

IN THE APPEAL COURT OF SWAZILAND

APPEAL CASE NO.54/83

In the matter of:

JOHN DU PONT Appellant

vs

THE CROWN Respondent

CORAM: ISAACS, J. A.

VAN WINSEN, J.A.

AARON, J.A.

JUDGEMENT

VAN WINSEN. J. A.

Appellant who was charged with an convicted of the theft of E2 200 appeals to this Court against both his conviction and sentence.

The following extract from the Judgement of the trial Court (Nathan CJ.) sets out in broad outline the main features of the Crown's case.

"It is common cause that the Complainant, who is an old man employed at the Havelock Mine, became entitled to compensation for an industrial disease in the sum of E10754.10. The Accused is a personnel officer at the Mine and it is part of his duties to assist employees in the collection of compensation due to them.

"The evidence is to the effect that on 14th January 1983 the Accused accompanied the Complainant to the District Officer, Piggs Peak, where the Complainant was handed a cheque for the sura of E10754.10. E4000 of this was placed on fixed deposit at the Swazi Bank and E1000 in a Savings account that was opened at the Swazi Bank, Piggs Peak. The Accused assisted the Complain -ant in these transactions. The Complainant can sign his name but otherwise appears to be illiterate. There was some conflict as to whether he can read or write. I do not think it was

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"established that he can do so, but very little, appears to turn on this.

"In regard to the balance of E5754.10 the Complainant was given a cheque drawn by Swazi Bank on Standard Bank Riversdale, Mbabane. (I think Riverside is meant). He and the Accused drove in the Accused's car to Mbabane. They could not cash the cheque for the E5754 because it was crossed and they went, at the suggestion of the Standard Bank, to Barclays Bank Riverside as the Complainant had a savings account at Barclays Bank Piggs Peak. The cheque for E5754 was deposited at Barclays Bank in the Savings Account and simultaneously E2400 was withdrawn and handed to the Accused. Here comes the important conflict between the Complainant and the Accused. They returned to the Accused's car. The Complainant says that he had asked the

Accused to withdraw E200 only and that the Accused gave him this amount when they got to the car. The Accused says the Complainant had authorised the withdrawal of E2400 from the Savings Account and that the Accused paid the whole of this sum to the Complainant when they got to the car. The subject matter of the charge, E2200, is the difference between E2400 and E200. The Complainant says that the following day, Saturday, his daughter looked at his various books and documents and told him that he had withdrawn E2400 and not merely E200. He immediately reported the matter to the Police."

Appellant gave evidence in which he confirmed that he was responsible for processing the claim of Complainant. Before the compensation was paid out he had informed the latter that it would be in the neighbourhood of E10,000. After he had been paid out Complainant specified that he wanted to put E2400 on fixed deposit, E1000 into a Savings Account and the balance in cash. Appellant agrees with the Crown witness that Complainant was given a cheque for E5754 drawn by the Swazi Bank on the Standard Bank, Riverside, and that he drove

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Complainant to Mbabane. He claims that he gave two youngsters, one being the witness Jabulane Mamba, a lift to Mbabane. On the way the Complainant, so Appellant testified, said he wanted to buy himself a Datsun motor car with the money he wanted to cash. Jabulane Mamba claims that he, too, heard Complainant say he wanted to buy a Datsun car. Complainant denied that he had said so. He said he had no use for a car there being no roads to where he lived. When they arrived at the Standard Bank in Mbabane Complainant, according to Appellant, wanted the whole of the cheque of E5754 in cash. As this could not be done at the Standard Bank, they went, on the advice of an official of the latter bank, to Barclays Bank, at a branch of which bank Complainant had a savings account. There an enquiry counter clerk filled in a deposit slip for the cheque of E5754.10 while Appellant filled in a withdrawal form for the E2400 which Complainant, so Appellant testified, wanted in cash. According to Mr. Stewart, who is employed as a teller by Barclays Bank and who was present in the bank at the time that the deposit and withdrawal slips were made out, Complainant signed the deposit slip before it was filled in by Appellant. While Appellant testified that Complainant had asked him (Appellant) to put the money in his briefcase, Stewart says that he handed the money to Appellant who put it in his briefcase while Complainant was sitting away from the counter on a chair provided for the public. Complainant also testified that the money was handed over to Appellant while he was sitting down and the latter put it into his briefcase. Complainant denied that he had asked the Appellant to do so.

As to what happened in Appellant's car after the latter and Complainant had returned to it from Barclays Bank, Appellant testified that he got into the car and put his briefcase between his seat and the passenger seat occupied by Complainant and that he had from the briefcase counted out the E2400 which he had withdrawn and handed it to the Complainant, The latter stated that the briefcase was placed to the right of Appellant between the seat and the door on the driver's

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side and he did not see what was in it.

In his judgement the trial judge while he said that the Complainant did not strike him as being a dishonest witness, he was nevertheless not a very satisfactory one.

