

IN THE HIGH COURT OF SWAZILAND.

In the matter of CASE NO. S.158/81

REX

vs.

MXOLISI T. NXUMALO

CORAM: WILL, A.J.

FOR CROWN: MR. FLYNN

FOR DEFENCE: MR. SHILUBANE

JUDGMENT

(Delivered 3rd December, 1981)

Will, A.J.

It is convenient to deal with certain matters of a general nature before I consider the individual counts on which the Accused has been charged.

There are several agencies of the Manzini branch of Barclays Bank where the Accused was employed. There is an agency at Matsapa which opens on Mondays to Fridays. One of the staff of the Manzini branch travels daily from Manzini to the Matsapa agency. There are other agencies, such as the one at Siteki, which open for two days a week. As in the case of the Matsapa agency a member of the Manzini Branch of the bank travels to the agency concerned. The teller who travels to an agency is referred to as the agency teller.

There were usually about three members of the staff of the Manzini Branch who functioned as agency tellers. They were not posted to particular agencies, but, depending upon the allocation of staff, they would operate at Matsapa or Siteki or one of the other agencies as the case might be.

2

It seems, however, that the Accused functioned during the periods alleged in the several charges mainly at the Matsapa agency.

The charges against the Accused arise from defalcations in the savings bank section of the bank and it is necessary therefore to consider the procedure which is followed in dealing with withdrawals from and deposits into savings bank accounts. A customer of the bank wishing to withdraw money from his savings account at the Manzini branch, completes and signs a withdrawal form which is checked by a counter clerk against the customer's ledger card. If the customer's account is in funds the counter clerk initials the withdrawal form which the customer then takes to the savings bank teller who cashes it. The teller makes a debit entry in the customer's savings book which is produced to him for that purpose by the customer. The teller then makes an entry of the transaction on a form issued for the purpose and he attaches this form to the withdrawal form. These are then passed on to the central office of the bank which distributes them to the clerks who keep the ledger cards so that a debit or credit (in the case of a deposit) can be noted. This clearance takes place every day so that at any given time, except during the short period of the clearance, the balances reflected on the customer's ledger card and in the customer's savings bank book should tally.

The procedure for depositing money is the same as that which I have described except that deposit

forms, and cash-in slips, differ in colour from those used for withdrawals. Deposit forms, too, are sent by the teller to the central office which transmits them to the ledger section.

3

What I have described is the procedure followed at the Manzini Branch. An agency of the bank does not, however, keep customer's ledger cards, and it does not, as I have already stated, have a permanent staff. If therefore a customer wishes to withdraw money at an agency the agency teller is entitled to use his own discretion in making payments of amounts up to E100. He is expected, if the withdrawal is to exceed E100, to check, by telephoning the savings bank section of the Manzini Branch, whether the customer's account is in funds. It appears, however, that sometimes agency tellers themselves authorize withdrawals exceeding E100 without reference to the Manzini Branch. The agency teller initials the withdrawal slip, after placing an impression of the agency stamp upon it, when he makes payment. He makes the corresponding entry in the customer's savings book. The agency teller attaches the withdrawal form to the completed slip on which the transaction is recorded and he hands them to the central office on his return to the Manzini Branch in the afternoon. From the central office they are transmitted to the ledger clerks.

When the Gown sought to put into Court copies of the first documents which it wished to produce as evidence Defence Counsel objected that the procedure prescribed for proof of banker's books had not been followed by the Crown. As the procedure had indeed not been followed it became necessary for the Crown to use the ordinary procedure for proving documents by production of the originals from the custody of the bank official who had custody of them. Much inconvenience was thus caused, because some of the documents required were in daily use by the bank.

Some of the original documents, which included withdrawal forms and customer's savings bank books, were lost. Photostat copies of these documents had been made by the bank before they were handed to the police.

4

The Bank itself lost the copies which had been made of some of the savings bank books. The Crown therefore applied for leave to place secondary evidence before the court by producing the copies of the missing withdrawal forms, and by oral evidence of the differences which were found to exist between the savings bank books and the relevant ledger sheets when they were examined by Mr Dlamini, the sub-accountant, before the books were lost. The Crown led evidence which satisfied me that the documents were indeed lost and that every effort had been made to find them but without success. I granted the application to lead secondary evidence. I do not, however, consider that I should leave this part of the case without adversely commenting on the negligent manner in which these documents were handled.

