IN THE COURT OF APPEAL OF SWAZILAND

APPEAL NO. 25/1981

In the matter between :

SAMUEL DOCTOR DLAMINI

vs.

THE QUEEN

CORAM: MAISELS, P.

WELSH, J.A.

AARON, J.A.

FOR CROWN: MR. MASINA

FOR APP.: MR. DUNSEITH

JUDGMENT

(Delivered 11th May, 1983)

AARON, J.A.

Appellant was convicted in the Court below on 4 counts of theft of money from the Swaziland Government. He had been brought to trial in the Court below on 17 counts of fraud and forgery and uttering, and a number of theft charges were brought as alternative charges. In most cases a single charge of theft was brought as an alternative to a group of other charges.

The charges on which Appellant was convicted were the following:

First conviction : Theft of E1170 (alternative to five counts of fraud ; counts 1 - 5)

Second conviction : Theft E432 (alternative to two counts of fraud : Counts 6 and 7)

Third conviction : Theft of E2590 (alternative to two counts of fraud : counts 13 and 14)

Fourth conviction : Theft of E300 (alternative to one count of fraud : Count 17).

He was sentenced to a total of 2½ years imprisonment and was ordered to repay the sum of E4492 to the Government of Swaziland. He appeals against all four convictions and the sentence.

First conviction (Alternative charge to Counts 1-5)

At the time when the offences were alleged to have been committed, Appellant was employed by the Swaziland Government as Senior Accountant in the Ministry of Works, Power and Communications, and served as Deputy to the Principal Accountant. His function was to control the finances of the Ministry and to supervise all staff engaged in money matters.

Counts 1-5 and the alternative charge of theft which formed the basis of the first conviction, related to the balance of money left over at the end of November 1979 out of an amount of E5120 which had been requisitioned for the payment of wages to labourers engaged on a special

project. It was common cause that money estimated to be needed for the payment of wages is requisitioned monthly from the Treasury and that any surplus moneys left over at the end of the month should be refunded to the Treasury and the relevant pay sheet "retired" within 14 days of the end of the month. In the general run of cases, this operation is repeated by Government departments every month, but as this particular amount of E5120 related to a special project, wages were only requisitioned on the one occasion.

At the end of November, there was about E2000 left over, but the pay sheet was not retired immediately because the clerical officer in charge of making the payments, one Goina Dlamini (to whom I will refer hereafter as "Gcina") was endeavouring to trace certain labourers whose names appeared on the pay sheets, but were missing.

From an exhibit which Appellant asked should be handed in (Exh. MM) it appears that on 17th March 1980, the Principal Accountant conducted a surprise check on cash, and found that Gcina still had a surplus of E1939.33. Appellant referred to this in his evidence. He said the Principal Accountant had told him of his check, and had mentioned the amount of cash found by him.

It was common cause that Appellant made another check on Gcina on 3lst March. The money in the safe was counted, and found to be correct. He then told Gcina that he required E100 as an advance for petrol while on official duties, and took this amount from him. He gave him

an unofficial receipt which he signed as evidence that he had taken the money, and said he would repay the money after he had submitted his monthly claim for travelling allowance. So much is common cause. Gcina added that the money was never repaid to him, but Appellant contended that he did repay him. He did not however take back or destroy his receipt. He thought Gcina would himself destroy the document.

Similar incidents are admitted to have taken place during the months of April, May, June and July, when Appellant took further amounts of E60, E500, E20 and E490. Gcina also stated that there was a last occasion on which Appellant took money from him. This was E20, and he was then left with about E3, in small coins. This last E20 was not made the subject of a charge, and if one adds the E20 to the five amounts which did form the subject of charges, one arrives at a total of E1190 taken by Appellant. Gcina says none of these amounts was repaid, but Appellant contended that he repaid them all at the end of each month, after he had claimed his travelling allowances. In no case did he take back or destroy the receipt or voucher he had given Gcina. The substantial issue on this count is whether the moneys were repaid.

