APPEAL CASE NO. 9/99

In the matter between:

MANDLENKOSI NCONGWANE **APPELLANT**

VS

REX **RESPONDENT**

Coram: **LEON J.P.**
VAN DEN HEEVER J.A.
BECK J.A.

For the Crown: **MRS M. DLAMINI**
For the Appellant: **MR M. MABILA**

JUDGMENT

Beck J.A.

The indictment has not been included in the copy of the record that is before us, as it should have been. This is a serious omission. The indictment is an indispensable part of the record of a criminal trial and care must be taken to ensure that it is not omitted when the record is transcribed. However, from the judgment of the trial court in the instant case it emerges that the appellant was charged as follows:-

> "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.
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> On the second count, the accused is alleged to be guilty of the crime of Fraud. Particulars of this are in that upon the 22nd September, 1997 and at or 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 valuable 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 N0.001072548192 the amount of E86,371.41, 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 bank 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 charges upon which the appellant was convicted appear from the concluding portion of the judgment of the learned Chief Justice, which reads:-

> "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.
>
> On the fraud charges, count 2 as amended, and 5 the accused is found guilty.
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> 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."

The sentences that were imposed on the appellant were the following:-

"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 is that of fraud in respect of the cheque which you deposited with the Building Society, you will be sentenced to 7 years of 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."

The practical effect of these sentences is that the appellant was sentenced to be imprisoned for 5 years, with a further 2 years conditionally suspended.

Although the point has not been raised in the notice of appeal, it must be stated at the outset that there was a duplication of convictions (what used to be called a splitting of charges) with regard to counts 2 and 4 and 5 and 7, which are the counts of fraud and of uttering in respect of the two forged cheques. The act of uttering the forged cheques constituted, or was at least an integral part of, the intentionally fraudulent misrepresentation that the appellant is alleged to have made to the persons to whom he uttered the cheques; it was part and parcel of a continuous course of conduct done with fraudulent intent. (S v GROBLER EN'N ANDER 1966 (1) S.A. 507 (A.D.) at 511 G – H).

The learned Chief Justice was alive to the difficulty. Just before delivering judgment on sentence he said to Crown counsel "Another thing that worries me about this ……..the fraud, doesn't it really include a crime of uttering a forged document? I sn't that really the same thing? Is there a splitting of charges here?", to which counsel merely replied "There is none my Lord", whereupon the learned Chief Justice said "Well then, I will just make the sentences run concurrently", which he proceeded to do.

With respect to the learned Chief Justice however, this is not the correct way of solving the problem. The mere fact of being separately charged is not only incorrect, it is also potentially prejudicial to an accused to have such an additional conviction form part of his criminal record. See, for instance, the passage in the judgement of Wessels J.A. p.523 B – E in the case of S v Grobler en'n Ander (supra). Accordingly the convictions on the counts of uttering, namely counts 4 and 7, must be quashed and the sentences on those two counts set aside.

The notice of appeal, which was timeously lodged on the appellant's behalf by the attorney who represented him at the trial was directed against sentence only and not against conviction. This is hardly surprising, because not only was the prosecution evidence against the appellant overwhelming, and not only was his own exculpatory evidence correctly rejected as patently absurd, but the appellant chose, after conviction, to give sworn evidence in mitigation of sentence, and in so doing he confessed his guilt and expressed remorse and a desire to make recompense to the complainants. I quote the testimony that he gave:-

"**DC:** Mr Ncongwane you have been found guilty of several of the offences with which you have been charged. Do you now want to tell the court exactly what happened with regard to this case before court?

ACCUSED: Yes, I am my Lord.

DC: Tell the court how you came to be in possession of these cheques.

ACCUSED: Fuma Mvubu came to me with the cheques…before he approached me with the cheques he asked me whether my business was among the sources of supply of certain goods to government of which I confirmed that it is. He then told me that there is a certain way we can use in gaining some money.

JUDGE: What is the certain way?

