

TANZANIA / JUDGMENT

19710526 TZHC Mwanza

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IP TI-It I-ITOH OCJItT CH P ZhI'TIL AT IHJittZA Appellate Jixciodiction CFJ1MItJ.LL LI'PEJil 110, 297 OP 1970 (Ooinal Oairnl Case Nb. 271- of 1969 of the distulct court of Mwan:a before H. N. Kazimoto Esq., roeilentcdistratc). JOHN THIHtOiT APJIELLLJTT (ozaloilJI ;ccus)

- . veraus TI-IL IIEPUBLIC I RESPONDE1TT (o1ioI1ILI PROSLCuidIt) CHART-N:- 3 counta of fordery C/S 337 of Penal Code.; 1 C0Ufl1 of fraudulent false accountin(: C/s 317(c) of Penal Todd; 1; 4 co aits of stealin by servant c/ss 271 and 265 of P0n21 (Joic. JUDGT,7 ffit EL-KIIDY, A0 1 J. The appellant, John Triplow, was chored with and convicted at hroo forperry contra to action 337 of Penal Code, one count of fraudulent false accounting contraVy to section 317(c) of the Penal Code, ad tour counts of oteolinI by servant contrary to section 271 and 265 of the Penal Code, On each conviction of foroery and fraudulent false accountilh:, the a ppellnt. n a vas sent n ecd to three onthst inpriso.Lent; ni. and on ouch conviction of seclin(-; by servant he was steneedto two years 1 i:laria:cn- nent and twenty-four strokes of corporal punishuent This neant that tiie appellEflt was awarded a total of nine (9) yearst iuprisonieent and 192 strokes of corporal punishuent, thouth the learned nad:istrate said tilur tle appellant would undergo 24 strokes of corporal punishuent. However, th sentences for .1 orpory and fraudulent false accountint were ordered to non consecutively- i thus fivinl the appellant a tern of 12 uonths The sent ncca for theft by servant were ordered to run concurrently, thus oivinC, appellant a tern of two years in iJrison This pave the appellant a total of tixcee years inprisonrient and a set of 24 strokes of coxporel punishra-nt. Then for reasons which I shall refer to later in this judpuent, the learned maistTate purported to suspend the corporal punishiaent but the accused (appella nt) is to underpo a total of three (3) years as ordere d The appellant is now appeolinp udainst his conviction und sentence. On appeal he was represented by the learned counsel Mr, 1Iuparubiau At the triol, he woro represented by the then learned counsel TIr P'arelth. The tepublic was represented by the learned State Attorney, Mr. Senatta The appellant V/as not present at the hearinp itse]1. The urouncils of, appeal are brief and I shall quote thaa in full. They read as follows:-

- (I) That there was no evidence to prove that Mwanza Developacnf Sche'rie fell-within those bodies to vthich the idininun Sente:iooa Act applies.