Evidence was led by the Crown that it is not permissible under any circumstances for any surplus left over from an amount requisitioned for wages to be used for another purpose. Gcina in his evidence stated that he was aware of this, but that he was a junior officer, and

the Appellant his superior. He also stated that by June 1980, it was evident that there would be no more claimants for wages out of the surplus, and that he would have retired the relevant pay sheets, but could not do so because he was still waiting for the Appellant to repay the moneys he had drawn. He made frequent requests to Appellant for repayment, but Appellant did nothing more than say he would repay the money.

It appears from Exh. MM that on 21st July, 1980, the Principal Accountant instructed Appellant to take the surplus moneys to the D. R. O. and thereafter to retire the pay sheets. This was however not done, for in January 1981, the auditors made an inspection and found that the pay sheets had still not been retired. Moreover there was only 59 cents left, which meant that at that date there was a shortfall of E1193.37 in the moneys which should have remained over from the November wage requisition.

Appellant also elicited, in his cross-examination of Gcina, that the latter had gone on a course at the beginning of January 1980 (before the check made by the auditors), and had then endeavoured to hand over the small amount of cash remaining to the official who would be taking his place. The official however refused to accept the money because the pay sheets had not been retired. Gcina then reported this to Appellant, as his superior officer, and was told to lock the money in a separate till.

Arising out of these allegations, appellant was charged with 5 separate counts of fraud, each relating to the events of a particular month. In the alternative, he was

charged on a single count of theft in respect of the aggregate amount of E1170 taken by him over the five-month period. He was convicted on the alternative count.

The learned Judge rejected Appellant's claim that he had repaid the money to Gcina, and unhesitatingly accepted Gcina evidence that the money had not in fact been repaid.

On appeal before us, it was contended by Mr Dunseith, who appeared on behalf of Appellant, that Gcina's evidence should not have been accepted in preference to that of Appellant. It is obvious that if Appellant's version is to be believed, then there must be some other explanation as to why there was a shortfall in the money which Gcina was supposed to have. Mr Dunseith suggested that there was at least a reasonable possibility that Appellant's failure to take back or destroy his vouchers created an opportunity which Gcina exploited, and that having seen the possibilities created by such a situation, he may have taken advantage thereof by retaining the moneys for his own benefit Gcina had been asked in evidence whether he had reported Appellant's failure to refund the money, and said that he had reported this to one Hlanganani. However, when Hlanganani gave evidence he denied having received such a report. The trial Judge accepted Gcina's evidence in preference to that of Hlanganani. Mr. Dunseith argued that there was no substantial ground for doing so, and that if Gcina had not reported Appellant to his superiors, this pointed to his own guilt.

He rounded off this argument by contending that where the door is left open for the possible misappropriation of moneys by persons other than an accused, the accused must be given the benefit of the doubt. In this connection, he cited the High Court decision in R v. Nxumalo 1970 - 76 SLR 414, and the unreported judgment in R v. Boy Bhutana Kunene (Case No. 80/80).

We cannot accept this argument. It does not provide an answer to the crucial question of why Appellant did not take back or destroy the receipts or vouchers he had given Gcina. The answer given by Appellant himself in his evidence was unconvincing. Nor does the argument explain why Appellant did nothing to ensure that the money was retired after he had been instructed to do so by the Principal Accountant in July 1980. If he had indeed paid back all the money, but left the receipts with Gcina, one would expect Appellant to have been particularly careful to see that Gcina accounted for all the money at that stage. The High Court decisions referred to by Mr. Dunseith do not in my view assist him. In both those cases, there was a deficiency of money, but no clear evidence that the person accused had taken it irregularly. There were other persons who had the same opportunity as the accused had to steal the money, and in such circumstances it was correct to say that a theft had not been proved beyond reasonable dount. But in this case, an unauthorised taking of money by the Appellant has been admitted, and the issue is whether he returned the money. The suggestion that the Appellant did return the money, but that because he failed

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to take back or destroy the receipts he had given, another person could have taken the money a second time, does not raise a reasonable doubt in my mind in circumstances where the Appellant's subsequent conduct is inconsistent with what could reasonably have been expected from him.

