

IN THE HIGH COURT OF SWAZILAND

In the matter of: Criminal Case No. S.284/82

REGINA

VS

1. ALFRED MANDLA NDZINISA

2. MARY SUKATI

CORAH: NATHAN C.J.

FOR CROWN: MR. NSIBANDE

FOR DEFENCE: MR. SHILUBANE

JUDGMENT

(Delivered on 13th October, 1983)

NATHAN C.J.

The Accused were charged on four counts of fraud. They pleaded Not Guilty to Counts 1 and 3. In respect of Count 4 No.1 Accused pleaded Guilty and No.2 Accused Not Guilty. This plea was accented by the Crown which withdrew the charge against No.2 Accused.

Count 1, reduced to its essentials, alleges that the two Accused were employed at Matsapha Airport as Accounts officers; that with intent to defraud they misrepresented to the Swaziland Government that certain persons listed in schedule A were entitled to be paid for overtime and that

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by means of this misrepresentation they induced the Government to pay out to the employees a total of E3,877.74 as overtime whereas the Accused well knew that the employees had not worked any overtime "bonus and were not entitled to be paid the amount of E3,877.74.

Count 2 alleged that with intent to defraud the Accused misrepresented to the Government that the persons listed in Schedule B were entitled to receive their salaries through pay sheets and thus induced the Government to pay the people listed the sum of E1264.49 through pay sheets, whereas the Accused well knew that the people listed in Schedule B were not entitled to receive their salaries through pay sheets and were not entitled to be paid the total amount of E1246.49.

Count 3 was in similar terms to Count 1 .

The defence sought further particulars in regard to the charges . It asked whether the alleged representation to the Government was oral or in writing; and if in writing a copy thereof was required. And it asked whether the misrepresentation was express or implied by conduct or by any Other means whatsoever.

The reply to this request was that the misrepresentation was in writing and that copies of the written misrepresentation had already been supplied. I have not seen the copy or copies that were supplied but assume that it was one or more of the pay sheets to which further reference will be made.

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The trial, as outlined by Mr. Nsibande who appeared for the Crown and as it appeared from the evidence that was called, proceeded on the following basis: the Accused had devised a scheme of making money through pay sheets. They would requisition an amount with which to pay employees who were paid in cash. A proper pay sheet reflecting the correct amount payable to genuine employees would be compiled and the genuine employees were paid on the basis thereof and signed accordingly. But the Accused requisitioned for a greater amount than they genuinely needed and to account for this surplus they destroyed the genuine pay sheets and prepared fictitious pay sheets reflecting amounts purportedly due to fictitious employees and amounts pretendedly due by way of overtime even to genuine employees. These sums they would pay themselves; "but they or somebody on their behalf would sign the fictitious pay sheets in the names of the employees, genuine and fictitious, listed thereon. Although pay sheets as such are mentioned only in Count 2 this pattern was common to Counts 1, 2 and 3.

It was conceded by the defence that the employees in question had not received the amounts reflected in the fictitious pay sheets and that the purported signatures thereon were not the signatures of the relative employees.

The evidence was to the effect that the fictitious pay sheets were only presented to Treasury after the money had been paid out. This was for the purpose of checking.

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As I have indicated, the "basis of the Crown case, in respect of Counts 1, 2 and 3, was that a fraud had been perpetrated on the Government by means of the fictitious pay sheets.

There is, however, an all-important fallacy in this approach, namely that the prejudice to the Government did not flow from the submission of the fictitious pay sheets "because payment had already been made. It really flowed from the fact that an inflated amount had "been requisitioned in the first instance.

Mr. Nsibande appeared to realise this in the course of his argument; but the difficulty is that this was not the basis of the case as presented. There was no attempt in the evidence to establish exactly who had made the initial requisition for an inflated amount or in what manner this was done.

Mr. Nsibande submitted that the surplus moneys had been misappropriated by the Accused and that there was a misrepresentation by them that the moneys had been paid to the employees. But in this regard, firstly the Accused were charged with fraud and not with theft and theft by false pretences. As was pointed out in *M. S. Dlamini v R 1977-78 SLR 131*, theft by false pretences is always fraud; but fraud is not always theft by false pretences.

Secondly the prejudice to the Government consisted, not in the fact that there was a misrepresentation that the money had been paid to the employees, but in the fact that an inflated amount had been requisitioned and in fact misappropriated by the Accused.

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There is a third difficulty. Count 1 of the indictment makes reference to the Government having paid out to the said employees a total amount of E3877.74 as overtime., Count 2 similarly alleges payment to the persons listed in Schedule B. Similarly in Count 3. But none of the payments in question were made to the employees concerned; and the evidence could not have established and did not establish this.

In order to overcome his difficulties Mr. Nsibande first invoked Section 182 of Act 67 of 1938. This is of no assistance to him. It refers to false representations as to the nature or quality of a certain article or substance, and has no bearing upon the present case.

Mr. Nsibande next sought to amend the further particulars to the indictment so as to allege that the misrepresentations were both in writing and oral. But there is no evidence of any oral misrepresentation at

all, unless it possibly consisted in a verbal requisition for an inflated amount. But this aspect of the matter was not canvassed in evidence; and in terms of Section 154 (1) of Act 67 of 1938 an amendment can only be granted if the Court considers that it will not prejudice the Accused in his defence. It is clear to me that the suggested amendment would be highly prejudicial and it cannot be granted.

In this connection I quote from the judgment in *S. v Rosejrthal*, 1980 (1) SA 65 (AD) at p.89 E - G:

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"In the absence of an amendment the State was not entitled or justified at the trial or before us on appeal to reply on the different case of defrauding the banks. In litigation of this magnitude and complexity a charge of fraud perpetrated by misrepresentation or concealment should generally be alleged with reasonable precision and clarity (*R v Alexander and Others* 1936 AD 445 at 457; *S v Heller and Another* 1964 (1) SA 524 (W) at 445H) so as to enable the Accused to prepare his defence in respect of that alleged misrepresentation or concealment and no other (*S v Hugo* 1976 (4) SA 536 (A) at 540F-H, and during the trial and on appeal the State should ordinarily adhere strictly to the case of fraud as pleaded and not be allowed to depart from it or to set up a different case (see the *Alexander and Huga* cases and *S v Heller* 1971 (2) SA 29 (A) at 52H-53D), unless it is clear that the Accused will not thereby be prejudiced (of, for exaple, *R v Alberts* 1959 (3) SA 404 (A)). Here the possibility of prejudice to the Accused is manifesto" In the result it is not possible to convict the Accused on Counts 1, 2 and 3 as presented.

The Accused are found Not Guilty on Count1. Accused No.1 is found Guilty on Count 4.

C. J. M. NATHAN

CHIEF JUSTICE