

IN THE APPEAL COURT OF SWAZILAND

APP. NO. 4/81

In the matter between:

ENOCK J DLAMINI Applicant

versus

REGEM Respondent

CORAM: MAISELS P

ISAACS J A

VAN WINSEN J A

REASONS FOR JUDGMENT

DELIVERED ON 6TH OF JULY 1982

VAN WINSEN J

The Applicant was convicted in the Magistrate's Court, Mbabane, on the 18th September, 1980 of the crime of fraud for which he was sentenced to a fine of E300 or 300 days imprisonment and in addition was given a prison sentence of 90 days. On appeal the conviction was confirmed and the prison sentence was altered to one suspended for 3 years. A subsequent application to the High Court for leave to appeal to the Court of Appeal was refused. Applicant, despite the delay in

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doing so, presently seeks leave from this Court to prosecute an appeal against the judgment of the Magistrate. Applicant's delay is condoned.

In considering whether to grant this application the Court must have regard to the chance of success on the merits of the proposed appeal, as well as to the reason advanced for the delay. It is unnecessary in considering the merits of applicant's case to refer in any detail to the full facts of the case which have been set out in the judgment of the presiding Magistrate, as well as in the judgment of Nathan C J and Cohen J in the High Court. It will suffice to refer to the essential facts bearing on this application. The Crown's case against applicant was that the latter had misrepresented to the Swazi National Treasurer, one ZWANE, that a sum of E2648,76 was required to be paid in cash to labourers employed on the construction of certain buildings for the Swazi National Administration, whereas in truth only E812,29 in cash was needed for the labourers working on such buildings and that, as a result of such misrepresentation, ZWANF parted with E1.835,97 to the prejudice of the aforesaid Administration, which sum Applicant thereupon used for his own purposes. It is not in dispute that Applicant received E2648,76 in cash from ZWANE and that Applicant used E812,29 to pay the labourers who in consequence received all that was due to them.

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Applicant's case is that he used part of the balance of E1835,97 to buy timber from a firm called Builders Place to use on State Buildings for the maintenance of which he was responsible. He claims that he paid Builders Place E1343,76 for the timber. He produced a receipt for this payment which the prosecution claimed had been forged. An employee of that firm, one GININDZA, testified that the firm had not received any such sum nor had it issued such a receipt. Applicant furthermore claimed that he had also, out of the balance of the sum mentioned above, purchased electrical equipment from a firm by the name of Bonga Refrigeration for a sum of E494,94 for the cold storage room being built at the expense of Swazi National Administration. He produced a receipt for this amount purporting to come from that firm. The owner of the business, one Ginindza, denied having received such an amount from Applicant or having given Applicant a receipt for this sum.

The Magistrate found that the Applicant had neither bought the timber from Builders Place nor the electrical equipment from Bonga Refrigeration but that he had used the sum of E1835.97 for himself.

Cohen, J in his judgment on appeal saw no reason to differ from the findings of the Magistrate on these points. He was also not prepared to interfere with the sentence save that he held that the imposition of a

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prison sentence was not compulsory and suspended the 90 days imprisonment imposed by the Magistrate for a period of three years. NATHAN C J concurred in this judgment.

It was contended by Mr Lukhele in this Court on Applicant's behalf that the Crown had failed to prove that when Applicant represented to ZWANE that he required E2648,76 for labourers' wages he did so with the intent to defraud the Swazi National Administration or that this representation resulted in prejudice to the Administration. He pointed out that the amount of R2648.76 was in fact owing by the Swazi National Administration to the Swazi Ministry in terms of the agreement whereby the former had undertaken to bear the expenses incurred in connection with the construction of the cold storage building and a two bed-roomed house. Applicant having paid the wages due to the labourers, but for the overtime pay of E812.29, was entitled to be paid this latter amount plus what he had paid the labourers from the funds placed at his disposal for maintaining the Royal Residences, in all a sum of E2648,76. Having out of this sum paid the overtime pay due to the labourers, i.e. E812,29 applicant used the balance of E1836,97, so Mr Lukhele claimed, to purchase material for use in the Royal Residences.

In fact, of course, the evidence shows that so far from representing to ZWANE that he needed E2648,76 to pay the labourers overtime pay of E812,29 and the balance

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to reimburse his vote, he represented to ZWANE with the aid of paysheets that he needed from him the cash to pay labourers the aggregate of the sum appearing on the pay sheets. In order to lend verisimilitude to this claim he brought with him to ZWANE two members of his accounting staff armed with pay envelopes into which the labourer's cash was to be put. Had he explained to ZWANE that only E812.29 was required to be paid to the labourers in cash the latter would clearly not have paid him the balance of E1835,97 in cash but would have drawn a cheque in favour of the Ministry for that amount which would in turn have frustrated applicant's obvious intention, as demonstrated by his subsequent actions, of converting the money to his own use. In making the representation he did to ZWANE he shewed a clear intention to defraud. That the Swazi National Administration was at least potentially prejudiced as a result of this misrepresentation is clear from the fact that they were bound by their agreement with the Ministry

to reimburse it for all expenses incurred by it on the cold storage building and the two bedroomed house. The fact that the amount of E1835.97 had been diverted into Applicant's pocket meant that the Swazi National Administration remained indebted to the Ministry in that amount. Accordingly, all the

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elements of fraud with which Applicant was charged were proved. Applicant has accordingly no prospect of succeeding in an appeal.

The application for leave to appeal was thus dismissed.

SIGNED

L. de V VAN WINSEN

JUDGE OF THE APPEAL COURT

I agree:

SIGNED

I.A. MAISELS

PRESIDENT OF THE COURT OF

APPEAL

I agree:

SIGNED

I. ISAACS

JUDGE OF THE APPEAL COURT

Order : Leave to appeal dismissed.