IN THE APPEAL COURT OF SWAZILAND

In the appeal of App. No. S.18/81

Rev. Themha Ndaba Appellant

vs

REGEH Respondent

CORAM: Maisels J.P.,

Dendy Young J.A.

Isaacs J. A.

For Appellant: Earnshaw

For Respondent: Thwala

JUDGMENT

(Delivered 28th January 1982)

MAISELS J.P.

The Appellant was found guilty in the High Court of theft from the Tisuka TakaNgwane Fund of sums totalling E78,196.31. He was sentenced to imprisonment for 7 years of which two years was suspended on certain conditions and he was also ordered to pay compensation in the full amount he was found guilty of having stolen. During the course of the trial an application was made to the learned Chief Justice who presided at the trial for his recusal on the ground that he had pre-judged the issues and that he had erred by continuously attempting to curtail the cross-examination by the Defence of vital Crown witnesses thus stultifying the Defence in the presentation of the case. This application for recusal was refused by the learned Chief Justice and the first point taken in this appeal on behalf of the Appellant by Mr. Earnshaw who appeared for him is that the learned judge erred in refusing to recuse himself in as much - so it is said - as he had pre-judged the issues. Mr. Earnshaw when arguing the matter yesterday referred to the fact that there were cetain omissions from the

record and at the request of the Court he filed an affidavit which indicates that there appear certainly to have been omissions from the record. I emphasize the word "omissions" because it is clear from what Mr. Earnshaw stated that these omissions were not deliberately made but occurred in the course of the transcription from the tapes of the very lengthy record in this case. It is necessary to deal firstly with the question of whether the learned judge erred in refusing to recuse himself. We have, of course, considered the whole record in this matter together with the record as supplemented by the omissions to which Mr. Earnshaw referred in the affidavit which he filed yesterday. I may say that Mr. Earnshaw also stated that there were probably other omissions from the record but in the short time at his disposal he had not found any others and these were in any event sufficient from his point of view - so he claimed - to justify his contention that the learned judge had prejudged the issues and ought not to have refused to recuse himself. The real ground for complaint seems to be that the learned judge had indicated that having heard

the evidence of Messrs. Mziniso, Mdluli and Dr. Khumalo that the Fund had no power to grant loans, that if the Appellant had received cheques signed by members of the Administering Committee he (the Appellant) must have known that the Fund had no power to grant loans. I should perhaps here interpose to say that the three gentlemen whose names I have mentioned constituted a committee appointed by His Majesty to administer this Fund. I should also here add that the Appellant was appointed at a certain stage to act in an honorary capacity (as were the other persons) as the Accourtant for this Fund. The point was taken by Mr. Earnshaw that this statement made by the learned Chief Justice at an early stage of the proceedings indicated that he had prejudged what would be an important issue in the case particularly as the Defence evidence had not yet been heard.

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The learned judge in giving judgment on the application for recusal during the course of the trial said and I quote -

"My remarks were not in any way an indication that I have made up my mind or prejudged the case, as indeed I have not. It is inevitable that a court should during the course of a case form impressions on the evidence and in my experience it is of assistance to the Defence for the Court to vocie these impressions so that the Defence can model its case with a view to correcting or dispelling them. To do this does not mean that the Court has prejudged the issue and in my opinion the expression of a prima facie view on this matter cannot be regarded as any indication that the Accused will not receive a fair trial." This statement is in accord with what was said by Galgut J in Attorney-General v Assistant Magistrate and Another 1960 (1) SA 491 at 492 (T) and would seem on the face of it to be a complete answer to Mr. Earnshaw's submission. There is no reason to believe that what the learned judge stated is not true. On the contrary a reading of the record indicates that considerable patience was shown by the judge in hearing this long trial. Reference was made by Mr. Earnshaw to the case of S v Bam reported in 1972 (IV) S.A. page 41 at page 43 where the authorites on the question of bias were fully considered and it was there pointed out that "the bias which disqualifies a judicial officer from trying a case must be in connection with the litigation in question and must be of such a nature that a real likelihood exists that the judicial officer will have a bias in favour of one of the litigants from kindred or any other cause..... If a judicial officer affected by real likelihood of bias in the sense indicated, presides at a criminal trial he commits an irregularity in the proceedings every minute that he remains on the bench."

