In the matter between:

Crim Appl. 5/89

MICHAEL K. ELLISON — Applicant

vs

THE KING — Respondent

CORAM: — N. HANNAH, CJ

FOR APPELLANT — MR. FLYNN
FOR RESPONDENT — MR. TWALA

JUDGMENT

09/06/89

Hannah,CJ

Between September 1985 and December 1986 a sum totalling E78 588-22 was stolen from the South African Trade Mission in Mbabane. The appellant was charged with that theft and after a trial lasting a number of days was found guilty on fourty four counts of theft. He was sentenced to a total of six years imprisonment of which two years were conditionally suspended and was also ordered to compensate the South African Government in the sum stolen. He now appeals against conviction and sentence.

There was no doubt on the evidence adduced before the court a quo that the money was stolen from the Trade Mission and Mr. Flynn, for the appellant, has not sought to argue to the contrary. Nor was there any real doubt as to the method used to carry out the series of thefts which occurred. The real issue was whether the prosecution had proved beyond reasonable doubt that the appellant was the thief or whether, as the defence contended, there was a reasonable possibility that another employee at the Mission named Malan was the culprit.
The appellant is a trained accountant and started working for the Trade Mission in that capacity in May 1985. He was immediately responsible

to the head of administration for his work. Initially that person was a Mr.France Ellis but in July 1985 he was replaced by a Mr. Barend Malan and then in December 1986 Mrs Helene Stapleford took over. It was Mrs Stapleford's suspicions which led to the discovery of the thefts.

The system used to perpetrate the thefts was a simple one. The normal practice was for the Trade Mission's trade accounts to be paid by cheque but before a cheque could be issued an expenditure voucher had to be prepared to authorise payment. The expenditure voucher is a printed form with spaces for the particulars of the account to be paid and the amount and it includes a certificate certifying that the account is reasonable, has not previously been paid etc . The certificate is signed by the secretary to the Mission who, at all material times, was the appellant and countersigned by the Head of Mission or someone acting on his behalf. Provision is then made for describing the mode of payment. If cash is paid the receipient's signature is required: if a cheque is issued the number and date of the cheque has to be given.

Once an expenditure voucher had been prepared, signed and countersigned the next step was for a cheque to be drawn and signed. Each cheque required two signatures and those authorised to sign were the Head of Mission, Mr. J. Sterban, his deputy, Mr F. Kriek, the Head of Administration and the appellant. The cheque was then sent to the payee and ultimately the paid cheque would be returned by the bank together with a statement of account. In the case of forty four expenditure vouchers prepared and approved during the period in question cheques were issued but although they were paid by the bank they were not received by or paid to the payees described on the vouchers. In twenty eight cases there was direct evidence that the cheques were cashed by the appellant over the counter at the bank and the only reasonable inference to be drawn, said the prosecution, was that the remainder were dealt, with in the same way. What happened, said the prosecution, was that the appellant, as secretary, would prepare an expenditure voucher and sign it and would then either obtain Kriek's signature approving

the expenditure or forge Kriek's signature himself. He would then prepare a cheque for payment and again would either obtain a counter signature from one of the authorised officials or forge one himself.

He would then cash the cheque over the counter and pocket the proceeds and to cover his tracks would place a cancellation stamp in the appropriate counterfoil in the cheque book.

The prosecution produced the relevant expenditure vouchers, cheque book counterfoils and bank statements and called a number of bank teller$ who testified that in the case of twenty eight of the cheques which correspondend to the counteroils the appellant was the person who had cashed the cheques.

The evidence of these tellers varied in weight. Some were able to point to the appellant's name which they had recorded on cash paid-out sheets, others relied on their memory and in one case the teller relied on the fact that it was the appellant who normally cashed cheques for the Trade Mission. As for the paid cheques themselves the prosecution evidence was that these had disappeared after being returned by the bank to the Trade Mission, the suggestion being that the appellant had disposed of them. But the appellant maintained that he had been instructed to hand over to Malan unopened any envelopes containing bank statements and unpaid cheques and this, he said, he had done. According to the record this was never put to Malan but having regard to the general tenor of his evidence there can be little doubt that he would have denied giving such an instruction. There were, however, three unpaid cheques traced and produced in evidence and they are of considerable significance. Each was signed by the appellant and each also bore the signature of Kriek but there was unassailable evidence that the latter signature had been forged.

On the evidence before the court a quo there were only two persons who could have carried out the thefts, namely the appellant and Malan, and of these two the probabilities pointed overwhelmingly to the appellant being the culprit. It was the appellant who prepared the expenditure vouchers and the cheques

and the opportunity for Malan to have forged Kriek's signature on such documents time and again would appear to be very remote whereas the appellant would have had every opportunity to do so.

