CASE NO.: SA 1/99

IN THE SUPREME COURT OF NAMIBIA

In the matter between

PHILLIPUS LONGER

APPELLANT

And

THE STATE

RESPONDENT

CORAM:, Teek, A.J.A., Levy, A.J.A., O'Linn, A.J.A.

HEARD ON: 01/10/1999 and 10/10/2000

DELIVERED ON: 2000/12/08

APPEAL JUDGMENT

O'LINN, A.J.A.: The appellant applied for condonation of the late filing of his appeal against conviction in the magistrate's court of Swakopmund on 5 charges of cheque fraud and against the sentences imposed.

A full bench of the High Court refused condonation on 13th December 1999.

Appellant then appealed to the Supreme Court without special leave of either the High Court or Supreme Court. This the appellant was entitled to

do on the clear understanding that the appeal was against the order refusing condonation and not against the conviction and sentence, even though the merits of an appeal against the conviction and sentence are always part of the consideration of an application for condonation. The Supreme Court in such a case has no jurisdiction to deal with such an appeal as an appeal against conviction and sentence.

Consequently, if this Court upholds the appeal against the refusal to grant condonation, the appeal against conviction and sentence must be heard in the High Court. On the other hand, if this Court dismisses the appeal against the refusal of condonation, that is the end of the matter.

I now proceed to deal with the appeal against the refusal of condonation and will deal for this purpose with the prospects of success of the proposed appeal against conviction and sentence.

The following facts are common cause or not in dispute:

(i) The appellant drew five cheques on his bank, the Standard Bank, handed in respectively as Exhibits "A", "B", "C", "D" and "E". The cheques were drawn on the following dates and for the following amounts:

8th February 1991, cheque 017 for N$120,00;

S v Tsedi, 1984(1) SA 565(A)
S v Absalom, 1989(3) SA 154 at 162 B - 166 D
S v Cassidy, 1978(1) SA 687(A) at 690 F - H
S v Gopal, 1993(2) SACR 584(A) at 585, c - d
Commentary on the Criminal Procedure Act by du Toit *et al*, the footnote on p. 3I - 15

9th February 1991, cheque 018 for N$20,00;

18th February 1991, cheque 021 for N$100,00;

18th February 1991, cheque 020, for N$50,00;

18th February 1991, cheque 022, for N$80,00.

(ii) All the cheques were cash cheques which were given by the appellant to the complainant, Mr. Kluft in part for goods and in part for cash.

(iii) None of the cheques were post-dated.

(iv) The cheques were all drawn on appellant's bank, namely Standard Bank and deposited by complainant with his bank, the Commercial Bank.

(v) None of the cheques were met when presented and all were marked by appellant's bank - "Refer to drawer".

(vi) The cheques were deposited by complainant in his bank account for collection by his bank and presented for payment to appellant's bank within 2 - 4 days from the date of the cheque as is apparent from the following dates and bank stamps on the cheques:

EXHIBIT "A": cheque dated 08/02/1991 for R120,00 -

stamped by Commercial Bank --/02/1991

(front)

stamped by Standard Bank 11/02/1991 (back)

stamped by Commercial Bank 12/02/1991 (back)

EXHIBIT "B": cheque dated 09/02/1991 for R20,00

stamped by Commercial Bank --/02/1991 (front)

stamped by Standard Bank 11/02/1991 (back)

Stamped by Commercial Bank 12/02/1991 (back)

EXHIBIT "C": cheque dated 18/02/1991 for R100,00

stamped by Commercial Bank 21/02/1991 (front)

stamped by Standard Bank 25/02/1991 (back)

stamped by Commercial Bank 22/02/1991 (back)

EXHIBIT "D": cheque dated 18/02/1991 for R50,00

stamped by Commercial Bank 21/02/1991 (front)

stamped by Standard Bank 22/02/1991 (back)

stamped by Commercial Bank 25/02/1991 (back)

EXHIBITH "E": cheque dated 18/02/1991 for R80,00

stamped by Commercial Bank 21/02/1991 (front)

stamped by Standard Bank 25/02/1991 (back)

stamped by Commercial Bank 22/02/1991 (back)

(vii) The appellant's account with Standard Bank was in overdraft from 5 - 25th February 1991 - thus extending over the whole of the period during which the cheques were drawn. On 27/2/91 he made a deposit on N$1211,05, probably his salary cheque and now had a credit balance of N$1 000,05. But unfortunately by the end of the next day his account was in overdraft once more.