ACCUSED: He told me that he would come with some cheques and he will pay me with those cheques because I am one of the suppliers of certain goods. He then gave me the two cheques. I then deposited the cheque amounting to E93,000 with the Building Society. The other cheque amounting to E86,000 I took that one with attorneys Shilubane, Ntiwane and Partners but I did not inform the said attorneys as to what was happening with these cheques.

JUDGE: Are you saying that you knew these cheques were forgeries?

ACCUSED: I did not know that they were forged but I knew that Fuma was in a position to get the cheques my Lord.

JUDGE: There was no question of you supplying goods?

ACCUSED: No, there was none.

JUDGE: You got these cheques and you acted as the cat's paw to go and cash them?

ACCUSED: That is correct my Lord.

DC: Was Fuma to get anything out of this?

ACCUSED: Yes my Lord, he was supposed to get a sum of E90.000 in all but he got only E30,000 because the other cheque was not cashed my Lord.

DC: Now you see you have made the Building Society lose money by giving them that cheque, as it were...?

JUDGE: Not as it were.

DC: Yes my Lord.

ACCUSED: I am aware of that my Lord.

DC: And are you willing or prepared to pay back that money?

ACCUSED: Yes, I am my Lord.

JUDGE: You say you are willing?

ACCUSED: Yes

JUDGE: How are you going to pay it?

ACCUSED: If I could be given another opportunity not to go into custody I can resume trading as I was trading before."

Some five months after conviction and sentence the appellant addressed a letter to the Registrar informing the court that he was withdrawing the mandate that had been given to the attorney who represented him at his trial, and advancing contentions to the effect that the evidence that he gave before conviction was wrongly rejected by the trial judge and should have been regarded as evidence that was reasonably possibly true.

Seven months later a new attorney filed with the Registrar a notice of appointment and lodged heads of argument on behalf of the appellant. These heads are directed exclusively against conviction, and contain no submissions whatsoever with regard to sentence.

At no time after the initial timeous notice of appeal against sentence was lodged, has any application been filed for condonation and for permission to amend the notice of appeal so as to appeal against conviction as well as sentence. Upon being confronted with this difficulty when the appeal was called, Mr Malinga, who appears for the appellant, submitted that the matter should be postponed to the next session of this court so as to enable him to prepare an application for condonation and for leave to amend the notice of appeal.

It was put to Mr Malinga that this would be an exercise in futility because there is no possible prospect of success in any proposed appeal against conviction, not only because of the strength of the Crown case but, in particular, because of the appellant's own sworn admission when testifying in mitigation that he had indeed committed fraud as charged. I find it inexplicable that Mr Malinga should have asked for an opportunity to amend the notice of appeal in the light of the appellant's evidence that I have quoted above.

Turning to the matter of sentence, Mr Malinga found himself unable to advance any argument aimed at reducing the effective sentence of 5 years imprisonment that was imposed. The matter of the theft of the two forged cheques could arguably have been regarded as a *de mininis* aspect of the case against the appellant, but the appellant has not been prejudiced by the conviction on this count. He took the cheques knowing them to have been stolen, and that was a separate and distinct offence which was not part and parcel of the fraud that he thereafter committed by misrepresenting the stolen cheques as good and valid instruments. The appellant's conduct consisted of receiving stolen property well knowing it to have been stolen and of retaining it for his own profit and gain, and that constitutes theft. (R v Arbee 1956 (4) S.A. 438 (A.D.) at 441 D – 442B). The circumstances of the theft and subsequent fraud however were such that it was appropriate to direct, as the trial court did, that the sentence on the count of theft run concurrently with the sentence on the fraud counts.

At the conclusion of argument we ordered that the conviction of uttering (counts 4 and 7) be quashed and the sentences that were imposed on those two counts be set aside, but that the appeal against sentence in respect of the counts of theft and fraud (counts 1,2 and 5) be dismissed. We informed the parties that written reasons for those orders would be handed down later. These are the reasons.

C.E.L. BECK
JUDGE OF APPEAL

I agree

R.N. LEON
JUDGE PRESIDENT

I agree

L. VAN DEN HEEVER
JUDGE OF APPEAL

Delivered in open court on the day of May 2000