Also, not only is it difficult to see what Malan could have hoped to gain from forging Kriek's signature when his own signature would have sufficed but had he done so it was almost inevitable that the appellant would have realised what was happening. Another significant factor is the risk which Malan would have had to run in instructing the appellant to cash these cheques as the appellant maintained

he had done and then hand over the proceeds to him. Had this happened it would have been obvious to a trained accountant such as the appellant that Malan must have been acting dishonestly. Then, of course, there were the cancelled cheque counterfoils.

Faced with the foregoing matters which, I may add, are by no means exhaustive of the probabilities pointing to the appellant's guilt and the poor impression which the appellant made on the learned magistrate in the witness box Mr Flynn was , if I might respectfully say so, obliged to grasp at straws when arguing the first ground of appeal which is that the learned magistrate erred in accepting the evidence of Malan and rejecting that of the appellant. His submissions were in the main based on the fact that Malan was inexperienced in accounting procedures and that accordingly the appellant might have unwittingly cooperated in a dishonest scheme devised by Malan thinking that Malan's strange behaviour was due to lack of experience. However, in my view the evidence showed that appellant took advantage of Malan's inexperience rather than that he became its victim.

As for the third ground of appeal, namely that the learned magistrate attached too much significance to the fact that the appellant resigned his employment with the Trade Mission shortly after Mrs Stapleford's suspicion were aroused, it may be that the magistrate did over emphasise the importance of this factor but it nonetheless had its significance in the chronology of events and was not to be ignored. In my view, the way the learned magistrate dealt with the matter provides no ground for interfering with his finding

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that the appellant was guilty of theft.

The only other ground of appeal which was advanced concerned sixteen of the forty four counts in respect of which the prosecution led no direct evidence that the appellant himself had cashed the cheques the proceeds of which were stolen. Mr Flynn handed in a typed list of these counts showing the amounts involved and certain other references and the Court is indebted to him for his industry. In the case of ten of these sixteen counts there was no evidence whatever that the appellant cashed the cheques in question and in the case of the other six the magistrate referred to and relied upon references in the bank paid-out sheets produced by tellers but which the tellers had not dealt with in their evidence. Mr Flynn submitted that this was an impermissible exercise on the part of the magistrate and I agree. There was no evidence before the court a quo that the tellers called to give evidence had dealt with these six transactions and as the documents did not prove themselves the learned magistrate should have ignored them.

Mr Flynn submits that without evidence that the appellant cashed the cheques in question it was not open to the learned magistrate to convict the appellant on these sixteen counts but I am of the view that in a case such as the present one this does not constitute a fatal lacuna. There was acceptable evidence of a system operated by the appellant to commit the offence of theft on a /twenty number of occasions as set out in the other/eight counts and that evidence, in my view, sufficiently established that it was the appellant who perpetrated the thefts alleged in the other sixteen counts where the identical system was used.

There was, in other words, such a similarity in the modus operandi on all forty four counts as to establish the appellant's guilt on all even though the evidence,

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in the case of sixteen of the counts, was not of the same probative value as in the case of the others.

For the foregoing reasons I am of the opinion that the appellant was properly convicted by the court a

quo and the appeal against conviction must be dismissed.

Mr Flynn has not sought to argue that grounds exist for interfering with the sentence passed on the appellant but he has submitted that in ordering the appellant to pay compensation to the South African Government in the sum of E78, 588-22 the learned magistrate exceeded his jurisdiction and that the order for compensation should be set aside. That this submission has merit in recognised by the learned magistrate who states in a note at the end of the record that he wishes this court to consider incorporating payment of compensation as one of the conditions of the suspension of part of the sentence.

The award of compensation was made under section 321 of the Criminal Procedure and Evidence Act and the proviso to subsection (1) of that section reads:
"Provided that the amount so awarded shall not exceed the civil jurisdiction of such court." Section 16
(1) of the Magistrate's Courts Act 1938 (as amended) provides- "The jurisdiction of magistrate's courts of the first and second class in respect of causes of action shall be in the case of-

(a) courts of the first class, all actions where neither party is not a Swazi, and all other actions where the claim or value of the matter in dispute does not exceed E2 000."

"Where neither party is not a Swazi "means "where neither the plaintiff nor the defendant is a non-Swazi" (see Hlatshwayo v Hlatshwayo 1979/81 S.L.R. 177) and in such a case it would seem that, subject to section 29 of the Act,

a magistrate's court of the first class has unlimited jurisdiction in civil cases. However, that was not the situation in the instant case where the complainant in whose favour the compensation was awarded was the South African Government and accordingly I hold that the learned magistrate had no jurisdiction to award compensation in excess of E2 000 and the award must be set aside.

I have considered whether it would be right to accede to the magistrate's request that payment of compensation should be made a condition of the suspended portion of the sentence but have concluded that it would not. I accept Mr Flynn's submission that to do so would have the effect of increasing the severity of the sentence and the circumstances of the case do not warrant such a course being taken. There is no undue prejudice to the complainant who is left with the option of seeking redress by civil proceedings.

For the reasons given the order of compensation is set aside but save for that this appeal is dismissed.

N. R. HANNAH
CHIEF JUSTICE