

TANZANIA / JUDGMENT

19800611 TZHC Tanga1

COURT
TZHCDECIDED
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c'i7- -r1L1 The appellant, t3 Hrnduu s/c Rumba ws con'victed in the District Court at Paia -on. 'our counts of stealing by agent contrary to eeOtion 273 (b) c the Penal Code, He was sentenced to five years lmprieon.meTnt n1nt one and to 6JX years imprisonment on each of couitS < Woo four, inclusive Sentences to rAnconctrrently ftb is now appealing to this Court against h'a conviction and sente%oes, Tbat the appellant was throughout the material time an agent of the National Lottery duly appointed is not in dispute In fact. the flirector of the National Lottery himself one Mr. MOHAMED MtYSA (pWi) gave evidence in the Court below on this aspect of the cee And he also tendered in evidence his office copy of the letterof appointment of selling agent, Exhibit P6. It is in evidence on the prosecution side which the learned trial magistrate accepted to the effect that every agent of the National Lottery is Sent A particular number of Rottery tickets .:~;f or a particular draw vrith , hree copies ofan issuenot. The white copy of . the issue óte is returned by the Agetto the National Lottery headquarters together with the sales money or the proceeds from sale of the lottery tickets' The pink copy ./2 C of the issue note is to,'be'returned imme.dia.té11 on receipt of the lottery tickets as it is on it that the agent ac1owledges receipt of the lottery tickets sent to him from the headquarters The evidence is silent as to the cblour of the third copy of the issue note and what it is thêant ±'àr, As regards the latter i3 however, seems to me that this third copy must be for the agent himself; at least for his reco±ds tOo -Be it qs it may, from copies of issue notes which were tendered and admitted in evidence by the trial Court, it is clear, that the final date for sale of lottery tickets for a particular draw js C shown or specified in the appropriate place on the relevnt. issue, note and this iS, understandably, before the date of The draw itself It was testified by pW3 that after every..draw the agent prepares a return of unsold lottery -tickete He does so by literally recording the numbers of the said unsold tickets in the retuxn The Director s PW1, testfied that'according to regulations an agent is required, to remit to the headquarters tie sale moneyi l.i4e money which he realized from the sale of lottery ticketbi Wlthi11 seven days after the; draw, As regards the nde of payment of sale uloney to the headquarters pW2, YOHARA BENDBRA MSHUZA, an accountmnt with the State Lottery stated that this could be by cheque or money orders and/or by production of patrons tickets Which won Aprizes of up to She 100/. National Lottery agents are psrmtted to effect payment to such wirmers and then later produce the said tickets and also show them in his sales statement Such tickets must s however, be produced by the winners within six northsof the draw It seems thereafter they become stale and oid The value of the valid winners t1ckts is however counted as a remittance by the agent concerned S I So much for the procedural aspèot of the. .case 0 pW2

