IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

28 April 2000

The Magistrate

Johannesburg

CASE NUMBER : A.597/99

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
DATE: 29/5/2000 SIGNATURE

In the matter between :-

BERNARD NTISA — First Appellant

PHUZISO STEVEN MOLO — Second Appellant

and

THE STATE — Respondent

J U D G M E N T

WILLIS, J.: The first appellant appeals against his conviction and sentence in respect of 29 counts of fraud and 2 counts of forgery. The counts of forgery are counts 12 and 13. The first appellant was sentenced to 6 months' imprisonment on each count, giving him a total sentence of

15/...

15 years and 6 months. The second appellant, who was accused 3 in the trial, was found guilty on counts 1 to 11, and counts 14 to 29. He was acquitted on counts 12, 13, 30 and 31. The second appellant was sentenced to 2 months' imprisonment on each count in respect of which he was found guilty, giving him a total sentence of 54 months or 4½ years. Accused 2 in the trial was acquitted on all counts. The accused were tried in the Regional Court. The learned magistrate gave a very full and well reasoned judgment, and it is not necessary in my view fully to traverse the ground which he covered.

The state case is that the first appellant recruited persons who were unemployed and then arranged for them to be issued with false identity documents bearing fictitious names. These persons would then be issued with false pay slips indicating that they worked for bona fide businesses. These slips would show salaries and tax deductions. Armed with these false identity documents and pay slips the individuals would approach financial institutions and well-known retailers to open accounts.

The first appellant hired a batch of separate telephone lines in one office giving Telkom, in respect of each line, a fictitious name of a business. This office was in Lester House, Bree Street, Johannesburg. The first appellant hired women to operate these lines. They were taught in a very skilled manner to simulate affairs so that when financial institutions and retailers telephoned to verify that the persons wishing to open accounts did in fact work there and earn the salaries appearing on the pay slips; this would be

confirmed. Records of length of service would also be provided and the nature of the business confirmed. Background noise would be simulated so that it would appear that the telephone receptionists were verifying details on a computer. Accounts would then be opened for the persons issued with false identity documents. They would purchase goods on credit, never pay the accounts, and share the proceeds with the first appellant. The first appellant was the mastermind behind the scheme. He was assisted by the second appellant. Clearly it was a well thought out scheme of fraud, and it would seem, and highly lucrative one.

The state case was proven by the evidence of Majozi Thomas Maloleke and his wife Theneko Baloyi Maloleke (who were issued with false identity documents, opened fictitious accounts, and purchased goods which were never fully paid for on credit), Madipho Maskalina Mokoena and Maphoka Connie Sengwai (who were employed as telephone receptionists), and Leon Barry Allandeck, a fraud investigator employed by Nedbank Card Division, whose excellent detective work uncovered the scheme.

Thomas Maloleke gave evidence with regard to counts 14 to 29 (fraudulent opening of accounts and fraudulent purchases) and counts 12, 13, 30 and 31 (false identity documents and pay slips). His wife gave evidence with regard to counts 1 to 11 (also fraudulent opening of accounts and fraudulent purchases).

The evidence shows that appellant 2 actively participated in the fraudulent telephone conversations, was fully au fait with the scheme and its method of operation,

and shared in the spoils.

The evidence of Madipho Mokoena and Maphoka Sengwai was of critical importance in this regard. As their evidence could not cover the time period when counts 12, 13, 30 and 31 were committed, the learned magistrate gave appellant 2 the benefit of the doubt and acquitted him on these counts.

Although Thomas Maloleke and his wife Madipho Mokoena and Maphoka Sengwai were accomplices (and their evidence must be treated with caution), they gave a good account of themselves and corroborated each other. They were materially corroborated by the excellent witness Leon Allandeck.

The version of appellant 1 that he hired the premises at Lester House for the purposes of trading in soft goods, and that he knew nothing whatsoever of the scheme, may be rejected. He changed his version. He cannot satisfactorily explain how it was that he was found in possession of incriminating documentation relating to the scheme.

