THE HIGH COURT OF SWAZILAND

REX

Vs

EDWARD MFANA MAGONGO

GEORGE MAINGANYA MAPHANYWA

Criminal Case No. 115/2003

Coram: S.B. MAPHALALA - J

For the Crown:MR. DLAMINI

For accused no. 1: MR. M. MKHWANAZI

For accused no. 2: MR. S. MAGONGO

RULING

(In terms of Section 174 (4) of the Criminal Procedure and Evidence Act, as amended)

(10th November 2005)

The application

[1] At the close of the Crown case the two accused persons being represented by Counsel have made an application in terms of the above-cited Section to the effect that the prosecution has not led prima facie evidence to put them to their defence.

The indictment/'s.

[2] The two accused persons are indicted before this court on several crimes as follows:

Count one:Fraud

Count two: Forgery

Count three: Uttering a forged document well knowing that it was forged

Count four -Theft

[3] On the first count, it is alleged by the Crown that both accused are guilty of the crime of fraud in that upon or about the 29th April 2003, and at or near Manzini in the district of Manzini, the said accused each or both of them acting jointly and in furtherance of a common purpose did unlawfully and with intent thereby to defraud misrepresented to Nedbank, Manzini branch that it was their honest belief that a certain cheque dated 15th April 2003 drawn by Standard Bank South Africa Eastgate branch in favour of Eddy's Services Investments (Pty) Ltd on the sum of $17000, 000-00 (seventeen million U.S. dollars) which when converted to Emalangeni is equivalent to El 17459,800-00 was a good and available cheque and would be met on presentation at the said Bank, and did by means of the said misrepresentation induce the said Nedbank, Manzini Branch, to potential loss and prejudice in the aforesaid sum of $17000, 000-00 whereas the said accused persons when they made the aforesaid misrepresentation well knew that the said cheque was not a good and available cheque and would not be met on presentation at the said bank, and thus did commit the crime of fraud.

[4] The forgery in count 2 also relates to the above-cited transaction, so is count 3 of the crime of uttering a forged document well knowing that it was forged, count 4 that of theft specifies that on or about the 29th April 2003, and or near Johannesburg in the Republic of South Africa, the said accused persons acting jointly and in furtherance of common purpose did unlawfully and intentionally steal motor vehicles registered PCP 655 GP and NWT 624 GP both valued at R616, 161-00 the property in possession of James Carmichael and that on or about

the 5th May 2003, the accused persons did unlawfully convey the said motor vehicles to Manzini in the Kingdom of Swaziland. Theft being a continuous offence the accused committed the offence of theft under the jurisdiction of this court.

The chronicle of the Crown's evidence.

[6] In the trial so far the Crown has led the evidence a number of witnesses including the bank employees being Elizabeth Terblanche, Winneth Mumcy Mabuza and Makhosazane Shongwe. Their evidence is to the effect that on the 29th April 2003, the said cheque was deposited at the Nedbank Manzini Branch made on Eddy's Investment Limited account. They noticed some irregularities in the cheque namely, it was a South African cheque which was supposed to be in Rands currency but instead it was in U.S. dollars. Also the amount involved was huge and if converted into Emalangeni currency, it escalated even higher. They then alerted their colleagues and they immediately commenced investigations with the South African bank which allegedly drawn the cheque, namely Standard bank Eastgate branch. As a result of the investigations it transpired that the cheque was forged, and further that Standard Bank South Africa did not have an account with Nedbank, Swaziland. Mummcy Mabuza testified that she personally called Edward Magongo [sole signatory to the account of Eddy's Investment Limited account] and talked to him over the phone and advised him that the cheque had been deposited on a "collection basis" and that he was not entitled to issue cheques until it was cleared and that Mr. Magongo had agreed to that. Mr. Magongo was called to come to the bank for discussions of his account where certain anomalities were detected on his account and the police were also notified of this transaction.

[7] PW4 Carol Maziya who is a Company Ltd was also called to testify, the bank on the day in question.

Secretary employed by Eddy's Investment She is the one who deposited the cheque with

[8] Further, one Jean Pearl Gobbel (PW5) was also called. She was an employee of SAAB in Sandton,

Johannesburg. She testified on how the motor vehicles in count 4 were purchased by the 2nd accused in April 2003. She deposed in great detail how the transaction was concluded.

[9] The police officer PW8 Bheki Themba Maphalala also gave evidence at length as to how he carried out his investigations in this matter.

The argument advanced for and against.