testified to the effect that in August, 1978 he inspected the sales of the state lottery tickets by agents throughout aniaia, Ona the agents whose sales ..he ; inspected was -the appellant who was then the agent here atThng There was an apparent shortage of She 15216/30 which was dtie :from'the appellant He recrted th iñat - er to the Director, PW1 Who eventually, intructe-him to come to Tanga and see the appellant inconnection with -the matter > Eë, pW2 1 travelled toTanga and met the appellant inthe'dffce and presence of the •0 - ... ;0. Commissioner who at the trial7.Mnt.of> \.; the said peting were, however, recored and a copy thereof tendered and admit - ted in the evidence before the trial Court. In fact two such meetings wece hel'd, i.e on 31.8.78 and 8.9.78 It was eventually decided tlitt the appellant should go to the National Lottery headquarters n Dar-es-Salaom. This wcj,s because he argued that his aocounts -did not tally with those of pW2, Indeed on 13.9.78 the appellant-and--PW2 travelled to Dar-es-Salaam and on 15.9.78 the twoof them 7 i.e PW2 and the appellant, inspected the relevantaccounts together They inspected issue notes 7 receipts and sales statements of ticket both sold and unsold Eventuall -y, tley arrived at the sum of She 93,217/35 short. On the difference between 9he'original amount found short C. by PW2 and the subsequent amount PW2 had this to say and I quote .froin the recIord: 0 "The shortage fell £romShs 155,216/30 cents to.Shs..., 93,217/35 cents as the accused had remitted some money during the interval He was sending this money to the 0 Headquarters directly." The appellant admitted that this -mount She 93,217/35, was due and owing from him- - - I .I. - •1 4 This admission WaS.reduced - in writingand the it before.a Commi.ssioner.of Oaths and in the presriceLbf PW1, see exhibit P8 Thereafter the Director, PW1, instruted the Internal Auditors for the National Lottery,, one 11ANIEL .30SE. LYIMO (pW3) to deal with the matter: . PW3 teStified.to:.the effeitthat in September, 191ã:the appellant went to Dar—es—Sulaam with his cccouxtnng documents fth comparison He i.e pW3, also audited. the appellant's accounts. For the sixth driw in 1978 whose proceeds, in past 4 are the basis of the charge in couzit, one s the .appf.iit was issiidv±th 16000 lottery. tickets. These were. issiednsiie':C note no. 6370 Exhibit P10 (i). The appellant sold 9 9 405 tickets and 55 tickets were unsold: Each ticket Sold at Shs 4/ The ... ,.- . - . . total amount realized was,' tIree •Shs 37,620/= 'Ou his the appellant got Shs 5 1 643/ = representing cent 6f....the sdl as his commission The Bciiance which appellant should have remitted is Shs 31,977/. He, however remitted only Shs 26,086/\$5 which was received on three receipts, Exhibit P10 (a),

- (3) and (4) and two "0RVS 11 , Exhibit P10 (5) nd P10 (6). The balance of Shs 5 1 890/15 remains unpaid For the seventh draw anothe,rset'bf.10,000 lbtry ticket- were sent to him on issue note no,..19.809 xhibi't"P12 'The appellant acknowledged receipt thereof; Each ticketwas valued at Shs 4/= The appellant sold, all except 225 'ticke'Which were not Sold He prepared a.returA of unsold;:t±ckets'yihiohki submitted to thd headquarters This was tendered .rid'adm1ttëd 'ill' evidence at the tri'il as Exhtbit P13 At this stage let me pause and. pont dutthat:the record of próceedingsshow s th,tP!3said in his evidence;that the appellant sold 5775, tickets for Shs 39 1 1001=-. . . .