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See also the case of R V. Milne and Erleigh (No. 6) 1951 (1) South African Law Reports p. 1 and a further Milne and Erleigh case reported in the same volume of the South African Law Reports at page 8.5.

We have given careful consideration to what Mr. Earnshaw has stated but we are unable to find any justification for his submission that the learned judge had either prejudged the issues or that he was in any way biased as against the Appellant. On the contrary, in fairness to the learned Chief Justice, on a reading of the whole record it seems to us that he went out of his way to endeavour as far as possible to do justice and to be fair as between the Appellant and The Crown. Consequently there is in our judgment no bais for the first ground or appeal.

But there is another aspect of the matter which has to be considered, and that is the second point raised in the grounds of appeal, viz. "That the learned judge erred in convicting the Appellant with regard to four cheques totalling E12,968."

It is said that this finding of the learned judge was erroneous and not supported by the evidence.

The effect, of course, of all this is that at best for the Appellant assuming that there was any question of bias on the part of the learned judge there would have to be a re-trial and taking the notice of appeal at its face value it would seem that the Appellant on his own admission would have been guilty of the theft of some E66,000 (I merely give that as a round figure without giving the exact amount). It is necessary, howevev,, now to deal with this question of E12,968, i.e. a cheque No. 410 dated 26.9.78 a second one No. 413 dated 6.10.78; a third one No. 433 dated 24.11.78 and a fourth one No. 447 dated 24.11.78.

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The total amounts of these cheques were respectively E3205, E3204, E4361 and E3204. These cheques were cashed against the account of the Fund at Barclays Bank. The counter foils of these cheques were for figures of E20, E20, E46 and E20 respectively, and the Crown case is that the figures on the cheques were altered so that in the first case the E20 became E3205, the second one. E3204, the third one E3461 and the fourth one E3204. The counterfoils as I have stated were for E20, E20, E46 and E20 respectively. These were admittedly in the handwriting of. the Appellant. The paid cheques which were in the possession of the Appellant have disappeared and they cannot be found. He had authority to take Bank statements and paid cheques from the Bank (Barclays Bank) and the inference is irresistible that the cheques were destroyed by him. The question arises why the paid cheques were destroyed byt him. The answer would seem to be having regard to facts, to which I shall refer, that there must have been either an alteration to the amounts on the cheques themselves to reflect the amounts which were paid by the Bank, an unauthorised alteration, or alternatively that there might have been a forgery of a signature or signatures on those cheques. What is important to note is that on the 25th September 1978, when the first of these cheques for E3205 was paid by Barclays Bank the Appellant deposited to his account at Standard Bank E1000 on the 26th September and on the same day E2400 to a savings account which he had at the Swaziland Development and. Savings Bank; that is an amount totalling E3400.

With regard to the second cheque for E3204 he deposited on the 6.10.78 E1000 to the credit of his own account at the Standard Bank, E2200 in his savings account, and further amounts to his account at the Standard Bank, E500 on the 1.11.78, E200 on the 11.11.78, and E500 on the 14.11.78. With regard to the third cheque for E3461 dated 24.11.78 and the cheque for E3204 on the same

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date paid by Barclays Bank, the Appellant deposited to his account at the Standard Bank E400 on the same date, and on the 27.11.78, that is three days later, he paid to his account at the Swaziland Development and Savings Bank three sums totalling in all E7200. The Appellant's salary at the time he made a voluntary statement to the Police in January 1979 was E6444 per annum and he had apparently been receiving from the Government prior to that time a salary of E5040 per annum. It would seem therefore that the vast payments into his account at the time when these cheques were paid by Barclays Bank, required some form of explanation by the Appellant.

