

SWAZILAND HIGH COURT

Rex

v

Moses Sabelo Dlamini

Joseph Mkhumane

Celucolo Mmema

Jethro Ndlangamandla

Cri. Trial No. 69/1998

Coram S.W. SAPIRE

For Crown Mr. Ngarua

For Defence Mrs. Matse (1st Accused)

Mr. Manzini (2nd Accused)

Mr. Nxumalo (3rd Accused)

Mr. Thwala (4th Accused)

JUDGMENT

(14/08/98)

Four accused appeared before this court on a charge of theft. It was alleged that on or about the 23rd September 1996 at or near the Ubombo Ranches Sugar Mill in the Lubombo Region the accused acting in common purpose did wrongfully and unlawfully steal 38 tons of refined sugar, the property of or in the lawful possession of Swaziland Sugar Association valued at E77 824.00.

After I had heard submissions from the Director of Public Prosecutions and from the counsel appearing for the accused person, I reserved judgment and

considered various aspects of the case. One of them which had not been raised in argument directly was that the ownership or possession of the sugar may not have been the Swaziland Sugar Association but may have remained in the mill which is owned by Ubombo Ranches Limited. It does seem to me despite what was said by counsel that there could not be any prejudice to accused persons by amending the indictment in terms of Section 154 to make allegations in accordance with the provisions of Section 128 subsection 8 of the CRIMINAL PROCEDURE AND EVIDENCE ACT. I accordingly ordered that the indictment to be amended to reflect the person from whom the sugar was taken to be in accordance with the evidence.

The evidence was led after the accused had all pleaded not guilty at the commencement of the trial. Evidence was led to establish the commission of the offence. The court was informed how sales of sugar in Swaziland are dealt with. The Swaziland Sugar Association controls the sales of sugar from all mills in the country. Sales are made only to persons to whom a quota has been given. When a quota holder

wishes to take a delivery of sugar from the mill, he does not deal with the mill directly but places his order with the Swaziland Sugar Association here in Mbabane. He has to make payment for the sugar before a release note is issued by the Sugar Association and communicated to the mill in question where the sugar has to be delivered. Delivery of the sugar is taken by the quota holder who supplies his own transport which he sends to the mill. There the driver of the truck has to identify himself and the transport which he has brought and to identify the order which is to be taken on that truck. All trucks entering or leaving the premises of the mill, in this case at Ubombo Ranches are required to pass over the weighbridge. The passage of each truck is monitored and recorded.

In this case a load of sugar was placed on a truck which had been hired from Unitrans which is a firm which provides transport for many purposes. The truck and its driver have been identified. There was testimony that this driver entered the premises of the mill in the normal way. The truck was loaded with 38 tons of refined sugar. The truck so loaded left the premises and its egress recorded by the security officer at the gate but there are certain indications which made the conclusion inescapable that this loaded sugar was in fact stolen from the mill.

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The first indication is that the Swaziland Sugar Association had no knowledge whatsoever of such a load having been ordered and there is no release certificate was issued in respect of that load. There is further evidence that this was an irregular delivery in that at the mill, each delivery is recorded in a delivery book consisting of the delivery note in multiple form. The original note is torn out on the book and handed to the driver while a copy is retained in the book. There is only one such book in use at a time and deliveries are recorded therein in the order in which they are fulfilled. There is no delivery note in the book which was produced as evidence to indicate the delivery of sugar in this case. There is a further indication that this load was irregular and that is there is no record of the truck having passed over the weighbridge at the exit gate. This concatenation of circumstances can only lead to one conclusion and that is that particular load of sugar was stolen from the mill.

Now I come to consider the part played or allegedly played by each of the remaining accused in this matter. I say remaining accused because one of the four at the conclusion of his evidence was found not guilty and discharged it being conceded that the case against him was not sufficient to make it necessary for him to remain on trial.

As far as the remaining accused are concerned, I will consider each of their cases in turn.

Dealing firstly with accused no.1

There is clear evidence that he is the person who ordered the transport from Unitrans. There is evidence that he came to Unitrans and there saw a Mr. Ernest Dumisa Magagula and from him requested a truck for the delivery of sugar from Big Bend, Ubombo Ranches to Matsapa. The evidence is that he was referred to the department which receives deposits for transport and that a receipt was made out in his name in respect of a payment of E1,200.00. There was also evidence that the receipts made out, that is this receipt and the subsequent receipt to which I will turn, also indicate that there was some business organisation whether it was a company or whether it was a business name but there was no indication then or at any other time that the first accused was acting as an agent or as a representative of anybody either than himself or a company or the name he mentioned. It turns out that E1,200.00 was

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not sufficient to pay Unitrans charges for the proposed load and the evidence is that he returned the following day to pay the remaining E200.00 and was issued with a further receipt.

