

REX

VS

MANDLENKHOSI NCONGWANE

Cri. Case No. 109/1997

Coram

For Crown

For Defence

S.W. Sapire, CJ

Miss Nderi

Mr. Malinga

JUDGMENT

(25/05/99)

The accused in this matter is charged on count 1 for the crime of theft it being alleged that in the month of August, 1997 and at or near Mbabane in the District of HHOHHO the said accused did unlawfully and intentionally steal 2 Swaziland Government Blank cheques with Stock Number 0345277 and 0345279 approximately valued at E0.48, the property or in the lawful possession of the Computer Section of the Ministry of Finance.

On the second count the accused is guilty of the crime of Fraud in that upon the 22nd September, 1997 and at or near Mbabane in the District of Hhohho, the said accused did unlawfully and with intent to defraud, misrepresent to Nedbank Riverside Branch that Swaziland Government Cheque No. 7275794 dated 15th September, 1997 in the sum of E86,372.41 was drawn by the Swaziland Government (Treasury Department) in favour of the accused's business Masombuka Import and Export and was a valid, good and available cheque and would be met on presentation at the Central Bank of Swaziland and did by means of the said misrepresentation induce Nedbank Riverside branch to its

potential loss and prejudice to deposit into bank account No. 001072548192 the amount of E86,372.41, this being the account the accused indicated to be credited with the said amount, whereas when the accused made the aforesaid misrepresentation he well knew that the said cheque was not drawn by the Swaziland Government and was not valid, good and available and would not be met on presentation to the Central Bank of Swaziland and the accused did thereby commit the crime of fraud. This charge was subsequently amended in that the complainant firm was substituted with the firm of Shilubane, Ntiwane & Partners was stated to be the person to whom the representation was made. This was in accordance with the fact which was later pointed out that the accused did in fact have this cheque deposited with the attorneys of the said firm and on the basis of deposit of the cheque to the cross account several withdrawals were made as testified by the witnesses.

The third count is that of forgery it being said that the cheque was forged by the accused.

Count 4 relates to the uttering of a forged document well knowing that it was forged.

The fifth count is a count of fraud and it relates to a second cheque which the accused deposited with the Swaziland Building Society and withdrew monies against the deposit of such cheque. It is also alleged that he is guilty of forgery in relation to that cheque and count seven is the uttering of the forged document. The evidence which was led established quite clearly that the two cheques in question were forged documents, the cheque forms themselves had been stolen from the Treasury and they had been printed by an unauthorised printer and the signatures affixed in a way not in accordance with the procedure used by the Treasury. They did not emanate from the Treasury other than to the extent that the forms themselves were Treasury forms which had been stolen. This the accused does not deny and it is not an issue that the cheques themselves were forged stolen documents which were presented. The accused's answer to this is that when he presented these documents to the firm of attorneys and to the bank respectively he did not know. He says that the cheques were received by him from one Fuma who he thought to be a Government Representative and who purchased goods from him. He conducted business in Johnson Street in which goods were sold but he at no time had any stock remotely resembling the amount of goods which he says were ordered from him. He says that because of an association

with the royalty he thought that he was a person who represented the Government and that he had been chosen especially to make an urgent supply of goods to assist in expediting the work on the Maguga Dam. This in itself is a fantastic story because it is difficult to see how the supply of protective clothing or boats could expedite the work at Maguga Dam or how the Maguga Dam works would be delayed by the lack of boats. The story in itself has this improbability. Of course it has more improbability in that the person who is said by the accused to the purchaser flatly denies that anything of the sort took place. There is nothing to criticize his evidence and there is no reason to believe that what he said was not true. I say this even in the light of my observation that the offence obviously involved the participation of more than one person. I do not see how the accused himself could have stolen the cheque forms from the Treasury. I doubt whether he himself actually caused the printing to be made on the cheques or for the signatures to be affixed thereon but I have no doubt that when he accepted those cheques he did not do so as payment for a legitimate order. His evidence.....is riddled with improbabilities and impossibilities. His story is that these cheques were paid in advance for goods which he had not yet even purchased and that he had to use the proceeds of those cheques in order to make the purchases of the goods he was to deliver from firms in Johannesburg. How he was going to make these purchases after he had already disposed of the bulk or to a large proportion of the proceeds of the cheque remains a mystery and it is an indication that the story is untrue. If one considers also that his story would mean that the purchaser, whoever he was, came to him with forged instruments, and allowed him to get the proceeds of the cheques and the basis of the story that the purchaser would get the protective clothing for which he had no immediate market. The whole idea is preposterous. There are other factors. The accused, after his arrest, made a written statement to the police after due warning. In the course of examining the police officer the defence counsel asked the police officer questions which opened the way for the introduction of evidence that the accused had admitted that he knew that these instruments were forged and that he was just taking a chance. This was a blunder on the part of defence counsel who asked unnecessary questions. The accused story is also completely unacceptable in the absence of production of the order form which he says he was handed. He also says that this form, together with his books of accounts was taken from his home by the police at the time of his arrest. They have never been returned to him yet when he takes action against the police or the authorities for the return of his passbooks he does not mention these important documents which he

