IN THE HIGH COURT OF SOUTH AFRICA

WITWATERSRAND LOCAL DIVISION

Case No. CA 03/06

In the matter of:

KENNITH CHETTY Appellant

vs

THE STATE Respondent

JUDGMENT

Horwitz AJ: The appellant appeared in the Regional Court on a charge of fraud and he pleaded guilty thereto. His counsel handed in a document purporting to be a statement in terms of section 112(2) of the Criminal Procedure Act No. 51 of 1977 and after much debate between the Magistrate and the appellant's counsel about the efficacy and adequacy of the statement, the Magistrate convicted the appellant.

The material allegations in the charge sheet were the following:

"On 5 November 2003 ….. the accused ….. with the intention to defraud …. pretended to Portia Mille Cassels or Nedbank that:

1) He was in lawful possession of the Nedbank cheque (*sic*)

2) He was entitled to present a cheque of Excel Petroleum (PTY) LTD to the value R490 000 and deposit the cheque to K Noortman account

3) That this was a valid and properly authorised cheque

and did then and there by mean (*sic*) of the said pretences induce Nedbank and/or

Portia Mille Cassels to the prejudice or potential prejudice of Nedbank and/or Portia Mille Cassels and/or Excel Petroleum (PTY) LTD to accept that the cheque presented was valid and properly authorised."

There then follow the usual allegations, the import of which is that the appellant knew that his representations were false.

In *S v Moya* 2004 (2) SACR 257 (W) I said the following:

"I write this judgment with the feeling that I am indulging in an act of supererogation. What is in issue is something that surely must arise hundreds of times a day and the applicable principles are trite. It seems, however, that the various role players become complacent about those principles and from time to time the High Court has to issue a reminder that those principles have not, and do not, become eroded with the passage of time. It is unfortunate that the Court has to spend time on something so prosaic. The High Court is overloaded with appeals from the magistrates' courts and should not be further burdened with having to take time to correct what is nothing more than a procedural shortcoming in a case."

Again the occasion arises for the peremptory terms of section 112 of the Criminal Procedure Act to be emphasised because it is clear to me that the statement which the appellant's counsel handed in and upon which the Magistrate relied for convicting the appellant does not comply with section 112(1). The relevant portion of that section provides :

"(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, ……

(a) ……..

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged **facts**of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she

has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the **facts**which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement."

I have highlighted the word "facts" because the Courts have, over a period exceeding twenty years, emphasised that a regurgitation of the allegations in the charge sheet and statements of law or conclusions drawn from the facts will not render a written statement compliant with section 112(2). An assertion therefore, that the accused did not act reasonably, is a conclusion drawn from facts and without a recordal of the facts from which the necessary conclusion can be drawn, would add nothing to a written statement prepared in purported compliance with section 112(2).

What happened in the present case was that after the appellant had pleaded guilty, his counsel handed in a document which I can only describe as an appalling piece of work. The first part thereof amounts to nothing more than a regurgitation of some allegations in the charge sheet. It contains a statement that the appellant

"unlawfully and intentionally presented a false cheque to Portia Mille Cassels and/or Nedbank and thus by means of the aforementioned false pretences induce (*sic*) Nedbank and/or Mille Cassels and/or Excel Petroleum (Pty) Ltd to accept that the cheque presented was valid and properly authorised."

As for the use of the word "unlawfully", I can do no better than to refer to the *Moya* case and the numerous cases which precede it. Regarding the allegation that the cheque was a "false" cheque, I do not understand what that allegation is intended to convey. Was the cheque forged? Was it a genuine cheque but the issue thereof procured for a non-existent debt? Was it tainted by a forged endorsement on the

reverse side thereof? This was surely something about which the Court should have been properly apprised. In the same vein, the statement should have spelled out why the cheque was not "valid and properly authorised". There is also no apparent reason why a copy of the cheque could not have been annexed to the written statement. All this could have been done with little or no trouble.

