

IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. 10/2002

In the matter between

BENEDICT SIBANDZE Appellant

and

THE KING Respondent

Coram BROWDE, JA

STEYN, JA

TEBBUTT, JA

JUDGMENT

BROWDE, JA

On 7 March, 2001 the appellant, having been charged before the High Court with three counts of theft, was found guilty on all counts and sentenced as follows:-

Count 1 Two (2) years imprisonment and an order was made in terms of Section 5(1) of the theft and Kindred Offences by Public

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Officers Order 22/1975 for payment of compensation in an amount of E4,500.00.

Count 2 Three (3) years imprisonment and an order for compensation in terms of Section 5(1) of Act 22/1975 in an amount of E37,000.00 and a further two (2) years imprisonment was imposed but suspended for three (3) years conditionally.

Count 3 Two (2) years imprisonment and an order for compensation in terms of Section 5(1) of Act 22/1975 in an amount of E7,920.00.

The sentences in counts 1, 2 and 3 were to run concurrently excluding the two years suspended sentence. Sentences were to run from the 8th November, 2000.

On 15 November 2002 this appeal came before this court but was postponed due to the record of the proceedings in the High Court being incomplete. Beck, J.A. who was one of the Appeal Court judges who were to hear the appeal dealt with the question of the missing evidence. He concluded his judgment by saying:

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"Accordingly we order that the appeal be postponed to the next session of this Court, and counsel on both sides are requested to do their best to furnish a reconstruction of the missing evidence. If no reconstruction can be made the matter will have to be dealt with at the next session on the

record as it stands. "

There has been no reconstruction of the record and Mr. Ntiwane who appeared before us on behalf of the appellant (he was also counsel for the appellant in the High Court) has confined his argument to the submission that the incompleteness of the record is of such a crucial nature that we should uphold the appeal on that ground alone. It is impossible, he said, to deal with the merits of the case for that reason. I return later in this judgment to a consideration of whether this submission is valid or not.

The modus operandi attributed to the appellant by the Crown was as follows (and since the thefts are all alleged to have been committed in identical fashion I detail below Count 1 only). The appellant was at all material times employed by the Ministry of Public Works and Transport, Mbabane, as the Acting Director of Civil Aviation. It was the duty of the appellant in that capacity or in the office he occupied after he relinquished the position of Acting Director, to receive all fees and charges involved in the registration of aircraft and to pay over such

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amounts as were received by him to the Accounts Department of the Ministry. One Engel, representing an entity known as T.A.C. Services desirous of registering a DC4 aircraft, arrived at the office of the appellant on 8 July 1998. The appellant, according to Engel, calculated the total cost of the registration of that aircraft to be E5 000. Because he was uncertain whether or not he would be permitted to pay by cheque drawn on a South African bank (Engel's employer was South African) he had brought with him sufficient cash money to meet the requirements of the registration. Engel handed to the appellant the sum of E5 000 whereupon the appellant left his office with the money and about "five or six minutes" later returned with a receipt for that amount. The only feature which distinguishes Count 1 from the other two counts (apart from the sums involved) is that Engel stated in evidence that while the copy of the receipt exhibited to him in court states that the E5 000 was received from "Airline Marketing Box 24 Mbabane", on the original receipt "Airline Marketing" was crossed out and "TAC Services" was substituted.

What occurred after the appellant left his office with the money is the essence of the case against the appellant. The Crown led the evidence of the clerk in the Accounts Department, Ms Ncane Dlamini, who was responsible for issuing the receipt but most of her evidence is not

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available to us because of the loss of the relevant tapes which bore the record thereof. However, it is common cause that in the receipt book there were two copies of the original receipt and that these copies unlike the original, showed the amount received by the Department as E500 and not E5 000. The Crown contends that the appellant wrote the original receipt, as is evidenced by the copies for E500 only, and then having handed that sum to the clerk, stole the difference of E4 500, and altered the original receipt which was given to Engel by the simple device of adding the digit "0" to the E500 and the word "zero" in the writing. Thus Engel received the receipt he required ostensibly for the correct amount, the receipt book showed the correct amounts received by the clerk, and the appellant had enriched himself at the expense of the Department in which he was employed, to the extent of E4 500.

It is thus that the central issue in the case against the appellant became the question of who wrote out the receipts issued to Engel.

The appellant in evidence denied that he wrote the original receipts. He also denied counting the money at any stage or to have looked to see what was written on the original receipts. He stated that on each occasion he handed the amount received from Engel to Ms Dlamini and that he

thereupon immediately engaged in conversation with others in the clerk's

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office while waiting for the completion of the receipt. He did not see the money being counted, so his evidence went, nor did he trouble to look to see whether the receipt was correctly made out or whose handwriting appeared thereon.

