts to reproduce the text of the two counts of fraud in full:

"COUNT II

That the said accused is guilty of the crime of Fraud. In that upon or about or between the 1st day of July, 1976 and 23rd day of August 1976 and at or near Lesotho Electricity Corporation Headquarters in the district of Maseru, the said accused did unlawfully and with intent to defraud Lesotho Electricity Corporation and/or Royal Palace and/or Lesotho Government, misrepresent to the storeman of Lesotho Electricity Corporation one Masenyetse that a certain document which he then and

/"there

"there produced and exhibited to the said Masenyetse was an order form authorising the said Masenyetse to book out certain materials (see Annexure "B") to the Royal Palace whose job no. is J9102, whilst he well knew that the said materials were to be delivered to his own house, and did by means of the said misrepresentations induce the said Masenyetse to the prejudice of Lesotho Electricity Corporation and/or Lesotho Government, to book out the said goods which goods were later delivered to his house.

"B I"

J9102

3 x surface 15 amp P/P - S/P
1 x surface 5 amp switch
4 x lengths 20m plastic pipe
1 x box fisher plugs
1 x box wood screws
sadles 20m, glue. "

" COUNT III

That the said accused is guilty of the crime of Fraud. In that upon or about the 6th day of August, 1976 and at or near Lesotho Electricity Corporation Headquarters in the District of Maseru, the said accused did unlawfully and with intent to defraud Lesotho Electricity Corporation and/or Royal Palace and/or Lesotho Government, misrepresent to one Masenyetse and/or one Siimane acting for or on behalf of Lesotho Electricity Corporation that certain labour charges that had been incurred by the Maseru Club be paid for by the Royal Palace and/or Lesotho Government well knowing that such charges were not payable by the Royal Palace but in fact by the Maseru Club in respect of work done by the Lesotho Electricity Corporation at the Maseru Club's special request. This done as the prejudice of the Lesotho Electricity Corporation and/or Royal Palace."

This appeal is against conviction and sentence.

The appellant was employed as Commercial Engineer in the Lesotho Electricity Corporation hereinafter referred to as L.E.C.. He was the head of his department and had varied duties. One of the largest projects in Maseru at the time was the construction of the Royal Palace. The job number allocated to the Palace by the L.E.C. (for Phase 3 Electrical Installations) was 9102 and it was well known to most of the staff including of course the appellant (see the evidence of Mr. David Smith at pp 42-48 and p.45 of the typed record).

Allocation of job numbers is the responsibility of 4 people

(1) The Appellant
(2) His Assistant (Mr.Smith)
(3) The Contract foreman
(4) The Minor Maintenance Clerk.

/Before

Before any work is carried out it ought to be authorised by the appellant,or presumably, in his absence, by his assistant. An authorisation form, in several copies, would normally be completed and signed by the appellant, but it was apparently possible to execute jobs initially by instructions written on chits of paper or even orally. The authorisation form (as well as other forms used) has space for the name of the customer as well as his allocated job number.

The appellant occupied an L.E.C. house. The job number allocated by the L.E.C. for carrying out extensions repairs or supply of electric fittings to L.E.C. houses was "6". This is a "non revenue producing" account and was also well known to the appellant.

The Crown evidence on the second count was to the effect that sometime in August 1976 the appellant told a wireman working under him, Mr. Tankiso Lepheane (PW6), that he wanted him to do a certain job in the house he occupied as a member of the staff. He gave Tankiso a document to draw certain electrical fittings from the store which were to be used at his house. The items are listed in an appendix to the charge. In this document the appellant wrote that the fittings were required for Job 9102, i.e. for the Royal Palace. He did not refer to his L.E.C. house or put his name. It was not true of course that the items were required for the Palace. When Tankiso went to the stores to collect the items, the storeman, Mr. Makalo Masenyetse, (P.W.14) discovered from the wireman that the items were required for work on the appellant's own house not the Palace. He refused to issue the items. The document was marked Exhibit E. It was written by the appellant in the presence of Tankiso (p.31). A number of witnesses who were familiar with the appellant's handwriting have testified to this effect. The document was produced at the trial, but has been extracted, with other exhibits, after the appellant's conviction, to be used in a civil case. The exhibit is now said to be lost. Anyway it is not available to me. Mr. Sello and Mr.Muguluma agree however it was simply a "chit" written by the appellant that contained only the Palace job number and a description of the items required but nothing else. If the items requisitioned were in fact issued, the Palace contractors could, not necessarily would, have been charged with the cost of the items and labour involved. (See p.63 of Mr. Masenyetse's evidence, and the gist of Mr.Siimane's (P.W.19) evidence). Wireman Tankiso went back to tell the