Now, the explanation which he gave to the Auditors and which is recorded in the ledger is wholly unsatisfactory and does not accord with the suggestion that this money might have been earned by him or with the suggestion, more importantly, that the cheques were drawn for a legitimate purpose connected with the Fund. There was therefore on the documentary evidence alone without reference to any oral evidence, a very strong prima facie case against the Appellant. Under these circumstances the question arises why the Appellant did not give evidence. It is quite true that he made a statement from the dock and thus the trial court was obliged to consider such a statement together with the other evidence in the case (see the case of Cele, 1959 (1) South African Law Reports page 245 A.D.). But this statement assumes less weight than if it

were given under oath having regard to the fact that the Appellant has not submitted himself to cross-examination, (see the remarks of Ogilvie Thompson, J.A. in Cele's case supra at page 257). It seems also to "be less effective where the accused is defended by counsel than when he is undefended. This also appears from Cele's case supra and reference might also "be made in this connection to the case of Rex de Wet, 1933 T. P. S. 68 and Rex v Sebi 1950 (III) (3) South African Law Reports 693 (0).

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The present is a case which in my judgment clearly called for evidence to be given on oath by the Appellant. In the case of Ndwandwe vs Rex reported in 1970-76 Swaziland Law Reports page 386 at page 388, giving the judgment of the Court of Appeal consisting of the then President Mr, Justice Ogilvie Thompson, Mr. Justice Milne and Mr. Justice Smit, Mr. Justice Smit said this:

"I agree with the trial Court that the evidence given by the Crown raised a prima facie case against the Appellant of theft and forgery in connection with these two cheques Ex. B 2 and B. 17."

I would like to pause here and say that the evidence led by the Crown in this case, raised a prima facie case, at least, against the Appellant of theft in connection with the four cheques which have been under discussion. Then the judgment proceeds:

"Holmes J.A. stated in the case of S v Lesoko and Others, 1964 (IV) South African Law Reports 768 A.D. at page 776 that, the true position is that in cases resting on circumstantial evidence if there is a prima facie case against the accused, which he could answer if innocent, the failure to answer it becomes a factor to be considered along with the other factors; and from that totality the Court may draw the inference of guilt.' Whether the signature purporting to be the Appellant's are genuine or not it is something peculiarly within his own knowledge. If he were innocent he could easily have refuted the prima facie case by his own evidence denying the genuineness of his own signature. He has only himself to blame if an adverse inference is drawn from his failure to give evidence in a case like this."

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Applying what was said in that case to the present case the position is that the cashing of these cheques, the large deposits made by the Appellant to his own account at the Standard Bank and in his savings account simultaneously or almost simultaneously with the Fund's cheques being cashed at the Bank indicate, in my opinion, that this was pre-eminently a case where the Appellant should have given evidence (if he could have) explaining the remarkable coincidence to put it at its lowest - of this cashing of cheques and paying of these large amounts into his own accounts. Then in addition there is the explanation which he gave the auditors, which simply cannot stand any scrutiny, and again in respect of which the Appellant should have taken the Court (if he could have) into his confidence and explained how he came to be possessed of these large sums of money. In my judgment the Crown proved the case against the Appellant beyond all reasonable doubt and the appeal should be dismissed.

BENDY YOUNG J.A.

I agree with the judgment of the learned Judge President. I want to take this opportunity to add one further comment to the remarks I made earlier during argument, anent Dr. Khumalo's part. These remarks must be taken to apply equally to Mr. Mdziniso who was also put forward as an accomplice by the Crown, These two men made no admissions of dishonesty of any sort on the record and consequently should not have been regarded as accomplices. The learned Chief

Justice should not have considered the question of indemnity in regard to them at all. I want to add that I am dealing only with the evidence as it appears on record,

Whether there is other evidence against these gentlemen is, of course, quite another matter, I agree with the judgment of the learned Judge President.

I agree that the appeal be dismissed.

I. ISAACS

(Signed)

JUDGE OF APPEAL

The appeal is dismissed,

(Signed)

I. A. MAISELS

PRESIDENT OF THE COURT OF APPEAL.