

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE.

CASE NO. S. 169/83

In the matter of

REGINA

vs.

BENJAMIN MAZIYA

CORAM:

DUNN, A.J.

FOR CROWN:

MR. DONKOH

FOR DEFENCE:

MR. MALINGA

JUPGMENT

(Delivered 13th April, 1984)

DUNN, A.J.

The Accused is charged with the crime of theft. It is alleged that on or about the 5th February, 1981 and at Manzini the accused did unlawfully and intentionally steal E3,369.00 the property of or in the lawful possession of the Pineapple Settlement company.

The accused pleaded not guilty to the charge.

The Crown's case is briefly that the accused who was employed as a manager by the Pineapple Settlement Company (The Company) made a loan of 200 bags of fertiliser to the Central Co-operative Union (C. C. U.). The loan was made on the 10th January 1980 when the accused completed and signed a voucher to that effect. It was agreed between the accused and the C. C. U that the fertilizer would be paid for in cash at a future date. The C. C. U. duly honoured its obligation and

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on the 2nd February 1981 issued a cash cheque for the sum of E3,369.00. The cheque was endorsed on the reverse by the accused and presented for payment at Barclays Bank, Manzini on the 5th February 1981. It was the crown's case that the accused put the cash he received to his own use.

The Crown led the evidence of Thandi Nkomo to establish the fact of the loan of the 200 bags of fertilizer to the C. C. U. Thandi was at the relevant time a clerk in the employ of the company. She handed into court the voucher which she stated was prepared and signed by the accused in respect of the fertiliser. She told the court that some time before the annual stock taking in June, she asked the accused if the fertiliser had been paid for by the C. C. U. The accused informed her that payment had been made and when she questioned the manner in which payment had been effected and the cheque number if payment had been by way of cheque, the accused replied that he did not know the details as payment had been made through the offices of the company's secretaries Messrs Coopers and Lybrand. It is important to note that Thandi specifically asked for the cheque number if payment had been effected by cheque. Thandi stated that Coopers and Lybrand did not confirm that payment had been made when she enquired from them.

Peter Cooper of Messrs. Coopers and Lybrand denied that payment for the fertiliser had been made to his office. He told the court that his office was not informed of the loan to the C. C. U. Mr. Cooper

explained that the accused was reimbursed for purchases which he made with his own money on behalf of the company. He stated that these were normally minor expenses including re-imburements for petrol purchased

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by the accused for use in the company vehicle on company work. He stated that all claims lodged by the accused were to be accompanied by documents supporting the amounts claimed. He told the court that certain claims by the accused had not been honoured because they had either been considered excessive or not to have been incurred in the course of the company's business. Such claims Mr. Cooper stated had been returned to the accused.

Mr. Cooper denied under cross examination that an amount of E3,059.71 was owing to the accused by the company for expenses incurred by the accused on the company's behalf.

The Crown closed its case when the defence made the admission that the accused had received the cash cheque from the C. C. U. and had cashed it and not accounted to the company for the cash.

The accused gave evidence under oath. He told the court that during the period 1974 to 1982 he incurred expenses totalling E3,059.71 on behalf of the company. The amount was made up of the following purchases.

1. Oil for a water pump.....18.62
2. Bolts and Nuts.....64.31
3. Rental of a Post Office box.....13.00
4. Petrol for a pump.....513.02
5. Petrol for a vehicle .....2,450.76

He stated that he submitted his claims to the company's secretaries on a monthly basis. He was not reimbursed despite correspondence and personal calls at the offices of Coopers and Lybrand. He told the court of the poor communication

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between himself and the company's secretaries. He explained that he continued to incur expenses for which he was not re-imbursed as he did not wish to see the company collapse.

With regard to the E3,369.00 the accused stated that he had cashed the cheque from the C. C. U. and that the money had gone missing from his table. He later explained under cross-examination that he had used the expression to mean that he had taken the money. I do not accept this explanation as it was clear that the accused innitially set out to have the court believe precisely what he meant and that it was only upon reflection after an adjournment that he realised that this was not in keeping with the defence which had been suggested to the crown witnesses and to the court when certain admissions were made by the defence.

The accused continued to state that he took the E3,369.00 in satisfaction of claims totalling over E4.000 which were due to him by the company. He could not give details of how this amount was made up in view of the figure of E3,059.71 given for expenses allegedly incurred between 1974 and 1982. He could give no explanation for not having notified Coopers and Lybrand of the steps he had taken to satisfy the outstanding amounts owed to him. The accused denied for the first time under cross examination the unchallenged evidence of Thandi that he informed her that payment had been made by the C. C. U. through Coopers and Lybrand. Thandi specifically asked for a cheque number if payment had been by

way of cheque and I see no reason for the reply given by the accused who admits that he received and cashed the cheque. This was in my view a deliberate attempt

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by the accused to cover up for the cash he had taken. The reply given to Thandi is not in my view consistent with the state of mind which Mr. Malinga has submitted the accused had when he took the money, namely, that he believed he had the right to take the money to satisfy his claims against the company. The accused as manager must have appreciated that Thandi's enquiry was for purposes of maintaining proper records of the company's transactions and if his belief was bona fide he should have informed Thandi what had become of the payment.

I find no substance whatsoever in the allegations made by the accused of outstanding claims. The accused has in my view attempted to explain his misappropriation of the E3,369 by building up fictitious claims, the satisfaction of which he states justified the misappropriation.

The question of 'claim of right', for which see Hunt, South African Criminal Law and Procedure Vol. 11 p. 587, does not arise in this case. The evidence is such that it is clear that the accused took the money and attempted to cover up this fact because he well knew that he was not entitled to take the money as he did.

I reject as totally false the evidence of the accused of the circumstances under which he states he took the E3,369.00.

I find the accused guilty as charged.

B. DUNN

ACTING JUDGE.