appellant that storeman Masenyetse has refused to issue the items but he did not find him in the office. He found Mr. Smith the appellant's assistant who, after looking at the chit and ascertaining the facts, told the wireman, to tell the storeman that the job number was "6", i.e. L.E.C. staff houses. Wireman Tankiso did this and the stores were duly issued. For accounting purposes the cost of the items have presumably been debited to the L.E.C. "non revenue producing"account.

The Crown evidence on count III was to the effect that on the 6th August 1976 (probably earlier than the date in count II) an L.E.C. electrician Josias Likate (PW10) was instructed by the appellant to go to Maseru Club on the following day, a Saturday, to fix or adjust some lights which were shown to him by the appellant. Josias did so spending 8 hours "overtime". He was with another workman. He had a form (Time Sheet) in which the appellant had written in the blank spaces provided the customer's name as Maseru Club, but gave the job number as 9102, the Palace job number. It seems that whilst the work was in progress a whiteman objected to Josias that the bulbs were of different colours and that they all ought to be the same. On the Monday Josias went to the stores to order bulbs to make them all uniform. He produced the form. Mr. Masenyetse the storekeeper noticed that the job was being done at Maseru Club (the name was shown on the form) whilst the job number given therein was that of the Palace. He refused to issue the bulbs. This refusal was reported to the appellant who told Josias to let the matter rest. Josias, however, had worked overtime which he recorded on the form. The form was handed in support of his claim for overtime and produced as Exhibit I. It is not available to me but both Crown and defence counsel agree on what was written on it and I have seen a specimen of form in some of the exhibits traced from the civil case. We do not know however whether the time spent on this job was invoiced to Maseru Club or whether it was invoiced to Integ Moru the Palace contractors. The evidence on this aspect is rather conflicting. I think it is right to assume that it is unlikely that Integ Moru were charged for this work. Mr. Masenyetse the storeman very properly took up the matter with the then managing director of L.E.C., Mr. Green, in that same month of August 1976. There was an exchange of correspondence dated 21st August 1976 between Mr. Green and the appellant on the subject. This correspondence was put in evidence at the trial as Exhibit 22 but yet again is not available to me.

/Mr.Green

Mr. Green did not give evidence. It was, however, agreed by Crown and defence counsels that Mr. Green wrote to the appellant deprecating the "practice" and asking him for an explanation about the matter (Mr. Sello in his heads of argument says it was in connection with count 2, i.e.the use of material at his own house) and the appellant replied that he "was involved almost exclusively with work at the palace during the period" and had given the job number of the Palace "inadvertantly". It is clear that what the appellant did was irregular (possibly criminal) otherwise the managing director would not have written to seek an explanation It does seem that the subject matter of count 3 came to light later when confusion arose in the accounts department as to whom the invoice for labour should be sent. It is not clear if Mr.Green was aware of the overtime claim by Josias when he wrote his letter on the 21st August 1976 or by the time he left the country but Mr. Masenyetse says that he reported to him that the appellant was trying to get goods for the Maseru Club giving the Palace job number. Mr. Green took no action after the appellant gave his explanation. Another managing director took over from Mr. Green. He was Mr. Dale. Mr. Dale came and went and the appellant continued with his employment until he was dismissed in December 1977 by a new managing director Mr. O'Hara. It is common cause that the appellant sued the Corporation claiming damages for wrongful dismissal. The appellant's previous "misdemeanours", if I may use the word loosely, were apparently referred to attorney(s) for advice and he(or they) thought that four of them (i,e. the four counts with which the appellant was originally charged) could be "criminal". The matter was in turn referred to the police and no doubt to the Director of Public Prosecutions who decided to prosecute.

