

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE.

CRI. APP NO. 2/84

In the matter of;

ELIJAH NGCAMPHALALA

Appellant

vs.

REGINA

Respondent

CORAM:

DUNN, A.J.

FOR APPELLANT:

MR DUNSEITH

FOR RESPONDENT:

MR MASINA

J U D G E M E N T.

(Delivered 8th June, 1984)

DUNN. A.J.

The Appellant was charged with the theft of E1,000. It was alleged that the Appellant had, whilst employed as the Clerk of the Mbabane Magistrate's Court, created a general deficiency of E1,000 in money which had come into his possession on account of his employment by the Swaziland Government.

The appellant pleaded not guilty to the charge. He was convicted as charged. The Magistrate found that there were no extenuating circumstances within the meaning of Section 4 of the Theft and Kindred offences by Public Officers Order 22 of 1975 and the appellant was sentenced as follows. Accused is sentenced to nine months imprisonment of which 3 months will be suspended for a period of 3 years on condition accused is not again convicted of any crime of which Theft is an element committed during the period of suspension of sentence.

2

The appellant noted an appeal against the conviction and sentence. It is not necessary to set out the grounds against the sentence as the appeal against sentence was abandoned by Mr Dunseith at the hearing of the appeal. The appeal against conviction was on the following grounds:

1. The learned Magistrate erred in law in holding that potential prejudice is sufficient to found a conviction of Theft;
2. The learned Magistrate erred in fact and in law in finding that the appellant had misappropriated monies in circumstances where persons other than the appellant had access to such monies.

The Crown's evidence was to the following effect. One Simon Mvubu was granted bail in the sum of E1,000 by the Magistrate's court Nhlanguano during April, 1983. Sometime thereafter, there is no evidence of the date but during April, Mvubu's wife who was employed in Mbabane paid the E1,000 bail deposit to the accused at the Mbabane Magistrate's Court. The accused issued her with a receipt. Mrs. Mvubu had at the time of the trial misplaced the receipt and it was not produced at the trial. It was common cause that the general receipt issued was No. 053684. The appellant communicated the receipt number to the court Interpreter Nhlanguano who then prepared a liberation warrant for Mvubu..

During the month of May 1983 it was discovered that the triplicate copy of the receipt No. 053681 was

missing from the receipt book which was in the appellant's custody. According to Ezekiel Maphalala, an accountant in the Treasury Department the procedure to be followed in issuing receipts is that the payee is given the original. The duplicate copy

3

accompanies the subsidiary cash book when the cash received is deposited at the district Revenue Office. The triplicate receipt remains in the receipt book which is upon completion returned to the Treasury Department. The discovery was made when the appellant returned a completed receipt book.

The appellant could not account for the missing receipt to Mdabu Dlamini, a Senior Accountant in the Treasury Department. He undertook to go and check with the Civil Clerk.

It was common cause and was reflected in copies of the subsidiary cash book which were exhibited in the court a quo that the Appellant had prepared all the documentation for the banking of all cash received by the Magistrate's Court during the period 22nd April 1983 and 3rd May 1983. The receipts issued were numbers 053683 to 053700. This series includes the missing receipt No. 053684. It was common cause that all the receipts except for numbers 053696; 053697; 053698 and 053700 which were issued by the civil clerk Paul Gumedze, had been issued by the accused.

On the 23rd November 1983, the case of Simon Mvubu was called in the High Court. The circumstances under which Mvubu was released on bail appear to have been in issue and the appellant was called to give evidence. A copy of the proceedings in the High Court was handed into the court a quo by the deputy registrar of the High Court. The Appellant stated that he received the E1,000 from Mrs. Mvubu and issued her with a receipt. He stated that he communicated the receipt number to the Magistrate's Court Nhlanguano. He stated that he must have banked the E1,000 as he had prepared the subsidiary cash book for receipts numbers 053683 to 053700.

The appellant stated in the High Court that he had since "received some kind of funny information as concerning

4

in fact they say the money was not banked, as far as I am concerned the money was banked."

The civil clerk Paul Gumedze gave evidence that he used to assume responsibility for the safe keys and the issuing of receipts whenever the appellant was not present either away on leave or interpreting in court. He did not know of the E1,000 paid by Mrs. Mvubu and did not know what had happened to receipt No. 053684.