(viii) On the 5th February 1991, prior to the aforesaid period a cheque, No. 14, was apparently cashed or paid out by appellant's bank, when his credit balance was N$708,13, resulting immediately in a debit balance of N$141,87. On the 20th February, according to Exhibit "G", appellant's bank cashed a cheque for N$140,00. It is unknown by who these cheques were cashed. They were however, not presented by the complainant Kluft. Whether these two cheques were presented by the appellant himself or another person, is unknown.

(ix) The complainant confronted the appellant after the cheques were returned "refer to drawer" and the appellant said that he was sorry about it and that he would pay complainant.

The complainant reminded the appellant later in 1991 when appellant was stationed at the border-post between Swakopmund and Walvis Bay that he had not paid.

Warrant Officer Uiseb informed the appellant of the case against him when he was subsequently stationed at Uis.

No payment was however made to complainant until two days before the commencement of the criminal trial in February 1993, two years after the cheques were returned unpaid.

(x) When the charges were first put to the appellant at the section 115 proceedings in the Swakopmund Magistrate's Court, after he was told by the presiding chairperson that he "may reveal his defence - but was not obliged to do so" appellant merely said:

> "We have agreed that I should repay complainant. I gave him money back - on 2/2/93. I telegraphed the money to complainant and I feel there should be no charge against me."

(xi) The appellant declined to testify at the end of the State case notwithstanding a warning by the presiding magistrate of the implications of the presumption contained in section 245 of Act 51 of 1977.

(xii) The only indication during the trial that the appellant thought that the cheques will be met was contained in the following question put by the appellant to the complainant in cross-examination:

"I believed that at time I presented cheques if cheques had been paid in that time they would have been met as there would have been funds available." Complainant Kluft replied: "The last three cheques were banked three (3) days after we received the cheques - there was no time delay".

(xiii) After conviction and during the sentence stage the appellant testified under oath and said: "Time of the commission of those offences wife was in hospital where she had undergone a cicearian and I was under financial pressure and that is why I went to complainant for some help".

Appellant also said that he "has presently financial crisis".

It has been argued before us on behalf of appellant that section 245 of the Criminal Procedure Act as well as sec. 236 is unconstitutional because these provisions are in conflict with Art. 12 of the Namibian Constitution.

In South Africa the Constitutional Court has decided that section 245 is unconstitutional in that it provides for a presumption and is consequently in conflict with section 25(3)(c) of the interim Constitution contained in South African Act 200 of 1993 providing for a fair trial in which an accused person is presumed to be innocent until proved guilty.[1] The said interim

[1] *S v Coetzee & Ors*, 1997(3) SA 527 (C).

Constitution has since been overtaken by the final Constitution contained in the Constitution of South Africa, Act 108 of 1996.

There are several important differences between the relevant provisions in the above-stated two Constitutions and the provisions of Art. 12 and particularly Art. 12(d) of the Namibian Constitution. Art. 12(d) provides:

> "All persons charged with an offence shall be presumed innocent until proved guilty <u>according to law, after having had the opportunity of calling witnesses and cross-examining those called against them</u>."
> (My emphasis added.)

The words "<u>proved guilty according to law"</u> and <u>after having had the opportunity of calling witnesses and cross-examining those called against them</u>" do not appear in the South African provisions. Furthermore the South African provisions provide for a "general clause on limitation of rights" applicable to all fundamental rights whereas in Namibia fundamental rights are distinguished from "the right to fundamental freedoms" and only the fundamental freedoms can be limited by the general limitation clause.

The result arrived at in South Africa may consequently not necessarily be the same as that in Namibia. It will for instance have to be decided what is meant by the phrase "according to law". Does it refer to common law, statute law, or customary law or all or some of these manifestations of the law? In South Africa, the Court in *State v Coetzee & Ors, supra,* relied heavily on what the position was under the common law relating to the

State's duty to prove each and every criminal charge beyond reasonable doubt.