- :∴. 4, pouMc* - . Thlo b'iio eDJ.&T - bQ'iru ct-b flhs 4/ per tcket 5775 tickets.would, by simple arithmetic, fetch Sha.23,100/ CoxnZE She 39,i/= would be the value for 9775 tickets at Shs ,4/, pe.r ticket. If. I may go further s 225 plus 5775 is equal to 6000 whereas 225 plus 9i775 equals to 10,000 which is.th number of the toket sent to nd received by the a-ppeflant for the -sev? nth .draw If the number rf unsold tickets -was.?25 as. ac1l.ed . by the appellant in Exhibit 213 then it . f.ol1pws, as night follows, day, that those soidmut have been 9,775," of course s that is there being no rom for dmniaged, stolen * or lost -tickets wiuch indeed, no onecame orwara and said that there were 'my. This error must s therefore, either have been on the part of the learned trial magistrate who must have mis heard pW3 or it was due to an inadvertence on the part of PW3 himself.. Whatever miht have beê the case the error is obvious and anyone inihis right frame of mind cannot dispute this I shall be reverting to this error later in this udgement. In the meantime suffice it to say that PW3 went on to say that the appellant deducted his conimissionfrom She 39 1 1001= at 15-per cent: This cme to Shs 5,865/= The appellant should ve reited the balance of Shs 33,235/..to the headquarters. his he apelltnt, never did and it forms the basis of Count For the Idd special Draws 12000 lottery tickets were sent to appel-lant 6 , The appellant acknowledged receipt thereof on issue note no. 19403, Exhibit P14 Each ticket for the special draw was worth She 6/. After the draW the appellant prepared his return. of .unsold tick?ts here were 5048 unsold tickets and 6952 were sold and these fetched Shs 41 1 712/ The appellant wasB entitled to his 15 per cent commission out of thie -. ...-/6 f '4
- 6. - ThIs tQShs. 6,256180. Te balnca of Shs, 35,.455/20 tou1d have been rexnitted to the headquarters by the appellant.' He, however, did not.do-_66 and this is the subject matter in count three s Por the eigbth drii, lott-*i7.,AJL*k*t9 ofte sut to tM' " appellant in two'lots of' 7,000 'ticketS each The appellant acknowledged receipt the'eof on issue notee nose 19857 and 19884, Exhibit P16' (l),'originaj and.carboz óoples aiid" Exhibit P16 (2), in original and carbon copies, re5pectively After the draw the appellant prepared a return of unsold tickets, Exhibit P18, in a]l out,of the total"numbèi of 14,000 tickets 2,921 tickets were unsold. Sold tickets were 11,079 and their v-itxé was She 44,3161=. The appellant deducted his 15 per cent CouimissionShs. 6,647/40, out the principal sun. There was there'fore a balance, of Sbs 37,668/60 whichthe' appellant was to renit When the appellant was preparing Exh. P18 2 PW3 was present, her.e.,at.,Tanga, and he also checkedit instantly. The appellant made Some remission in three instalments for the draw The first instalment was of She. i6,000/= for which he appellant, was issud With receipt no.' 4745 of 13/10/78, Exhibit P17 (3) Th e second instalment was of Shs. 3 1 0001=. The appellant was issued with a receipt no. 4755 of 13/10,78, Exhibit P17 (2). The third instalment was in the form of winners tickets vaLued at She 7,430/ He WaS issued with a receipt no. 226' of 9/10/78, Exhibit P17 (i). The total amount paid by appellant '± the eigbth draw was p therefore. ,Shs. 26, 430/ There'yias never- theless, still a balance of Shs. 11,258/60 which was not paid and this is the basis of the charge in Count 4 'After his auditing pW3 prepared a report wh±'àh"h, tendered in evidence at the trial and marked Exhibit P19