There is also evidence that the accused no. 1 on at least one occasion telephoned Ubombo Ranches to have the provision of the truck expedited on this

journey to Ubombo Ranches to pick up sugar. There is evidence that somebody identifying himself as the accused no.1 phoned on several occasions. There may be some doubt whether accused no 1 was indeed the party calling.. I confine my consideration to the evidence that he called on one occasion.

It is clear that the transport which he ordered was used to take the sugar from the mill. This is the very truck which he ordered which went to the mill and was driven by the witness Gwebu. The sugar was uplifted, later taken to Matsapa and was later disposed to a buyer.

The inference is inescapable once again, that accused no.1, if those were the facts, is the person who participated in the theft of the sugar by providing or arranging the transport of the sugar from the mill.

Accused no.1 however, has, in his defence, testified that he was not acting as a principle in ordering the transport for the sugar but was doing a favour for an acquaintance of his. He claims that his part in the transaction was limited to making payment on behalf of his friend for the transport. He denies specifically having gone there on a second day to make up the payment and he says that he only phoned once to have the provision of the truck expedited.

He says, he was acting on behalf of one Reggie who asked him for a lift at the Tavern Hotel where the parties were passing the time of day. The accused who had indicated that he was going to Kwaluseni to do some research at the University told Reggie that he could not give him a lift because his length of stay at Kwaluseni was uncertain. It was then that Reggie produced the E1 200 and asked accused no.1 to make payment for him on his account at Unitrans. This accused No. 1 agreed to do. He took the E1 200.00 and paid it in that day. He says he did not see Ernest Magagula at all, and that Ernest Magagula, for some reason or other had invented the story that he came there and asked for a load of sugar to be delivered on a truck

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belonging to Unitrans. In this he is in direct conflict with Ernest Magagula. This alone is not a basis to support a conviction. There are a number of other aspects of his evidence which makes it difficult to accept his account even as reasonably possibly true.

There is the improbability that if he were actually acting for Reggie that he would have had receipts made up in his own name Although he has been able to advance far fetched and unbelievable explanations for every the defects in his evidence the time comes when a number of these explanations he has to give in themselves take away the credibility of his account.

His explanation as to why he contacted Unitrans to expedite the delivery after he had nearly made the payment is in itself quite unbelievable and clearly a fabrication to meet the difficulties with which he found himself faced.

Another difficulty which lies in the way of accepting the veracity of the accused's evidence is the evidence of Dumisa Ngwenya who was a Policeman who interviewed the accused no. 1 before his arrest. The interview which took place was recorded on the 16th December 1997 and took place, as you will see, sometime after the sugar had been stolen. The interview was recorded in the way of question and answer and the interview itself was concluded on the 16th December and continued on a later date sometime thereafter on the 17 February, 1998. The record of what took place and the notes made by Ngwenya cannot be regarded as a statement by the accused because he never put his signature thereto but they do represent a contemporaneous note by the Police officer of what was said. The document went in without objection and the police officer gave evidence of what took place. If one looks at it this way one sees that even making allowances for any inaccuracy there is not any distortion that could have taken place as a result of inaccuracies. One thing which is clear is that the accused when questioned particularly about the order which he placed was insistent on distancing himself from any knowledge of the delivery of sugar and he relied on saying that what he did was that he was going to assist a friend of his. The curious thing about it is that the story given to the policeman is not the same with what was said here in the witness box and the most important thing is that he refers to Reggie, he first of all gave his

surname and secondly he refers only to a consignment of maize meal from Matata. This was in direct response to a question about the upliftment of sugar. The answer recorded was " I do not know anything about sugar." Of course when it came to trial the accused endeavoured to overcome

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this difficulty by saying as he had reservations at the time about the statement and that there are certain omissions which changed the meaning of the statement. Of course that is true that he did not sign the statement but it is true that he did record that there are certain omissions but this is not the matter of omissions. The omissions referred to in this court was that the policeman did not make it clear to him that the consignment of sugar he was talking about came from Ubombo Mills. That is an explanation which is quite unacceptable and clearly a fabrication to overcome the difficulty in which the accused put himself by trying to distance himself from the delivery of sugar at all.

I am satisfied that the statement taken by the policeman reflected what the accused intended to convey. This is the exculpatory statement in which he wished to show that he had nothing to do with the sugar. It is completely inconsistent with the account he gave in this court.

