



# IN THE HIGH COURT OF SWAZILAND

Crim. Appeal Case No. 89/95

In the matter between:

PIUS MKHARI DUBE

Appellant

vs

THE KING

Respondent

CORAM:

S.W. Sapire A.J.

FOR THE CROWN

Miss Nderi

FOR APPELLANT

Mr. A. Cele

## Judgment

(30/8/95)

The appellant was charged cumulatively and in the alternative with several offences before the magistrate in Manzini. Count 1 related to the theft of a cheque from the Swaziland National Provident Fund. The appellant was found not guilty of this charge. Count 2 related to the crime of forgery. Particulars thereof were that the accused forged an instrument, namely cheque No. 026306 for an amount of E16,467.89. The third charge related to the uttering of the same forged instrument. In the alternative thereto, the accused was charged with crime of fraud, arising from the presentation of the forged instrument and the obtaining of moneys thereby.

The fourth count was a similar charge of forgery relating to a cheque for E16,250.16 and count 5 relates to the uttering of the document. In the alternative to count 5, the accused was charged with the crime of fraud on the same basis as an alternative to count 3. Count 6 was a further count of forgery relating to a third cheque for E15,978.95.

Count 7 alleged the uttering of forged document was an alternative to a count of fraud. The same pattern was filed for counts 8, 9, 10 and 11.

The circumstances giving rise to these charges were described and related by Michael Dlamini who was a participant therein and who was clearly an accomplice in the commission of the offences. His evidence has to be treated as such. He had previously been charged with the offences to which his evidence related and which his evidence disclosed he had committed together with the appellant and a third person.

Michael Dlamini testified that he knew the appellant who on a date in December 1992 approached him at the snooker court in the Tavern Hotel with a proposition that they would obtain money by presenting certain cheques to various banks. It was clear that the plan would involve falsification of the cheques and the production of false passports and other documents for identification in order to obtain the money from these banks. The proceeds of the encashment of these forged cheques would be shared between the participants in the offence in accordance with the arrangements they had made. Dlamini was clearly a willing party in this enterprise and agreed to join the appellant and one Gama who was the third party in this enterprise.

Sometime later, the appellant and Gama called for Dlamini at his home and told him that a time had come to act. They explained to him that he was to go and present a cheque at Barclays Bank Piggs Peak. The three travelled there together and Dlamini was handed the forged cheque together with identification documents including a forged passport so that he could withdraw the money amounting to some E16,000.00. The money was withdrawn by Dlamini and he handed the proceeds to Gama. The three then returned to Mbabane. The following day, the three went to Hlatikulu where a similar theft was committed. On the return journey a similar theft was committed at Simunye and a further amount of approximately E16,000.00 was obtained. From Simunye the three travelled to Siteki where Dlamini again attempted the theft of money but on this occasion he was arrested. In each of these offences a cheque known by all the parties to be false was presented

by Dlamini in furtherance of a common purpose. The identification documents were known by all to be false and were supplied by Gama and the appellant to Dlamini. These documents were produced to facilitate the fraudulent encashment of the cheques. The false documents were produced and identified at the trial were those specified in the charges.

On this evidence the magistrate was entitled to convict but for the cautionary rule that in the case of an accomplice who testifies against his co-participants, evidence aliunde connecting the accused with the crime is required.

Michael Musabi an employee of National Provident Fund in uncontested evidence identified the stolen cheques and established forgery thereon.

Henry Vusumuzi Zulu also employee of the Provident Fund testified that on the 23rd December 1992 when on duty at the front office in Manzini received a telephone call from Swazi Bank in Siteki reporting on a suspicious cheque presentation. Zulu immediately travelled to Siteki where he was informed that an old man had been arrested. This witness was able to establish that the person arrested was not the payee of the cheque which he had presented.

