

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRI.T.S.80/80

In the matter between:

REX

vs .

BOY BHUTANA KUNENE

CORAM:

C. J. M. NATHAN, C.J.

FOR CROWN:

MR. AFFUL

FOR DEFENCE:

MR. P. DUNSEITH

JUDGMENT

(Delivered on 10 September 1980)

Nathan, C.J. :

The Accused, who was an Accounts Officer in charge of the salaries section of the Ministry of Justice of the Swaziland Government, is charged with the theft, over the period 1st April 1978 to 30th November 1979, from the Government of sums totalling E2383.99. This amount is broken down in an Auditor's Inspection Report, Ex. J, which was put in evidence by the Auditor Mr. A. M. Mndzebele; but for present purposes it is not necessary to go into details of the break-down.

It was common cause that the moneys in question were for the most part sums by way of salary that had been originally destined for members of the Prison Department who had, however, for some reason or other left Government Service. The moneys consisted in some cases of cash and in others of cheques. The procedure, as outlined by the Crown witnesses - and there was no dispute in regard to this - was that when it became apparent that those members of the Prison Service were not entitled to receive the moneys in question these had to be returned to Treasury. This was, unfortunately, done in a somewhat circuitous manner.

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Mr. Peterson Dladla, the Prisons Officer responsible for staff wages and salaries, maintained a Cash Control Book. Ex. A. Each of the amounts which had to be returned to Treasury was entered in this book, with details of the date, month, name and number of the originally destined recipient, the amount in question and whether it was cash or cheque. The amounts were placed in separate envelopes with the relevant Salary Advice notes if there were such, or a note explaining the position in the absence of the Salary Advice Notes. These amounts, with the envelopes and the Cash Control Book were taken by Mr. Dladla to the Accused at the Ministry of Justice and the Accused used to initial, sign and date the Cash Control Book for each amount that he received, after checking the particulars in the book with Mr. Dladla. On two occasions when the Accused was on leave payment was made to Mr. Paul Nkambule, the Accounts Officer in the Ministry of Justice. Mr. Dladla said that after handing over the money and obtaining the signatures he used to return to the Prisons Department with the book. This was disputed by the Accused who said the book used to be kept with him; but very little appears to turn on this. The usual procedure, according to Mr. Dladla, Mr. Nhlengethwa, and Mr. Nkambule was that the Accused would then take the money and the relevant envelopes and Salary Advice slips to Mr. Nkambule who would check the amounts and issue receipts out of the General Receipt Books Exx. B. E and 7 for each amount and remit the cash or cheques in question to Treasury. The receipts were given to the Accused who in

turn would pass these on to Mr. Dladla. As I say, it was an unnecessarily cumbersome procedure.

Subject to two minor reservations, all the items totalling the E2283.99 were signed for by the Accused in

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the Cash Control Book but no receipts in respect thereof were issued by Nkambule or anybody else and they did not find their way to Treasury. The minor reservations I have mentioned were that, on page 18 of the Cash Control Book the bracket enclosing the Accused's signature appears to have been extended to include an item of E113.78 in respect of one R. Mkhumane, and there are two similar apparent extensions of the bracket on page 22, but here the relevant entries have been obliterated with what is known as tippex. It further appears that two receipts of money by the Accused figuring on page 24 of the Cash Control Book for E113.78 in respect of one C. S. Magagula and E116.66 (the amount appears to have been altered) in respect of one C.G. Cindzi, which form portion of the total sum of E2283.99 and for which no General Receipts were issued, were rejected by Treasury because they were not supported by Salary Advice Slips together with employment numbers. But these items are of importance because they certainly must have left the possession of the Accused before they could be rejected by Treasury.

Investigations into the loss began in about November 1979 and on 24th December 1979 the Accused wrote to the Accountant-General saying that he was prepared to make good the deficiency at the rate of E50 per month. The exact amount of the deficiency does not appear to have been calculated at that stage. The Auditor Mr. Mndzebele gave evidence that when it was calculated the Accused admitted that he had misappropriated each of the items in question. But Mr. Mndzebele, although no doubt honest, was a singularly unimpressive witness and I have no doubt that he persuaded himself that the Accused by agreeing to the deductions from his salary was agreeing that he had misappropriated the money. This, of

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course, is not correct. There was sufficient evidence of a contrectatio by the Accused to justify the Ministry in saying that prima facie the Accused was responsible to make good the deficiency; and the Accused may well have agreed that this was so. But this does not amount to an unequivocal admission by the Accused that he had stolen the money.. Mr. Afful for the Crown, correctly did not place reliance upon this evidence of Mr, Mndzebele's. I should point out that the exercise of common prudence by the Accused would have dictated that he ensured that he received receipts for all the amounts that he paid Mr. Nkambule. But his failure to do this does not necessarily make him a criminal.

To pause here for a moment we have the position that the Accused by his signatures admitted that he received all the items in question from Mr. Dladla. The Accused said that he accounted for all of these to Mr. Nkambule, and in a few instances to Mr, Nhlengethwa. Mr. Nkambule and Mr. Nhlengethwa say that they issued general receipts for all the amounts they received from the Accused.

Nkambule's word, however, cannot be relied upon. He was convicted in the Magistrate's Court of having embezzled moneys that he had received for remission to the Treasury in the same manner as the moneys in issue in the present charge. He was suspended from duty, and the drawer of his desk was forced open by the Permanent Secretary for Justice. In the drawer was found an uncanceled cheque for E2.33 in favour of one S.M. Dlamini, for which no receipt was issued. This is one of the items forming the subject of the present charge. It is to be noted that if Nkambule could misappropriate a cheque for the trifling sum of E2.33 there is no reason why he should not have misappropriated the cash which accompanied it, namely an amount of E109.33 in respect of one CM. Sibandze which is another of the items forming the present charge.

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It is further to be noted that amongst the items in respect of which Nkambule was convicted were amounts totalling F.968.18, which Nkambule had received from the Prisons Department and signed for in the Cash Control Book, page 20, and which he admitted that he had misappropriated.

In regard to all the items except one, therefore, it is a question of the Accused's word against that of Nkambule, a convicted and self-confessed thief. The one item which is an exception to this is an amount of F84.41 in respect of certain H.V. Dlamini, for the receipt of which the Accused had signed the Cash Control Book on page 16. This is one of a batch of items in which Mr. Mhlengethwa had issued General Receipts in the absence of Nkambule; but no General Receipt was issued in respect of this amount of E84.41. Mr. Nhlengethwa said he did not receive it.

Although some suspicion may rest upon the Accused in respect of this last-mentioned amount, I do not consider that he can be held criminally liable in respect thereof, or, indeed, in respect of any of the other amounts. The position is not dissimilar from that in the case of *R. v. Nxumalo*, 1970-76 S. L. R. 414 in which I held that in a criminal case such as this the Crown must establish its case beyond reasonable doubt and that once the door is left open for possible misappropriation by other persons the accused must be given the benefit of the doubt. As was pointed out in *R. v. Difford*, 1937 A.D. at p.373, no onus rests on the accused to convince the Court of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable

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possibility of his explanation being true, then he is entitled to his acquittal. That is the position here.

The Accused is found Not Guilty and is discharged.

(C J. M. NATHAN)

CHIEF JUSTICE