It is also illuminating to observe that what he was originally asked about was whether he had made calls to Unitrans. The question which was recorded by the police is that:- Did you make phone calls to Unitrans Matsapha about upliftment of a load of sugar? In this regard it was put as the case for the accused that the policeman left out that the sugar was from Ubombo Mills in Big Bend. But the answer to that question was, " No. Generally I used to call them on many issues with the exception of sugar upliftment". That question/answer is clearly indicative of the fault I find in the accused version, namely that it is irreconcilable with the case he seeks to make out in evidence, that the sugar was involved in the transport that he ordered was so insistent on denying any connection with a delivery of sugar.

This ties up with the evidence of Ernest Magagula who says that the accused came to him and ordered transport specifically for sugar. When one considers this and other discrepancies in his evidence one is led to the conclusion that accused number 1 was not telling the truth

Important to this case also is the fact that the "Reggie" who he identified as the person on whose behalf he is acting has disappeared from the scene. His existence is in question and the antics which were performed in this court to identify a person as Reggie indicate a manufactured defence prepared in order to explain his association with the order for the transport. I may say that a statement is made of a surname of this person Reggie. It is never put to the policeman that this is his own invention yet at a later stage the accused indicated that he knew no surname and nobody knows a

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surname or a person of that name. Witnesses were called by the defence to testify that one of the habitués of the Tavern Hotel was this Reggie and that he was somehow associated with accused no. 1. These witnesses were pitiful. Counsel for accused no. 1 with leading questions practically put the name in the mouth of the first witness who was called in this connection.. When that did not succeed two further witnesses were called. Each put on a great show. Their demeanour says much for their thespian ability but little for their veracity. They pretended they did not know what they were coming to testify about. Only at the end did each talk about Reggie and by some curious co-incidence identified him by some peculiarity of his hairstyle which the accused had slipped in as a last thought in re-examination. This was not impressive at all and it is another factor itself which is not conclusive, but it is indicative of a spurious defence.

The accused himself, appears to be a man who seems to be personable. He is well educated and intelligent. He has an engaging personality and the only fault I can find in him is his insult to the intelligence of a normal person by advancing a palpably spurious story as he has in this matter. That is indicative of arrogance with which he has displayed in the matter.

In his case I am satisfied beyond reasonable doubt that he participated in the theft of sugar by ordering the truck.

The case of Accused No 2

He is connected with this offence by the evidence firstly that he reserved an area where the sugar might be off-loaded and in fact supervised the off-loading. These aspects of the matter are not in question. Accused no. 2 however says that he in performing these acts was the agent of one Chonga of Heralds Transport and that this is part of his business as a broker to attend to these matters. This is an explanation which in itself while open to suspicion could reasonably be true.

There is also the evidence of Chonga that the money paid over for the stolen sugar was received by him, Chonga, and paid over to accused no. 2. If this were so obviously accused no. 2 would be implicated in the theft of the sugar and further explanation might be necessary from him. However, whether to believe Chonga or accused no. 2? It is a question of the one's evidence contradicting that of the other. Accused No 2 accused says that the money was indeed not received by him through

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Chonga but he received merely a commission for payment for the services he had rendered. For these reasons it is clear that the roles of Chonga and the accused could easily have been reversed and it would be difficult to say whose version is correct beyond reasonable doubt. In the case of no. 2, therefore I find that there is reasonable doubt as to his complicity in the offence and he is found not guilty and discharged.

The case of Accused No. 3

As far as no. 3 is concerned his complicity is that he was the man on duty at the weighbridge in charge of the computer used in connection with the way in the passing of vehicles over the weighbridge and that he contributed to the endeavour of the by allowing the vehicle to go over the weighbridge without it being weighed and without the relevant entries being processed.

The evidence of this is a printout of the computer entries for that day and conspicuously absent is any reference to the guilty vehicle. Also the vehicles which passed over the weighbridge were recorded in strict numerical order corresponding to the delivery notes which I have made reference to earlier and there is no delivery note appearing in the computer payout which could possibly refer to this vehicle. The accused's defence is that somebody in the employ of the Ubombo Ranches could, with applying the password, have entered the computer and eliminated the entry which he had made in respect of the vehicle. This suggestion is contradicted by the evidence of the persons concerned and there is evidence that although it is possible to alter the entry to completely eradicate such an entry from the system is impossible. The evidence thus points to accused no. 3 as having participated in the offence by of allowing the vehicle to pass over the weighbridge without recording it.

There is evidence of Shongwe at the gate that made entries and who says he received a computer generated pass and other documents relating to the vehicle. However, I did not understand him to say that he had studied those documents and was able to confirm that the documents he received were indeed genuine documents, which related to that vehicle. The fact remains they could not have been because there were certainly no delivery notes and there is no evidence of a computer generated weighbridge ticket having been issued. I find that the explanation given by no. 3 accused is so devoid of truth to leave no doubt that he assisted in the way I have described and is therefore also guilty of the crime of theft as charged.