At the trial the appellant elected to keep silent and called no witnesses. Mr. Sello's main contention on the appeal is that the Crown has not discharged the onus of proving that the appellant's conduct was fraudulent or amounted to fraud. It was, at its worst, irregular or contrary to procedure He contended further that there was no misrepresentation in the two documents. In any event, it was further argued, it was not deliberate and could have prejudiced no one. The appellant had reasonably explained his conduct to his superior (Mr. Green) who, having taken no further action must be deemed to have been satisfied that there was negligence but no intent to defraud, and consequently that that

/should have

should have been the end of the matter. It was not necessary to call upon the appellant to go into the box to explain what he had already explained.

The magistrate's attitude was that inserting the Palace Job Number on the two documents was a perversion of the truth since the material and or labour were to be expended elsewhere. Considering the fact that the Palace number was well known to most managerial staff at the L.E.C. and by the appellant himself, the magistrate's description of appellant's acts and conduct was not unjustified If the storeman Masenyetse did not ask Tankiso the wireman (count 2) to which place the fittings were to go, and had accepted the chit, the stores would most probably have been invoiced to the Palace contractors. If Masenyetse had not read on the time sheet produced by Josias when ordering the bulbs that the job was being done at Maseru Club, not at the Palace, there was a possibility, it cannot be put at more than that, that Palace contractors may have been invoiced for the labour involved. In the first case however the matter was detected before any harm could be done and in the second, apart from the fact that the bulbs were refused, it created confusion, to say the least, as to which customer should be invoiced for labour.

Proof of intent to defraud is of course a question which is not free from difficulty. The magistrate however had before him not an isolated incident but two incidents in the same month. It was not easy for the magistrate, on the facts as adduced, to accept willy-nilly that the misrepresentation (and there is no doubt that it was) could in both instances, be attributed to mere negligence or inadvertance. I would have raised my eyebrows. If when the appellant instructed Tankiso to get the items for his own house, and the jobs register was not handy, and he was unsure of or had forgotten the job number of L.E.C. houses (rather unlikely) he could have put, for example, "required for L.E.C. house" number so & so or "my own house" or other words to indicate this. The appellant was a senior officer and head of department, but he cannot without permission, authorise the use of his employers funds or materials to improve or extend light fittings to his own staff house, any more than I can as Head of the Judiciary draw Government funds or materials to fix a plug in my official residence. Mr. Green's reaction, which was admitted, shows prima facie, that the appellant had no prior authority to execute such work on his house. If

the matter ends there, intent to defraud may not be apparent, but were I to go further and draw a document that the funds or materials were required to improve the High Court chambers but intend, by instructing a workman to use the funds or materials instead to add to or improve my official residence, the whole position changes. Similarly with the appellant when he drew the document (Exhibit E) giving a different job number. At that stage of the trial, a sinister inference may, (not must) be inferred. No one can tell what goes in a person's mind, but the appellant could have said to himself "I need a few fittings (and the list indicates they could not have been worth more than a few rand - wood screws, fisher plugs, plastic pipe etc..) to improve my L.E.C. house. If I ask for permission from my employers I may not get it or may not get it immediately or I need not bother. The job at the Palace is big and no one is likely to notice, when their bill is eventually presented for payment, the few inexpensive items that I have drawn". If, when instructing Josias to go and work at Maseru Club, the appellant did not have the jobs register handy and was unsure of or had forgotten the job number of Maseru Club, he would have left this part (in exhibit I) blank to allow the storemen if goods were required and/or accounts clerks if it was calculation for the cost of labour, to insert the correct job number. The fact that the appellant had told Josias not to proceed with procuring the bulbs from the store to fit at Maseru Club indicates, prima facie, that he was not regarding this (as his duty demands) a purely commercial transaction for the benefit of L.E.C., because if he did he would have pursued it, if necessary correcting the job number if it was genuinely given inadvertantly, a situation which he must surely have appreciated when Josias communicated to him Masenyetse's refusal to issue the bulbs on the form as presented.