Mr Dunseith also put forward an argument based on the figures in Exh. H. This was the reconciliation of how the amount of E5120 requisitioned for wages in November 1979 had been dealt with. Founding his argument on the evidence that when the surprise check had been carried out on 17th March 1980, cash in an amount of E1939.33 had been found, Mr Dunseith calculated that if Appellant had thereafter drawn El190, this would have left only E749, 33 in cash. Yet according to Exh. H, amounts totalling E887,63 had been paid to claimants after 24th March 1980. This proved, so the argument ran, that some amounts must have been paid back to Gcina after 17th March.

The flaw in this argument is that the dates reflected in Exh. H do not necessarily reflect exact dates of payment. The payments reflected as having been made before the payments which total E887,63, total E3038,41 and if these are deducted from the original amount of E5120, the difference is E2081.59. This is more than the amount found at the cash check on 17th March. Clearly, therefore, there is some inconsistency in the dates of the entries on Exh. H. It may have been possible to clear this up in evidence had the matter been raised in the Court below, but it was not canvassed.

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If, instead of trying to date the various payments, we look at the overall figures, we get the following results :

Amount requisitioned in November E.5120,00
Less Total wages paid as per Exh. H 3926,04
Balance that should be left 1193,96
Less Amounts drawn by Appellant 1190,00
3,96

This calculation is entirely consistent with Gcina's evidence, and it does not require the inference that some money was repaid in order to make the figures balance.

In the result, I am of the view that the evidence fully established the theft of E1170 by the Appellant, and I would dismiss the appeal against this conviction.

Second conviction (Alternative charge to Counts 7 and 8)

The moneys which Appellant was convicted of having stolen in respect of this count also related to a balance which remained over at month end. On this occasion, the surplus was E772,25, and was the balance of a sum requisitioned for the month of September 1980, and which was under the control of Grace Khoza, the accountant at the Mobile Unit of the Ministry of Power, Works & Communications.

It was common cause that Government officials who are due to travel out of the country would in the normal course apply to the Accountant-General for a tour advance. On completion of the tour of duty for which the advance is made, the official completes a claim form for his expenses,

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which is sent to the Treasury for payment. If his actual expenses exceed the advance, the Treasury will give him a cheque for the difference. If, however, his expenses are less than the amount advanced, he will be required to repay, or "retire", the excess.

In cases of urgency, when there is no time to obtain a tour advance from the Accountant-General, and if the amount required is small, the requisite money may be drawn from the Ministry's standing cash float. In such cases, an application form is completed and given to the Ministry's accounting section, and is retained in the section.

The events covered by this charge related to such drawings, one by the Permanent Secretary of the Ministry, Gilbert Mabila, and a second by the Under Secretary, Christopher Mkhonta. Mabila testified that in October 1980, he was due to go to Maputo on official duties, and he duly applied for a tour advance of E178.00. The application form signed by him was handed in as an exhibit. There was a delay in the receipt of this sum, but Appellant indicated that he would try to get him the amount from the Standing Cash Advance. According to Mabila, Appellant subsequently gave him E178 in cash. Mkhonta's evidence was that he also was required to go on an official tour of duty during October, in his case to Lesotho, and as there was not sufficient time to complete an application for a tour advance in the usual way, Appellant advanced the amount required, which was E90, from the Standing Cash Advance.

