48/95

CG CASE NUMBER: 434/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HILTON MHLUNGU Appellant

and

THE STATE Respondent

CORAM: **E M GROSSKOPF, VAN DEN HEEVER et HOWIE JJA**

HEARD ON: **4 MAY 1995**

DELIVERED ON: **12 MAY 1995**

J U D G M E N T

VAN DEN HEEVER JA

Appellant was convicted in the Regional Court, Johannesburg, of fraud and sentenced to three years' imprisonment. His appeal to the Witwatersrand Provincial Division was dismissed. A differently constituted bench of that Division granted him leave to appeal to this Court against both his conviction and the sentence imposed.

The charge was based on a cheque in the sum of R30 946,23 drawn on the Fox Street Branch of the Standard Bank, Johannesburg, by The Employment Bureau of Africa Ltd which had been altered to reflect appellant as being the payee, and was paid into his savings account. After he had pleaded not guilty, his attorney stated (and appellant confirmed) that the account into which "the money" was deposited was that of appellant, and was in respect of "the house which was sold by the [appellant]".

The facts giving rise to the charge may be summarised as follows. On 4 August 1992 The Employment Bureau of Africa Ltd issued the cheque in question, marked "not transferable", in favour of Norfin (Pty)

Ltd. The Bureau's cheque forms have a counterfoil attached to the top containing the instruction that it be detached before depositing the cheque. The cheque would in the ordinary course have been posted to the payee but was not received by that company. A portion of the counterfoil paper was pasted over the name of the payee, appellant's name written on this patch which was invisible unless the document was held to the light, and the date altered from 4 to 14 August. On the 19th August the cheque and a deposit slip (Exhibit A) were placed into the cheque deposit box in the banking hall of the Standard Bank at Westville, Natal, which had opened only two days earlier, for the former to be credited to appellant's savings account (number 005919568) with the same bank at its Selby branch in Gauteng. The signature "H Mhlungu" at the foot of exhibit A does not match that of appellant. The appellant's account, into which his net salary of R1103,12 was deposited on the 20th of every month, was a modest one. The bank statement dated 5 September 1992 reflects an opening balance in early August of

R597,93. This was depleted mainly by autobank withdrawals leaving a credit balance of only R7,21 available on 15 August. On the 19th the account was credited with the amount deposited at Westville. One of the duties of the customer liaison officer at the Selby branch, Mr Naidoo, who knows appellant quite well, is to look into the regularity of deposits made by cheque in excess of R5 000. He called for the deposit slip relating to the large amount reflected as having come into appellant's account, his resultant inquiries revealing that the relevant cheque had been drawn in favour of Norfin (Pty) Ltd.

On Saturday the 5th of September appellant came to Mr Naidoo and tried to withdraw R6 000 from his savings account. Mr Naidoo's evidence is clumsily phrased (having been clumsily led) but one gathers that appellant had earlier telephoned Mr Naidoo to find out whether he could draw against money deposited to his credit by a Mr Khumalo who owed him money, and had been told that money had ostensibly been remitted by a Mhlungu, not Khumalo; that the bank was busy with his

account (which had in fact been stopped); and that there was a one-week hold on the cheque. When on the Saturday appellant had made out and signed the withdrawal slip exhibit B, assisted by Mr Naidoo, the latter referred the matter to the manager who called the police. Appellant was furious at being made to wait and accused the bank of racism in treating him so.

On arrest appellant told the police that a certain Themba Khumalo was to have deposited money into appellant's account. He gave Khumalo's address as 201 Plaza Court, corner of Broad and Twist streets, Durban; and his telephone number. Sergeant Burnett went in search of Khumalo. He found a Broad Street in Durban but no Twist Street intersecting or even near this, nor any Plaza Court. The telephone with the number which appellant had given, was installed in premises in Umbilo Road. No one there knew any Themba Khumalo.

Appellant's attorney called his client into the witness box to elaborate on the basic explanation tendered with his plea. His evidence

in chief may be summarised as follows. His late parents had lived in a house at Ntendega in the Newcastle district. Appellant sold this to his Ntendega neighbour, Themba Khumalo, for R32 000. Khumalo was to deposit this amount into appellant's account after which appellant "would then make arrangements with a lawyer, that is with regard to the handing over of the house". This agreement was concluded at Ntendega, where appellant and Khumalo had grown up together, attending the same school. They were still members of the same church, though Khumalo works and stays in Durban. He gave appellant his address there which appellant in due course passed on to the police. During August Khumalo telephoned appellant.

> "He told me that he had deposited the money in the bank. I then phoned Vince Naidoo ... to ask him if the money was deposited and it was confirmed.
>
> .....
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> And on 5 September 1992, you went to Standard Bank and wished to withdraw a sum of R6 000? --- Yes because I saw on my statement, the money was reflected on my statement. So I was satisfied that the money was indeed deposited."

He denied any knowledge of the (scil: specific) cheque which had been paid into his account.

Under cross-examination he contradicted himself in various respects and improbabilities in his tale were highlighted. The trial court listed some, the court *a quo* framed them somewhat differently, both were of the view that there was no reasonable possibility that he was telling the truth. Two factors induced the third bench seized of the matter to grant leave to appeal. Firstly the name of the depositor given on the deposit slip is the appellant's own name, which he would hardly have given had he been a party to the fraud at that stage. Secondly, the appellant's failure to tell the police that Khumalo was to be found in Newcastle when they could not find him in Durban, which the magistrate held against appellant, had been explained by appellant himself in answer to a question put by the court: the police had not told him that they had not found Khumalo.