- (2) The sentence is unduly excessive. ... 2 The appeal therefore did not seek to challenge conviction itself in so far as it related to the applicability of the Hirwariri Sentences Act Cap.526. Basically, it was an appeal against the sentence. The appellant was employed by Mwanza Development Scheme referred to as the scheme & 1) as a cashier, since 15th of November, 1968. His duty included the handling of all cash payments of the scheme. He kept all the receipts for payments made by him on behalf of the Scheme, and he also banked the money on its behalf. It would appear that as from November, 1968, the accounting system used was that of cash receipt, i.e. the scheme used petty cash books, payment vouchers, receipt books and cheque books. From the end of February 1969, the scheme began to prepare and maintain proper books of account using the payment vouchers, cash sale receipts and other documents then in possession of the appellant. The appellant also held the keys to the two safes. Mwaribelaswa (P.11.3) was the accountant of the scheme, and he regularly checked the accounts of the appellant. On 6th March, 1969, he checked the appellant's account and he discovered that payments made out by the appellant were not entered in the petty cash book. The appellant was instructed to make the entries, but he could not do so until the 18th of March 1969. Although he made the entries later, the appellant failed to make the summaries as well and Mwaribelaswa was forced to make a thorough check. He discovered that the appellant's account supposed to have balance of S.3,390/40. He took into account the amount paid out and the cash in hand. There was no bank balance then. When the appellant was asked to account for this money, the appellant could not explain how the loss occurred, and it is alleged that he told Mwaribelaswa that the money was lost. Upon further examination of documents, it was discovered that certain documents had been tampered with to show either more or less was paid out or received and that false entries had been made. As a result of the discovery of these irregularities, the appellant was accordingly charged. In respect of the 3rd and 4th counts, the appellant told the trial court that he had a contract with the scheme to paint one of their buildings. It was agreed that he would receive payments in instalments and that in fact happened, and that payment was provided by the scheme itself. His contract was worth S.520/- and this amount was fully paid to him. He was shown a payment voucher (Exhibit 6). He said on this voucher he was paid S.100/-, but S.2100/- was then added in the duplicate. Obviously, the amount of S.100/- stated in words and in figures, had been crossed out and in their place, the words "and in figures, the amount of S.2100/- was added." The appellant agreed that he had altered the receipts because, apart from the amount paid out to Kassim Salun, another amount of S.2000/- was paid out for building materials. The learned judge rejected this explanation on the ground that the signature was forged. In my view, the learned magistrate's finding was justified. If the appellant had spent an additional amount of S.2000/- towards purchase of building materials, this would not have appeared in the payment voucher with the amount paid out to Kassim Salun as remuneration for services rendered. The words "purchase of building materials" appear to have been in a different appearance to the words of Mr. Kassim Salun on contract. There would also have been cash sale or invoice to support it. There is no doubt that this document was altered. The learned trial judge held further that the alteration amounted to forgery as it told lies about itself, and that the appellant must have stolen the

amount of S.2000/- These findings were not attacked on appeal. In respect of count 5 and 6 9 Hury Hair (P.7.9) told the trial court that on 3rd of March, 1969, he sold brake lining to the scheme for S.350/-. He said that he issued a receipt to the customer, and he retained its duplicate which he showed as cash sale receipt No.073 in Exhibit 9'. The duplicate showed that the amount received from the scheme was S.350/-. He said that Phitosida (P.7.5) was the one who collected the goods and paid the money in cash. However, the original of this cash receipt (073) SiiOyTod found that the amount paid was S1350/- Hair denied that he received S.1350/- on this amount. Phitosida did not say anything about this amount of money. Nor was he asked anything about it. The original cash sale receipt was in possession of the appellant. On this issue, the appellant did not say anything specifically but he alleged; namely that he was over-loaded with work and that he kept the documents in his office. On these counts, the trial magistrate "felt compelled" to hold that the appellant Z, alleged cash sale receipt No.073 added a figure of one in front of the figures 350 so that the amount came to be S1350/-, and he inferred that the appellant pocketed the balance. Jain, these findings of the bench-mediated trial magistrate were not attacked on appeal. In respect of the 7th and 8th counts, Mwanja (P.7.1) told the trial court that on the 10th of March, 1969, he took 14 cases of empty bottles, to Tanganyika Breweries - Mwanza, and said that he was given a refund of S.2801-9. He claimed that thereafter, he handed over the cash sale No.40915 (Exhibit II) and the money to the appellant; However, Mwanja was not given receipt for the money he paid out. Giga (P.7.1), an employee of Tanganyika Breweries Ltd., Mwanza, confirmed that he paid out S.280/-, in cash, to a customer in respect of Exhibit 11, but he could not remember the name of the customer. Nor he asked if he could identify the material customer if he saw him again, so that his evidence did not confirm Mwanja's claim. On this issue, the appellant said that he did not take the S.280/- from Tanganyika Breweries Ltd., and that he did not steal the sum of S.154/70 from the scheme. However, Mwanja (P.7.3) said that when he checked the appellants' accounts, the appellant "agreed that he received the money" 0 Also in the course of checking, Mwanja (P.7.3) discovered payment voucher No.19.2 (Exhibit 5), which purported to show that the appellant paid out S.280/- . . . 4. to Tanganyika Breweries Ltd. This amount is similar to that on each of S.40915 and the payment voucher referred to this cash sale as the one in support of the transaction. The alleged payment voucher too, showed was not signed by anybody, although this does not appear to be important; however, as there were genuine payment vouchers which were not signed by anyone. However, the learned magistrate held that the appellant received the account of S.280/-, and that, therefore, it was not correct that, by the same cash sale, the appellant paid out S.2801-9. He was satisfied that the balance of the payment voucher was fraudulent and that it was intended to cover the amount he had misappropriated. I think his finding that the money was received by the appellant cannot be challenged as there was evidence from Mwanja and also the appellant's own admission to Mwanja. If he received the amount together with the cash sale receipt No.40915 (Exhibit 11), it was clearly fraudulent to use this cash sale to support his allegation that he paid a similar amount of S.280/- to Tanganyika Breweries Ltd. And in respect of counts 9 and 10, Chohan (P.7.7), an employee of Tanganyika Bus Service Co. Ltd., said that he issued cash sale receipt No. 1043 (Exhibit 14) after he sold one inner column steering