- L. 0
- PW3 further testified to the effect that on 21/9/78 he met the appellant in the office of the Area Commissioner. The appellant was asked to pay the money which he had so far not yet remitted and found to be short to him. He appellant 7 then asked for a period of two days in which to look for and find the money. His request was complied with. On 23/9/79 PW3 and the appellant met again in the office of the Area Commissioner. The appellant then asked for three more days to look for the money. He was given another chance and they arranged to meet there again on 26/9/78. When they met on 26/9/78 the appellant asked for yet another extension of time. It was then agreed that they should meet there again on 30/9/78. When they met on that day the appellant was asked to pay the outstanding amount which then stood at Shs. 85,818/95. This time the appellant kept quiet and no payment was made. The matter was then reported to the Police who there, apparently arrested the appellant and subsequently charged him. I have deliberately used the adverb "apparently" because no evidence of arrest was adduced in the case. In his statement in defence the appellant stated that in September, 1978 he was visited by PW2 who after introducing himself to him asked to audit his accounts. He produced all his receipts and books and showed them to PW2. Thereafter PW2 claimed that he, i.e. appellant, owed the National lottery cash to the tune of Shs. 155,000/. He disagreed because he had all the receipts for all Draws. There were however, only two Draws i.e. the 7th and 8th, whose tickets he was then still selling. However, he showed all the tickets which he had to PW2 who then disclosed to him that the demand was in respect of the 6th, 7th, Iddi Special, and 8th Draws for 1979.. He had a receipt no. 1974 for Shs. 19,149/70, Exhibit D9, which he showed to PW2 but the latter did not accept it - whereupon the appellant - to the Area Commissioner. They failed to reach an agreement whereupon he told the Area Commissioner that he would take his receipts to Dar-es-Salaam for comparison. The appellant went on to state that before he left for Dar-es-Salaam, however PW2 asked for Shs. 15,000/. from him so that "he may talk to the Director", on his behalf. He refused after PW2 had refused to issue a receipt for the money. The matter was not reported to anyone. PW2 intimated to him that he had no money whereupon he gave him Shs. 1,000/. He appellant was given a receipt for this no. 4671, issued at Dar-es-Salaam, Exhibit 153. The said receipt shows that the amount on it was credited to the 5th draw for 1978. He himself however, wanted the money to be credited to the draws for which he was still indebted to the National Lottery. The appellant stated in his defence that on 18/9/78 he was called by the Director who then asked him about the remittance. He also told the appellant to agree to pay for the 6th, 7th, Iddi Special and 8th Draws. To this the appellant replied that he had already sent money by bank orders and he demanded his receipts. The cashier then issued five receipts to him nos.: 4589 for Shs 25,000/= (Exhibit D4A), 4291 for Shs. 10,000/ (Exhibit D4), 4642 for Shs. 10,000/ (Exhibit D40), 2137 for Shs. 1,960/ (Exhibit D4D) and 2139 for Shs 71/30 (Exhibit D4E). The appellant said that he did not direct the headquarters for what draws the money was for. Nevertheless the headquarters allocated the money for draws for which he was never told before that he had debit balance. Later he was taken to the office of the Tanzania Legal Corporation. While there he was told to sign a

document, When he asked what for he was told to Sign as a Tanga Agent. He, thefore, signed the document s Exhibit P8without intending to admit the ebt

- .
- s 9 Thereafter, he returned to Tanga. When he arrived he received more rcceipts. These were No, 4647 for 8hs.3,000/= (Exh. D 5 A), No 4648 for Shs,5,0001= (xh. D \$ fl) and No 4665 for She o20,000/= (Exh D 5 C) 0 These receipts showed tht they were entered against draws for which they were not ir.Ltendod and in which he was not indebted. There were also more receipts which he received in respect of Winners tickets which he submitted. Those were No 2142 for Shs.11,410/ (Exh D 6 A), No 2143 for Shs.120/75 (Sxh D 6 C) and No 2178 f or Shs 0 28/30 (Exh D 6 B) 0 These too were wrongly credited. While at Tanga the appellant stated that he handed over Shs16 ? 0001 to PW3. He was issued with a receipt No 4745 dated. 9/10/78 (ch D 7 A)0 He also submitted Winners tickets worth Shs 7030/=G He was given a receipt No 2262 dated 9/10/78 (Exh, D,7B) Q He was also given another receipt No 4755 for Shs.3,0001= dated 13/10/78 (L'xh, D 8) He was also given a receipt No 2097 dated 29/8/78 for Shs.10,250/= (Exh 0 D.io). According to the appellant, if the amounts on the cited receipts are totalled up it will be found that he is not indebted at all. He wont on to say that the whole case is a frame up so that someone else takes over the agency from him, The learned. Magistmtë reviewed all the evidence before him with care. He found that the'recoipts tendered by the appellant in his defence had already been taken into account by P143 at the time he prepared the report, Exh.P.19 Thereafter the learned. trial Magistrate considered the individual counts. He was satisfied that, with the exception of count two, the appellant had the amounts shown in the counts, due and owing to him. Since he, appellant, was, however, denying that any amount was due from him then, found the learned. trial Magistrate, he must have intended, to deprive the owner of the money permanently, r 0o/10 -s I . .-lo-I. In Count two the learned trial magistrate altered the amount but he entered a conviction all the same As for the amount I think I have sufficiently demonstrated as to how it must have arisen It is the error vñ±ch 1 mentioned earlier in this judgement which must have misled the learned trial magistrate Lewing this topic aside for the meantime the learned Co,ureel for the appellant 9 Mr Bishota, made capital, when argiing this appeal before me, of the fact *:Ithat during croas. examination by himself at the trial P2 stated that the appellant had no shortage before July, 1978,. However. what the learned Counsel, with respect, appecrsnot to see is the clarification by PW2 iii his re-examination the relevant portion of which reade and I quote: "It was in August 1978 that we discovered the siortage for the previous lottery draws the accused is charged with Had the libikio (Sic) been less than his, Security bond this would have been norma1" Earlier on during croSS-examination this Saé Witness, pW2, inf.act to1d.Mr Bishota thatthe appellant's "limbikiz& was the firt.Mg one" he had ever peen. The evidence on record Ldoes, therefore, show that the ppèllant had some debit balance, for previous dr'aws PW2 also stated in his evidence that "all / reeipts giv'n to. the agent after remitting the money to us Shows for what draws itwas" This explains the draws Shown on practically all the receipts which were produced by theappellant In, his defence the appellant contends that the sa.id draws were - wrongly entered I have myself , very carefully