Engel, however, states in evidence that at the time he made the payment he regarded the appellant as the Acting Director of Civil Aviation in this country. Indeed the appellant informed him, so he said, that he was the Acting Director. He went on to say that he was informed by the appellant how much was required to register the particular aircraft for which he sought registration, this after it was calculated by the appellant. He then handed over to the appellant the amount in question. The money was taken by the appellant to another office which, said Engel, he imagined was the office "where payments were made." The appellant soon returned with a receipt. It is not without significance that it was not disputed in cross-examination of Engel, that the appellant calculated the sum required in each instance, and that he, Engel, handed over that precise amount to the appellant. That, in my view, disposes of the averment made by the appellant that the sum had been calculated by someone else - he did not say who could have done this - and that all that Engel was doing in his office was asking him to do him, appellant, a favour by taking the money to the appropriate office. It is common cause

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that that office was one floor up from appellant's and no acceptable explanation was given by appellant as to why Engel would ask the Deputy Director of Civil Aviation - that is what Engel thought appellant to be - to go and pay money on Engel's behalf which he could easily have done for himself. Although it may not be the only inference that could reasonably be drawn from this conduct it is nevertheless a reasonable inference that the appellant wanted to take the money himself so that he would be able to carry out the operation involving the receipt, out of sight of Engel, thus achieving his purpose of stealing some of the money. It remains merely to add that it was observed by the learned Judge when the receipts were handed to him at the trial, and it was not challenged, that suitable spaces between the digits and in the written parts had been left, which would facilitate the fraudulent insertion of digits and words.

At this juncture I wish to refer to the judgment of Sapire C.J. who heard the case in the High Court. He stated

"The decision of this case therefore depends on whether it is Dlamini's version or that of the accused, which is to be accepted. Before a conviction can result the accused's version has to be rejected as being incapable of reasonably possibly being true. "

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He was obviously referring to the question as to who wrote out the receipts - in other words whose handwriting was it on the receipts and the carbon copies in the receipt book.

Mr. Ntiwane who argued before us on behalf of the appellant, contended strenuously that since the version of the clerk Ms Dlamini is not before us, it necessarily follows that without a reconstruction of the record (which we now are given to understand cannot be achieved) the appellant is entitled to be acquitted.

This argument cannot be sustained for the following reasons. Firstly it was considered and rejected by this court at its last session in November 2002. When the matter was called Mr.

Ntiwane who appeared for the appellant asked the Court to uphold the appeal on the grounds that there was missing from the record material portions of the evidence of two witnesses namely Ms Ncane Dlamini and Evert Madlopha. In his judgment rejecting this argument Beck, JA distinguished the cases cited to the Court stating that "...there is a substantial amount of evidence in the record as it stands which does incriminate the appellant and which, arguably, might well be sufficient to support the convictions." Then after stating that he was of the view that a reconstruction of the missing

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evidence could still be achieved, Beck, JA ended by saying, as I have already above referred to:-

"Accordingly we order that the appeal be postponed to the next session of this Court, and counsel on both sides are requested to do their best to furnish a reconstruction of the missing evidence. If no reconstruction can be made the matter will have to be dealt with at the next session on the record as it stands." (My emphasis).

When the case was called last week we were informed by counsel that no reconstruction had been achieved and no heads of argument had been filed by either side. When asked why there were no heads, Mr. Ntiwane once again submitted that in the absence of the missing evidence the appeal should be upheld without further ado. This submission clearly overlooked the judgment I have referred to. When Mr. Ntiwane ultimately and reluctantly appeared to understand the effect of the judgment, he undertook to file heads of argument which were to deal with the merits of the case by Friday 12 November 2004. He filed heads of argument in time but once more, and this defies my understanding, he has again only addressed the issue of the missing tapes. No reference is made by him to the merits of case on the record as it stands.

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Before I advert to the evidence that is available to us in the record there are two observations which should be made. Firstly, it is the duty of counsel on both sides, when it is called for, to do all they can to assist in the reconstruction of the record. If for any reason a sufficient reconstruction cannot be made then counsel or attorneys on both sides should place before the court affidavits stating precisely what efforts have been made to achieve the reconstruction and why it is beyond them to succeed in so doing. It must be borne in mind that the legal representatives must also approach the presiding judicial officer whose notes will often be a source of assistance in the reconstruction. That very little effort, if any, was made by the parties in this case to reconstruct the record is clear. As I have said, Mr. Ntiwane has based his whole case on the absence from the record of the evidence of Joyce Ncane Dlamini. There are, however, several passages in the record which show what that witness deposed to in regard to important aspects of the case. I refer to the following examples:-

(a) At page 328 the following appears as having been put by Mr. Ntiwane to the appellant giving evidence in chief:

"Ncane Dlamini has testified before this Court and she has told this Court that in fact you did not give her the monies set out in

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the receipt but rather you gave her the monies which appear in the duplicates and triplicates, in receipt of the receipt for E8, 800 she claims she was given 880, in respect of the receipt for E5,000.00 she claims she was given E500, in respect of the receipt for E41, 600 she claims she was given E4,600. Did you hear her when she testified?"