Appellant 2's version that he had only visited the office once, being the day of his arrest, in order to visit Mr Dlamini a member of a burial society, may also be rejected. He had been seen there on a previous occasion by Mr Allandeck. He could give no plausible explanation for why Madipho Mokoena and Maphoka Sengwai should lie about his role.

There is no doubt that the conduct of Thomas Maloleke and his wife, in all the counts, amounted to the making of misrepresentations with intent to defraud, which caused actual prejudice or potential prejudice to others, and that

they/...

they were guilty of fraud and forgery.

The evidence with regard to count 21 is a little thin. Counsel for the state did not press for the conviction to stand on count 21 on appeal. I accept that I may be erring on the side of caution but I think that the argument only just succeeds that there was insufficient proof beyond reasonable doubt on count 21. There is no reasonable doubt that appellants 1 and 2 made common purpose with Thomas Maloleke and his wife in the commission of these frauds and are accordingly guilty of fraud as well. It would in my view be more accurate to describe appellants 1 and 2 as co-perpetrators.

Counsel for the appellants submitted that as the fraudulently obtained identity documents had been used in the commission of the fraudulent opening of accounts, there had been an unfair splitting or duplication of charges. This aspect was never raised in the grounds of appeal, and the learned magistrate was never afforded an opportunity to comment on this point. I am in any event satisfied that there is no merit in this submission. There was not a single criminal intent (cf. R v Sabuyi 1905 TS 170 at 171, and S v Grobler 1966 (1) SA 507 (AD) at 518).

The fraudulent identity documents were forged with intent to prejudice, or cause potential prejudice, to a number of persons rather than a single individual in a single transaction. The forgeries were committed with a general criminal intent to defraud, not limited to any one of the fraudulent transactions at issue, or even to the totality of such criminal transactions. The intent of each

forgery/...

forgery was, by necessary inference, to defraud shops and other business generally, and was not limited in scope to an intent to defraud only in the instances charged in this case.

Moreover, if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate criminal offences (cf S v Grobler, supra, at 519 (A)). In this case this is certainly the position. (10)

The evidence of the fraud relating to the obtaining of the identity documents is complete without reference to the opening of the accounts, and the evidence of the opening of the accounts would establish fraud even if the false identity documents had not been used to assist the process.

A common sense approach also indicates that this argument must fail. If a person at an entirely separate time and place steals a firearm, which he later used to commit a number of different acts of robbery and murder, he would not be able to escape conviction on the count of the theft of (20) the firearm because he used that firearm to commit other murders and robberies. Normally theft of firearms is difficult to prove. It nevertheless occurs quite routinely in the High Court that persons are charged, and convicted, of both unlawful possession of a firearm and murder and/or robbery, where an unlawfully possessed firearm is used to commit murder and/or robbery. Ultimately it is a question of fairness (cf S v Mbulawa 1969 (1) SA 532 (E)).

In my view there is nothing unfair to the accused in convicting them as they were. It would be very unfair to the (30)

state/...

state and society if they were to be acquitted on certain of the counts on the basis of this argument.

It is clear that appellant 1 played the leading role in the scheme and that appellant 2 was his right-hand man. The learned magistrate did not misdirect himself with regard to sentence. The sentences are not disturbingly inappropriate, do not induce a sense of shock, and are not excessive in the circumstances.

In my view the appeal against conviction and sentence on count 21 must succeed. In respect of all other counts I would dismiss the appeals against conviction and sentence.

MARAIS, J.: I agree. The appeals of both appellants succeed against their convictions and sentences on count 21 and their convictions and sentences on count 21 are set aside. The appeals on all other counts are dismissed.

The effective sentence of the first appellant (accused 1 in the court a quo) therefore becomes 15 years, and that of the second appellant (accused 3 in the court a quo) becomes 52 months.

ON BEHALF OF APPELLANTS:	(In person)
ON BEHALF OF THE STATE:	ADV EDWARD
DATE OF HEARING:	28 APRIL 2000
DATE OF JUDGMENT:	28 APRIL 2000