In Namibia, the normal grammatical meaning would include the above-stated manifestations of the law. Consequently the statute law, which existed at the time when the Namibian Constitution became operative, would be part of the law and that law included legal presumptions, some justifiable, others not, which were accepted for decades as part of Namibian law. The members of the Constituent Assembly and their legal advisers were certainly aware that these presumptions were part of the then existing law and if it was intended to exclude all statutory provisions providing for presumptions from the term "law" in Article 12(d), it would have been easy to omit the words "according to law" or to use different language.

I make these comments to explain the difficulties in merely following the South African decisions in *State v Coetzee and Others.*

The issue has not been argued in depth before us. I find it unnecessary to finally decide this issue in this judgment in view thereof that even if the Court now finds section 245 and 236 unconstitutional, the invalidity would not be retrospective. And the Court would still have to regard the sections in force until such declaration of unconstitutionality and the appeal would still have to be decided on the basis that the aforesaid sections were valid and enforceable at all times relevant to this appeal.

This follows from the most recent decision of this Court in *Myburgh v Commercial Bank*, Strydom, C.J., who wrote the judgment of the Court, stated:

> "Seen in this context it follows that the words 'any law' in Art. 25(1)(b) and 'all laws' in Art. 140(1) can only refer to statutory enactments and not also the common law because in the first instance such laws, which were in force immediately before independence, remain in force until amended, repealed or declared unconstitutional by a competent Court. The Constitution therefore set up different schemes in regard tot he validity or invalidity of the common law when in conflict with its provisions and the statutory law. In the latter instance the statutory law immediately in force on independence, remains in force until amended, repealed or declared unconstitutional."[2]

Consequently the trial magistrate who convicted the appellant in 1991, was duty bound to regard sections 245 and 236 of the Criminal Procedure Act 51 of 1977 as valid and to apply these provisions to the case before him.

The crime of fraud can be defined as "the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another"[3]

The requirement of intention in turn requires proof that the accused must have been aware that his representation is false. But, as Snyman points out:

> "an accused can be said to be aware that his representation is false, not only if he knows that it is false, but also if he has no honest belief in its truth, or if he acts recklessly, careless as to whether it is true or false. He can even be said to know that his

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2 *Myburgh v Commercial Bank, NmS, December 2000, unreported*

3 *Criminal Law* by Snyman, 3rd ed. p. 487

> representation is false if, although suspicious of their correctness, he intentionally abstains from checking on sources of information with the express purpose of avoiding any doubts about the facts which form the subject matter of the representation. All these rules, applied in practice, it is submitted, are merely applications of the rule that *dolus eventualis* suffices, that it is sufficient if the accused foresees the possibility that his representation may be false, but nevertheless decides to make it. ..."[4]

The learned author Milton in *South African Criminal Law and Procedure* sets out the law on the point as follows:

> "The *locus classicus* in regard to intent to deceive is *Derry v Peek,* in which Lord Herschell said:
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> > '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 or 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 its truth.'
>
> Lord Herschell goes on to make it plain that the second case - absence of an honest belief in the truth of the representation - includes possibilities (1) and (2) in the above *dictum*. This definition has been adopted in numerous South African cases, civil and criminal, and notably by the Appellate Division in *R v Myers.* Shorn of excess verbiage, however, all that is required is that X must have made the representation foreseeing that it might be false."[5]

I must pause here to remark that Hannah, J., and Frank, J., in their judgement in the High Court set the requirements too high when they said:

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[4] *IBID*, 493/494 and the decisions referred to in footnote 57.

[5] *South African Criminal Law and Procedure,* Vol. 2, *Common Law Crimes,* 3rd ed., by Milton, 730/731. See also the decision of Stegman in *Ex Parte Lebawa Development Corporation Ltd.,* 1989(3) SA 71 (T) at 101 G - I where the two distinct representations made, are dealt with - one amounting to *dolus directus* and the other to *dolus eventualis.*

> "The appellant elected not to give evidence and the only question was whether the evidence established that at the time the cheques were issued, the appellant knew or believed that they would not be met."