The appellant states affirmatively that he had heard that evidence but added that it was not true.

One asks oneself why this was not referred to by either counsel as evidence of Ncane Dlamini which could, to that extent at least, have been reconstructed. This evidence, of course, puts paid to the submission of Mr. Ntiwane in his heads of argument which reads: "3.9 In the absence of Dlamini's evidence it is submitted that one of the elements of the crime of theft has not been proved as no other witness testified in that regard and proved the taking of any money.

In the premises it is submitted that Ncane Dlamini's evidence is material for the conviction to be upheld. "

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(b) At page 329 - again in the words of Mr. Ntiwane in reference to the evidence of Ncane Dlamini:-

"She claims that you wrote the original receipt in the receipt book in respect of all the transactions before Court. " To which the appellant said:

"I never wrote the receipts in the receipt book, my Lord."

(c) On page 331 in reference to Evert Madlopha whose evidence also required reconstruction, Mr. Ntiwane put to the appellant the following:

"Mr. Madlopha has testified that he knows all handwritings of his Heads of Departments, he knows your handwriting he can actually tell that this is Benedict Sibandze 's handwriting. "

ACCUSED: "I don't think he was telling the truth there he doesn't, "

"He says that from 1996 he was going to Parliament with you and that he would see you write and that he would see where you had written. What would you say to that? "

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The appellant ultimately conceded that notes had passed between him and Madlopha in Parliament.

(c) At P 407 the following appears:-

"Crown Counsel: Mr. Sibandze, in fact what you want this court to believe is an untruth. You heard Ncane say that when you presented her with the money she took care to count them against the sun because there (sic) were South African notes she wanted to ensure that they were genuine notes.

Accused: Yes, I heard her say so." Then, apart from some specious remarks about the sun, the appellant conceded that he could not deny the evidence.

(d) At P 411 the following appears:

"Judge: Because she (Ncane Dlamini ) has told this court that the only money she received was the amounts appearing on the copies on the duplicates and triplicates of the receipts.

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Accused: Well, I heard her tell the court that, My Lord. Judge: How can you say it wasn't true if you didn't count it? Accused:I didn't say it wasn't true My Lord. "

It is obvious from the above, which does not represent all references to the evidence of the witnesses concerned, that if counsel attempted to reconstruct the record their efforts were of an extremely perfunctory nature. No reconstruction at all was shown to us to have been achieved and Mr. Ntiwane's submission that the appeal should be upheld purely on the basis of an alleged "absence of Ncane Dlamini's evidence" is without substance. Indeed, the passages from the record which I have cited show what force there was in the judgment of Beck, JA, when he said that this case was distinguishable from *S v Phukungwana* 1981(4) SA 209 inter alia because "there is a substantial amount of evidence in the record as it stands, which....might well be sufficient to support the convictions."

That disposes of the only argument which Mr. Ntiwane chose to address to this Court in support of the appeal.

I wish to add this. The judgment of Sapire, CJ shows such a careful analysis of the facts of the matter coupled with impeccable logical

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reasoning in arriving at his verdict, that it is hardly surprising that counsel did not attempt to attack the verdict on the merits of the matter.

In conclusion it remains for me to point out that the evidence of Engel clearly proved the amounts of money handed by him to the appellant, while the appellant could not deny (as he put it) that lesser amounts had been handed to Ms Dlamini. That the receipts were written out by the appellant was proved beyond doubt, firstly by the evidence of Ms Dlamini to which I have referred but also by the evidence of a handwriting expert who was called by the Crown. Despite a lengthy and rigorous cross-examination he steadfastly maintained that the handwriting on the receipts was that of the appellant. His evidence was in my view correctly accepted by the trial Court. There is also the corroborative evidence of Madlopha and Dr. Tambi both of whom had good reason for knowing the appellant's handwriting and who recognised the handwriting on the receipts as being that of the appellant.

As against the welter of evidence for the Crown the appellant gave evidence which could aptly be described as pathetic. His answers to questions in cross-examination were in many instances evasive and on crucial issues palpably false.

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The appeal is dismissed and convictions and sentences on all the counts are confirmed.

DELIVERED IN OPEN COURT THIS. 23th .DAY OF NOVEMBER 2004

J. BROWDE, JA

I AGREE

J. H. STEYN, JA

I AGREE

P.H. TEBBUTT, JA