In actual fact, however, the moneys did not come from the Standing Cash Advance. According to Grace Khoza's

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evidence, Appellant sent for her on 8th October He said he had heard there was a surplus in her September wage account, and asked her for E500, saying that this was required by the Permanent Secretary for his expenses on a tour of duty to Maputo. He did not give her any voucher signed by Mabila, but himself signed a voucher on which he had written: "I have taken E500 to the P.S. who is going to Maputo". This document was also handed in as an exhibit. About a week later, Appellant came to her again, and asked for a further E200, this time for the Under-Secretary who would be travelling to Lesotho. On this occasion, she was not given any signed voucher, but was told by Appellant to record the payment herself on the voucher which she had been given for the E500 She knew it was irregular to advance these sums in this way, but she gave the money to Appellant because of his senior position.

Appellant had told her the moneys would be repaid after the tour advances had been received.

The moneys were, however, not repaid, and she was unable to retire her pay sheet for September. It was only in March 1981, when a query had been raised by the Treasury, that she retired it.

Appellant did not contest the evidence that he had drawn E500 and E200 in this way, or that the money had not been repaid to Grace Khoza. He claimed that he had paid the full amounts of E500 and E200 to Mabila and Mkhonta respectively, and when asked why he had drawn sums in excess of the E178 and E90 which they had applied

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for, he explained that these sums were only for hotel expenses and allowances, and that he had given them the extra amounts to cover their travelling expenses, as they would be using their own cars. Mabila and Mkhonta both denied receiving anything in excess of what they had applied for, and both denied that they had travelled in their own cars.

Appellant's version was rejected by the trial judge, and he was found guilty of stealing E432, being the difference between E700 and the aggregate of E178 and E90.

I see no reason to disturb this finding. Mr Dunseith contended before us that in the absence of corroboration, the Court should not have convicted on the single evidence of the respective Crown witnesses, both of whom had "an interest or bias adverse to the accused". In my view, the conviction was fully justified by the evidence, for a number of reasons. First, if the Appellant's version is to be accepted, the procedure adopted by him was entirely irregular. Public servants who use their own motor vehicles on government work are expected to bear their own expenses, and to claim reimbursement at the end of the month. In a case where they do not have the funds to meet the expenses themselves an advance may be made to them on production of a payment voucher. In this case, no vouchers signed by either Mabila or Mkhonta were given to Grace Khoza. The only reason that suggests itself as to why Appellant did not obtain such vouchers from them is that the vouchers which they would have signed would have been for the lesser amounts, and these would not have satisfied Grace Khoza /..... .

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If Appellant's version were true, there would have been a reconciliation at the end of October. Not only would Mabila and Mkhonta have had to account for their actual expenses, and adjust these against the advances paid to them, but one would have expected Appellant to ensure that such reconciliation took place, and that the moneys advanced by his department were repaid. But this did not happen, and although Grace Khoza asked him on a number of occasions for the money back, he took no active steps to adjust the position.

Appellant's version is in any event unsatisfactory in itself. Although he claimed that Mabila had told him he was going to use his own car, in Mkhonta's case he said he had merely assumed this, because he knew that he had a car. This evidence cannot be taken seriously.

Then, if Appellant is to be believed, it must follow that Mabila and Mkhonta both retained the excess moneys paid to them, knowing that their applications had been for lesser amounts and that if called to account, they could not justify the receipt of the moneys. This is highly improbable .

Looking at the evidence as a whole, I am satisfied that the learned judge was correct in accepting the version of Mabila and Mkhonta, and in rejecting that of the Appellant. In my view, he was properly convicted on this count, and I would dismiss the appeal.

Third Conviction (Alternative charge to Counts 13 & 14)

This charge relates to two amounts (E590 and E2000) which were given by the Clerk of Works at Piggs Peak, one

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Fonscka Fernado, to the Appellant, on 20th December 1980 and 12th February 1981 respectively. According to Fernado's evidence, Appellant had indicated that he needed the first amount to pay wages to PWD Building Section at Mbabane. He went on to say that the moneys were not returned to him, and that when he retired the paysheets for December and February, these amounts were reflected as missing. These paysheets were handed in as exhibits.