The criminal law in South Africa (and Lesotho) on the subject of fraud is much wider than English law. In Hunt Criminal Law and Procedure (Vol.II) at p. 713, the learned author summarises the position as follows :

> "The resulting state of the law is relatively certain and seems to be socially satisfactory. It certainly gives little comfort to people who act dishonestly. Indeed the tendency has been to regard more and more types of fraudulent misrepresentation as potentially prejudicial, and more and more types of non-proprietary harm as prejudice, with the result that though it is still inaccurate to say that the law punishes as fraud the mere making of any misrepresentation with intent to defraud, we are not very far from that result.".

He adds relying on R. v. Persotam 1928 A.D 92, and R. v. Deetlefs 1953 (1) S.A. 418 (A.D.):

> "The evolution of the South African law crime of fraud does not appear to have been much influenced by English law except perhaps by the English cases on false pretence, intent to defraud and prejudice. But even in regard to false pretence the influence has come rather from the English civil than from the English criminal cases. Thus for many years before the English Theft Act, Edgington v. Fitzmaurice was good South African criminal law".

Lord Herschell in Derry v. Peek (1889 14 Appeal Cases 337 cited by Hunt, supra, at p. 724 is reported to have said :

> "Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly careless whether it is true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its truth".

In R. v. Myers 1948 (1) S.A. 375, 382 Greenburg J.A. adopted the following passage from Halsbury's:

> "A belief is not honest which, though in fact entertained by the representor may have been itself the outcome of a fraudulent diligence in ignorance - that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense) believe".

In R. v. Henkes 1941 A.D. 143 at 161 Tindall J.A. said :

> "Generally speaking, if a misrepresentation which is capable of deceiving is made wilfully (i.e. without an honest belief in its truth) and the person making it intends to deceive the person to whom it is made, that is sufficient to prove the intention to defraud where the misrepresentation is one which causes actual prejudice or is calculated to prejudice".

Prima facie therefore the appellant was at the very least recklessly careless whether his representations were true or false and clearly had a case to answer.

Has it been proved that appellant intended to prejudice or

/potentially

potentially prejudice anyone? In the absence of any explanation from him the magistrate was entitled on the evidence to infer that that was so. I think it is clear the risk of harm involved not only the possibility that the non-proprietary rights of the L.E.C. were being infringed in the sense of impairment to its reputation for wrongful invoicing if the false misrepresentation escaped the storeman's or accountant's notice (see R. v. Seabe 1927 A.D. 28 at 33) but also the risk that a third party could have been (not necessarily would have been) invoiced for costs, whether of labour or material, which they have not in fact incurred. As Schreiner J.A. in R. v. Heyne 1956 (2) S.A. 604 (A.D.) at 622

> "the false statement must be such as to involve some risk of harm, which need not be financial or proprietary, but must not be too remote or fanciful, to some person, not necessarily to the person to whom it is addressed".

The fact that Mr. Green "accepted" the appellant's explanation does not mean that the magistrate was bound to be satisfied with an explanation made to another party outside the confines of the courtroom. If I catch my housegirl taking money from my wallet and she explains to me that she only intended to borrow it, and I tell her, "very well don't do it again" my personal forebearance or attitude does not affect the legal and judicial attitude the magistrate will take to the evidence in question if the girl is later, for whatever reason, prosecuted. The appellant elected, as he is entitled to, not to go into the box. The magistrate did not hear him, was unable to assess him, or to test his credibility. The prima facie case was not answered, certainly not judicially, and this is a matter which must have weighed against him.

The evidence is that on both occasions the appellant's deception have been discovered before great harm (save what was paid for Josias "overtime" by the L.E.C. not apparently invoiced) was done. But the fact that the appellant's attempts were aborted whether it was through the vigillence or intervention of others or because the deception was so palpably clumsy or brazen is not and has never been in our law an excuse.

