



IN THE HIGH COURT OF SWAZILAND

CRIMINAL REVIEW CASE NO.131/01

In the matter between:

REX

VS

THOMAS BHA THWALA

CORAM

:

ANNANDALE J

ORDER ON REVIEW

This matter was brought before me on automatic review following the conviction and sentence of the accused in the District court of Manzini.

The accused was charged with two counts of theft, the first relating to 65 bags of cement and the second relating to a long list of items set out in an annexure to the charge sheet. These mainly consist of items used in the auto body repair business, welding rods, sandpaper and a door frame, with a total value of E9 095.51.

The accused was acquitted in respect of the charge pertaining to the 65 bags of cement and convicted of the theft of all the numerous items in the second count, with a two-year custodial sentence imposed.

Ad Conviction

The evidence pertaining to the large number of different items in count 2 is that the list, which comprises the items for which the accused was charged with, was compiled in the complainants normal course of business operations. A bi-monthly stocktaking revealed that the listed items should have been in stock but was missing. The shortage in stock taking thus resulted in the formulation of the items listed in the charge.

In my view, without detailing the evidence, as the learned Magistrate already has done in his reasons for judgment, the accused was correctly convicted of theft of a number of items detailed in the annexure to the charge sheet. The items in the list were, as said, compiled and tabulated following a stock taking of complainant's store. The stock-takings were done with a two-month frequency. Thus, all items that were not accounted for at the stock-taking ended up as being listed as shortages and formed the basis of the charge sheet.

The accused was convicted of the theft of all these numerous listed items which were in effect a general shortage covering a two-month period. The *onus* or burden of proof by the prosecution is such that it must be proven beyond a reasonable doubt that each of the articles mentioned in the charge, must be proven to have been stolen by the accused. To prove a general shortage that also co-incides with the time when the accused stole some of the items, does not also prove that he stole all of the missing items.

When this is given effect to, it is not the only reasonable conclusion to be drawn that it is the accused who, in addition to the items proven to have

been stolen by him, that he also stole the remainder of items. For instance, it certainly is also a reasonable conclusion that some customers may have “shoplifted” a number of items, or that other employees of complainant also may have stolen some of the listed items.

For these reasons, I cannot agree with the factual finding of the learned Magistrate that the Crown has proven beyond reasonable doubt that it was the accused himself who stole each and every item listed in the charge sheet. Some of it yes, all of it, no.

It thus stands to reason that on review the conviction has to be altered, to read as follows: -

“Guilty of theft (of various items charged with, total value unknown:”

Ad Sentence

When regard is had to the items proven to have been stolen and their values in relation to the averred total value of E9 095.51 as per the initial charge and conviction, further regarding the factors applicable to sentencing, it is ordered that the imposed sentence of two years imprisonment be altered on review, to include: “...of which one year is suspended for a period of four years, on condition that the accused is not convicted of theft, or a competent verdict on a charge of theft, which is committed during period of suspension.”

Ad Warrant of Committal

It is ordered that the SC 4 Warrant of Committal, dated 10th May 2000, which in any event wrongly indicated that the accused was convicted of two counts of theft and not one, be set aside and that a correct warrant be re-issued, on which the outcome of the matter on review stands to be reflected.

The learned Magistrate must ensure that warrants are diligently scrutinised to ensure its correctness, prior to issue of same, unlike the present example.

JACOBUS P. ANNANDALE

Judge