

CRI/A/7/80

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOHASA THOO Appellant

v.

REX Respondent

Reasons For Judgment

Filed by the Hon. Judge Mr. Justice M.P. Mofokeng
on the 20th day of March, 1980.

The appeal in this matter has been upheld. The following are the reasons:

The appellant was charged before the Senior Resident Magistrate with the crime of theft it being alleged that

"upon or about the 10th day of May, 1979 and at or near Peka in the district of Leribe, the said accused did unlawfully steal the sum of R70.00 and a Standard Bank Savings Account Book, the property or in the lawful possession of MATSELISO MOPELI".

The facts are common cause and briefly are:

On the 9th day of May 1979 complainantⁿ discovered that a sum of M1388.72ⁿ was missing from the safe in the cafe and reported the matter to the appellant. She asked him to go to his (appellant's) wife and daughter to find out if they had not taken the money. They denied having done so. Appellant suddenly levelled accusations against the complainant that she had stolen the money. He seized her savings account book and a sum of M70.00 which she claimed was her property.

The appellant was found guilty of the theft of the savings account book but ^{not} of the sum of M70.00 and was sentenced to a serve a prison period of 6 (six) months the whole of which period was suspended for a

period of 3 (three) years on certain conditions.

The onus was on the Crown to prove

- (a) that the appellant had the intent to steal the Savings Account Book;
- (b) that the appellant permanently intended to deprive the complainant of the said Savings Account Book;
- (c) that the appellant did steal the Savings Account Book.

Crown Counsel conceded, and quite correctly in my view, that the proof of the intent to steal on the part of the appellant was not established nor was it indeed established beyond reasonable doubt. From the very outset the appellant explained the purpose or intention of keeping the Savings Account Book to Lt. Lehlasoa. To him he explained :

"..... that there were certain matters which had to be settled about the booklet and money".

This clearly indicates that when appellant took the Savings Account Book he had no intention to steal nor the intention to permanently deprive the complainant of it. (See S. v. van Coller, 1970(1) S.A. 417; 424 and 425. The taking of another's property with intent to holding it as security, that is, to enforce a debt does not amount to a taking with an intent to deprive the owner of the whole benefit of ownership. This is the position here. The appellant had already initiated and obtained a civil judgment against the complainant. The present case is distinguishable from that of R. v. Mtshali, 1960(4) S.A. 252 in which the appellant's intention was apparently to hold the wireless and the gramophone until the complainant had paid him the money which he suspected she had stolen from him. In answering the question: How permanent did he intend that situation to be? Holmes, J, said at page 255 :

/"It seems

"It seems to me to be relevant to enquire whether he had reasonable grounds for suspecting that the complainant had stolen his money, for if he had no such grounds, he could not have expected that she would pay the money, and his intended retention of the goods becomes indefinite. That in the absence of factors pointing the other way, would give rise to an inference of an intention to terminate the complainant's enjoyment of her rights, and a conviction of theft would be in order."

In the present case the complainant was not only in charge of the cafe but the money was under her control even though other people apparently had access. The appellant's grounds for suspicion were not, it seems, unreasonable.

The learned magistrate did not make any adverse findings against the appellant's credibility. He described him as a "fairly reliable witness as well". He was comparing him to the complainant. So both witnesses were "fairly reliable". Before, therefore, the learned magistrate could prefer or choose one version from the other, adequate reasons had to be given for rejecting the one and accepting the other (Rex v. Mohlerepe, CRI/T/52/78 (unreported) at pages 16 - 17. This is lacking here. In any event, the appellant meets the requirements of the test namely, that his explanation could reasonably be true. Once that test was satisfied, appellant's version ought to have been accepted,

It came as no surprise, at all, to me when the Crown intimated that it did not intend to oppose the present appeal and that it did not support the conviction. In its discretion, the Court ordered the refund of the appeal deposit to be paid to the appellant.

JUDGE.
20th day of March, 1980.

For Appellant : Mr. Ramolibeli
For Respondent : Mr. Muguluma.