At the conclusion of the evidence of Mr Dlamini, the sub-accountant of the Bank, Counsel for the Crown applied for several amendments to the charges in order to bring them into conformity with the evidence which had by then been given by Mr Dlamini. On count 1 the application was to amend the date of the alleged offence from July 1980 as it appears on the charge, to the period 18th September 1979 to 6th February 1980. Despite opposition to the amendment I granted it because it did not appear that it could cause prejudice to the Accused particularly as I granted leave to Defence Counsel to recall any of the crown witnesses, who by then had given evidence, for further cross examination if he was so minded. I refused the application to amend the charges further by adding the word "Siteki" to the word "Matsapa" as the places at which the thefts were committed. My reasons shortly stated for having refused the application are:

The charges as framed are defective for misjoinder because each separate unauthorized withdrawal of cash was an independent transaction and each such transaction should, technically

5

therefore, have been the subject of a separate count. It was not permissible in the circumstances of this

case to lump the several transactions together on an allegation of general deficiency. What happened was that the Crown, on count 1 for example, added together in one count the several withdrawals from the savings bank account of Selina Mtembu. The offence was alleged to have taken place at Matsapa. The evidence, however, disclosed that some of the withdrawals took place, not at the Matsapa agency, but at the Siteki agency. Apart from count 1 there were other counts in which there had been similar misjoinders and in which the evidence disclosed that the withdrawals were made at Siteki and not at Matsapa as alleged.

I was asked to amend the charges by substituting for the allegation that the offences took place at Matsapa, the allegation that they took place at both Matsapa and Siteki in order to bring the charges into conformity with the evidence. Objection was not taken to the misjoinder of the charges as they were originally framed, and it is clear that there could not have been prejudice resulting from the misjoinders as originally charged. The amendments to the charges sought by the Crown, however, would have had the effect of making the charges, already defective for misjoinder, even more defective for misjoinder, and the question of prejudice could have arisen.

#### Count 1

The allegation on count 1 is that at Siteki the Accused stole the sum of E1503 from Barclays Bank. This sum is the total of twelve withdrawals from the account of Selina Mtembu. Only four of these withdrawals, namely those for E68, E150, E160 and E100 reflected on exhibit C3, C4, C5 and C6 were made at Siteki.

6

They total E478. All the other withdrawals were made in Matsapa and they are not therefore in accordance with the charge. Counsel for the Crown argued that, in the circumstances of this case, the place alleged in the charge is really not of any materiality because the thefts were from the Manzini Branch of which both Si-teki and Matsapa are merely agencies and that no prejudice could arise. There is much to be said for this argument but I have nevertheless come to the conclusion that I should only take into account the thefts from the place mentioned in the charge.

The evidence was that all the withdrawal slips Exhibits C1 to C12 were initialed by the Accused both as authorizing officer and also as agency teller who paid out on them.

The person who purported to have applied for the withdrawals did not sign the forms but placed thumb prints upon them instead of signatures. I accept the evidence of Assistant Superintendent Dlamini that the thumb prints upon the withdrawal forms were those of the same person whose prints appeared on exhibit Y namely those of the Accused. None of these withdrawals are reflected in the savings bank book, exhibit B, of the customer.

Selina Mthembu, the customer, said that she knew nothing of these withdrawals. When she did make withdrawals they were in the vicinity of E40 only.

Accused confessed to Mr. Dlamini the Sub-Accountant and to the Manager of the Bank that it was he, and not the customer, who had made these withdrawals.

The evidence of the Accused's guilt on this count is overwhelming. He stole the money from the Bank and used the fraudulent withdrawal forms in an endeavour to cover up the thefts. I convict the Accused however, of the sum of E478 only.

#### Count 2

On Count 2 the Accused is charged with the theft at Matsapa of E2860 from Barclays Bank.

7

The sum represents the total of thirteen..... irregular withdrawals, on exhibits M1 - M13, from the savings bank account of Felicia Matse and which were not reflected in her savings bank book.

Felicia Matse said that she made no withdrawals at all during the months of February and March 1980 which are the months during which the withdrawals in question were made. Nor did she withdraw the sum of E2860. When she did make withdrawals she did not draw sums exceeding E10 or E20, she did not make the withdrawals on exhibits M1 to M13 and the comparatively large sums reflected on the exhibits , which range from E100 - E500, were much in excess of her withdrawals. Noone had authority to withdraw these sums.

