

IN THE HIGH COURT OF SWAZILAND

In the matter between: GRIM. CASE NO. S.98/80

REX

vs.

PETROS DLOMO

CORAM: MR. JUSTICE DAVID COHEN

FOR THE CROWN: MR. A. TWALA

FOR THE ACCUSED: MR. S. EARNSHAW

JUDGMENT

(Delivered on the 29th August, 1980)

COHEN, J.:

The amended indictment on which the Accused appeared in this Court is to the effect that the Accused had on or about the 20th December 1978 stolen the sum of E1723.23, "the property of the Government of Swaziland and/or of Isabel Khumalo" and had thereby committed the crime of theft.

Summarized, the case for the Crown was that Isabel K. Khumalo (hereinafter for convenience sake referred to as the "complainant", although this description may in fact be a misnomer), at the relevant time a school teacher at the Makhava Central School, in the Shiselweni District, on the date in question received a salary cheque from the Government of Swaziland in her favour in a sum of E1998.88. This amount was a gross overpayment as on calculations effected by the Accused who was then the District Education Officer for the area and the headmaster of the school she was entitled to receive only the sum of E275.65.

2

After joint consultation with the two of them it was decided to have the cheque cashed at a local store, for the complainant to receive out of the proceeds of the cheque her full entitlement and that the balance would be handed to the Accused for remission to the Ministry. This decision was according to the evidence of the headmaster in conflict with instructions from the Ministry as he stated that on telephoning it he had been told that the cheque should be returned to it. Be that as it may, however, he endorsed the cheque in verification of the complainant as the true payee and she likewise endorsed it and the cheque was cashed, but as the shopkeeper did not have the full amount of the cheque available she was paid E275.65 in notes and cash and the Accused in accordance with arrangements then made returned to the store later that day and received the balance of E1723.23 which according to him he then placed in a locked drawer in his office. Presumably the storekeeper banked this cheque and it was duly paid out.

Thereafter in February 1979 the complainant received a letter from the Ministry dated the 15th of that month which was copied to the Accused, which copy was admittedly received by him and handed in as evidence (Exh. A). It reminded her that she had received the cheque of E1998.88 and that although her monthly salary was only E153.00 she had never queried the amount of the cheque. It proceeded to advise her that this overpayment would be recovered from her salary at a fixed monthly rate of E14.39 over a period of eight years.

3

On receipt of this letter she went to the Accused to find out what had happened to the money - this she thought was at the end of February. According to her the Accused then told her he had used the money and that he was unable to give her any of the money; he also stated he would try to send the money to the Ministry. There is an important conflict between her testimony and that of the Accused as to this conversation. The latter denied that he told her he had used the money or that he had no money to pay to her but averred that he told her he had been too busy to attend to the remission of the money to the Ministry but would do so in due course.

Complainant did not communicate with the Ministry again until July 1979 when in a reply to a letter querying her salary claim for the month of February 1978 she wrote them a letter which had been drafted for her in the Accused's own handwriting as she had taken this query to the Accused (Exh. B). Apparently no further communication was directed to her on the subject of the overpayment and she was never again called upon to refund it in whole or in part.

The Crown further clearly established that the Accused effected payment of the balance of the E1998.88 to the Ministry of Education (indeed according to the records he paid more than this balance), but the mere subsequent payment of the money at a later stage does not mean that he had not committed a *fraudulosa contractatio* prior to such payment. The question is whether the Accused in whose possession the money was from approximately the 20th December 1978 intended between that date and the final payment by

4

him to convert it to his own use or to some unauthorised use by him.

The actual repayments were effected by the Accused in the following manner: Under cover of a registered letter dated the 26th June 1979 he forwarded a cheque for E500, making it clear that this was in part payment of the sum of E1,725.23 and the balance of the proceeds of the Government's cheque of E1998.88 sent to complainant. He also undertook to send a further sum of E223.23 before the end of July 1979. (This figure may be in error for the true balance of E1223.23; on the other hand he may have intended to leave the ultimate balance of E1000 for later payment; this possibility was however not canvassed in evidence). His next payment, also by cheque, was for E1220 in respect of which a receipt (D1) dated the 21st August 1979 was issued. According to the Accused he paid this sum personally to the Ministry and at the same time paid it an amount of E58.23 -according to him in cash but according to receipt (D2), it was paid by cheque on the 28th August 1979. A further payment was made by him also by cheque in a sum of E80 under cover of a registered letter dated the 13th August 1979 for which a receipt (D3) was issued. Accused was clearly wrong when he had stated that he paid the sum of E58.23 at the same time as the E1220 - the exhibits contradict him and more over the Accused had no banking account and had caused the bank in Nhlanguano to issue the other cheques for him; it could not have done so, if as he alleged, this overpayment was requested from him in Mbabane and then and there paid.

5

The amounts paid by him were therefore E500 (Exh. D4) E1220, E58.23 and E80, totalling in all E1858.23 being E135 in excess of the outstanding balance. All the receipts were made out in the name of the complainant and bore the legend "overpayment of salary".

Clearly the Accused had retained the money which he had undertaken to refund to the Ministry over a considerable period of time and it is obvious to me that he was, therefore, called upon to give an explanation for this delay.

The explanation he gave, apart from certain unsatisfactory features and inherent improbabilities, is in conflict with the testimony of the complainant given as follows:-

In chief: (Referring to the interview between her and Accused towards the end of February and after receipt of Exh. A) "Accused told me he had used the money. He was not able to give me any of the

money. He further told me he would try and send the money to the Ministry of Education". In cross examination: "Accused told you he had used the money?"

