

an exercise book. A sum of P70.60 was obtained. This money was treated as being the property of the owner of the dead cow and was kept in an envelope to be delivered to him.

There was no real system in the police station for dealing with this sort of money. First it came into the hands of the constable who had brought in the cow. Then it passed through the hands of another police constable, finally arriving with the exercise book in the hands of Constable Selemogo. The latter had little idea of why or for what period he was to have the money. After about a month the appellant came to him and asked him to hand over the money so that he could give it to the owner. Selemogo knew that appellant had personally returned money to owners and duly handed it over.

About the only dispute in this evidence was in relation to the safety of the custody of the money. It was kept in what was described as a safe but which turned out to be a locked drawer or cupboard. Somewhat conflicting views were given of the state of repair and standard of safety. Certainly it was not ideal but in any event the money was not lost during this period.

Apparently there had been a case going on in the local court relating to the dead cow and on 15/5/85 an enquiry was made by the local tribal authority.

In consequence Detective Inspector Thothe of the Serowe C.I.D., interviewed appellant. He told him that he was making enquiries and gave a caution. Appellant told him that he had taken P70.60 for safe keeping and had given it to his

wife for that purpose. Thothe and the appellant went to appellant's house where P40 was produced. Appellant said that his wife had used some of the money in his absence. The wife said that the money had been given to her in an envelope for safekeeping.

Subsequently an offer was made by the accused to make up the difference but this was rejected by Thothe.

The appellant and his wife gave evidence. His story was that he sold the edible parts of the dead animal in order to save as much as possible from the death. Sometime afterwards the owner of the cow came. He was offered the P70.60 but rejected it on the grounds that the animal was worth P200. After a discussion the owner agreed to attempt to get his money by a case in the local Kgotla against the man who stole his cow. Appellant agreed to hold the money until this matter was determined. As at times he had to make long journeys, he gave the money to his wife for safe keeping. He thought his office was not particularly safe. In fact without his consent, she had used some of the money. The wife gave evidence that the money had been entrusted to her for safe keeping but that she had, without her husband's consent, used some of it with the intention of later repaying. Subsequently she went and borrowed money to make up the difference but Thothe had refused it.

The learned magistrate having gone through the facts dealt with the matter in these words:-

"This Court accepts the evidence given by PW 1, 2, 3, 4, 5, 6 and 7. They were all honest and

straight forward witnesses. This Court disbelieves the accused and his wife. The accused has cocked up a story to suit the occasion. His wife has merely come forward to save him from a predicament."

This passage gives the impression of resolving a conflict between the prosecution and the defence. In fact there virtually was none. It would have been quite possible to believe both. The story told by the appellant does not appear to me to be inherently beyond reasonable belief. That it might have been carelessness or bad judgment for him to entrust the money to his wife does not mean that the appellant was dishonest. The defence is somewhat cursorily rejected by the learned magistrate.

I do not consider that the learned magistrate gave sufficient thought to this aspect of the case. I am left with a very uneasy feeling that justice may not have been done. In the circumstances I would allow the appeal and quash the conviction and sentence.

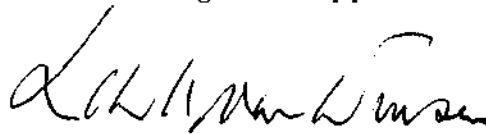


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B.A. DOYLE
Judge of Appeal



P.P. T.A. AGUDA
.....
T.A. AGUDA
Judge of Appeal

I agree



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L. DE VAN WINSEN
Judge of Appeal

I agree

GIVEN at the Court of Appeal, Lobatse, this 18th day of July, 1986.