When the appellant in the case dated and signed the cheques, he represented that the cheques would be met on presentation. The cheques were not met. The element of making a false representation was consequently proved in each case.

The facts which I set out above which are common cause or not in dispute, constitute at least a strong *prima facie* case that the appellant could not have had and in fact did not have any honest belief in the truth of the aforesaid representation. How could he have had an honest belief, when he constantly had a debit balance and when some cheques were met and other not. At least, he acted recklessly - careless as to whether his representation was true or false. Alternatively, he foresaw the possibility that his representation may be false, but nevertheless decided to make it.

The appellant failed to testify. There was consequently no evidence indicating that he honestly believed that the cheques would be met. And the accused was the only person who was in a position to tell the Court what his state of mind was, if it was in fact different from the guilty state of mind reflected in the abovestated proven facts.

The appellant was a policeman. Although he was not assisted by counsel, it would have been a simple matter for him to testify as to his belief, if he had in fact an honest belief in the truth of his representation.

In the circumstances, the strong *prima facie* proof was converted into conclusive proof.[6]

I have read the judgment proposed by my brother Levy, A.J.A., but do not agree that the appeal must succeed. In my respectful view, the appeal must be dismissed.

Although the learned Judge apparently accepts that the intention to defraud can be in the form of *dolus eventualis*, he fails to apply this principle to the facts as accepted by Law.

He says:

> "These statements prove that applicant was permitted by the Bank to operate his account in overdraft - even though certain cheques were not met by the Bank.
>
> The Bank did not close his account but met some cheques and charged him interest on his overdraft. It is a fundamental principle that a person cannot approbate and reprobate. The Bank was taking interest and keeping his account open. It is reasonably possible that applicant was lulled into a belief that cheques may or may not be met because towards the end of the month the sum of N$1211,05 was to be paid into the account. This amount was in fact paid into the account on 27th February reducing the overdraft to N$1 000,05."
> (My emphasis added.)

I make the following comments:

(i) If the appellant was "lulled into a belief that cheques may or may not be met", then the representation inherent in the

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[6] *S v Van Wyk*, 1993 NR 426 NmSC at 434H - 435G
S v Haikele & Ors, 1992 NR 54 (HC) at 63 C - 64 A

drawing of his cheques and the handing of it to the complainant as payment for goods, he should have represented that the cheque "may or may not be met".

When he represented by implication that the cheque will be met, he made a false representation.

He knew that the cheque may not be met and nevertheless handed the cheque over to the complainant as payment for goods or in exchange for cash and thus knowingly made a representation which was not true. Alternatively, even if he entertained a belief that the cheques will be met, the belief was not honest, because it was "the outcome of a fraudulent diligence in ignorance.[7]

(ii) The last sentence in the above-quoted paragraph is incorrect in that the overdraft was not reduced to N$1 000,05, but the overdraft was replaced by a credit balance of N$1 000,05.

(ii) The alleged indulgence by the appellant's bank to allow appellant to "operate this account in overdraft even though certain cheques were not met by the Bank", is exaggerated and too much reliance is placed on this factor.

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[7] *R v Myers*, 1948(1) SA 375 (A) at 382

After all, as shown above, none of the five cheques given during February 1991 to complainant were met. The two cheques relied on fall outside the period during which the five cheques given to complainant were given and all dishonoured. The first one of the above two i.e. No. 14 for N$850,00, was tendered and met on that same date when there were sufficient funds in the Bank to cover all but N$850,00. The second cheque relied on, i.e. No. 23 for N$40,00 on 20th February 1991, "was cashed for N$40,00 and met by the Bank although applicant was in overdraft". This cheque was apparently cashed by the appellant himself at his own bank. Both this cheque and cheque No. 14 were not placed before Court and neither the State, nor the defence led any evidence in this regard. How the appellant had managed to cash cheque No. 14, is consequently unknown.

After the 5th February when appellant's account once more had a debit balance, no cheques drawn by appellant were honoured.

Although the appellant paid a cheque for N$1 201,05, apparently his salary cheque into his banking account on 27th February 1991, he was again overdrawn by the end of the 28th. The appellant apparently also paid his salary cheque for January 1991 into this banking account but by 5th February 1991, his account again showed a debit balance and remained so until the 27th February 1991 when he was in credit for one

day only. Unfortunately, Levy, A.J.A., stopped with the history of the appellant's account on 27th February. Appellant was overdrawn for the whole period during which he gave cheques to complainant.