gavd .i through the auditors report, Exhibit P19, which PW3 prepared It is a very comprehensive report indeed and .irtcover&, literally, the whole period of the appellant's agency All there receipts which the appellant produced at the trial are shown in the: column for payments or remittances and their amounts They are against their appropriate draw Some, admittedly, are apportioned but they are shown all the same If, therefore there was double payment the SÜé would have easily been reflected on this report, Exhibit P19, which indeed, shows that previous to the sixth Draw s 1978 there is 110 amount still outstanding What I find to be some what interesting is the fact that the appellant stated in his defence that he had all his receipts and relevant accounting documents:.. At the same time he is said to have oíé through the accounts for at least more than once wjth PW2 and pW3 Ixideèd the appellant now denies this but on 'my part, I am -tiied that this is no more than the laB t wriggle of a dying python That being so and if what the appellant states is correct then, as aforesad, any amount in excess would have been found or, alternatively, the remittances had not been credited then- aplln ,would,,have produced the relevant receipts as he did these which he te -ide.red -ach one of those receipts produced shows its draw with the. exception of receipt no. 2137, Exhibit D41). PW3 in his evidence, however:.. sa..dtha -t this was for the third draw of 1978

- To crown it all there is the evidence of pW3 as to the number of times the appellant kept on asking for time to find the money The appellant did not comment on it nor did he contradict it Admittedly, the duty in the case is on the prosecution to prove it.beyond reasonable doubt Nevertheless.. If the money was then there', the appellant' would have produced it If it were in safe custody somewhere then appellant would have said. Certainly / IlpII I -' 1
- 12— 41 these are facts Which he may reasonably - be expected to be able and interested to explain Instead the appellant remained mute In all the irouthstances of the case s the only reasonable inference is that. I had no money. That was on 30th September, 1978 when even retuliib of unsold tickets for the latter draws j.e Iddi speial (Eibit P15.) and the 8th Draw for . 1978 .(xhibit :Pl&) had infact, already been prepared One does not prepare a return of unsold..., corn odities,bfore and without Selling. any - This would be perverse Byprepareding the said returns of unsold tickets the necessary inference that can be drawn therefrom is that the sale had already been completed - ed If so then the money ought to have been there and appellant, as the seller, must be presumed to have known where it was and went 1 The fact of the matter, however, 19 that when the owner of the sale money, i.ej the National Lottery :::: in the person of P3 demanded that he could not get it nor could the appellant show where it was The only reasonable inference., to be drawn in the circumstances of the case is therefore that' - -. he stole the same It is true to say that after 30, 1978 the "• - appellant made some remittances to the headquarters These, as can be seen on Exhibit P19 helped to reduce the total amount due • to Shs. 85,818/95 which still remains outstanding This is however 1 -in all the circumstances of the case s immaterial because, in the case of money, the fraudulent state of mind exists if the person who takes or converts it does so that is he takes. or -- converts it with an intent to use it at his will,- although he may intend afterwards to repay . I may add does i repay-the amount or any portion thereof to the owner . . . :: Mr. Bishota for the appellant

