IN THE APPEAL COURT OF SWAZILAND

CRIM APP. CASE NO.10/86

In the matter of

NDODA DLAMINI

vs

THE KING

CORAM: MELAMET J.P.

SCHREINER J.A.

HANNAH C.J.

FOR THE APPELLANT: MR. W.M. PUPUMA

FOR THE CROWN: MR. N.S. DLAMINI

JUDGMENT

(8/10/87)

Hannah, C.J.

The appellant stood trial in the High Court on an indictment containing one count alleging the theft of E20,000, a second count alleging the forgery of three documents and a third count alleging the uttering of the forged documents. He was indicted jointly with one Joyce Masika and while Masika was convicted of forging and uttering two of the documents referred to in counts two and three the appellant was convicted by Hassanali J. on the first and entirely separate count of the theft of E20,000. He was sentenced to five years imprisonment of which two years were conditionally suspended and now appeals against that sentence.

The facts on the first count can be stated quite briefly. The appellant was employed as a cashier and teller at the Manzini branch of the Bank of Credit and Commerce International Ltd. On 25th October, 1984 he was handed a sum of money by the Chief Cashier for the purpose of paying the soldiers at Embuluzi Barracks their

wages. The Chief Cashier said that the appellant asked for and was given E51,900 for this purpose. The appellant on the other hand, said he asked for E31,900 only but, unbeknown to him, at least initially, he was given E51,900. Although, therefore, there was an issue as to the circumstances in which the appellant came to be handed E51,900 there was no issue that he was in fact handed that sum. There was also no dispute that he did not require E51,900 to pay the wages in question. E31,900 was more than sufficient and when the wages bill had been paid the appellant was left with a sum in excess of E20,000 which he should have returned to the Chief Cashier. Again it was common cause that he did not return the whole of this sum to the Chief Cashier but kept back the sum of E20,000. The Crown case was that together with Masika, the

co-accused, he stole this sum; the appellant's case was that he was forced to misappropriate the E20,000 by the co-accused and did so largely for her benefit; and the trial Court, while not being satisfied on the evidence of the role alleged to have been played by the co-accused, was satisfied that the appellant played "a major role" in the theft and convicted him.

I will say at once that the defence run by the appellant was, as a matter of law, a non-starter. Even had the Court a quo accepted as a reasonable possibility that the appellant misappropriated the E20,000 because of threats made to him by the co-accused that false allegations of forgery would be levelled at him, as the appellant claimed was the case, the defence of duress or necessity would not as a matter of law have been available to him. The appellant's proper course would have been to report the threats to the bank management and if, as he claimed, the allegations of forgery were false, this should have posed no real problem for him.

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However, quite apart from the foregoing the trial court found against the appellant on the facts. It found it unbelievable that the appellant would have succumbed to threats that he would be reported on false charges of forgery and a further telling factor which militated against the appellant's story was that this particular part of it found no mention in a statement which he made to a magistrate after his arrest. This statement gives what appears to be a full account of how he came to retain the E20,000 as a result of a request by Masika but nowhere is there any mention of Masika applying any pressure on the appellant. The question of duress was, in my view, plainly an afterthought introduced in an attempt to lessen the appellant's blameworthiness and that part of his account was rightly rejected by the learned judge.

The judge also found that the appellant had deliberately set the ground for the theft by obtaining the sum of E51,900 on the pretence that he would later give the Chief Cashier a requisition for that amount but instead provided her with a requisition for E31,900. While I do not say that this may not have been the position the evidence adduced by the Crown on this aspect of the case was so vague - for example, the cash book in which the chief cashier said she recorded the payment to the applicant of E51,900 was not even produced to the Court - and the financial control procedures at the bank were so lax that I am of the view that the learned judge should have entertained some doubt on the matter. In my view, he should have found on the evidence that the probabilities were that the appellant suddenly found himself faced with a windfall and with a certain amount of encouragement from at least one other employee dishonestly decided to take advantage of the situation.

