

IN THE HIGH COURT OF SWAZILAND

CRIM CASE NO. 12/85

In the matter of:

THE QUEEN

vs

CORAM: J. A. HASSANALI

FOR THE CROWN: A. DONKOH

FOR THE DEFENCE :

CHARGE: THEFT

JUDGMENT

20-05-86

HASSANALI, J.

The Accused stands charged with the following two count -

- 3) theft of E500. belonging to Manzini Supermarket on 14/6/82
- 2) theft of E1,000 belonging to Manzini Supermarket on 26/6/82. He pleaded not guilty to count I and guilty to count II.

The accused at all material times was employed as a sales assistant at the Manzini Supermarket where Minah Khumalo also worked as a book keeper. One of her duties as book keeper was to total up the day's collection and send it to the Bank for deposit by the accused. Sometimes she herself did the banking.

Minah Khumalo testified that on 14/6/82 she with the assistance of one Parcel Dlamini checked and totalled up the monies for banking and handed over to the accused a sum of E5000. together with the bank deposit slip in duplicate. When the accused returned from the bank neither Minah nor Ndwandue, the owner appeared to have checked the duplicate deposit slip. Minah's explanation for this was that the accused was a trusted employee and therefore

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there was no hesitancy to check. Her explanation is unsatisfactory and I don't agree with it. XXX waver honest a person is, he XXX as book keeper should have been to check the deposit slip make the necessary entries in the relevant books. From the XXX examination of the Crown witness I gather that the accused defence was that he did not take any money to the Bank for XXX on that day- Then what happened to this money?....

It must be remembered that the burden of proving beyond reasonable doubt that it was the accused who stole the money cast squarely on the Crown.

The only evidence that links the accused with the theft of this money is that of Minah. Parcel Dlamini who happened to be present according to her, when the money was counted and handed over to the accused, was not called to give evidence for the Crown since his whereabouts was not known. It is also regrettable

that the Bank Deposit slip and cash book were not produced in evidence. I understand that they had been misplaced or lost.

Although Ndwandwe mentioned that he saw accused taking the money to the Bank, he was not sure of the date. In the circumstances I do not propose to place much reliance on his evidence.

According to Minah, the accused in her presence admitted to Ndwandwe that he took the money. But Ndwandwe denied that Minah was present. This is a serious contradiction and therefore I do not wish to give any credence to either of them as regards to the accused's admission.

From the evidence it is clear, that the accused had every opportunity of stealing this money had it been given to him for deposit. On the other hand Minah herself could have taken this money by writing the deposit slip since she had handled the banking on occasions. The effect of this is to introduce Minah

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as a possible suspect. However she appeared to me to be a honest witness, and it is fair to say that nothing more than opportunity has been established against her.

Taking all the factors into consideration I have come to the conclusion that there is some doubt as to whether the accused took the money.

Mr. Donkoh stressed the fact that the accused did not give evidence. This is a circumstance to be taken into account: the importance to be attached to the failure of the accused to give evidence depends upon the circumstances of each particular

case. One of the factors to be considered in this connection is the strength or weakness of the Crown case. See R vs Ismail 1952 (1) 205 at 210. However in this case the Crown has not established a prima facie case against the accused, although there are certainly some grounds for suspicion. In these circumstances I do not consider that the accused's failure to give evidence can turn the Crown's prima facie case into a conclusive one.

In my opinion the Crown has failed to establish its case against the accused beyond reasonable doubt. I regret that I have to come to this conclusion because it is clear that a well conceived theft has been perpetrated upon the complainant.

The accused is found not guilty in respect of count 1 and he is acquitted.

The accused had already pleaded guilty to Count II. Therefore I find him guilty as charged.

J. A. HASSANALI

JUDGE