The principal areas of dispute between Appellant and Complainant relate to events in the bank, and to the latter's alleged intention which he expressed to buy a Datsun car while they were on the way to Mbabane. While it is common cause that E2400 was drawn from Barclays Bank and the Appellant put the money in his attache case, it was critical to decide whether the amount

drawn was the amount specified by Complainant. If it was not, and Complainant had only asked for E200, then Appellant would have had to conceal from Complainant that he had drawn E2400. To do so it would have been necessary to obtain Complainant's signature on the withdrawal form before it was filled in, and to conceal from him the amount of money handed over to him (Appellant) by the teller in the bank. If Appellant's evidence is correct that Complainant had told him at the Standard Bank that he wanted E5754.10 in cash, there seems to have been no reason why he should have asked him while at Barclays Bank how much he (Complainant) wished to withdraw. It is therefore improbable that he asked him this question. According to Complainant's evidence it would have been unnecessary for Appellant to have asked any questions while in Barclays Bank about the amount to be withdrawn since Complainant had previously told him that he wanted E200. If this evidence is correct then it is understandable why Appellant would have wanted to conceal from Complainant the figure on the withdrawal slip and the amount of the money handed to him by the teller and placed in his briefcase.

Mr. Flynn, for Appellant, however, argued that the Court a quo erred in accepting the evidence of Complainant, more especially in the light of its finding that he was not a very satisfactory witness.  
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reading of the record certainly shows that in a number of respects he was confused. That, however, is a different matter from saying that he was a dishonest witness who deliberately invented the whole story, either with or without the assistance of his daughter, after he had arrived home from Mbabane. I find such an invention very difficult to accept and it would appear to be devoid of any motivation.

The case for Appellant relied heavily upon the fact that the reason for the alleged request for a withdrawal of E2400 was to enable Complainant to buy a Datsun motor car. It is clear from the evidence that Complainant had no use for a motor car nor did he know anything about a car. There is no rational explanation for Complainant having arrived at the figure of E2400 as being the sum required to buy a motor car and indeed Jahulane, whose evidence was in any event rejected by the Court a quo - and rightly so, in my opinion - did not say that Complainant had mentioned any sum which he wished to expend on a motor car.

I can find no ground on which to defer from the conclusion of the trial court that the evidence concerning the expressed intention of the Complainant to buy a car was a fabrication to justify the withdrawal of E2400 from the bank.

In regard to the sentence it appears that the trial judge was influenced in the sentence he imposed by the question as to whether Appellant was prepared to express remorse for his conduct by means of stating that he accepted the Court's judgement on the merits. He is recorded as having said the following in this regard.

"It may be unusual but I should put it to defence counsel that you may not answer it if you prefer not, that does the accused accept the judgement or doesn't he because on the one hand if he accepts the judgement I may regard that as a matter of showing remorse. If he doesn't and still wants the appeal he is entitled to but it might probably affect my (inaudible)".

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It is I think safe to assume that the reference in the last line was to the sentence. This approach to sentencing was prejudicial to Appellant and constitutes a misdirection on the part of the trial judge since his remarks resulted in placing Appellant in a quandary as to whether to undertake not to appeal and hopefully thereby have a lesser sentence imposed on him or take the risk of

appealing, accepting that it might involve having a heavier penalty imposed upon him. In view of this misdirection it would be appropriate for this Court to consider the sentence afresh.

The first matter to be considered is whether a term of imprisonment would be an appropriate sentence, or whether the Court should only impose a fine with an alternative prison sentence. Reference was made in argument to two "trends" to be found in judicial pronouncements in similar cases in the High Court of Swaziland. The one "trend" was said to favour a prison sentence in cases of this kind and the other the imposition of a fine. Reference to "trends" in deciding upon an appropriate sentence - if such there be - is unhelpful in determining the fit punishment to be imposed in any particular case. The facts in each case are uniquely different from those in other cases, and, although precedent is not without value, it should not be regarded as a prime determinant of the nature and severity of the sentence.

Allowing for the facts that Appellant has a good working record as an employee in a responsible job with the Havelock Mine and that he is a first offender with four young children to support, I am nevertheless of opinion that it is an aggravating factor that he betrayed the trust placed in him by his firm to assist its employees, such as Complainant, in obtaining compensation due to them by the firm. After careful consideration this Court decided that a term of imprisonment, half of which is suspended, represents a just retribution for Appellant's crime.

It was for these reasons that the Court made the following order:

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"The Appeal against conviction is dismissed. The sentence imposed by the trial court is amended as follows:

Appellant is sentenced to 2 years imprisonment, 12 months of which are suspended for a period of 3 years, on condition that Appellant repays to the Complainant the sum of E2200 in instalments of E550 per quarter, the first payment to be made within 6 months of his release from prison, and subsequent payments in 3 monthly instalments calculated from the date of the first payment.

Such payments are to be made to the Registrar of the High Court, who is directed to transmit such amounts to the Complainant.

In the event of any payment not being made in accordance with this order, the Registrar is directed to inform the official referred to in Sec. 215(1) of the Criminal Law and Procedure Act of 1958, and also the Complainant, who shall be at liberty to institute such civil steps as he may be advised".

(Signed)

L. de V. VAN WINSEN J.A.

(Signed)

I. ISAACS J.A.

(Signed)

S. AARON J.A.