Regarding the allegation that

"Nedbank and/or Mille Cassels and/or Excel Petroleum (Pty) Ltd [were induced] to accept that the cheque presented was valid and properly authorised.",

there is no allegation in the charge sheet that Excel Petroleum (Pty) Ltd was induced to accept anything at all. Be that as it may, my real problem with this allegation is that on a charge of fraud, the allegation in the charge sheet that someone was induced to "accept" the truth of the representation, does not satisfy the requirement that the charge sheet should contain an allegation that the accused acted to the prejudice of someone. That allegation is integral to the allegation that the accused deceived the representee. It means nothing more than the representee believed what was told him or her. What is lacking is an allegation that the representee was induced to act on the strength of the representation or that the accused attempted to induce the representee to act on the strength thereof. The mental element, namely, that the accused succeeded in persuading the representee of the truth of the representation, does not satisfy the requirement of prejudice. In this regard, see the *dictum* of BUCKLEY J in *Re London and Globe Finance Corporation, Ltd*, (1903) 1 Ch. 728 at 733:

"deceive is to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to act to his injury. More tersely it may be put that to deceive is by falsehood **to induce a state of mind**, and to defraud is by deceit **to induce a course of action.**"

(The emphasis is mine.)

As HENNING J succinctly put it in *S v Isaacs* 1968 (2) SA 187 (D) at 192A:

"Although, therefore, every fraud involves deceit, the converse is not true."

See also the remarks of the learned Judge at 191H and see also *R v Fitzgerald* (1898) 15 SC 241 and *R v Dhlamini* 1943 TPD 20.

In summary, therefore, the admission that the representees

"accept[ed] that the cheque presented was valid and properly authorised"

does not amount to an admission by the appellant that he caused someone actual or potential prejudice.

The appellant's statement in terms of section 112(2) then continues with the allegation that a friend of his (Jaiman) handed him a cheque and a completed deposit slip, with a request that he (the appellant) assist the friend by depositing the cheque at any "Nedbank in town". What the statement does not indicate, however, is that the appellant complied with the request and indeed effected the deposit. Did he hand the cheque to anyone at the bank for deposit? If so, what was that person's reaction? Was anyone's account credited with the cheque and if so, what transpired thereafter? These all the relevant facts and should be included in the written statement, so that the presiding officer has the fullest picture before him. Failure to do so reduces the exercise to a formalistic, mechanical one and belittles the seriousness of the crime. There is no room, in this type of matter, for speculation or conjecture about what the appellant did. Section 112(2) is peremptory and the statement must reveal the material facts upon which the conviction is based.

The next two relevant allegations in the written statement are the following:

"3.2 I admit that when I took the cheque from Jaiman I had no honest belief that it was his cheque or carefully ascertain (*sic*) that such cheque was valid and properly authorised.

3.2 I admit therefore that I recklessly and carelessly conducted myself in a way that directly created a potential prejudice to the bank."

The first point, apropos this, is that this Court is still left in the dark (as, indeed, the Magistrate must have been) as to what the shortcoming in the cheque was, so as to render whatever the appellant did a fraudulent act.

What really troubled the Magistrate, and understandably so, was whether the two paragraphs that I have just quoted amounted to an admission by the appellant of *mens rea*. The appellant's admission recorded in paragraph 3.2 of the statement says nothing concerning the appellant's state of mind when he effected the deposit, namely, either that he intended someone to suffer loss or realised that there was the possibility that someone might have suffered loss but nevertheless proceeded to effect the deposit regardless whether loss might have been suffered or not. The concepts recklessness and carelessness are conclusions drawn from facts; they do not constitute the facts from which a court could justifiably draw the conclusion that the appellant had the necessary *mens rea*.

The amount of time that was then wasted on argument on this issue is inexcusable. I empathise with the Magistrate in his frustration and irritation that is evident from the record. Why this matter could not have been resolved by the use of simple language is beyond comprehension.

In an attempt to address the Magistrate's difficulty, another handwritten document was then prepared. It is reproduced below.

It is quite astounding that a legal practitioner would venture to hand in something like this in a court of law. This type of laxity borders on contempt for the judicial process and is to be deprecated. It leads to a general disintegration of standards and should not be condoned. Nothing more need be said about this piece of paper beyond pointing out that the appellant's signature does not even appear below the second sentence. His signature below the first sentence appears to me to have been an act of initialling the alteration, which, in any event, left the sentence grammatically inept. Judicial officers should refuse to accept something like this.

It is clear to me that the Magistrate was still not satisfied that the appellant had made a proper admission in respect of *mens rea* so he proceeded to question the appellant, presumably in terms of section 112(1), quoting portions of the written document, whereafter he convicted the appellant on the charge. In my view, the appellant's

answers fall short of what was required to establish that the appellant admitted all the facts necessary to establish that he had the necessary *mens rea*. To demonstrate why I say this, it is necessary that I quote from the record:

"COURT: Okay. Can I just get clarity. You knew there was something wrong with this cheque? Is my inference correct? You knew that there was something wrong with this cheque?

