1991(1) SACR 418 (NmS) SA 1/90

IN THE SUPREME COURT OF NAMIBIA

In the matter between

WERNER DRAYER	FIRST APPELLANT
DAWID BENJAMIN MAJIEDT	SECOND APPELLANT

versus

THE STATE	RESPONDENT

CORAM: BERKER, C.J. et MAHOMED, A.J.A. et
DUMBUTSHENA, A.J.A.

Delivered on: 1990/11/12

APPEAL JUDGMENT

MAHOMED, A.J.A.: Both the appellants were charged in the Regional Court in Windhoek with the offence of fraud. In terms of the amended charge it was alleged that during the period 8 June 1987 to 7 August 1987 and at Windhoek they had unlawfully and with intent to defraud misrepresented to SWA Meat Corporation Limited ("SWAMeat") the amount of meat they had removed from the premises of SWA Meat. It was alleged that the true amount of meat so removed during this period was 3,450 kg more than the amount which was represented by the accused to SWA Meat.

It was further alleged that by this misrepresentation the appellants induced SWA Meat, to its potential prejudice, to

accept that the appellants had during this period removed a quantity of meat which was 3,450 kg less than the actual quantity which was in fact removed.

Both appellants purported to plead guilty to the charge and handed into Court written statements in terms of Section 112(2) of Act 51 of 1977.

After stating that he was guilty of the charges against him, the first appellant made certain factual admissions which included an admission that he had misrepresented the amount of meat which had been taken out and that this had operated to the potential prejudice of SWA Meat. He thereafter set out the factual circumstances which gave rise to the offence by explaining that the second appellant needed a loan of R3 000 and that he sought to accommodate this need by devising a scheme in terms of which meat in excess of the amounts invoiced to the first appellant would be removed from the premises of SWA Meat and diverting the profit on the meat so removed for the benefit of the second appellant who was an employee of SWA Meat. The scheme operated successfully with the co-operation of the second appellant because on each occasion when deliveries of meat were taken by the first appellant his vehicle was weighed in circumstances which included the weight of two employees who were not on the vehicle when it was weighed at the premises of SWA Meat on the return trip. The difference in the weight which would result from this was made up by the excess meat.

The first appellant explained in his 112(2) statement that this scheme had been devised because his credit limit with the complainant did not permit him to purchase the excess deliveries which he required in order to accommodate the needs of the second appellant, but he stated that he always had the intention to pay for these extra supplies. He stated expressly in this regard that -

> "Because I never had the intention to take the meat without paying for it and in order to ensure that no accusations were afterwards made that I had such an intention, I sent a letter on 2 June 1987 to one Danie Theron (who was within SWA Meat in control of the invoicing of meat delivered to me) in a sealed envelope. In that letter I requested him to debit me with a further 3,450 kg of meat and I said that I would give him further information to explain why this request was being made. I put this letter in a sealed envelope and gave it to the said Danie Theron and on the envelope I wrote that it should be opened on 1 September 1987. When I gave the letter to the said Danie Theron, I requested him to open the letter only on that date. I also informed the second accused about the letter. The second accused indicated that on that basis he would ensure that whenever there was sufficient meat available he

would give to me 150 kg in excess of the amount which he would disclose to Mr Theron. After I had received this undertaking from the second appellant I handed the letter to Mr Theron who received it and put it in his drawer."

In the statement which the second appellant made in terms of Section 112(2) of the Act he also admitted his guilt and complicity in the scheme and stated that he was aware that his conduct was wrongful and that it constituted an offence. In the statement he confirmed that he had read the factual circumstances described by the first appellant in his statement and he confirmed the correctness thereof save for the fact that he was not aware as to precisely how the first appellant would be removing the excess meat from the premises of SWA Meat without the complainant becoming aware thereof. He then goes on to state that -

"On 2 June 1987 I and the first accused agreed -

(a) that the first accused would on 1 September 1987 pay for all the meat which was irregularly removed;

(b) the first accused would show me the receipt for such payment so that I could also be satisfied that payment for such meat had been made; and

(c) that in order to bind himself irrevocably to the payment of such meat the first accused would hand to Mr Theron a letter (which the first accused explained to me was already in the possession of the first accused at that stage) to be opened by Mr Theron on 1 September 1987."

After these statements had been read by counsel for the appellants, both appellants indicated to the Magistrate that they had in fact signed their respective statements. The Court then entered their pleas of guilty and stated that on the strength of the statements made by the appellants the Court was satisfied that they were guilty of the offence charged. Both appellants were so found guilty by the Magistrate.

Both the appellants were thereafter called "in mitigation of sentence" and cross-examined by the Prosecutor.

Before passing sentence the Court indicated that it wished to call certain evidence in order to get clarity about "aspects of the case" in respect of which the Magistrate indicated that he had a "doubt".

Pursuant thereto evidence was heard from a Mr Grobler of the complainant firm. Each of the appellants were thereafter sentenced to four years imprisonment of which

one year of imprisonment was suspended for a period of five years on certain conditions.

In his judgment on sentence, the Magistrate, however, appears to have rejected the claim of the appellants that the first appellant had intended to pay for the excess meat which had been removed from the premises of the complainant.