What is of importance is that he also testified that before he entered the bank he saw and spoke to the appellant outside the bank. He and the appellant are well known to each other. The significance of this evidence is that it places the appellant in Siteki close to the scene of the crime on the day it was committed. This supports and corroborates the evidence of the first crown witness and contradicts the appellant's denial that he was in Siteki on that day. This went some way in fulfilling the requirement of the cautionary rule. Dlamini had told the court that he had come to Siteki on that day in the company of the appellant to commit the offence. No other reason for the appellant's presence in Siteki has been suggested and indeed the magistrate found that the appellant had lied in denying that he was there at all. With this finding there is no reason to differ.

In addition to this evidence there was that of Constable Sithole who informed the court that on the 28th December 1992, he went to Siteki. There he found Michael Dlamini who was the accomplice under arrest. At that time the appellant was not there. Dlamini apparently explained to Sithole how he came to be arrested and implicated the appellant in the offences.

Although Sithole went in the company of Michael Dlamini to the appellant's home, the appellant was not to be found there. Some weeks later, Sithole met the accused in Mbabane and there arrested him. After cautioning him according to Judges Rules Sithole told the appellant that he was investigating the matter and that he was under no obligation to say anything. After being cautioned the appellant told Sithole that Musa Gama requested him to organise for an old man to cash the cheque. A reward was promised by Gama. The appellant informed Sithole that he sought out Michael Dlamini as Michael Dlamini was old and cheques were meant as pension payments for old people. The appellant also confirmed having organised a passport for Michael Dlamini. Later Sithole caused Michael Dlamini and the appellant to meet and in the presence of the appellant Michael Dlamini corroborated what the appellant had told Sithole. Sithole then charged both of them. This evidence was not disturbed in cross examination and although it was put to the witness that the appellant "never implicated Musa or himself" the witness did not agree with such proposition.

In giving evidence himself the appellant did not deal with this allegation by Sithole.

The statement made by the appellant to Sithole is not a confession but it certainly is evidence connecting the appellant with the commission of the offences and implicating him therein.

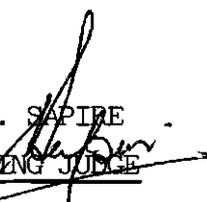
On appeal Mr. Cele who appeared for the appellant argued that there was no corroboration of the accomplice's evidence. He did not however even refer to the evidence of Sithole. No reason was advanced other than the absence of corroborating evidence as to why the decision of the magistrate should be reversed.

The magistrate correctly found that the three persons involved were acting in furtherance of a common purpose and that everything done by them including the forgery of the documents alleged in the various charges was done in furtherance of the common purpose. Although the appellant did not himself forge the cheques or the documents for identification he clearly he adapted these forgeries as part of the scheme. The appellant could perhaps have been charged and found guilty with the theft of moneys and on the occasions of the first three enchashments of the forged cheques and the attempted theft in relation to the fourth occasion which failed and resulted in the arrest of the perpetrator Michael Dlamini. The charges were however not laid in this manner. This does not detract from the correctness of the magistrate's findings on the counts forgery. The conviction must therefore stand.

There is also an appeal against sentence. The magistrate being aware that the appellant is a first offender nevertheless in his discretion was satisfied that a custodial sentence was necessary and appropriate. He sentenced the appellant to two years imprisonment on counts 2, 4,6,8,10 and 12, which were forgery charges and ordered the sentences to run concurrently. The magistrate was also aware that the accomplice witness was convicted and was sentenced to five years imprisonment wholly suspended.

The fact that the appellant was a first offender does not automatically entitle him to a suspended sentence. The appellant is a mature person of some sophistication who has shown no regret or remorse other than the disappointment at having been caught.

I have found no irregularity as far as the sentence is concerned nor has been argued that any irregularity exists. As a court of appeal I am reluctant to interfere with the proper exercise of the magistrate's discretion. In my view the sentence imposed is appropriate. The appeal both against the conviction and the sentence is dismissed.

S.W. SAPIRE  
  
ACTING JUDGE