IN THE HIGH COURT OF SWAZILAND HELD AT MBABANE

In the Appeal of:	CRIMINAL APPEAL NO. 2/80
JOHANNES MHLOBO MATSE	(Appellant)
vs.	
REGEM	(Respondent)
CORAM:	HON. MR. JUSTICE D. COHEN AND HON. MR. JUSTICE D. LUKHELE
FOR APPELLANT:	MR. D. MATSE
FOR RESPONDENT:	MR. A. DONKOH

JUDGMENT

(Delivered on the 18th March, 1980)

COHEN, J.:

This is an appeal against the conviction and sentence of the appellant by the Magistrate at Siteki on a charge of theft of six cartons of floor tiles the property of the Swaziland Government valued at E170. The original grounds of appeal were augmented "by application for amendment, but I do not think that they go much "beyond the general complaint that the verdict was against the weight of the evidence. The appellant a Government employee, was sentenced to six months imprisonment, the minimum sentence (in the absence of extenuating circumstances) which the Magistrate was entitled to impose in terms of The Theft and Kindred Offences by Public Officers Order No. 22/1975. No order for compensation was made, presumably because the corpus delicti had been recovered, although the fate of two cartons of tiles still remains a mystery.

It is clear from the Crown evidence that the accused and one Prince Ndabenhle were in charge of these tiles and that it was accordingly their duty to account for them. The last mentioned of these two persons testified on behalf of the Crown and there appears nothing in the evidence which implicates him in the offence.

During the course of the evidence several efforts were made by the prosecutor to lead evidence of statements made by the accused to certain persons in authority. It seems to me that the Magistrate was over generous to the accused in excluding some of this evidence - his reasons are not clearly stated and indeed there was no need to refer to them in his final judgment. Although it is perhaps safer and fairer for a Court to hesitate to admit admissions or confessions unless completely satisfied about their admissibility, there is also a duty on it in the interests of justice not to lean backwards in favour of the accused as the Magistrate appears to me to have done in this case, although I hasten to say that what I have stated is largely an impression which I gained in the absence of a fuller recording of argument and reasoning.

The Court however allowed without query and apparently without objection by the prosecutor the evidence of a defence witness in the person of one Mordecai Khumalo, at that time Under Secretary in the Ministry of Works, Power and Communications. His testimony related to an interview with him by the accused, in which, inter alia, the accused asked to be re-instated in his post from which he had been suspended pending the outcome of the criminal proceeds "because he is not guilty of an offence". This

type of evidence is not admissible in our law which has

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been well summed up by Hoffmann, S.A. Law of Evidence (2nd Edition) at page 22 as follows:-

"A witness may not be asked in chief whether he has made some previous statement which tends to confirm his testimony. This rule applies whether the earlier statement was oral or in writing. Nor may be confirmed by calling someone else to prove that the witness made such statement" .

David Gwebu who was employed as clerk of Works in the Public Works Department testified that amongst the accused's duty were those of receiving and recording stock requisitioned by the Government, the stock being building material. He himself i.e, the witness had ordered the goods in question which were clearly Government property. He stated that the accused received these goods on the 2nd March 1979 and identified accused's signature (or initials) to the relevant delivery note. Despite a lengthy cross-examination on this point (indeed nearly all the Crown witnesses were extensively cross-examined) the accused himself did not in his own evidence deny that the signature (or initials) were his. In any event Ndabenhle Dlamini testified to a similar effect.

Gwebu further testified that on the 11th April 1979 he found 6 cartons of tiles missing. The accused and Ndabenhle denied any knowledge of their whereabouts and despite search were unable to produce them. He then i.e, the 18th April reported the matter to the police. Subsequently he identified the missing tiles at the police station. He was closely questioned about his alleged antipathy towards the accused and his desire to have him removed and his friendship with one Mhlanga, who had been convicted

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apparently on a charge of receiving these tiles from the accused and who later gave accomplice evidence. The suggestion on the part of the accused was that the witness Gwebu and the accomplice had conspired to implicate the innocent accused, a suggestion which was rejected by the magistrate.

One Sydney Zwane, a farmer and a disinterested witness, testified and spoke of an occasion at about 1p.m. when accused asked him to assist him in the transport of an old greyish coloured box locked with a padlock. He did not know its contents but it was heavy and he drove it to Mhlanga's place at accused's request. This was apparently towards the end of March. Accused told this witness in the absence of Mhlanga that the latter was to take the box which contained food to his children in Manzini. He denied the suggestion that this was stated by the accused to Mhlanga in his presence. The accused however in his own evidence contradicted Zwane in this most relevant respect of his defence. There however seems to me to be no reason why the evidence of this witness should not have been acceptable and if so it does provide corroboration of the accomplice evidence, more especially so as he refutes accused's version. The accomplice after receiving the statutory warning stated that he had purchased the tiles in question and which were in the box from the accused at the latter's suggestion and paid him E38 as the purchase price. Appellant left the tiles with the witness and later returned to fetch the box in which the tiles had been. The witness stated that he thereafter became afraid and reported to Gwebu and at the latter's instructions he told the police at whose place the tiles eventually landed. As already

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indicated like other witnesses he was extensively cross-examined; Counsel at one stage suggested that he had departed from his statement to the police, but the magistrate who had apparently with Counsel's connivance been shown the statement found this allegation to be inaccurate.

The accused who gave evidence under oath denied any knowledge of the theft. A considerable portion of his evidence was devoted to dealing with the animosity which existed between him and Gwebu. In my view, however, the truth or falsity or even exaggeration of this relationship does not materially affect the final issue which is dependent on whether the accomplice's evidence was acceptable to the magistrate or

not and whether it had been sufficiently corroborated by reliable evidence. The magistrate has duly taken into account the law relating to accomplice evidence and concluded that it was reliable and had been adequately corroborated.