[10] In arguments in support of the application in terms of Section 174 (4), it was contended for accused no. 1 by Mr. Mkhwanazi that the Crown has not advanced a prima facie evidence against him in respect of all the counts he is facing in the following respects; In respect of count 1 that of fraud that the Crown has not proved the elements of fraud as stated by the authors JRL Milton, The South African Law of Procedure Vol II, (Common-law crimes), Juta, 1996 at page 707 viz (a) unlawfully; (b) making a misrepresentation; (c) causing; (d) prejudice; (e) intent to defraud. On (b) making a misrepresentation it was contended that there is clear evidence that the said cheque was presented at the Bank by a certain lady and that the name of the accused person does not appear. Therefore the other requirements (c), (d) and (e) automatically fall away.

[11] On count 2 that of the crime of forgery Mr. Mkhwanazi submitted that the arguments advanced in respect of count 1 above apply mutatis mutandis thereto. He relied heavily on what is stated by the learned author Milton, (supra) at page 743.

[12] It was contended in this regard that the Crown has failed to lead evidence to the effect that when the cheque was presented to the bank, it was unlawfully signed by the accused person. There is no evidence that accused no. 1 signed the cheque. Mr. Mkhwanazi conceded though that the Crown has led evidence that the cheque was

false, but that this was not enough. The evidence must prove that the accused was the one who forged the document.

[13] On count 3 Mr. Mkhwanazi referred the court to the requirements for this offence as enunciated by the author Milton (supra) at page 751 thereof. In this regard it was contended that the Crown witnesses did not point to accused no. 1 as the one who uttered the said cheque.

[14] In respect of count 4 that of theft it was argued for accused no. 1 that the elements of the crime of theft have not been proved in casu. The evidence of the car dealer from South Africa was clear that the motor vehicles were purchased from the garage.

[15] Mr. Magongo who appeared for accused no. 2 also made a similar application as Mr. Mkhwanazi for accused no. 1. He associated himself with the submissions made by Mr. Mkhwanazi for accused no. 1 and also relied on the same legal authority that of Milton (supra) at page 730 et seq. He also introduced a new argument in respect of all the* counts that the Crown in all these counts has alleged common purpose but the evidence advanced fall far too short in proving common purpose in each of the counts.

[16] Mr. Dlamini for the Crown advanced au contraire arguments and also conceded that the Crown has not made a prima facie case against both accused persons in respect in count 2 only. In respect of accused no. 2 in count 1 it was contended for the Crown that the element of representation has been proved which was made through his employee who took the cheque to the bank on the instruction of accused no. 2. The legal authority in Milton (supra) at page 734 was cited where the learned author discusses Section 243 of the South African Criminal Procedure and Evidence Act.

[17] As regards accused no. 1 in count 1, it is the Crown's contention that it has proved a prima facie case therein in that the evidence shows association for a common purpose. The Crown in this regard relied on the dictum in the case of S v Malinga 1963 (I) S.A. 692.

[18] On count 4 that of theft the Crown submitted that it has advanced a prima facie case although conceding that the evidence of James Carmichael [complainant] was not led.

The applicable law.

[19] If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

[20] The words "no evidence" in the section have been interpreted in many decided cases to mean no evidence upon which a reasonable man acting carefully "may" convict (see S vs Cooper and others 1976 (2) S.A. 875 (T) at page 888 - 90, S vs Khanyapa 1979 (1) S.A. 824 (A) at 838 and S vs Mpetha and others 1983 (4) S.A. 262 (c) at 263 (H)).

[21] The decision to refuse a discharge is a matter solely within the discretion of the presiding officer and may not be questioned on appeal (see R vs Lakatula and others 1919 A.D. 362 and that of R vs Afrika 1938 A.D. 556).

[22] See also Du toit et al, Commentary on the Criminal Procedure Act, Juta at 22 - 32 et seq and the cases cited thereat.

[23] On the doctrine of common purpose, it is trite that the essence of this doctrine is that, where two or more people associate in a joint unlawful enterprise, each will be responsible for any acts of his fellow which fall within their common design or object, (see C.R. Snyman, Criminal Law, 2nd Edition, Butterworth at page 258 and the cases cited thereat).

[24] The above therefore is the legal premise on which the present case ought to be decided.

The court's analysis and the conclusion thereon.

[25] As it has been stated above the Crown has conceded that it has not proved a prima facie case against both accused persons in respect of count 2 and therefore ther are both entitled to their discharge forthwith, and it is so ordered.

