



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 378/2012

In the matter between

REX

and

KHANYISILE DLAMINI

Neutral citation: *Rex v Khanyisile Dlamini* (378/2012) [2013] SZHC 249
(8th November 2013)

Coram: **Mamba J**

Heard: **01, 06 August and 08 October 2013**

Delivered: **08 November, 2013**

[1] Criminal Law and Procedure – on a charge of fraud – it is not enough for the crown to prove that the document in question is a forgery. The crown must go further and prove that it the accused who forged it or that the accused had reason to believe or suspect that the document is a forgery.

[2] Criminal Law and Procedure – accused making bank withdrawals on deceased's bank account on which she had a mandate to do so. The crown has to establish that such withdrawals though authorized were not for the intended authorization. Crown failing to establish this.

- [1] The accused faces four counts. On the 1st two counts she is charged with the theft of money totaling E135 694.40. It is alleged that this money was the property of or in the lawful possession of Calsile Dlamini who was at the relevant time under the curatorship of Sallie Abdullah. On the first count it is alleged that on or 'between the dates 8th January and 18th February 2002 (all dates inclusive) and at or near First National Bank of Swaziland Limited Matsapha branch' ... she did unlawfully and intentionally steal, appropriate and convert to her use the total sum of E22 200.00; whilst on the second count she is alleged to have stolen a sum of E113 494.40. This was allegedly committed at the said bank between 25 May 2002 and 25 November 2002 (all dates inclusive).
- [2] The third count alleges that on or between 16th December 2001 and 5th February 2002 (again all dates inclusive) and at or near Ludzeludze area, she unlawfully falsely and with intent thereby to defraud and to the prejudice of the Estate of the late Ndosini Vincent Dlamini, forge an instrument in writing, to wit, the Last Will and Testament of Vincent Ndosini Dlamini...dated 16 October 2000. On the 4th count it is alleged that on or about 5th February

2002 she presented or uttered, offered and put off the said document before the Master of the High Court well knowing it to have been forged and the crown alleges that she so acted with intent to defraud and to the prejudice of the Estate of the late Vincent Ndosini Dlamini, which in turn incurred a loss of E135 694.40.

[3] The accused plead not guilty on all four charges herein. The crown led a total of eleven witnesses in support of its case whilst the defence led three witnesses, including the accused, in support of its own case.

[4] At the close of the case for the crown the defence unsuccessfully applied for the acquittal and discharge of the accused in terms of section 174 (4) of our Criminal Procedure and Evidence Act. As stated in my ruling on that application;

‘5.10 The crown has in my judgment, prima facie led the necessary evidence, through Lawrence Teboga Mashabela (PW9), the handwriting expert, that the signature appearing on exhibit T1, which is the purported Will and Last Testament of the deceased as the signature of the deceased is not the signature of the deceased, (See Exhibit X and W). It is a forgery. So far, there is nothing to gainsay this.

[6] From the above summary of the evidence by the crown, it is clear that the case for the crown hinges on or is dependent on the alleged forgery of the Will. It was through that purported Will that the Master of the High Court issued the Letters of Administration to the Accused and it was on the strength of those Letters of Administration that the bank released the monies that were held by the deceased into the name of the accused. The crown argues therefore that but for the forged Will, the Letters of Administration would not have been issued to the accused and the bank would not have released the relevant money to her.’

[5] Again, there is no denying that the purported Last Will and Testament of Vincent Ndosi Dlamini is a forgery.

[6] In her defence, the accused who was married to Vincent Ndosi Dlamini in terms of Swazi Law and Custom, denied that she forged or had anything to do with the forgery of the Last Will and Testament of her husband. She told the court that the said document was handed or given to her by Thulani Dlamini a brother or close relative of the deceased whilst she was at her home still mourning the death of the deceased. She told the court that the said Thulani was in the company of Lucky Gwebu (Dw 2) whilst she was in the company of Thokozile Elizabeth Mkhwanazi (born Dlamini) (DW3), one of her sisters-in-law.