also complained about Exh 8 upon which, he said, the learned "trial magistrate placed too much weigh-t The appellant himself denied Signing it while in full 13 posse'sion of his mental faculties He said that he signed it simply because he was told to Sj it The learned trial magistrate expressed surprise that a i a secondary school leaver the appellant would have failed to read Exhibit P8 which is written in Kiswahili.. On my part the appellant's allegation on this aspect of the case does souHaently false The learned trial magistrate was therefore exft1ted to reject it, However on my evaluation of the evidence, even if the admission in Exhibit P8 were completely ign'ed, Which I am preared to do 1 the eonyictions would still sand •' the same are sound in law and supported by other evidence, Oral and documentary. After looking at the audit reportEthbit P19 1 1 find that the.,. receipts produced by the appllaft trnderstandably failed to.. raIse . J.. . ,. . . any reasonable doubts in the mind of the trrl agitrte The same do not raise any doubts ihmy mi ike the learned trial magistrate I am also satjsffd that thapp61ia't Sto1 the money HoWever, in Count two the correct amount.is as charged and not as 1 erroneously,found br tketriai:magistrate The amount for which the conviction was entered inCount two iS therefore, altered to read 8hs 33235/' Turning to sentence 1. thisis 1 in thê.norrnal circumstances, purely within the' • discretion of the tiäl Court A Court of appeal cannot 1 lig)ztly interfere with suchdiscretion unless it is satisfied thaj the trial magistrat proceeded on wrong principle in sentencing or if it is manifestly jnadeqüateor excessive: In ts case 'the appell.nt has himseifto blame He deliberately abused the trust Wiich was placed in him by a national and public ihstitution' I have purposely used the word 'deliberately' bcause thetype of off encs the tappellant committed are acts of coiSSiofl and they involve pr.emeditatio. 4Qyever 1 the appellant is, a, first offender and both learned counsel for the S. Opfl2 ('uiczcs t'rR) 0861 'unf Jo P .tI\$-Tt T'- vTrca, .t iioo tthdo u peta&TTocr p&ssTWsTp ST -T sqoedso.x ietqo Ilu u Gpaonpoi ueaq a&t seotxoquos ot. queqxe etfl. oq. POMOTTU s-c 1dd sp-. 9,lnsaaluuij 9TAq. u 6/9T'L c9q o ean9TT 2uoam st. aoT pe!nq.sqns 19 T G6/18'G9 sqS ;o 9,unomu qoojaoo ot. UOi4deOXe et. t1flM poqJtlqsTpUfl j1 sT uoi4usUdtioo .xo; iepxo qLTj itUTP.I00Ot p.IOp.IO ST q.I 4 aeaqq, pu OM. UnOO UT °O°T UflOO t[0C0 0 qoodsi trç quamuosTjdmT (71 sauas o; ;o IiLxaq, L, eojaxqq pepTq.sqns s - i put OpTsu gau ooit. ptx O4 squ -aOD u outes etjq. eSTMSTrI tflO. puu auo ounQo tOO 0 OOdSSJ UT ouamuosTadmi St28 Q. o mxeq t atoexeqq. portqqsqns s1 Puu spçsv ss ait no; ptfl euD qunoo uç seotxeq.uos qUeAa etq. UI ATSseOXO LTse;Tutw eOtf17q.sUmo.rO 9T. TTG UT 'ST q.UaIIIUOslcITXrç S1JS-9 XIS JTO WI eA.tSqflS pe.zc cou.Ioq4o e4S peUJto pU Tith /

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