

IN THE HIGH COURT OF SWAZILAND

REX

V

MANDLENKHOSI NCONGWANE

Cri. Case No. 109/1997

Coram S,W. Sapire, CJ

For Crown Miss Nderi

For Defence 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 two 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 alleged to be guilty of the crime of Fraud. Particulars of this are that in that upon the 22nd September, 1997 and at or

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near Mbabane in the District of Hhohho, the 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

The prosecution amended the charge during the course of the trial, in that the complainant firm was substituted with the firm of Shilubane, Ntiwane & Partners, which was stated to be the person to whom the representation was made. This was in accordance with the facts as they emerged in evidence.

The third count is that of forgery it being alleged 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. He later withdrew monies against the deposit of such cheque.

Count 6 alleges forgery in respect of that cheque. Count 7 is the uttering of the forged document.

The evidence established quite clearly that the two cheques in question were forged documents. The cheque forms had been stolen from the Treasury and they

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had been completed by an unauthorised printer. The signatures were 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 in issue that the cheques themselves were forged stolen documents which he 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 that they were stolen and forged. He says that he received the cheques from one Fuma who he thought to be a Government Representative as the purchase price of goods, he was to deliver.

The Accused conducted business from a shop in Johnson Street. At no time did he have any stock remotely resembling the amount of goods which he says were ordered from him.

He says that because he knew Fuma to reside at the Royal palace and was to be seen driving Royal motor vehicles, he thought that Fuma was a person who represented the Government. He believed on the strength of what Fuma told him that he, the accused, 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. The accused could not have believed that a supply of protective clothing could expedite the work at Maguga Dam, or that the Maguga Dam works would be delayed by the lack of boots. The story is incredible even in this respect.

Fuma who gave evidence for the prosecution to rebut this defence flatly denied that anything of the sort took place. There is little to criticize in his evidence and there is no reason to believe, judging by the evidence he gave and the manner in which he gave it, that what he said was true. On the other hand I am not convinced that his account is the complete truth. To the extent that he denied that the cheques were handed to the accused in pre-payment of the purchase price,

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of goods purchased by him from the accused on behalf of the government he is supported by other circumstances.

I took the precaution of warning him when he took the oath that he did not have to testify to anything, which may incriminate him in the offences, alleged. On the accused's version he was an accomplice to the scheme to encash the stolen cheques. His evidence is treated as that of an accomplice and accepted where it conflicts with that of the accused only to the extent that the accused's evidence has to be rejected for other reasons.

The offence obviously involved the participation of more than one person. The accused himself could not have stolen the cheque forms from the Treasury. He had no access to the stock of cheques. I doubt whether he himself actually caused the printing to be made on the cheques or for the signatures to be affixed thereon. I have no doubt that when he accepted those cheques he did not do so as payment for what he thought to be a legitimate order. The possibility that Fuma was one of the participants in the scheme exists.

The accused's 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. He had to use the proceeds of those cheques in order to make cash payments to firms in Johannesburg for the purchase of the goods he was to deliver. How was he going to make these purchases after he had already disposed of a large proportion of the proceeds of the cheques is a question? This he could not answer. It is a strong indication that the story is untrue and could not reasonably be so.

His story necessarily implies that the purchaser, whoever he was, knowingly came to him with forged instruments. Yet, he allowed the Accused to collect the proceeds of the cheques. The only benefit to the purchaser would have been that he would at best get the protective clothing. For this consignment he had no immediate market. The whole idea is preposterous.

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There are other factors. The accused, after his arrest, made a written statement to the police after due warning. This statement was exculpatory. In the course of examining the police officer who received the statement, the defence counsel unwisely asked the officer questions which opened the way for the introduction of evidence that the accused had admitted that he knew that these instruments were forged. This was a blunder on the part of defence counsel. The evidence however cannot be disregarded and must redound to the serious prejudice of the Accused. The account given by the accused that he dealt with the forged cheques innocently can be dismissed as untrue on other grounds.

The accused story is also completely unacceptable in the absence 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 took 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. The police deny that anything other than the items mentioned were taken from him.

The accused's account is unacceptable not on the basis of any one of these factors. Cumulatively the evidence is devastating to the accused's account. Clearly the full story is not known. There can be no doubt that the accused was not an innocent party.

It follows therefore that the accused accepted these cheques, and 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

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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.

On the fraud charges, count 2 as amended, and 5 the accused is found guilty. 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 the documents. 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. 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. You could not have committed this offence 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 were to be encashed. What is worse however, is that there are many other such cheque forms which have been stolen and are still, at large. Your protestations of remorse which I have heard this morning do not ring true having regard to your behaviour up to now and I am convinced 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. The possible damage which can arise from the use of the outstanding stolen cheques still remains. Your refusal to disclose the origin of

the forgeries is not consistent with remorse. You have no

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prospect of paying back the large amounts, which you stole, from the Building Society and your attorneys.

I cannot treat you with the consideration often shown to first offenders, even though your previous convictions took place a long time ago.

A custodial sentence is unavoidable. 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.

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S. W. SAPIRE C J