In the matter between:

Mnyamezweni Shongwe
Appellant
v

REX
Appeal Case No.17/99

Coram: Leon J.P.
Van Den Heever J.A.
Beck J.A.

For the Appellant : Mr D.M. Mamba
For the Crown : Mrs M. Dlamini

JUDGMENT

Van den Heever. JA

The appellant was originally charged along with Dumsile Malaza as accused No.2 with contravening Section 3 (1) (c) of the Counterfeit Currency Order of 1974,

> "in that upon or about 10th March 1999 at or near Mathendele location in the district of Shiselweni the said accused persons acting jointly in furtherance of a common purpose did knowingly and unlawfully hold 5002 counterfeit notes with a face value of E1.000, 400-00."

At the commencement of the trial Mrs Dlamini for the Crown applied for a separation of trials, which was granted. Accused No.1 ("the appellant") who was then represented by Mr Smith, pleaded guilty to having been found in possession "of these counterfeit notes" adding the rider, "but they were not mine."

Common cause facts are that on 10th March 1999 Constable K. Mngomezulu and Detective Constable C. Motsa received a tip-off on the strength of which they looked out for a car with registration number SD 068 ZM, and in due course came across it. When they searched the car they recovered the false bank notes, purporting to be South African currency, which is legal tender in Swaziland. The two occupants of the car were arrested. The notes were counterfeit, according to the report of a forensic expert which was handed in by agreement. The appellant was convicted as charged.
He was a first offender. He was called by his legal representative to testify in mitigation of sentence. He was then 49 years old, and displayed a vivid but puerile imagination in his explanation of how he came to be in possession of the false notes. When he came home one evening gangsters were trying to abduct two of his children. They then forced the appellant into the boot of a car, took him "into a bush around that area" where they released him but assaulted him brutally, eventually giving him an ultimatum: he had to find an employee of his, David Mkhabela, who had taken "certain items", "their money," which they wanted returned to them by David within three days, "otherwise they will come back and they will kill everything in the homestead." And if he dared report to the police, their gangster colleagues "would come and kill me and my children…"

This was supposed to have happened on the 27th of February 1999, a Saturday. On Monday after recovering from the assaults (which caused no visible injuries) he went looking for David, but never found him. He had just "disappeared" from the appellant's employ. The appellant however told of his travels to South Africa, where he traced and took the notes, and back again. Although the three days of grace had expired and no one had caused any disturbance at his homestead, he went looking for David all over Swaziland, taking the notes with him in his car; where they were found by police on 10 March. His wife was the other occupant of the car (the former second accused) during this search for David, taken along on the trip because " I wanted her to witness that the items are taken back to the owners."

It is unnecessary to analyse his evidence in detail. His story fell apart under questioning. Merely as an example: he initially said he had not known the money was forged. Asked why, having found and brought back the money, he hadn't merely waited for the gangsters to come and fetch it, but went looking for David long after the expiry of the three-day ultimatum, he improvised. He knew of a man who had been killed by persons

> "looking for the forged notes which he had taken and failed to return to those people
>
> Judge: But you didn't know that these were forged notes – you told me that.
>
> Accused: I was told when I got to South Africa so on my way back I was fully aware that these were forged notes."

The Court *a quo* in determining what would be an appropriate sentence pointed out that the appellant had shown no contrition, instead persisted "in hiding the true origin of this money

in order to protect the people who are the gang or syndicate who are responsible for the production of a lot of counterfeit money which is presently circulating in Swaziland." Counsel had asked for a fine, arguing that a middle-aged first offender with a family would merit the option of a non-custodial sentence. Moreover, he urged, the appellant and his wife had both been in business and both had lost those concerns as a result of their arrest and so had already suffered as a result of the offence.

The sentence imposed was one of 5 years imprisonment, plus a fine of E15,000 or 2 years imprisonment.

Our copies of the record do not contain the original notice of appeal, filed and served on 20th October 1999. The "amended notice of appeal" attacks the conviction as well as the sentence, i.a. on the ground that the indictment "was and is fatally defective….. in as much as it fails to allege an essential element of the offence, namely that the Appellant knew that the forged notes he held were forged." There is no merit in any of the listed grounds of attack upon the conviction detailed in this "amended notice." I have quoted the indictment verbatim. The appellant wants to delete the word "knowingly" from it, on what basis he could not explain. The indictment does indeed set out the basic requirements of the offence created by Section 3 (1) (c) of the relevant Order, so making the second ground of appeal that such offence "does not exist" equally mystifying. The appellant had pleaded guilty. He admitted in the passage 1 have quoted above that he knew that the R200 notes in his possession were not the real thing. That makes nonsense of the third ground of appeal against the conviction, which states that the court should (despite the plea, the conviction, that evidence) have entered a plea of not guilty, after the appellant told the court in mitigation that he did not know that the bank notes were forged. So too the last ground in this amended notice lacks substance. It seeks to import into the relevant section a further intent which the statute does not require: that possession of the prohibited article must be accompanied by a further specific intention: to hold it "for his own benefit or for any other ulterior motive." The statute does not require that, any more than for example the South African Statute requires possession of cannabis to be "in order to smoke it" or "sell it" or for any other purpose. Possession, simpliciter, is what is forbidden. The reason seems obvious. Even if one's own motives are not "ulterior" the articles can lead others into temptation and cause harm in the wrong hands.

As regards sentence, the approach of the trial court seems to have been that the legislature had failed to keep pace with economic realities, and so had made it impossible for the courts to impose a non-custodial sentence proportionate to the gravity of the offence committed where, as here, that offence was not part of a small-scale operation. The maximum sentence laid down in 1974 is one of a fine of E15000 or 15 years imprisonment or both. The trial judge said

> "….in 1974 …the value of one Lilangeni was a multiple of what the value is today. One year's imprisonment, however – the value of that has not changed and there is disproportion between the fine and the sentence of imprisonment. The same ratio of equivalency does not exist. I do not think a maximum fine of

E15000 would meet the case. I am therefore required to consider an imprisonment as well as any fine which I may impose. In today's terms E15000 is negligible for the magnitude of the offence. But the section says that I may impose the one or the other or both. I have decided that I will impose a sentence of E15000 and imprisonment for a period of five years without the option of a fine" -

the alternative to the fine being then determined at two years.

The reasoning behind this sentence appears to me, with respect, to be flawed. Having determined that the legislature had precluded him from meting out adequate monetary punishment, the trial judge did not consider whether it could serve any purpose at all to impose a fine where

(a) there was no evidence to suggest that the appellant had himself benefited from the counterfeiting scam (depriving him of ill-gotten gains was not a valid motive, therefore), and

(b) there was no inquiry at all whether the appellant would be in a position to avoid the additional two years' incarceration, about which there must be considerable doubt where the further sentence of five years effective imprisonment in any event removes him from the lawful economic activities he could have undertaken to enable him to pay the fine.

The imposition of a fine at all was, on the evidence before us, pointless. The intention of giving the appellant an option would be realistically met by suspending the further two year period; which would hopefully discourage the appellant from future similar activity.

The appeal against the conviction is dismissed. The conviction is confirmed. The appeal against sentence succeeds to the limited extent that the sentence imposed is altered by the deletion of the fine and its alternative imprisonment, and the addition, after "five years imprisonment" of the words "plus a further two years imprisonment which is suspended for three years on condition that the appellant is not again convicted of an offence in terms of Order 31 of 1974."

VAN DEN HEEVER, J.A. LE**ON, J.P.** **BECK, J.A**