In S. v. Isaacs 1968 (2) S.A. 187 at 189, Henning J. quoted Mason J. in Moolchund v. Rex 1902 N.L.R. 76 who said ·

/"It would

> "It would be monstrous, we think, if because of a person's wicked mechanications have been defeated or unsuccessful, on account of intervention of some person, or the occurrence of some event beyond his control, or because his misrepresentation have not been believed on or acted upon, that he should escape the penalty of the law".

In Seabe, supra, at 32 Wesells C.J. gave an example :-

> "Take this case. A person who can barely write and has no idea of spelling presents to the bank a cheque which purports to be drawn by an educated client of the bank. The forgery is so gross that no bank clerk would be deceived. The forger in his ignorance of banking business thought he would get the money. Can we say that because it was probable and reasonably certain that the bank would not cash the cheque there was no potential prejudice to the bank? It has never been suggested to my knowledge that in such a case there is no crimen falsi.... Where there is some risk, though perhaps slight, the element of prejudice necessary to support the crimen falsi exists".

It has been said however (see Kotze A.J.P. in R. v. Firling 1904 18 E.D.C. 11 at 17) that potential prejudice should not be too fanciful or remote and this has been repeated since, for example, by Schreiner J.A. in Heyne, supra. What is fanciful and remote must depend on the circumstances of each case. Kotze J.A. when sitting on the appeal in Seabe, supra, at 34, many years later, said that there is prejudice whenever, in the opinion of a reasonable man it appears that a risk of prejudice has been caused by the prisoner's conduct. As I have endeavoured to explain there was a risk and I see nothing in it which is fanciful or remote as can be seen from Mr. Green's reaction to the complaint in count 2, and the confusion that has arisen in the accounts department in count 3. There is in any event, support for the proposition that even if the risk was remote, which I do not think it was, that a conviction for attempted fraud would have been justified (Hunt p.735 and p. 737).

It is contended by Mr. Sello that the malpractice (of putting job numbers different from that allocated to the customer) was quite common at L.E.C., and that the object of the appellant's prosecution on matters long past and forgiven, well after the departure of two managing directors under whom he served, was to harass him when he sued the L.E.C. for wrongful dismissal. It might have been added that personal financial gain was not on the

appellant's mind, for on the second count the benefit of improvements to the appellant's house would ultimately accrue to the L.E.C. and in the third count he probably intended a favour and if financial gain there was it would have accrued to the Maseru Club if they had not been billed not to himself. My personal view is that it was rather petty, perhaps mean, to have brought about a prosecution over 18 months after the events and if I were the Director of Public Prosecutions I would probably have declined to prosecute at tax payers expense. But I have not heard or read of case where an accused, against whom fraud has been proved, (unless it can be brought within the maxim de minimis - which this case is not - as for example in R. v. Bell 1963 (2) S.A. 335) to be entitled to an acquittal, if the complainant's motive in bringing a prosecution was spiteful or vindictive. If the practice was "common" or "frequent" amongst the L.E.C. staff that does not make it lawful. And it makes no difference if the appellant had received no financial gain for himself (S. v. Shepherd 1967 (4) S.A. 170). All these factors affect sentence not conviction. If I had been the magistrate I would probably have shown my displeasure by imposing a nominal fine or perhaps a caution and discharge However, a sentence is within the magistrate's discretion. It was not so excessive as to cause me a sense of shock and it would be wrong to interfere with it simply because I would have taken a more lenient view.

In the result the appeal against conviction and sentence is dismissed.

Before I leave this appeal perhaps I should comment on the question of exhibits. Exhibits should not be disposed of until

(a) the time for appeal has elapsed, or
(b) if there is an appeal, until the decision on appeal is pronounced.

If a party wishes to make use of the exhibits in another case the name of the person allowed to take them should be recorded and an undertaking given that he will produce them when required to the appellate tribunal. If they consist of documentary exhibits the originals should be kept and only taking of photocopies should be permitted.

I shall be grateful if the Registrar will bring my comments to the notice of all magistrates and their clerks.

/CHIEF JUSTICE
13th March, 1980

For Appellant: Mr. Sello
For Respondent: Mr. Muguluma