

IN THE HIGH COURT OF SWAZILAND

In the matter of: Criminal Appeal No. 14/83

JEREMIACH MASEKO AND OTHERS

VS

THE QUEEN

CORAM: NATHAN C.J.

FOR APPELLANT: ADVOCATE D. SMITH

FOR RESPONDENT: MR. HASINA

JUDGMENT

(Delivered on on 30th September, 1983)

NATHAN C.J.

The Appellant was convicted of fraud and was sentenced to imprisonment for 18 months of which 12 months were suspended for 3 years. He was also ordered to pay the sum of E2046.10 to the Swaziland Government as compensation.

He appeals against the conviction and the sentence. In the Indictment the Appellant was charged with fraud alternatively with Theft by false pretences. He was charged with one Patricia Nhengethwa who was discharged. The Appellant was found guilty on the main count. It was alleged that the Appellant and No.2 Accused were respectively Project Manager and typist employed by the Swaziland Government and that they unlawfully and with intent to defraud this represented to the Treasury Department of the Government that certain persons set out in a schedule were employed by the Government

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and as such included in pay sheets and entitled to receive wages for certain months and that they did by means of the said misrepresentation induce the Treasury to its loss and prejudice to pay the amounts reflected in the schedule, whereas the Accused knew that the persons reflected in the Schedule were not employed by the Swaziland Government and were not so entitled.

The evidence disclosed that the money required for the payment of wages is requisitioned from Treasury by means of a voucher. When the wages are paid the pay sheets are signed by the employees in most instances. But if the employee is not present or if, as no doubt happened in the present case the employee reflected the pay sheet was a fictitious person or was not working for the Government the money apparently due to such person would be taken by the Appellant and no doubt misappropriated by him. After the money has been paid the pay sheet is sent to the Treasury for checking.

But the important point to note - and this point was made by Mr. Mathse who appeared for the Appellant at the trial - is that there was no misrepresentation to the Treasury in the pay sheet which caused the Treasury to pay out; because the money had been paid by the Treasury before it ever saw the pay sheet.

On this basis it appears to me that the Crown did not establish the case of fraud made in the Indictment. The Appellant may well.. have been guilty of theft by false pretences or some other species of fraud but he was not found guilty on such charges and the correct false pretence was not alleged.

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The misrepresentation alleged in the alternative charge is to the same effect as the misrepresentation alleged in the main charge and the alternative charge does not assist the Crown.

In my view the Appellant should not have been convicted on the main charge as framed and the conviction and sentence and order for compensation should be set aside. I regret having to come to this decision; but it is important that trials be conducted according to the rules of the game. The onus is on the Crown to prove all the essential elements of the crime charged.

In setting aside the conviction I leave it open to the Director of Public Prosecutions, if he can, to frame a new charge against the Appellant and to the Treasury to take any other action to recover the amount misappropriated that may be open to them.

The conviction and sentence and order for payment of compensation are set aside.

The Appellant is entitled to a refund of the Appeal Fee of E4.

C. J. M. NATHAN

CHIEF JUSTICE

I agree

B. DUNN

ACTING JUDGE