spindle for S's.541/70. He said this amount was paid to him by cheque. (Exhibit 13), and that there was his endorsement at the back of the cheque. The cash sole showed that the cheque given in payment was No. P.041964, and this tallied with the number on Exhibit 13. The amount on Exhibit 13 is Sh.541/70 and, signed by the cashier. But the amount on the cash sole receipt was Sh.1541/70. Chalmers did not recollect who the cashier was. P. Hiteside said that he authorised payment of 541/700. Then there was a cash voucher (Exhibit 10.1178), in the handwriting of the appellant, showing that an amount of Sh.541/70 was paid for steering spindle, and, in support of such payment, the cash sole (Exhibit 14) was quoted. The duplicate of this cash sole (Exhibit 15) showed the amount as Sh.541/70. On this evidence, the trial magistrate held that the amount in fact paid out was Sh.541,700 and not Sh.1,541.1/70. As the appellant's cash voucher (Exhibit 10.1178) was in the handwriting of the appellant, he was satisfied that the appellant was the one who forged the cash sole (Exhibit 14), and that he pocketed the balance. I think the evidence shows clearly, that the cash sale was forged and a one was inserted before the 541/70. As it can be seen, therefore there was ample evidence in support of each of these counts. However, the learned counsel for the appellant argued that there was no evidence that the scheme was registered society for the purposes of the Minimum Sentence Act, Cap.526, and the learned State Attorney conceded on this point. It is clear from the record of the evidence that no such evidence was led, and therefore the learned magistrate erred whom he - acted under the Minimum Sentences Act, Cap.526 when he passed the sentence. . . 15 In addition it was argued that the sentences were excessive. With due respect, I do not think that the sentence was so excessive so as to require the interference of this court. I set aside the terms of imprisonment imposed, and impose therefor a sentence of three (3) months in count 3, three (3) years in count 4, nine (9) months in count 5, two (2) years in count 6, three (3) months in count 7, nine (9) months in count 8, three (3) months in count 9, and two (2) years in count 10. All these terms should be served concurrently. The learned magistrate's scheme of serving the terms of imprisonment would not necessarily have been illegal in view of the High Court decision in the case of *IGhihli v. F* (1968) Et.C.D. No, 331, if he had not erred as I have explained. Further to that, the learned magistrate purported to suspend the sentences and impose an omnibus sentence of three years. In this regard he erred, as he had no power to suspend and impose another sentence as he was already functus officio and he could not impose omnibus sentence as he purported to do, as that would be contrary to many decided authorities of this court. If the learned magistrate discovered subsequently that he erred in imposing the sentences, the course open to him was to remit the case file to the High Court for appropriate action. ORDER:- This appeal is dismissed. Dated, delivered in Court on 26th May, 1971. (Z. LT 11-K. ndy) 1T. JUDC, MWANZA. 26/5/71. Present: Mr. Sekule, Absent: Mr. Ibrahim and Appellant.

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