The exhibits M1 - M13 were among those the originals of which were lost. The photostat copies which were handed in as exhibits M1 - M13 are not very clear. Nevertheless they were sufficiently clear for the witness to see that the signatures upon them were not hers. The Accused's initials are on all of them except exhibit M11 (on which there are no initials). The Customer's bank book is one of those which is missing.

Mr Dlamini, the Sub-Accountant of the Bank, stated that he handed the savings bank book to the police but before he did so he checked it against the ledger sheet, and he found that the amounts which were reflected on the withdrawal slips and on the ledger card were not reflected in the bank book.

In the absence of the evidence of a handwriting expert connecting the Accused with the forged signatures on exhibits M1 - M13 the possibility cannot be excluded that someone other than the Accused forged the signatures on the withdrawal slips and cashed them.

8

The only evidence which connects the accused with this count are the Accused's initials on the withdrawal slips and it was there fore he who cashed them; and the evidence of Mr Dlamini, the Sub-Accountant that entries were not made in the bank book when they should have been made by the Accused when he cashed the withdrawal slips ..

Because the photostat copies of the withdrawal slips are not clear it is impossible to state where the withdrawals took place except that on a few of the withdrawal slips the word Matsapa can be made out.

It would be unsafe to convict the Accused on this count and he is accordingly found not guilty.

Count 3.

This count is in respect of two sums of E200 and E100 respectively reflected on the withdrawal slips copies of which, because of the loss of originals, were handed in as exhibits 01 and 02. The exhibits are not clear. The eyesight of the customer concerned, Grace Dlamini, is poor and she could not read anything on the exhibits. She could not therefore say if it was her signature which appeared on them. The evidence of this witness generally was poor and no reliance can be placed upon it. All that connects the Accused with this count are his initials on the exhibits as paying teller, and the fact that, according to Mr Dlamini, the sub-accountant, the withdrawals were not noted on the bank book which was subsequently lost. The word Matsapa can be made out with some difficulty on the exhibits. The Accused is found not guilty on this count.

Count 4

On Count 4 the Accused is charged with stealing E600 from the Bank at Matsapa.

9

The sum represents the total of two withdrawals of E200 and E400 respectively. The original withdrawal slips are missing, but copies of them were handed in as exhibits Q1 and Q2. The sums were withdrawan

from the account of Sarah Ntshangase, who stated that the signatures on the somewhat blurred copies of the slips were not hers. In the absence of evidence of a handwriting expert as to the signatures on the slips, there is nothing to connect the Accused with these withdrawals, except that his initials appear upon them and that the withdrawals had not been entered in the bank book when Mr Dlamini examined it prior to its loss.

The possibility can not be excluded that someone other than the Accused forged the customer's signature on the withdrawal slips and presented these for payment. The Accused is found not guilty on count 4.

Count 5.

This count was withdrawn after plea and the Accused was accordingly acquitted.

Count 6

On this count the Accused is charged with stealing E6250 from the Bank at Matsapa. This sum represents the total of fifteen withdrawals during the period March 1980 to May 1980. The amounts of the withdrawals range from E100 - E1,000 and they are reflected on exhibits G1 - G15. No details of these withdrawals have been entered in the customer's bank book exhibit F. The Accused's initials appear on all the withdrawal slips all of which show Matsapa as being the place of withdrawal.

There are finger prints on all these withdrawal slips which purport to have been made by the customer as receipts for the sums withdrawn.

10

There was evidence, which I accept, from Assistant Superintendent Dlamini the finger print expert, that the finger print on exhibits G1 to G15 are those of the Accused.

The evidence of Mathiwi Ziyane and of her son Molena Ziyane was that the savings account had belonged to Mgciba Ziyane husband of Mathibi Ziyane who died about five years ago. Since then Mathibe Ziyane has kept the bank book and she has made no withdrawals from it since her husband's death.

The evidence is overwhelming that the sum of E6250 was stolen from the Bank by the Accused and that he endeavoured to cover up the theft of the money by completing fraudulent withdrawal forms. I find Accused guilty on this count.

