IN THE HIGH COURT OP SWAZILAND

In the matter of : Criminal Case No. S. 189/83

REGINA

VS

JOHN DU-PONT

CORAH: NATHAN C.J.

FOE CROWN: MR. NSIBANDZE

FOR DEFENCE: MR. FLYNN

JUDGMENT

(Delivered on 14th November 1983)

NATHAN CJ

The Accused is charged with the theft of the sum of E2200 from the Complainant.

It is common cause that the Complainant, who is an old man employed at the Havelock Mine, became entitled to compensation for an industrial disease in the sum of E10754-10. The Accused is a personnel officer at the Mine and it is part of his duties to assist employees in the collection of compensation due to them.

The evidence is to the effect that on 14th January 1983 the Accused accompanied the Complainant to the District Officer, Piggs Peak where the Complainant was handed a cheque for the sum of E10754-10. E4000 of this was placed on fixed deposit at the Swazi Bank and E1000 in a Savings account that was opened at the Swazi Bank, Piggs Peak. The Accused assisted the Complainant in these transactions. The Complainant can sign his name but otherwise appears to be illiterate. There was some conflict as to whether he can read or write. I do not think it was established that he can do so, but very little appears to turn on this .

In regard to the balance of E5754-10 the Complainant was given a cheque drawn by Swazi Bank on Standard Bank Riversdale, Mbabane. (I think Riverside is meant). He and the Accused drove in the Accused's car to Mbabane. They could not cash the cheque for the E5754 because it was crossed and they went, at the suggestion of the Standard Bank, to Barclays Bank Riverside as the Complainant had a savings account at Barclays Bank Piggs Peak, The cheque for E5754 was deposited at Barclays Bank in the Savings Account and simultaneously E2400 was withdrawn and handed to the Accused. Here comes the important conflict between the Complainant and the Accused. They returned to the Accused's car. The Complainant says that he had asked the Accused to withdraw E200 only and that the Accused gave him this amount when they got to the car. The Accused says the Complainant had authorised the withdrawal of E2400 from the Savings Account and that the Accused paid the whole of this sum to the Complainant when they got to the car. The subject matter of the charge, E2200, is the difference between E2400 and E200. The Complainant says that the following day, Saturday, his daughter looked at his various books and documents and told him that he had withdrawn E2400 and not merely E200. He immediately reported thematter to the Police.

The Complainant was not a very satisfactory witness. He was contradictory and inaccurate in portions of his evidence. He was cross-examined at some length in an attempt to shake his credibility. But I did not at

any stage gather the impression that he was being dishonest in his evidence. And indeed on one key important point in the case his evidence was very superior to that of the Accused,

3

The Complainant said that when the money was handed to him he was sitting in the passenger's seat of the Accused's car; the Accused was in the driver's seat and the "briefcase from which the Accused took the money was on the right hand side of the Accused. There was no cross-examination of the Complainant in regard to this. The Accused in evidence stated that the brief case had been placed between them. The Complainant was recalled and asked about this and he insisted that the brief case had not been placed between them. It is to be noted that the Accused is not corroborated on this point by the defence witness Jabulane Mamba who said that he hag not seen any money at all being handed over in the car.

It was put to the Complainant in cross-examination that he had wanted the whole balance of E5754-10 remaining after making the Fixed Deposit and Savings Account deposit to be paid to him in cash. He denied that this was so. It seems probable that the Complainant is correct on this point because there would have been no reason why "the whole amount of E5754 should not have been withdrawn. Instead, on the Accused's version as put to the Complainant in cross-examination, the Accused asked him at Barclays Bank how much he wanted to withdraw and he said E2400. There would have been no point in asking how much he wished to withdraw if the whole amount of E5754 had already been agreed upon.

It was then put to the Complainant that he had told the Accused that he wanted to withdraw E2400 in order to purchase a Datsun motor car. This is the matter of importance to which

4

I referred earlier. The Complainant denied that he had said he wished to purchase a Datsun car and said that he did not know anything about a car. He later elaborated on this and said that he cannot drive; his father never owned a car; his home is in the bundu, where there are no roads; and he asked whether he would buy a vehicle to throw it away. All this struck me as wholly credible.

He also said that he could not have said he wanted to buy a car because he did not know how much compensation he would receive. There is some conflict in regard to this. A document entitled Workmens' Compensation Agreement which the Complainant signed, refers to the compensation of E10754-10 and recites that the document has been explained to the workman (the Complainant) by the Labour Commissioner. It is n ot signed by the Labour Commissioner but it was signed by the District Officer, The Accused said that the document was read to the Complainant by the D.O., but the Complainant denied this and said he was merely told to sign the document. I do not consider that the evidence warrants my making a finding adverse to the complainant on. this issue. But I do not regard the matter as being of any material significance.