The complainant only managed to recover his money from appellant, two years later, a few days before the commencement of the appellants trial in the magistrate's court, Swakopmund.

It is consequently a gross overstatement to say - "these statements prove that applicant was permitted by the Bank to operate his account in overdraft even though certain cheques were not met by the Bank."

Similarly, the statement that the appellant "was lulled into a belief that cheques may or may not be met because towards the end of the month the sum of N$1 211,05 was to be paid into the account ... " is much too generous to the appellant. Furthermore, the reliance on the payment of N$1 211,05 on 27/02/91 gives a distorted picture, if the fact that appellant was again overdrawn on the next day, is not mentioned and not brought into the equation.

Apart from the implications of section 245 of the Criminal Procedure Act, the effect of the appellant's failure to testify, had to weigh heavily against him in the circumstance of this

case. My learned brother wrongly fails to give any consideration to this factor in his proposed judgment.

The last argument of my learned brother Levy is formulated as follows:

> "Applying the principles in *Blom's* case, there is a reasonable inference to be drawn from these facts that Kluft knew or foresaw the possibility that when he presented cheques "C", "D" and "E" for payment at Standard Bank they may not be met and that he may have to wait for payment. In the circumstances the inevitable inference that applicant intended to deceive Kluft when he gave him the cheques cannot be drawn."

I wish to comment as follows:

(i) This argument restricts itself to the last three cheques. The first two cheques are ignored. If the excuse is valid for the last three cheques, it does not cover the first two.

(ii) My learned brother applies a very novel approach. Instead of focussing on whether or not the appellant had reasonably foreseen that the cheques would not be met and nevertheless gave the cheques to complainant, he focuses on the possibility that the last three cheques would also not be met.

He now assumes, without the slightest evidence, that the complainant knew that the last three cheques would not be met and accepted the cheques simply as "acknowledgements of debt" as "a business risk". But at the same time he relies on what the appellant said in cross-examination of the complainant namely that he expected the cheques to be met, not that Kluft accepted that the cheques would not be met and accepted the cheques as a "business risk" and "as acknowledgement of debt".

For such a unique defence, one would have expected at least an allegation to that effect, at least in cross-examination.

The argument also relies heavily on the assumption that when complainant received the last three cheques he knew the previous two had not been honoured by the Bank. This assumption again is mere speculation. No one knows whether or not complainant in the interim received his bank statement and paid cheques and cheques marked R/D from his banker.

The question not pondered by the learned judge is: If the complainant Kluft accepted the cheques as a mere "acknowledgement of debt" why did he deposit the cheques with his bank for collection within three (3) days of receiving them?

Even if it is assumed that the complainant did foresee the possibility that the last three cheques may not be met, this surely does not mean that the appellant had no intention to defraud and that he could be exonerated on that ground.

Far from him being protected by the mere possibility that the complainant knew at the time of receiving the three cheques that the first two had been dishonoured, the appellant had less justification for a belief that the last three cheques would be honoured, than that the first two would be honoured. Consequently, even if he had a *bona fide* belief that the first two cheques will be met, he could not have had such a belief when he tendered the last three cheques to the complainant.

It is trite law that even if the representee knows that the representation is false when made, such fact does not assist the representor, provided there is at least potential prejudice. Obviously, when the representee merely suspects that the representation is false, such fact cannot possibly assist the representor. After referring to many decisions of the Courts on this point, the learned author Milton concludes:

> "Accordingly, it is the law that a person commits fraud where he makes a representation which is not believed by and does not deceive the person to whom it is addressed (provided the misrepresentation is potentially prejudicial)".[8]

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[8] *South African Criminal Law and Procedure,* Vol. II, *Common Law Crimes,* p. 728 See also: *Criminal Law*, 3rd ed. by Snyman, 491.

It follows from the above that there are no reasonable prospects of success on appeal.

In the result, in my respectful view, the appeal should be dismissed.

(signed) O'LINN, A.J.A.

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