ACCUSED: I had a doubt in it your worship that there was, I has some feeling that it was. You understand? But I was not sure.

COURT: Did you foresee that there was something wrong with this cheque?

ACCUSED: I could actually say your worship I had a feeling that it was, there is something but I was not sure of it your worship.

COURT: Okay. My question is going to be very clear and please answer it not by stating what **you**wish to state.

ACCUSED: Yes.

COURT: I want you to say yes or no. Do you agree with this statement? The statement is as follows. "Therefore I admit that I reasonably", I assume that is what was tried to be written here, "foreseen that the cheque was fraudulent."

ACCUSED: Yes.

COURT: Are you sure about that admission?

ACCUSED: Yes, your worship.

COURT: Okay. "But nevertheless proceeded and presented it to the bank."

ACCUSED: Yes, your worship.

COURT: Are you happy with this admission that you make?

ACCUSED: Yes I am happy.

COURT: Should I read it to you again just for safety sake?

ACCUSED: No …….. You can read it again your worship.

COURT: Okay. "Therefore I admit that I reasonably have foreseen that the cheque was fraudulent but nevertheless proceeded and presented it to the bank."

ACCUSED: I do understand, your worship.

COURT: Do you make this admission?

ACCUSED: Yes, your worship."

I have two difficulties with this. I do not believe that the appellant's answers sufficiently establish that he had the necessary *mens rea*. The gist of what he conveyed to the Magistrate was that he entertained some doubt about the cheque, whatever that doubt might have been. I do not believe that the Magistrate acted absolutely correctly in telling the appellant that he had to answer with a simple "yes" or "no" (although I fully appreciate that by that time, the Magistrate was at the end of his tether).

The second difficulty is the following: when all is said and done, I still do not know precisely what the appellant's representation was regarding the cheque because I cannot glean from the record what imperfections inhered in the cheque. *Ergo*, I do not know what the nature of the doubt was that the appellant allegedly entertained in regard to the cheque.

The statement manifests a job done in haste, with no attention paid to detail. In short, judicial officers should ensure that what is presented to them is a full picture, not just a few discrete facts which, it is hoped, fulfils the requirements of section 112 of the Act. It follows, in my view, that there was not sufficient on record for the Magistrate to convict the appellant. All this could have been avoided had counsel and the prosecutor put their heads together and prepared, in simple English, a comprehensive statement of the facts, devoid of all legalese.

In my view, and but for the special circumstances of the case, which I deal with below, the appeal would have fallen to be dealt with in terms of section 312(1) of Act 51 of 1977, which provides:

"Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)(b) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be."

The problem, however, is that the appellant was sentenced on 31 August 2004 and since then he has been in prison, serving the sentence which was imposed on him. Why it has taken so long for the matter to come before this Court remains a mystery. The notice of appeal is dated 23 May 2005 and on 20 June 2006, the Magistrate provided a written statement to effect that he did not wish to add to his *ex tempore* reasons. Why there was more than a year's delay between those two dates is also incomprehensible. Adv Karam, counsel for the appellant, informed this Court that the appellant will very soon be considered for parole and if this Court were now to invoke section 312(1), by the time that the matter comes before the Regional Court again, the appellant will in all probability be out of prison. I believe that we would do the appellant an injustice to apply the strict letter of the law and I therefore believe that we should rather do the best that we can with the material before us and dispose of the appeal. The appellant's counsel has in fact requested that we deal with the matter on that basis, bearing in mind that notwithstanding the procedural imperfections, the appellant did admit his guilt.

The appellant was, at the time of his conviction, 39 years old. Since 1993 he has had no less than seven convictions, six for fraud and one for robbery. In 1999, he was sentenced to four year's imprisonment for 127 counts of fraud and had he served the full sentence, he would have been released in 2003. In the same year, he committed the present offence, again one of fraud involving a cheque of R490 000,00. The Magistrate hesitated to call the appellant a career criminal. I think that he is one. The Magistrate delivered a comprehensive and flawless judgment on the question of sentence and the only question that then remains is whether he exercised his discretion properly in sentencing the appellant to eight years' imprisonment. I believe that he did.

I therefore propose that the appeal be dismissed and that the sentence be confirmed.

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Horwitz AJ

Acting Judge of the

High Court

I agree. It is so ordered.

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Labe J

Judge of the High Court

Date of judgment: 10 March 2008

Counsel for the appellant: W A Karam

Counsel for the State: R Dookun