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Before concluding I want to say a few words about investigation. No evidence was led in this court as to who actually was the employee of Ubombo Ranches who loaded that vehicle and on what authority he did

so. One would have expected that such evidence should have been forthcoming and that the method used in effecting this theft would then have become more apparent. I say this because I am left with speculation as to how the driver managed to get documents to allow him to pass the gate when he knows that no genuine documents had been generated that day.

Secondly, the evidence suggests that there is a lacuna in the security provision in that there is no record of any authority having been given by the accounting department to any person to do the physical loading of the truck. The chain of security would have been measurably strengthened if the loading was done only following a written instruction from the administrative department to the crane driver who loads trucks to allow that particular load.

Thirdly, I have already commented on the evidence of the police officer Duma Ngwenya. In his case I was impressed by the way he gave his evidence and the manner in which he described the explanation which was given to him. I am satisfied that he is in fact telling the truth when he testified but the matter would have been put beyond any dispute had that particular statement and his interview with accused no. 1 been either televised or recorded on an audio machine so that we would have had a visible or at least audible record of what took place. In this way the investigation would have been improved enormously. But the deficiencies to which I have referred cannot assist the case of accused no. 1 and 3 and despite these deficiencies I am satisfied that both of them are guilty of a crime with which they are charged beyond any reasonable doubt. The accused 1 and 3 are found guilty as charged.

SENTENCE

Mr. Ndlangamandla you have been found guilty in participating in the theft of sugar from your employer, Ubombo Ranches. My attention has been drawn to previous judgments in this court which say that where an employee commits a theft

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which amounts to a breach of the trust placed in him by an employer inevitably the sentence should be a custodial one. It seems to me however that such a judgment does not bind me and that each case must be approach with regard to the special facts applying in that case. The evidence in this case under which you have been found guilty disclose that you did play a minor part in the offence and probably did not receive anything like the benefit of the purchase price of the stolen sugar. I must also take into account that you did serve your employer faithfully up to the time of this and that you are a man who has reached the stage of your life without previous clashes with the law. I do not consider that to sentence you to imprisonment without the option of a fine is called for in this case. Certainly not unless that sentence is to be suspended. On the other hand a wholly suspended sentence cannot be regarded as adequate punishment in a matter such as this. There is strong evidence which I accept that if you were not sent to jail you could be rehabilitated and that you could be a useful citizen again. In fact the fact of sending you to prison could be negative for all concerned. But as I say you have to be punished so that in the first instance I am going to impose a fine on you in default of payment of which you will serve a period of imprisonment. That portion of your sentence will not be suspended. I will also impose a further period of imprisonment without the option of a fine which will be wholly suspended which I hope and trust will be a deterrent not only to you but to others like you who may be tempted to assist others in stealing from their employers.

The sentence, which I impose upon you, is E2 500.00 fine in default of payment of which you are to serve 1-year imprisonment. You are further sentenced to 2 years imprisonment all of which will be suspended for a period of 3 years on condition that you are not hereafter found guilty of an offence involving dishonesty committed during the period of your suspension. The fine is to be paid by not later than 21st August, 1999.

Moses Sabelo Dlamini, regarding your sentence, I may say that I have considered the evidence that was led by the Psychologist and I do not see in you any sign of remorse. Of course, the defence you have adopted and the defence, which you put here, prevents you from giving any indication of remorse

because it is quite inconsistent. I must therefore treat you on the basis at best of neutrality as far as remorse is concerned.

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You are a first offender and it has often been said that first offenders should be given one opportunity and that on the first conviction it is not desirable to send such a person to jail. All depends of course on what the crime is. There are crimes of violence which attack the dignity of a person which would lead to terror, physical harm, in such a case I am not sure that the rule applies as in the case of robbery for instance that this first offender rule applies at all. Your case however is not one of violence and it is one of participation in a carefully planned theft. It involves getting other people to fail in their duty to their employers for not only must the man at the gate have been bribed but it may be that even the driver of the vehicle and the man who actually loaded the vehicle may have been involved. Your involvement is quite clear and that you engaged the transport necessary for the endeavour and that you knew when you did so what the purpose was for sending the truck. In your case the sentence will be E10 000.00 fine in default of payment of which 3 years imprisonment. There will be a further 2 years imprisonment suspended for a period of 3 years on condition you are not hereafter found guilty of a crime involving theft or other dishonesty committed during the period of your suspension. The fine, which I have imposed, may be paid as to E5 000.00 immediately upon which you will be released and the balance in instalment of E1 000.00 per month until the balance of the fine shall have been paid. The initial E5 000.00 must be paid by not later than 4.00 o'clock on the 19th August, 1998.

S.W. SAPIRE, CJ