.....Yes...

Did he say all or only part of it?...He made no explanation to that effect".

Accused's version of this interview in chief, the gist of which was frequently repeated "by him during the course of the rest of his testimony was as follows:-

"In February 1979 Exh. A was copied to you?...Yes, I received the copy.

Did you respond to that letter at all?...It did not come to my mind to respond to a copy; usually a copy

6

is for explanation. Having received the copy I asked complainant to come to my office which she did. I said since you are given eight years in which to pay the money, there was no hurry (the last phrase may not be quite a verbatim record of his reply). I pointed out that I was too busy at that time and would send the money later".

When questioned by the Court on this conflict he stated that he had heard her say that he had said he had used the money but she was not telling the truth. Nor was it true that he told her he had no money. Asked if he could explain why his version was not put to the witness in cross-examination he could give no explanation save to state that had he been allowed to cross-examine the witness he would have done so.

I have no hesitation in preferring the complainant's evidence on this point. She was an eminently honest witness. The only point of criticism levelled against her testimony is that she and the Crown witness, Reuben Sibiyi, her principal, were not in accord with each other as to whether she had alleged to the Accused that she was pressed and needed her salary. Although I accept Sibiyi's evidence on this point, I do not think that she told a lie about it - it could not have been a matter of materiality to her and there would be no reason for her to be deliberately false about it. Twenty months had elapsed since that conversation and she is in my view genuinely mistaken about it. On the other hand the conversation on receipt of Exhibit A was not one she was likely to forget as her main reason for coming to the Accused was to ascertain what had happened to the money.

7

Moreover the probabilities are that the Accused would not have merely told her that he had no time to remit the money. She would then surely have re-claimed the money from him with a view to dispatching it herself. Another important factor against the Accused's version is that, as the letter rather scolded the complainant for not having queried the overpayment and fixed liability on her, the Accused did not there and then re-assure her by telephoning the Ministry or writing a short note that he held the money and would be forwarding it as soon as he had a spare moment. The only comfort he gave her was that she had eight years in which to repay it!

To proceed further with the Accused's explanation. He stated that E750 of the money in his possession were diverted by him for use to cover expenses being incurred by him in connection with arrangements for a visit by the Minister of Education which eventually took place in April 1979. He was not authorised either by the Ministry or the complainant to use any part of the money for that purpose, but according to him he expected to be re-imbursed for it by the Ministry. In a letter of the 6th February 1979 (Exh. K) he asks for E700 to meet the expenses. There is no reference in this letter to the money already in his possession. By further letter (Exh. H) dated the 21st March 1979 (by which date one would have expected under normal circumstances that he would have remitted all the money held by him to the Ministry) he asked it to approve of the date of the visit "even if funds are not available to enable us to

meet all expenses for the occasion" (the quotes are by me). Of course, if he bona fide believed that he was entitled to use

8

the money in his possession then there were in fact funds available in his own possession but he makes no mention of it in this letter. It may also be mentioned that in this respect he could not rely on the rest of his explanation that he had no time because here he in fact had time for two letters, the last of which was a detailed two paged letter. His first reference to the use of money received by the complainant is in his letter of the 22nd August, 1979 at a time when he had already repaid to the Ministry more than the balance of the cheque of E1998.88.

There are other improbabilities in his version as to the use of the E750 but I do not think it necessary to deal with them here. Suffice it to say that I reject his explanation and in any event do not think it constituted a bona fide claim of right to have used the money. In striking contrast to the complainant he was in most respects an unsatisfactory witness. He was inclined to pontificate when answering questions and was in many instances evasive, failing to answer the question itself but resorting to an illogical or irrelevant reply.

His explanation of his dealing with the rest of the money entrusted to him by the complainant is also unacceptable. He would have the Court believe that between December 21st 1978 and the 26th June 1979 when he wrote Exh. F he had no prior opportunity to write or explain to the Ministry that he had possession of the overpaid amount of the cheque and that he would be remitting it or that he had used part of it on behalf of the Ministry, It seems to me that complainant's

9

testimony at the interview at the end of February 1979 is correct, namely, that at that stage already he had used the money for his own purposes or if he had in fact not used it he had already appropriated it to himself.

The main problem in this case is not whether the Accused stole the money but whether he did so from the Government or the complainant. The onus of proof, especially having regard to the provisions of The Theft and Kindred Offences by Public Officer's Order No. 22 of 1975, is of course on the Crown. Mr. Twala urged that the Crown had proved a theft from the Government in that when the balance of the cheque was handed to the Accused for transmission to the Ministry the Government had a direct interest in the money so received by him. He referred to the case of *S. vs. Kotze 1965(1) S.A. 118(A)* in support but, although there is much force in Mr. Twala's submission, I do not think that in this case the Crown has established a theft from the Government as opposed to one from the complainant. It seems to me that she was the recipient of the overpayment, and had in fact made it possible for the cheque to be cashed by endorsing it in the presence of the Accused; the shopkeeper who became a bona fide holder for value of the cheque paid the proceeds of the cheque to the Accused on her behalf. Moreover the parties themselves treated the Accused as her agent in the transaction. The Accused himself stated this in re-examination and complainant apparently wanted the money back from the Accused when he told her he was not in a position to give it to her. Finally, all the receipts were made by the Ministry in favour of the complainant, although the money came from the Accused.

10

In my view therefore the Accused committed theft of the sum of E1723.23 from the complainant and this is the verdict which I return.

(D. COHEN)

JUDGE OF THE HIGH COURT

29th August, 1980 MBABANE.