- [7] The accused said exhibit T, the forged Will and Last Testament, was brought to her about three weeks after the burial of the deceased. She explained further that this document was contained in an envelope and because she was still mourning the death of her husband, she had covered her head and face as custom did not allow or permit her to look at or talk to any male person, the said envelope was received on her behalf by DW3. The two later opened the envelope after the departure of Thulani and DW2.
- [8] The accused also testified that Thulani told her that exhibit T had been given to him by the deceased during his lifetime. Thulani, according to the accused was a brother or a very close relative and business associate of the deceased. The accused testified further that the purported Will was taken to the Master's office by her father Mr Thwala on her instructions. She told the court that in all her dealings with the said document, she did not know that it had been forged and did not have any reason to believe or suspect that it had been forged.
- [9] The evidence of the accused on how she got possession of exhibit T has been corroborated by Thokozile Mkhwanazi and Lucky Gwebu who gave

evidence as DW3 and DW2 respectively. Thulani Dlamini is said to have since died and was therefore not called as a witness on behalf of the accused. Lucky Gwebu was called instead. He confirmed that although he had not actually read exhibit T, Thulani had told him that the envelope he was taking to the accused contained the Last Will and Testament of the deceased and had also explained to him what a Will was or at least what its purpose was.

[10] The crown has not led any evidence to establish that it is the accused who forged exhibit T. As already stated above, that exhibit T is a forgery has been conclusively established by the crown through the evidence of Teboga Mashabela, PW9 the handwriting expert. However, it is just not enough for the crown to prove that exhibit T is a forgery. That is just one part of the exercise. The other is that the crown must prove that it is the accused who forged the document or that she used it fully aware that it was forged or at the very least, that the circumstances were such that she must have reasonably suspected that it was a forgery. This proof must be on the requisite standard of beyond a reasonable doubt. Anything less would not suffice.

[11] The substantive and major beneficiary of the deceased in terms of exhibit T is the accused who is also appointed as the Executor of the Estate. DW3 is only tasked with the responsibility ‘to assist’ her in all family affairs – as I instructed her during my lifetime.’ The crown argues that because of these provisions in the forged Will, I should hold that it is the accused who forged it. This calls for reasoning by inference based on circumstantial evidence.

[12] In *R v Bezile Sikhala Khumalo case 118/2012* judgment delivered on 8th September 2013 I restated the law pertaining to reasoning by inference as following:

‘In *Shongwe, Lucas v R, 2000-2005 (1) SLR 136 at 142* this court per Masuku and Maphalala JJ referred with approval to the well known judgment in *S v Pepenene 1974 (1) SA 216 (O) at 219* where the court stated that:

‘All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error, because the court may be mistaken in its reasoning. The inference which it draws may be a *non sequitur*, or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible

In reasoning by inference there are two cardinal rules of logic which cannot be ignored.

- (i) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (ii) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

I repeat these remarks herein.

[13] The circumstantial evidence in the instant case is very narrow or brief. It comes in two parts, namely (a) the forged document was found in the possession of or came to light through the accused and (b) she is the substantive beneficiary therein. From the outset I mention that these are rather tenuous or weak pieces of evidence from which to deduce the required inference or conclusion. First, it is common cause that the accused was married to the deceased and that at the time of the death of the deceased, the two were living together as husband and wife at their home at Ludzeludze. This is the home that is purportedly bequeathed to her in the forged Will.

Albeit it is common cause that LaGinindza, (PW5) the other wife of the deceased originally lived there, she had been expelled therefrom by the deceased and had returned to her parental home. Secondly, the deceased and the accused operated joint bank accounts at the First National Bank and the accused was a signatory in those accounts. Her own personal income from her business was often deposited into these accounts for the joint benefit of herself and the deceased. Therefore what may be viewed or termed as her real gains from these properties, ie, the home and bank accounts are minimal. Thirdly and perhaps more importantly, she has given an explanation on how she got to be in possession of exhibit T. The crown has not shown that her evidence in this regard cannot reasonably possibly be true.

[14] I need not believe the veracity of the version given by the accused in order for me to acquit her. If, in the circumstances of the case her evidence may reasonably possibly be true, I have to give her that benefit of the doubt. It would be stretching one's imagination too far indeed to hold that simply because she was found in possession of a forged will wherein she is appointed the Executor and she is also a major beneficiary, she is the person who forged it or that she dealt with it knowing that it was forged.