The Clerk of Works of the PWD Branch at Siteki also gave evidence. The tenor of his evidence was to rebut any suggestion that the E590 given to Appellant in December was ever received by his section in Siteki.

Appellant in his evidence did not dispute having requested or having received the two amounts, but denied having told

Fernado that the money was wanted to pay labourers at Siteki or Mbabane. He explained that he had decided to keep a float in his office in case anybody came to him at the end of the month and asked for money because he had a cash shortage. This float would have been in addition to the Standing Cash Advance of E300 authorised for his Ministry. In point of fact nobody came to ask for money, and the Appellant claims that he then returned the E590 to Fernado, so that he could retire his December pay sheet, but in February he again took money from him, this time E2000, for the same purpose. Appellant testified, in fact, that on the second occasion he asked for only E1800, but that Fernado gave him E2000. He claims that he repaid this amount also.

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Appellant's explanation about wanting to maintain a float in his office was rejected by the trial judge as being untrue, and in my opinion, rightly so. Such an action on his part would have been completely irregular and unauthorised, and there is the added factor mentioned by the trial judge, that a figure of E590 is a most unlikely amount to request for such a purpose.

But Appellant's contention that he repaid the two amounts to Fernado merits fuller consideration. The retired pay sheet for the month of December 1980, was handed in as Exh. GG. It reflects that an amount of E15000 was advanced to the Piggs Peak section for the month, and that wages allocated under various headings totalled E12.853.15. This indicates that there would have been a surplus of E2.146.85 at the end of the month. The exhibit reflects further that when Fernado retired the pay sheet, he paid in an amount of E2219.49, i.e. more than the balance he should have had.

In the light of this documentary evidence, it is impossible to understand the evidence of the Crown witnesses. The retired pay sheets were not tendered in evidence by prosecuting counsel, but were put in through Fernado during his cross-examination. A subsequent Crown witness was asked to look at the exhibit, and after doing so, he said in evidence that it appeared that the E590 was also not retired. But he was not asked to explain what portion of the exhibit he was looking at, or why it appeared to him that the money had not been repaid. On the

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contrary, as I have pointed out, it appears to show that the section was not short of E590 at the end of the month, and accordingly this bears out Appellant's version that he did repay the amount.

The position of the February pay sheet (Exh. HH) is different. That reflects an advance of E11.900 in respect of wages, of which E9336.48 was actually paid. This means that there should have been a balance at the end of the month of E2563.52. The exhibit shows that when the pay sheet was retired, only E563.52 was paid in, leaving a shortfall of E2000. There is a note on the exhibit, in pencil, dated 12/2/81 and reading "Senior Ace. borrow 2000".

The contrast between the two retired pay sheets is obvious. In my view the trial judge should have accepted Appellant's version that he had repaid the E590, but he was correct in rejecting his claim that he had also returned the E2000. If he had done so, there is no reason why the pay sheet should have been retired in the form described above. This document corroborates the evidence of the Crown witnesses and even though fey may have been unclear in other respects, in my view the learned judge was fully justified in accepting their evidence as to the non-repayment of the E2000.

Although there were two amounts involved, Appellant was charged in the alternative with only one count of theft. Although the conviction should in my view stand, he should have been convicted of the theft of only E2000, and not of E2590.

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Fourth conviction (alternative charge to Count 17)

This count related to surplus moneys which had remained in the hands of Stephen Dlamini, the Clerk of Works at the Matsapa Royal Residence.

He testified that on Wednesday 4th March 1981, the Appellant had telephoned him to ask whether he had any surplus funds. When he answered affirmatively, Appellant told him there were four labourers in one of the Road Department sections who had not been paid their wages, because of a shortage of money in that section. Stephen Dlamini went on to say that he told Appellant that the Clerk of Works concerned should come to him with the four labourers, so that the labourers could sign his pay sheets. The matter was left on that basis, and he was expecting the Clerk of Works and the four labourers to come up.