An appeal against these sentences was thereafter noted and prosecuted in the Court a quo on a large number of grounds, including the ground that the Magistrate had erred in sentencing the appellants on a factual basis different from the basis on which they had pleaded guilty. The Court a quo which heard the appeal, appeared to accept that it was irregular for the Magistrate to have sentenced the appellants on facts which were materially different from the facts set out in their statements in terms of Section 112. The Court decided however that -

(a) the statements made by the appellants in terms of Section 112(2) did not constitute an unequivocal admission of guilt and the Magistrate should have entered pleas of not guilty.

(b) The fact that the first appellant had stated that it was his intention at a later stage to pay for the excess meat which had been taken from the premises

> of the complainant and the fact that "second appellant was of the same opinion", should have caused the Magistrate to entertain a doubt as to whether the appellants indeed admitted their guilt.

In the result the Court a quo made an order setting aside the conviction and sentence of each of the appellants and remitting the case for hearing before a different Magistrate.

An application was thereafter made for leave to appeal against that order on the grounds that the Court had erred in holding that the statements of the appellants did not constitute an unequivocal admission of guilt and in holding that the Magistrate should have doubted whether the appellants were indeed admitting their guilt. The leave sought was granted.

When the matter was called before us, the Court queried mero motu whether an appellant had any right of appeal from an order which set aside his conviction and sentence (and which remitted the matter for further hearing before a different Magistrate). Both counsel for the appellants and counsel for the State submitted that such a right of further appeal did exist at the instance of an accused person but because the matter had not previously been raised in the Court a quo or at any other stage, the point was not fully argued. In the special circumstances of this

matter I am of the view that the Court should decide the appeal on the merits, by assuming without deciding that the appellants did in fact have such a right of further appeal (with leave).

In a very thorough argument Mr Maritz who appeared for the appellants conceded that if there was any doubt as to whether or not the appellants were making an unequivocal admission of guilt before the Magistrate, the order setting aside the conviction and sentence of each of the appellants and remitting the case for hearing before a different Magistrate, was correctly made. He contended however that on a proper analysis of the elements of the crime of fraud alleged in the charge against each of the appellants and a detailed analysis of the factual admissions made by each of the appellants in relation to those charges, the appellants had in fact made and intended to make an unequivocal admission of guilt. He conceded that both the appellants had expressly contended before the Magistrate that there was a continuing intention at all relevant times to pay the complainant for the excess meat which had been taken from the premises of the complainant during the relevant period but he contended that this did not detract from the fact that each of the appellants made an unequivocal admission of guilt with respect to the charge against them.

Mr Heyman, who appeared for the State, disputed these contentions and referred us to various parts of the record in support of his arguments.

Upon a consideration of all the relevant evidential material, I have come to the conclusion that the Magistrate should indeed have had a doubt as to whether or not the appellants were making an unequivocal admission of guilt.

1. Whilst it is perfectly true, as Mr.Maritz reminded us, that the offence charged was fraud and not theft and that the admissions made by the appellants in their statements in terms of Section 112(2) were directed to the relevant elements of the offence of fraud, the insistence by the appellants in their statements that they always intended to pay for the excess meat which had been removed from the premises of the complainant, was not irrelevant to the element of mens rea in the offence so charged.

2. Whilst the appellants in their respective statements admit that their conduct operated to the "potential prejudice" of the complainant, there is no express averment that they intended to cause such potential prejudice.

3. In the course of his evidence in mitigation the first appellant not only repeated his statement that he always had the intention to pay for the excess meat

removed from the premises of the complainant, but he significantly added that he never intended to steal anything or to commit fraud.

4. The second appellant similarly attempted to show an innocent state of mind by asserting not only an express agreement between him and the first appellant that the first appellant would pay for such excess meat but by further insisting that he would "never in his life" have assisted the first appellant at all if he had known that payment for the excess meat supplied would not be made to the complainant.

5. Indeed the Magistrate himself in considering this evidence was constrained to observe that the appellants sought to project themselves so innocently as to cause him to wonder at times whether he should not have altered their plea of guilty to one of "not guilty".

At the very least this evidence of the appellants, should in my view have caused the Magistrate to doubt whether the appellants were indeed making an unequivocal admission of guilt and he should accordingly have acted in terms of Section 113 of the Criminal Procedure Act of 1977 to alter

the pleas of guilty, even if those pleas had correctly been entered initially. It is perfectly true that the Magistrate did not appear to believe some of the apparent protestations of innocence projected by the appellants but that is quite irrelevant in determining what plea should have been entered. The test is not whether an accused person should be believed in what he says but whether if what he says is true it would disclose a possible defence to the charge preferred against him. The presumption of innocence should operate in favour of the accused person in such circumstances. (See: S v Mkize, 1978(1) SA 264 (N) at 268; S v Ncube, 1981(3) SA 511 (T) at 514.)

In the result I would dismiss the appeal.

MAHOMED, A.J.A.

I concur:

BERKER, C.J.

I concur:

DUMBUTSHENA, A.J.A.

Advocate for the Appellant: Adv. J.D.G. Maritz

Instructed by: Van der Merwe, Louw & Partners, Windhoek.

Advocate for the State: Adv. J.L.Heyman - Acting Prosecutor General.