The entire foundation of appellant's story is however flawed in the

light of his inability to explain the exact terms of the agreement or his own conduct in relation to that. Although cross-examination was neither as systematic nor persistent as my curiosity would have wished, what there was showed that no lawyer was needed "with regard to the handing over of the house". Appellant's parents had died already in 1976. Their house is in a tribal area where property is allotted to persons who live there under the rule of an induna. When his father died appellant as the eldest son became "responsible for everything", the arrangement being made "traditionally. There was no paperwork involved". Assuming that he had any right to transfer to another, in return for money, rights to an allotted asset for which he had become responsible "in a customary way", it is clear that the Deeds Office would not be involved. Appellant then said that the arrangement with an attorney was envisaged

> "to satisfy Themba so that there must be some proof that he bought the house".

Yet he gave Khumalo no receipt for the money paid into his account, and

agreed that Khumalo must have trusted him since he did not ask for one. Yet again, once Khumalo had fully implemented his part of the bargain, the parties were to approach a lawyer to draw up a written contract

> "to satisfy Themba that now the house is in his possession. And if the full amount is not paid? --- We would not proceed with the final arrangements because we people do not trust each other, especially where money is involved".

He did not telephone Khumalo when he discovered that the amount deposited was short of the full price agreed upon, because Khumalo was no stranger and he himself was still in possession of the house. Instead, he went home to Ntendega to look for and question Khumalo. He found Khumalo at Ntendega. Khumalo said that he would contact appellant as soon as he had the balance available. This changed to: appellant did not telephone Khumalo because he himself was going to Ntendega at the end of the month to take money home. He thought that possibly Khumalo would do likewise; and he found him there.

Despite not having proceeded "with the final arrangements because

we people do not trust each other" he tried to draw against the money deposited into his account because he needed money urgently to pay the builder for operations he was engaged in at his home in the township, and was confident that Khumalo would have understood. There is no suggestion that he tried to contact him telephonically to get his advance permission to do so.

He has seen Khumalo since being arrested and released on bail, the first time on the weekend of the 12th September, and again in January.

> "And did you tell him ... that you are in trouble now because of the cheque he deposited in Durban? --- I did tell him but he told me that it is probably a mistake from his work and he is going to see to it that it is rectified because he had brought the money from his employer."

Appellant's evidence that the police did not tell him that the address and telephone number he had given them were false, takes the matter no further. Appellant himself clearly had no faith in them. His not telephoning Khumalo about either the shortfall in the purchase price or his intention of drawing against that, regardless, is logically explicable

only on that basis. We do not know who filled in the deposit slip accompanying the fraudulent cheque or tampered with the latter. It may have been an accomplice, who "signed" appellant's own name instead of that of some unknown other. But it is not an indispensable link between the cheque and appellant, merely a stupid slip by appellant or such accomplice. Appellant was expecting money to be paid into his account. If he did not deposit the cheque himself, he must at least have given the depositor his account number. Should Khumalo and their contract fall away, it would be pure speculation to suggest that the appellant expected something other than what really happened; and if he did not himself deposit the cheque, *qui facit per alium facit per se*. And Khumalo and the contract must fall away. It would have been equally stupid of Khumalo, had he really existed and tried to contract with appellant in relation to immovable property at Ntendega, to bother to give appellant a false address and telephone number elsewhere when the two knew one another well and met periodically, at Ntendega; to implement their

agreement by means of a falsified cheque; and to undertake to rectify the "error" and think an innocent seller would do nothing about it. (This seller was not a person averse to asserting himself, as witness appellant's conduct before the police arrived at the bank to arrest him.)

In short, the magistrate was fully justified in rejecting appellant's tale as beyond doubt false. Without that "explanation" the *prima facie* case presented by the State ripened into conclusive proof.

The appellant, then 41 years old, in steady employment, married, with two schoolgoing children, admitted a number of previous convictions but had walked the path of virtue for some seven years since the latest of those. Sandwiched between a conviction in 1974 for drunken driving and what appear to have been convictions for minor offences of violence chalked up against him in 1984 and 1985, were two relevant to the present matter since they involve dishonesty. In 1978 he was sentenced to effective imprisonment for car theft but released on parole after serving half of the 18 months imposed. In 1982 he was

given the option of a stiff fine plus 2 years' imprisonment, conditionally suspended, in respect of a conviction described as "Diefstal - klerasie - R10 272-02".

The magistrate warned himself against over-emphasising appellant's previous convictions, but commented that appellant had erred through greed, not need, being in fixed employment at a salary of R1800 per month; and that the entire operation must have been carefully planned. According to him this type of fraud, where cheques are stolen and deposited so that the actual depositor cannot be identified, is on the increase, and a deterrent sentence called for.

I find no misdirection in the magistrate's reasoning, and the power of a court to interfere on appeal with a trial court's exercise of its discretion is limited. Moreover although appellant's previous convictions are fairly old, they reveal that, despite having reached mature years, he does not appear to have learned from experience, save to become more sophisticated in the manner of his sinning. Neither fines, suspended

sentences, nor short-term effective imprisonment have succeeded in deterring him from breaking the law again.

The appeal is dismissed.

L VAN DEN HEEVER JA

CONCUR:

E M GROSSKOPF JA)
HOWIE JA)