[26] Turning to the remaining counts viz counts 1, 3 and 4, I shall address each accused person as it relates to each count ad seriatim hereinunder, thusly:

In respect of accused no. 1

On count 1 (Fraud)

[27] Fraud consists of unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another, (see Milton (supra) at page 703). In casu, on my assessment of the evidence in toto in this regard I find some of the essential elements outlined above have not been proved by the Crown regarding accused no. 1. On the essential element of making a misrepresentation it has not been shown by the evidence of the Crown witnesses that accused no. 1 presented the cheque to the Bank, on the contrary evidence reveal that the cheque was deposited by a Secretary under the employ of accused no. 2's company. In fact, the Crown witnesses who gave evidence did not mention accused no. 1 or even tangentially. It

has not been shown in evidence that accused no. 1 either verbally or in writing made any misrepresentation in connection with this cheque. It was also not proved in evidence that accused no. 1 by conduct made any misrepresentation either by nodding or shaking his head, dressing up in a certain way, using certain stationery, entering certain premises, conducting business along certain lines, disguising merchandise, tendering a document, or a credit card, or a cheque card, etc. In fact evidence proved that he never entered the premises of the Bank at the material time.

[28] On the essential element of causing the comments made in respect of the element of making a misrepresentation apply mutatis mutandis hereto.

[29] In the circumstances, for the above-mentioned reasons I find that as regard the first count of fraud the Crown has not led a prima facie case to put accused no. 1 to his defence and therefore he will be entitled to a discharge under the Section.

On count 3 - Uttering a forged document well knowing that it was forged.

[30] The crime of uttering consist in putting off, unlawfully and with intent to defraud, a false document which causes actual prejudice or which is potentially prejudicial to another (see Milton (supra) at page 750 and the cases cited thereat). The evidence of the Crown does not mention accused no. 1 in relation to this count. The evidence is clear that accused no. 1 never set foot at the bank on the day in question. There is no evidence of putting off by accused no. 1.

[31] In the circumstances, for the afore-going reasons the accused person is entitled to a discharge in terms of the Act.

On count 4 - Theft.

[32] In this regard accused no. 1 is charged with the offence of theft, simpliciter. It is alleged by the Crown that on or about the 28th April 2003, and at or near Johannesburg in the Republic of South Africa, the said accused person acting jointly and in furtherance of common purpose did unlawfully and intentionally steal motor vehicles registered PCP 655 GP and NWT 624 GP both valued at R616, 165-00. The property in possession of James Carmichael and that on or about the 5m May 2003, the accused person did unlawfully convey the said motor vehicles to Manzini in the Kingdom of Swaziland. Theft being a continuous offence the accused persons committed the offence of theft under the jurisdiction of this court.

[33] According to the legal authorities of Milton (supra) at page 579 and Snyman, Criminal Law at page 446, theft consist in an unlawful contrectatio with intent to steal of a thing capable of being stolen. The evidence adduced by the Crown from the car dealers who gave evidence in this case is that the motor vehicles were purchased from the garage and all procedures thereto were followed. The garage released the motor vehicles after the cheque had been cleared. On the evidence I find that the Crown has not led evidence to show that accused no. 1 had the intention to deprive permanently as required by the law. Accused no.l subsequent conduct as regards these motor vehicles do show this intention to deprive permanently

[34] In the circumstances, for the afore-mentioned reasons I find that accused no. 1 is entitled to a discharge in respect of count 4. In the final analysis therefore, as it relates to accused no. 1 he is discharged in terras of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended) No. 67 of 1938.

<u>In respect of accused no. 2.</u>

[35] In my assessment of all the evidence and the submissions made by both Counsel as relates to accused no. 2,

and for the sake of brevity, It is my considered view that the Crown has adduced prima facie evidence in respect of count 1 and 3, namely fraud and uttering a forged document well knowing that it was forged, respectively. I say so for a number of reasons, but most importantly that the making of a misrepresentation has been proved by the Crown in respect of the count of fraud when accused no. 2 sent his Secretary to the bank to deposit the forged cheque. It is common cause that the cheque was deposited in the account of his company. As to the element of intent to deceive I agree with the submissions made by Mr. Dlamini in this regard when he cited the case of Derry vs Peek (1889) 14 APP CAS 337 where Lord Herschell said the following:

"Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true of false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in truth".

[36] I agree in toto with the submissions made by the Crown as regards to count 1 that of fraud and count 3 that of uttering that the Crown has proved a prima facie case to put accused to his defence.

[37] As to the issue of the doctrine of common purpose I agree with the Crown that on the evidence it appears that accused no. 1 and accused no. 2 were associated in some object although it has not been shown in respect of accused no. 1 that he was connected with the cheque deposited with the bank. As regards accused no. 1 the court can only draw broad inferences which are not supported by evidence adduced. However, as regard accused no. 2 the facts place him at the centre of events surrounding the presentation of the cheque to the bank and therefore he has a case to answer. As regards count 4 that of theft I find that accused no. 2 has no case to answer.

[39] In the result, for the afore-going reasons the following order is accordingly recorded:

i) Accused no. 1 is discharged on all counts.

ii) Accused no. 2 has a case to answer is respect of count 1 and 3, namely fraud and the crime of uttering a forged document well knowing that it was forged.

S.B. MAPHALALA

JUDGE