It was put to the Complainant that after he had reported the matter to the Police he told the Police that he had only been joking when he said he wished to purchase a Datsun car. The Complainant denied this. In my view his evidence is to be accepted on this point. It is difficult to see what point there would have been in making such a joke at all; and I do not believe the Accused when he says that the Complainant suggested buying a Datsun car. In my opinion the

5

evidence in regard to the proposed purchase of a Datsun car was only introduced in order to explain the withdrawal of the sum of E2400; and I find that this was a fabrication on the part of the Accused.

The Complainant said he had not in fact tried to buy a Datsun Car and he is supported on this point by his daughter. I accept the Complainant's evidence in this regard=

The defence called a young man named Jabulane Mamba who accompanied the Accused and the Complainant to Mbabane from Piggs Peak. He said that on the way the Complainant said that he wished to purchase a Datsun car with the money he was getting; but that no amount was mentioned. This is in line with the Accused's evidence on this point. But I do not accept this evidence. In my view the whole of the evidence about purchasing a Datsun car is a fabrication introduced, as I have indicated, to explain why the Accused withdrew E2400 from the Complainant's savings account at Barclays Bank instead of the E200 that he had been asked to withdraw.

I draw attention to the fact that although it had been put to the Complainant in cross examination that on the way to Mbabane he had said that he wanted to buy a Datsun car for E2400 no figure was mentioned by either the Accused or Jabulane.

It is in my view unthinkable that overnight, as it were, the the Complainant and his daughter concocted a plan whereby the Complainant would falsely allege that the Accused had stolen E2200 from him.

6

In my opinion the Crown has established beyond any reasonable doubt that the Accused stole E2200 by withdrawing E2400 from the Complainant's savings account and paying him only E200 thereof. It follows that the Accused must be found guilty as charged.

C. J. M. NATHAN

CHIEF JUSTICE

7

JUDGMENT ON SENTENCE

The Accused has been convicted of the theft of E2200 from the Complainant. Evidence in mitigation has been given by Mr. Berry, the personnel manager of the Havelock Mine where the Accused and the Complainant were employed. It appears that the Accused has a good record with the Company, but Mr. Berry's evidence suffers from the defect that he says it is not possible to state what the Company's attitude towards the continued employ ment of the Accused will be. Nor, for that matter, was he prepared to state what his own attitude would be if the matter rested with him alone.

The Accused is 33 years old. He has 4 children ranging in age from 11 to 5 years old, whom he is supporting. But there are certain aggravating features of the case that I must take into account. He was in a position of trust and took advantage of an illiterate old man. This is a more serious breach of trust than in the case which has been referred to of breach of trust towards an employer Bank.

I asked Mr. Flynn who appeared for the Accused, whether the Accused shows any remorse in that, for example, he admits his guilt and says that he succumbed to sudden temptation in stealing the E2200. I indicated that this might have an appreciable bearing on the proper sentence to be imposed and I granted Mr. Flynn an adjournment to enable him and the Accused to consider the question. But this did not assist matters. Mr. Flynn stated that the Accused was only prepared to express remorse without prejudice and subject to all rights of appeal. I should point out in this connection that Mr.

8

Flynn stated that the Accused could not unqualifiedly express remorse because he did not know what the Court's sentence was likely to be, and that the Accused wished to preserve his rights of appeal in this regard. I explained to Mr. Flynn that it was, of course, open to the Accused to appeal against the sentence, but that I wished to know whether tie Accused admitted his guilt and expressed remorse in regard to the offence itself.

I cannot in the circumstances regard what Mr. Flynn has said as a proper expression of remorse. And I do not think a fine and partly suspended sentence would be adequate in the circumstances of this case.

Mr. Flynn asked me to take into account, in passing sentence, that the Accused has been ordered to compensate the Complainant in the sum of E2200. I propose to do this. I am, however, not entirely in agreement with Mr. Flynn when he submits that the Accused cannot make restitution until after he has served any goal sentence that may be imposed on the Accused. One asks in this regard, what about the E2200 which has been stolen and of which the Accused is presumably in possession? However I will take this into account.

Mr. Nsinandze for the State submitted that the only feature which might persuade the Court not to impose a prison sentence is the necessity for ensuring that restitution to the Complainant is made as soon as possible. It appears to me that this is insufficient reason not to impose a prison sentence.

The sentence I am going to impose is as follows : The Accused is sentenced to imprisonment for 2 years of which 9 months will be suspended for 3 years on condition -(a) that the Accused is not convicted of any

offence of which theft is an element, committed during the period of suspension.

(b) that the Accused pays to the Registrar of this . Court within 6 months of the expiration of the effective prison sentence imposed upon him the sum of E2200 for transmission to the Complainant. The DPP is ordered to take the . necessary action should payment of this said amount not be made timeously. In that event the Complainant will be entitled to take whatever action he may be advised to recover the said amount of E2200. It is the intention of this judgment that no such action shall be taken until 6 months after the expiry of the effective prison sentence imposed upon the Accused.