Although not relevant on the question of guilt this would have been material to the question of sentence.

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I now turn to the sentence. The courts have stressed time and again that theft by employees must be dealt with severely even in the case of first offenders. In R v Barrick (1985) 7 Cr. App. R (S) xxx Lord Lane C.J. said of the type of case where a person in a position of trust such as an accountant, an attorney, a bank employee or a postman has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money:

" In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. Despite the great punishment that offenders of this sort bring upon themselves, the Court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence .... The following are some of the matters to which the Court will no doubt wish to pay regard in determining what the

proper level of sentence should be (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the fraud or the thefts have been perpetrated; (iii) the use to which the money or property dishonestly taken was put; (iv) the effect upon the victim; (v) the impact of the offences on the public and public confidence; (vi) the effect on fellow-employees or partners; (vii) the effect on the offender himself; (viii) his own history; (ix) those matter of mitigation special to himself such as illness, being placed under great strain by excessive responsibility or the like, where, as sometimes happens, there has been a long delay, say over two years,

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between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police."

In the instant case the following factors seem to me to be relevant. Firstly, the appellant was in a position of trust and because of his position as a cashier and teller employed by a bank the trust reposed in him was inevitably high. Secondly, the sum' of money which he stole was, by the standards of this country, a substantial one. Thirdly, although there may be some doubt about the matter it would be proper to regard the theft as being spontaneous rather than pre-planned. Fourthly it may be that the appellant did not act alone and that a more senior employee gave him encouragement. Fifthly, it was an isolated incident of theft. Sixthly, the appellant assisted the police in recovering almost three quarters of the amount stolen. Lastly, the appellant was only twenty two years of age at the time, was a first offender, was at the threshold of his career and that career now lies in ruins.

In passing sentence the learned judge emphasised the first two mentioned factors but save for the fact that the appellant was a first offender, failed to refer to the others. Had he directed his mind to the others he would I think, have been bound to conclude that a sentence of five years imprisonment was, in all the circumstances, excessive. An appropriate sentence reflecting the mitigating factors just mentioned would, in my judgment, have been one in the order of three years imprisonment with one half suspended but there is one further important factor which has to be taken into account in the present case. For the offences of

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forgery and uttering in which the sum of E6,700 was involved the co-accused was fined E600 or eighteen months in default and a further sentence of four years imprisonment was wholly suspended on condition that she was not convicted during the period of suspension of any offence in which theft is an element and further that she repays the sum of E6,700 by instalments. She was in a more senior position than the appellant and the trust reposed in her could be said to have been proportionately higher and yet she escaped with her liberty.

It is right that in sentencing the Court should, unless there are clear reasons to the contrary, deal with offenders who have committed similar offences, in a similar way. Not to do so gives rise to a justifiable sense of grievance which offends against the appearance of justice. In my view, no real grounds existed in the instant case for making the substantial distinction between the appellant and his co-accused such as was made by the learned judge. For this reason, and this reason alone. I have reached the conclusion that while an immediate custodial sentence with part suspended would have been appropriate, on the grounds of parity the sentence on the appellant should be wholly suspended on certain conditions. I would, therefore, propose that this appeal be allowed to the following extent:

The sentence of imprisonment to be varied to one of three years imprisonment suspended for a period of three years on condition (1) that the appellant is not convicted of any offence of which

theft is an element committed during the period of suspension; and (2) that the accused repays to the Bank of Credit and Commerce International, through the Registrar,

the sum of E5,142 in monthly instalments of E150 on or before the first day of each month the first such payment to be made on or before 1st November, 1987. If the appellant should default in any such payment, but has made previous payments, then that portion of the suspended sentence which the appellant will serve will be in proportion to the amount the appellant has actually paid.

N.R. HANNAH

CHIEF JUSTICE

I agree.

MELAMET J.P.

I agree.

SCHREINER J.A.