The appellant gave evidence that he prepared for banking on the 3rd May 1983. The cash on hand balanced with the total amount reflected on the issued receipts. He banked the money. He subsequently realised that the triplicate receipt No. 053684 was missing from the receipt book which he was returning to the Treasury.

The Magistrate states the following in his Judgment -

"There is however no trace of the E1,000 having been banked. The accused does not deny having received the money. He is surprised that the receipt book has since disappeared. He is also surprised that the receipt has also gone missing. On the evidence before it the court is satisfied that the crown has proved that the accused did accept the payment from PW:1 and accused then communicated the receipt No. to the clerk of court in Nhlanguano. The court is satisfied that the accused received the said payment from PW:1 in his capacity as clerk of the court receipted the money and the money became government property. The court is also satisfied that government was placed in a position where she would suffer prejudice. Prejudice need not be actual or of a monetary character or one effecting proprietary rights as was held in R v. Heyns 1956(3) S.A. 60/1 and also Enock Jabulane Dlamini v. Regem 1980 where Cohen

J.

5

said 'It is sufficient if it is potential and if the false statement involves some risk or harm to some person, not necessarily to the person to whom it is addressed provided that it is not too remote or fanciful money had been advanced for a set purpose.'In the result the court finds the accused guilty as charged."

It must be pointed out that in Heyne's case the accused was charged with fraud.In Enock Dlamini's case the accused was charge" with Theft by False Pretences alternatively fraud. The accused was convicted on the latter count.(For the full statement on the question of prejudice by Cohen J. see Enock Dlamini v. R (2) 1979 - 8l SLR 302 at 305 C - D)

It is difficult to appreciate the relevance to the present case of the two cases relied upon by the Magistrate as the charge in the present case was theft.Mr Masina who appeared for the crown at the hearing of the appeal quite correctly, in my view, did not support the argument advanced by the Magistrate on the question of prejudice in the present case.

Mr Masina has submitted that despite the misdirection by the Magistrate there was sufficient evidence on record to justify the conviction.The evidence referred to by Mr Masina is that referred to by the magistrate namely, that the appellant received the E1,000; that he stated in the High Court that he had banked the money and that the duplicate and triplicate copies of receipt No 053684 issued by the appellant had gone missing.

This evidence does not, in my view justify the conviction. The copy of the proceedings in the High Court does not as correctly submitted by Mr Dunseith contain a specific admission by the appellant that he banked the E1,000.The tenour of the appellant's evidence in the High Court was that the E1,000 must in the normal course have been banked.The banking procedure

6

entailed totalling the amounts reflected on the receipts issued and checking this against the cash in hand.It was common cause that there was no discrepancy when the accused prepared his books for banking on the 3rd May 1983.Mr Masina argued that the appellant was negligent in not checking the receipt numbers as he added the amounts reflected on each receipt.I should point out that the subsidiary cash book does not appear to make it necessary for a person preparing for banking to take particular note of the receipt numbers.The subsidiary cash book hasa section in the following format -

Receipts Issued			
From	To	Amount	
		Emalangen	Cents

There is no space provided for the entry of the number of receipts issued as provided for in the bottom section of the subsidiary cash book which is as follows -

Unused Receipts on Hand

Type	From	To	Number

The possibility of not realising that a receipt is missing is made apparent when one considers that the Central Bank where the cash was deposited by the appellant did not defect that the receipt number 053681 was missing. There is nothing on

7

the record, that the appellant should have had any reason to have kept the figure of E1,000 in mind and therefore to have been struck by its absence when totalling the amounts reflected on the receipts.

Whilst the appellant might have been negligent in not checking that the used receipts followed seriatim, it cannot be held that the appellant misappropriated the amount charged nor can it be said that any facts emerged at the trial which established conclusively that the deficiency was stolen by the appellant.

It is trite law that it is not enough, in cases such as the present, for the prosecutor to prove a general deficiency and then to rest. See in this regard R v. Nxumalo 1970 - 1976 S. L. R. 414 at 416 D - E

The Appellant's version is in my view such that it might be reasonably true. There is nothing on the record and the reasons for judgment why the court a quo rejected it. See R v. Difford 1937 A.D. 370 at 373.

The appeal must in my view be allowed. The conviction and sentence are set aside.

B. DUNN

ACTING JUDGE

I agree:

J.A. HASSANALI

ACTING CHIEF JUSTICE.