[15] From the foregoing, I cannot hold that the crown has proven its case beyond a reasonable doubt on counts 3 and 4 herein. Consequently, the accused is found not guilty and is acquitted thereon.

[16] Counts 1 and 2 relate or pertain to the various bank withdrawals that the accused admittedly made after the death of the deceased. The evidence by the crown is substantially found in the testimony of Eve Dunn (Pw 4). This evidence is common cause as it was expressly admitted by the accused. The accused, however, denied that these withdrawals by her were unlawful or were acts of theft on her part. She referred to past or previous withdrawals made by her alone during the lifetime of the deceased which were accepted or honoured by the relevant bank.

[17] In examining or assessing the evidence on counts 1 and 2, the following facts are of paramount importance, namely;

17.1 The deceased died on 16 December 2001

17.2 Exhibit T was forwarded to and received by the Master's office on 05 February, 2002.

17.3 The bank received the Letters of Administration from the Master's office on 25 May 2002. It would therefore stand to reason that the sum of E22,200.00 withdrawn by the accused from the bank and which is the subject of count one, was not made by the accused and honoured by the bank on the strength of the Letters of Administration that were issued to the accused. These Letters were not in existence then. It is therefore quite understandable why the crown has characterized this offence as one of theft simpliciter rather than fraud.

[18] The evidence by PW4 (Eve Dunn) shows that the accused withdrew a sum of E10,000.00 and E7,000.00 from the deceased's (Bob save) savings account on 08 and 28 January 2002 respectively. (See exhibits O and P). These were cash transactions made by her through a teller in the bank. She made cash withdrawals through the Automatic Teller Machine totaling E5200.00 between 04 to 18 February 2002 (See Exhibit R). These transactions make up the grand total of E22 200.00 that is the subject of count one. The bank account number for this account is 62014014203. The accused was authorized to sign or make withdrawals on this account. Infact as per the mandate held by the Bank (exhibit F), 'anyone' was authorized to

sign or make withdrawals. Anyone in this case obviously refers to the accused and the deceased.

[19] From the above evidence, it is therefore not surprising at all that the accused was permitted by the tellers to make the withdrawals referred to above. The accused told the court that she was authorized to make the withdrawals and the bank knew about this fact and indeed permitted her to make the withdrawals. The accused further testified that these withdrawals were effected for household necessities and not exclusively for her own personal benefit.

[20] The crown alleges that the money withdrawn by the accused belonged to Calsile Dlamini. There is not even a shred of evidence to support this or at the very least that Calsile did not benefit from these withdrawals made by the accused for household necessities. The conclusion is, in my judgment, inevitable that the crown has failed to establish beyond a reasonable doubt that the accused committed the crime of theft in effecting the relevant withdrawals herein. She is accordingly found not guilty and she is acquitted on this count as well.

[21] I now examine the evidence on count two. The withdrawals in this case were made between 25 May 2002 and 25 November 2002 and the total sum involved is E113 494.40. The crown alleges that these monies were transferred from the deceased's bank accounts into account number 62034799695 held by the accused following a request made by the accused on the strength of the Letters of Administration issued to her. (See exhibit Q). The total in my calculation is E113 929.10 and not E113 694.40.

[22] The Letters of Administration, it is common cause, were issued on the basis or authority of the forged Will. The court has already found that there is no evidence to establish that the accused was aware or had reason to believe or suspect that the Will was forged. This extends to the issuance of the said Letters. That being the case, I can find no reason to hold that she acted with the requisite mens rea or state of mind to commit the crime of theft in instructing the bank to transfer the relevant monies into her account as the executor of the estate of her deceased husband.

[23] Again, as in the other counts herein, there is no evidence that the monies in question herein belonged to Calsile Dlamini or that these were the proceeds of her claim from the Motor Vehicle Accident Fund. But, I accept of course

that this lack of evidence may not *per se*, where theft has been proven, in law result in an acquittal of the accused. In the present case, the crime of theft or any other competent verdict has not been established or proved. The accused is accordingly found not guilty on count two and is hereby acquitted.

[24] In summary, the accused is found not guilty on all four counts and is hereby acquitted thereon.

MAMBA J

For the Crown : **Mr M. Nxumalo**

For the Defence : **Mr S. Gumedze**