Count 7

The charge on count 7 is that at Siteki the Accused stole the sum of E350 from the Bank. Withdrawal slips, Exhibits U1, U2, and U3 purporting to have been presented by Jeannete Dlamini, the bank's customer, to the bank were handed in as exhibits. The charge alleges that the theft took place at Siteki but only one of the withdrawals, namely that for E100 on Exhibit U3, was made there. The others were made at Matsapa.

These withdrawals were not entered in the customer's savings book Exhibit T and Jeannete Dlamini stated that she did not make them. According to her evidence she only made two withdrawals last year, one for E20 and the other for E10

The Accused's initials appear on the withdrawal forms and I accept the evidence of the finger print expert that it is the Accused's prints which appear on the withdrawal slips.

11

The evidence establishes that the Accused stole from the Bank the sums reflected in these withdrawal

forms, and that he endeavoured to cover up the theft by fraudulently completing the withdrawal forms.

Only E100 of the E350 stated in the charge sheet was, however, stolen at Siteki and the Accused is therefore convicted of the theft of that sum only.

#### Count 8

This count, in which the Accused is charged with stealing E120 from the Bank, differs slightly from the others in that it was connected with a deposit whilst the others are connected with withdrawals.

Norah Magwaza employed by Barclays Bank as Assistant Accountant stated that she checked the savings bank book, exhibit V, of the Banks customer, Juliet Fakudze, with her ledger card exhibit W. She noticed that there was a deposit of E120 reflected in the bank book in June 1979. The corresponding entry did not appear on the ledger card. The signature in the bank book of the teller who received the deposit was that of the Accused. The witness checked the Accused's "Cash-in" book, exhibit X, and found that it showed a sum of E120 having been received as a deposit in respect of savings bank book, No 59305389, which is the number borne by Juliet's bank book exhibit V. This entry, however, had been scratched out. When a customer makes a deposit he does so on a deposit form used for the purpose. After the teller has acknowledged receiving a deposit by signing for it in the customer's bank book, he should attach the deposit slip to a cash-in slip and these should be passed to the central office.

12

From there they are transmitted to the ledger section. No deposit slip or cash-in slip was passed to the central office in regard to this deposit.

The customer, Julia Fakudze, said that on the 9th of July 1979 she deposited E120 after completing the deposit slip and handing it to the teller. It is clear therefore that E120 was paid by the customer to the Accused, as teller, together with a deposit slip. The deposit slip and cash-in slip have disappeared and the relevant entry in the cash-in book was cancelled. E120 was therefore stolen from the Bank and the person who stole it endeavoured to cover up the theft by deleting the entry in the cash-in book, and doing away with the deposit slip and the cash-in slip.

The Accused did not give evidence on this, or any other count, but it was put to Norah Magwaza in cross-examination that another bank official, in the Accused's absence from the teller's counter, might have taken E120 out of his till; have taken possession of the cash-in slip and deposit slip; and have deleted the entry in the cash-in book. Norah would not admit this as a reasonable possibility and I am not prepared to find, especially in the absence of any explanation by the Accused, that it was a reasonable possibility.

The Accused is convicted of the theft of E120 on count 8.

#### Count 9

On count 9 the Accused is charged with stealing from the Bank, at Siteki, the sum of E3521. This sum is the total of twenty-six withdrawals represented by exhibits J1 to J26.

The withdrawals on Exhibits J1 and J3 to J13 were, according to the date stamp, made at Siteki and the others were made at Matsapa.

13

The total of the withdrawals at Siteki is E1689. The withdrawals were made during the period 1979 to February 1980.

The Accused's initials appear on all the exhibits as paying teller. None of the withdrawals were reflected

on the bank book, Exhibit L, of the customer, Siphon Mbhamali. The handwriting expert stated that it was the Accused's finger prints which appeared on the withdrawal slips as being the person who withdrew the money. There was evidence from the customer and from his aunt, Madela Mbhamali, that she kept her savings bank book for him. She was the only person who made withdrawals from it and she made no withdrawals at all in 1979 and 1980. Before those years she only made one withdrawal per year which did not exceed E20.

There can be no doubt that Accused stole from the Bank the sum of E3521 of which E1689 was stolen at Siteki and I convict him on the theft of E1689 on count 9.

In the result I find the Accused guilty as follows -Count 1 Theft of E478 Count 6 " of E6250 Count 7 " of E100 Count 8 " of E120 Count 9 " of E1689

D.D. WILL

ACTING JUDGE