

IN THE HIGH COURT OF SWAZILAND

CRIMINAL APPEAL NO.141/95

In the matter between:

EMMANUEL VUSIE TSELA                      APPELLANT

VS

REX                                              RESPONDENT

FOR THE CORAM:                              S.W. SAPIRE A.C.J.

J.M. MATSEBULA A.J.

FOR THE CROWN :                              MR. NGARUA

FOR THE APPELLANT :                              IN PERSON

JUDGMENT

21/02/96

The appellant was on the 29th August 1995 convicted of a crime of fraud and sentenced to a term of three and a half years imprisonment. The appellant has now noted an appeal against the conviction and sentence.

I would refer briefly to his notice of appeal which has been drawn inelegantly but one can understand what he is saying and I would refer to Paragraph 2 and 3. Paragraph 3 seems to be dealing with the question of sentence. The appellant feels that the sentence should have been suspended. In paragraph 2, the appellant states that the complainant which is the Standard Chartered Bank was not called as a witness.

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The Crown had called PW2 Themba Elmon Gamedze. Mr. Gamedze stated that the appellant had given him a cheque of E30,000, (thirty thousand Emalangeni) a cheque which was drawn at Stanbic not Standard Chartered Bank.

In Paragraph 4 of the reasons for his appeal, the appellant states that the cheque exhibit 'E' does not have his identity number or authority by PW2's Manager that the cheque could be cashed. I do not propose to go into details of the evidence given at the trial.

The charge alleges that the appellant had unlawfully and with intent thereby to defraud misrepresent to Standard Chartered Bank that the cheque he brought there, it was his honest belief that the cheque drawn by him in his favour on the Matsapa Branch of Stanbic for the sum E30,000 was good and available cheque and would be met on presentation at the said bank. The charge continues and states that it was this misrepresentation which induced the Standard Chartered Bank to its lost and prejudice to pay the appellant the sum of E30,000 (thirty thousand Emalangeni) and he thus according to the Crown committed the crime of fraud.

No evidence was led from the representative of the complainant that is ±he Standard Chartered Bank.

PW2 says he did not even refer this cheque and he was aware it was irregular but did not refer it because he says he was doing

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the appellant a favour. The appellant who was initially-represented by Mr. Jele who subsequently withdrew, Mr. Jele had put a question to PW2 whether he knew as a fact that the cheque had not been met. PW2 has stated that he was not sure.

The appellant then gave evidence stating that he was in a business of lending money and he had lent the PW2 the sum of E30,000. And indeed PW2 had on some two or three occasions had gone appellant's house at Mankayane to tell the appellant that the cheque had not been met on presentation. This resulted in the writing of the exhibit 'G' which is a certain letter allegedly written by the appellant's wife, signed by the appellant and signed by his wife as a witness. There is no explanation why PW2 had asked the appellant's wife to write this exhibit 'G' instead of the appellant himself. And according to exhibit 'G' the note is directed to a branch manager, either the branch manager of the Standard Chartered Bank or the branch manager of Stanbic Bank, the appellant's bank, it is not clear. But in that note, the appellant undertakes to make sure that the money is made available if the cheque was not met on presentation.

I am of the view that failure by the Crown to call the representative of the Standard Chartered Bank left a lacuna in the Crown's case and the learned Magistrate ought

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to have had entertained a doubt as to whether the Crown had proved the case beyond reasonable doubt. Referring to the witness PW2, he had stated under cross examination by Mr. Jele that he had in fact been co-charged with the accused and the charge was only withdrawn that morning when the proceeding against the accused started and he agreed that he had been told either by the Magistrate, it is not on record here, or by the prosecution that he was an accomplice.

PW2 had taken a very active part in trying to trace the appellant and getting exhibit 'G' written and he says he did that so that he can take exhibit 'G' to his employer and tell the employer that in fact the appellant had received the money. He said he looked for the accused at his house on several occasions, he even went to Pigg's Peak and ultimately he managed to get the accused at his home and that was when the exhibit 'G' was written.

If there was any misrepresentation made, the appellant would have made that misrepresentation to PW2. It is not clear from the record whether in fact that misrepresentation was made and if it had in fact been made would it suffice for the purpose of misrepresentation made to the prejudice of the Standard Chartered Bank if made to the witness PW2.

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In the light of all this circumstances, I am of the view that the appeal should be upheld and I so order.

I agree

J. M. MATSEBULA

S.W. SAPIRE

ACTING JUDGE

ACTING CHIEF JUSTICE