The accused stated that all he had asked Mhlanga to do was to take a trunk containing foodstuff to his (accused's) family in Manzini. There are several improbabilities in this version to some of which the magistrate has referred. The accused hardly knew Mhlanga and it was just by chance that he heard that the latter was going to Manzini the next day and he then ran over to him at 1p.m. to ask him in the presence of Zwane whether he could take this trunk of foodstuff to Manzini with him. Why there was this urgency so that he had to run to Mhlanga's place is not explained. In any event however Zwane denies that all this conversation with Mhlanga took place in his presence and also refutes by implication the evidence of accused that Mhlanga said he

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would not be able to collect the box and that accused should ask Zwane to fetch it. As I have already intimated the magistrate accepted Zwane's evidence and I repeat that there seems to be no good reason why he was not entitled so to do. The trunk was locked and there remains unanswered the obvious question as to how the family in Manzini would have opened it seeing that the key was in accused's possession. Mr. D. Matse in his very able argument suggested that they probably had a spare key. There is however no evidence to that effect and had accused instructed his Counsel to that effect it is highly unlikely that Counsel who conducted a thorough and vigorous defence before the magistrate could not have put the question to him in his evidence-in-chief.

The accused stated that he removed the trunk from Mhlanga's store after Mhlanga had found himself unable to go to Manzini as contemplated because the latter asked him to do so on the pretext that his partners would not want to find "strange articles" at the shop. This explanation seems to be improbable - what valid objection would any partner have made to the presence of the trunk in the shop for an extra day or two? Strangely enough, however, this explanation was not even put to Mhlanga in cross-examination.

Much of Mr. Matse's argument was directed towards the probable existence of a sinister plot between the accomplice and Gwebu to involve the accused in this crime of which both of them knew him to be completely innocent. He urged that it would be unlikely that accused would have sold the tiles to Gwebu's friend and his (accused's) enemy

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and placed great reliance on what he contended was Mhlanga's contradiction of Gwebu's version that the tiles had at 6.45 one morning been brought to Gwebu by the then frightened accomplice. The contradiction, he urged, showed that Mhlanga had something to hide, namely, that he and Gwebu had there and then conspired to involve the accused. Basically this suggestion is extremly improbable. There is some confusion in the evidence on this point, namely, Mhlanga's visit to the P. W. D. area where Gwebu also resided, but it is most unlikely that Gwebu's advice to Mhlanga would have been to the effect that he should not only take the tiles to the police but also implicate the accused as his partner in the crime, instead of naming him, Gwebu, It seems to me to be verging on the preposterous that Gwebu having reported the theft to the police should place himself in such a weak position so as to leave his entire fate in Mhlanga's hands even although he was such a close friend as has been suggested and that the latter would act on it. Mhlanga had nothing at all to gain from such a conspiracy.

Mr. Matse has criticised certain other aspects of the magistrate's findings. No judgment can ever be perfect, but I do not consider that Mr. Matse has made out any case at all to justify this Court's rejection of the magistrate's final acceptance of Mhlanga's evidence taken as a whole corroborated as it has been.

Mr. Matse also endeavoured to find support for the accused in the copy of his alleged letter (Exhibit D) dated the 22nd February 1979 to the Permanent Secretary, Ministry of Works, Power and

Communications. This letter was not admissible as evidence. Apart from the fact that the original

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should have been produced under a supoena duces tecum, it is of a character similar to the defence evidence of Mordecai Khumalo to which I have referred at an earlier stage in this judgment. Be that as it may, it is of minimal evidential nature. Even its validity is not beyond doubt having regard, inter alia, to the fact that he made no mention of it to Mr. Khumalo who had never seen it, and that there was apparently no reply to or any acknowledgment of it.

Amongst other points of criticism Mr. Matse urged that the magistrate should not have found that the missing tiles were in fact stolen property. But there was adequate circumstantial evidence to that effect. Gwebu discovered them to be missing, the two official custodians of the articles who had access to them were unable to offer any explanation, the tiles or tiles similar to those missing, the evidence established, were found in the possession of a third party, who gave an accepted explanation for his possession, implicating the accused who the magistrate found had lied about his involvement. All these circumstances taken together lead to the only inference, namely that these were the missing tiles. They are all factors relevant to the question of whether the articles were stolen. It has been laid down that the identification of the corpus delicti does not have to be considered in a "separate watertight compartment". See e.g. Rex vs.. Tshabalala and Others 1942 T. P. D. 29; and Rex vs. Chetty 1943 A.D. 514, and Hunt Vol. 2 page 612.

To sum up: It has been established that the tiles which were under the joint control of the accused were stolen; that four cartons of them were in Mhlanga's poseession,

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and that the latter stated that they were in a trunk delivered to him by one Zwane at the accused's behest. Mhlanga's evidence that he had purchased them from the accused was found by the magistrate, who had clearly guarded himself against the danger of believing an accomplice's uncorroborated evidence, to be satisfactory. He however found sufficiently strong corroborative factors.

In the circumstances this Court is unable to disagree with the magistrate's conclusions who does not appear to have misdirected himself on any vital features in the evidence.

The appeal accordingly fails and the conviction and sentence are confirmed.

(D. COHEN)

JUDGE OF THE HIGH COURT

I agree.

(D. LUKHELE)

JUDGE OF THE HIGH COURT

MBABANE MARCH, 1980