The witness was then called away because there was a house burning. Before leaving, he authorised the accountant, Wilson Nkambule, to pay the money to the labourers if the Clerk of Works should bring them up while he was away.

The Crown case was then taken up by Nkambule. He testified that while Stephen Dlamini was away, the Appellant arrived. He claimed to have spoken to the Clerk of Works, and to have been authorised by him to collect the money because the labourers were from separate depots. He then gave the money to Appellant, who signed his name against the figure "E3000" on a piece of paper which bore other writings.

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When Stephen Dlamini returned, and heard what had happened, he said they would go to see the Appellant, and they did this on the next day, the Thursday. Appellant was not at his office, and so they went again on Friday. They did not find him on that day either, and so they went again on the Monday. On that occasion, they found police officers at Appellant's office, and they

were instructed to go to the Police Station to make statements.

Appellant's version is that one Carlton, who was acting as Clerk of Works, came and asked him for about E2000 with which to pay certain students who were working as labourers. He telephoned the Building Section at Mbabane, and was told they had the money. He then sent Carlton to fetch it. But as he himself was going to Manzini, he telephoned the Royal Residence, and when he heard that they had a balance, he went to collect E300. However, when he got back, Carlton told him he had obtained all the money he needed from the Building Section, and that he did not need the E300.

Appellant stated further that he had telephoned Nkambule early on Thursday morning, to ask for invoices relating to a warehouse account which he said was being disputed. He said he then told Nkambule to come and fetch the E300, which he no longer needed. He conceded he was not in his office for the rest of the Thursday, but says he was there on the Friday, that he saw Nkambule, and that he then returned the E300 to him. He, however, got no receipt for it, and did not ask for the return of the paper he himself had signed.

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Nkambule denied the receipt of the money, and Stephen Dlamini supported him by saying that the two of them were together all the time on the Friday when they were at Appellant's office. Appellant was not there at all that day and they returned to Matsapa together.

The trial judge accepted the evidence of the Crown witnesses, rejected that of Appellant, and found him guilty of theft of the E300.

In my view there is no merit whatever in this appeal. Mr. Dunseith contended that in the absence of a proper reconciliation statement, no shortage in the funds of the Matsapa Royal Residence had been proved; but in a case of this sort, when receipt of the money by Appellant was admitted, I do not regard such reconciliation as necessary before Appellant could properly have been convicted. Mr Dunseith also submitted that the Crown had failed to prove an intention to steal. This submission is based on the fact that according to Nkambule's evidence, Appellant had promised to return the money before 15th March, and the Appellant was arrested before that date arrived, so that he could not return the money. This argument cannot succeed. The statements made to Nkambule were untrue, and Appellant's conduct in going to fetch the money after Stephen Dlamini had told him that the Clerk of Works should himself come up with the four labourers, indicates a dishonest intention. He had no authority or right to take the money, and got it from Nkambule only by trickery. His explanation of why he took the E300 from Matsapa when Carlton had already gone to Mbabane to fetch E2000 is completely unconvincing.

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Appellant clearly had a dishonest intention, and the fact that he was arrested before he might have returned the money does not mean that he did not commit theft.

In my view, Appellant was rightly convicted on this count.

In the result, I would dismiss the appeals against all four of the convictions, but in the case of the third conviction, I would alter the conviction to one of theft of E2000, instead of E2590.

As far as the appeals against the sentence are concerned, there is no basis for interfering, even though the amount found to have been stolen in the one count has been reduced.

I would dismiss the appeals against the sentence.

Appellant was ordered to refund the sum of E4492 to the Swaziland Government. In view of the finding in respect of the third conviction, the amount to be refunded should be reduced to E3902.

S. AARON

JUDGE OF THE APPEAL COURT

I agree :

SIGNED:

I A MAISELS

PRESIDENT OF THE APPEAL COURT

I agree:

SIGNED:

R S WELSH

JUDGE OF THE APPEAL COURT