says are still in the possession of the police. Of course the police deny that anything other than the items mentioned were taken from him. It is not a question that the accused story fails on the basis of any one of these factors. There of course can be any explanation and it is possible that the full story has not been told to us by the purchaser. It is possible thatfor the police to make a mistake but theof all these circumstances is such that it demonstrates the complete false of the accused's version and his explanation which cannot be accepted even on the basis of being only reasonably possibly true. It follows therefore that the accused accepted these cheques, when they came into his possession he knew that they were false and when he presented them to the Building Society and to the firm of attorneys he knew that they were not true documents. As far as count 1 is concerned the accused is charged with the crime of theft and it relates to two Swaziland Government blank cheques. It is true that there is no evidence that he stole these documents or that he was the person who extracted them from the Treasury. But on his own evidence he must have known that these documents were unlawfully abstracted from the Government and he took them into his possession. Theft is a continuing crime. His acceptance and his making use of these documents makes him guilty of theft on count 1. He is accordingly found guilty of theft on count 1.

As far as count 2 is concerned as amended, as far as count 5 is concerned the charges of fraud clearly he misrepresented to the persons to whom he gave the cheques that they were good cheques and he did say to their prejudice. He is found guilty on counts 2 and 5. As far as count 3 is concerned, the count of forgery, it is not clear that he himself actually forged the instrument and there being doubt on this aspect he is found not guilty on count 3. On count 4 and 7 it is clear that he did in fact utter this document and he is found guilty on count 4 and on count 7. For reasons which I have stated he is similarly found not guilty on count 6.

SENTENCE

I have heard what you have to say and I have heard what your counsel has said on your behalf in regard to mitigation. Nothing detracts from the fact that this was a serious case of fraud and in fact stealing. You have a previous record for this sort of behaviour. Although the convictions are certainly old in the sense that they date from 1986 to 1987 ending up in 1989, nevertheless they do indicate that you are a person of dishonest

tendencies. I do appreciate that this offence could not have been committed by you alone. There must have been somebody at the Treasury who stole the cheque form, there must have been somebody who printed them and there must have been a plan as to how these forged documents are to be encashed. What is worse however, is that there are many other such cheque forms which have been stolen and are still, if I may say so, at large. Your protestations of remorse which I have heard this morning do not ring terribly true having regard to your behaviour up to now and I still feel that you have not told the complete story. There is the possibility that this person who you have mentioned may have been part of the plan but you have not taken the court into confidence and told everything so that the possible damage which can arise from other people from whom you got these cheques causing further damage and further problems can be arrested. I do not want to say that you have shown any degree of remorse, it does not appear that you would have any prospect of paying back the large amounts which you infact abstracted from the Building Society and I do not feel in view of all the circumstances that there is any reason why you should not be sent to prison. Of course it may have a damaging effect on your children who have now been deprived of their mother but all criminals have children, or many of them have children. People who embark on criminal activity cannot think that because they have children they are going to be treated with greater leniency than any other people.

The sentences which I impose upon you are as follows:

On count 1, that is the count on theft, you will be imprisoned for 2 years. On count 2, the count of fraud involving the cheque which you presented to the firm of attorneys, you will be sentenced to 7 years of which 2 years will be suspended for a period of 3 years on condition that you will not hereafter be found guilty of any offence involving fraud or theft committed during the period of suspension. On count 4, which is the uttering of the forged document, you will be sentenced to two years. On count 5, which that of fraud in respect of the cheque which you deposited with the Building Society, you will be sentenced to 7 years for which 2 years will be suspended under the same conditions as applying on count 2. On count 7 , uttering a forged document, once again you will be sentenced to 2 years imprisonment. All these sentences of imprisonment will run concurrently.

S.W. SAPIRE, CJ