IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO.5 OF 2011

In the matter between:

KHOLU MANYALA APPELLANT

and

REX RESPONDENT

AND

REX APPELLANT

and

NEO NTSEKE RESPONDENT

CORAM: RAMODIBEDI P
SMALBERGER J A
SCOTT J A

HEARD : 13 APRIL 2012
DELIVERED: 27 APRIL 2012

SUMMARY

Appeal and cross-appeal against conviction and sentence of accused 1 and acquittal of accused 2 respectively on charges of fraud and theft – evidence reviewed – failure of accused 1 to give evidence to rebut prima facie case – consequence of – need for corroboration of accomplice evidence against accused 2 – no acceptable corroboration implicating accused 2 – both appeal and cross-appeal dismissed.

# JUDGMENT

## SMALBERGER JA

[1] Kholu Manyala (accused 1) and Neo Ntseke (accused 2) appeared in the High Court before Hlajoane J on four counts of fraud (counts 1, 2, 5 and 6) and two counts of theft (counts 3 and 4). At the conclusion of the trial the learned trial judge convicted accused 1 on counts 1 and 2 and acquitted her on the remaining four counts; accused 2 was acquitted on all counts. Accused 1 was sentenced to an effective sentence of five years imprisonment, the two counts on which she was convicted being taken as one for the purpose of sentence. She appealed against her conviction and sentence. In turn the Crown appealed

against the acquittal of accused 2 on all counts. The two appeals are presently before us. I shall deal with each of them in turn. For convenience I shall refer to the appellant in the first appeal and the respondent in the second appeal as accused 1 and accused 2 respectively.

[2] It is common cause that the offences with which the accused were charged were committed in the execution of a cleverly contrived plan with the object of defrauding, inter alia, the Lesotho Government. In issue at their trial was the alleged complicity of the two accused in such plan. In essence the charges against the accused related to two cheques that were created within the Department of Treasury (the Treasury). Both cheques were created in the name of Metropolitan Services, the first on 6 November 2002 in an amount of M486,719.50 and the second on 24 January 2003 in an amount of M489,625.21.

[3] The evidence established that in order for a cheque to be captured and created within the operative systems of the Treasury a confirmed and authorized payment voucher with underlying and supporting documentation was required. After the creation of a cheque there would be a "signing off" process undertaken by a different section of the Treasury designed to confirm that the cheque corresponded with the captured information. In the event of a created cheque being found without the necessary payment vouchers and supporting documentation the cheque would be sent to the bank reconciliation section of the Treasury where it would be placed in a deposit box and later cancelled and reversed. This was an integral part of the system that operated within the Treasury and was well-known to all who worked there. However, not everyone in the Treasury had access to the cheques that were sent to be cancelled.

[4] It is common cause that the two cheques in question were both created by accused 1 on the computer on which she operated, purportedly in compliance with payment vouchers 1455 and 1785 respectively. The Crown case against the accused was that they were parties to a joint scheme carried out on two separate occasions in an identical manner; that accused 1 created cheques by capturing non-existing vouchers and information onto the computer system; that the cheques were then sent to the bank reconciliation section when they were found not to have supporting documentation in order to be cancelled and destroyed; that accused 2 induced an accomplice, Rethabile Thamae (PW8), who had access to the returned cheques, to uplift them before they were cancelled; that the cheques were handed by PW8 to accused 2; that accused 2 in turn handed the cheques to another accomplice, one Christian Nescilescu (PW11), who at accused 2's behest

had opened an account in Bloemfontein with ABSA bank into which the cheques were to be deposited and "laundered" through the banking system; that PW11 subsequently paid over the bulk of the proceeds of the cheques to accused 2; and that PW8 later recovered the cashed cheques and handed them to accused 2 to be destroyed. That there had been a scheme operated on the above lines, and that PW8 and PW11 had participated in it, was never in dispute. In issue was the involvement of accused 1 and 2 in such scheme.

The appeal by accused 1.

[5] That accused 1 was responsible for creating the cheques in question is beyond doubt. She purported to have done so on the strength of valid vouchers and supporting documentation. The undisputed evidence reveals that the authorized payment voucher No. 1455 only

came into operation on or about 20 December 2002 i.e. more than a month after that voucher number was used by accused 1 for the creation of the first cheque. Furthermore, voucher No. 1785 had not yet been authorized and issued when accused 1 used it for the purpose of creating the second cheque. There is no evidence to suggest that duplicate voucher numbers might have existed within the Treasury system.

[6] It is further common cause that in spite of diligent search by a number of officials in the Treasury the vouchers and supporting documentation purportedly underlying the cheques created by accused 1 could not be found, suggesting that they never existed. Significantly no such vouchers and documentation were present during the signing off process shortly after the cheques were created, hence the cheques being sent to the bank reconciliation

section for cancellation. If they had been in existence when accused 1 captured the cheques someone must have removed them, on two separate occasions, before the cheques went through the signing off process, something of which there was no suggestion.

[7] The above evidence, which directly implicated accused 1 in the creation of two fraudulent cheques used in the scheme to defraud the Treasury constituted *prima facie* evidence of her involvement in the scheme. Yet accused 1 refrained from giving evidence and providing an explanation with regard to how she had created the cheques, what documentation there was in support of the cheques and how she had come to reflect voucher numbers not in use at the time.

[8] While accused 1 had the undoubted right to remain silent, her decision to do so is not without consequence. It is clearly established that where there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, a court may be entitled to conclude that the evidence presented is sufficient to prove the guilt of the accused in the absence of an explanation (S. v Boesak 2001 (1) SACR (CC) at par [24]). Her failure to give evidence resulted in there being nothing to gainsay the evidence of the Crown. The evidence of her defence witness did not assist in that regard, as it did not detract in any way from the Crown's evidence, and the inevitable inference of guilt that must follow from it in the absence of any rebuttal. In the result accused 1 was correctly convicted on counts 1 and 2 and her appeal against her convictions cannot succeed.

[9] With regard to sentence, a custodial sentence was clearly called for having regard to, inter alia, the amount involved, accused 1's abuse of a position of trust, her apparent lack of remorse and what would seem to be the prevalence of this type of offence. (Cf: R v Lebina and Another LAC (2000-2004) 464 at 478C – 479G.) The learned judge *a quo* has not been shown to have misdirected herself with regard to sentence and no ground exists for interference with the sentence imposed. As an effective sentence of five years imprisonment was clearly intended by the trial judge, for the sake of clarity the words "on each count" should be deleted from the first line of the sentence imposed.

<u>The cross appeal by the Crown.</u>

[10] The Crown's case against accused 2 is based on the evidence of the two accomplices PW8 and PW11. They

testified with regard to what were essentially two independent factual situations. In relation to those events they did not corroborate each other. Their evidence only overlapped at one point, to which I shall revert later.

[11] PW8 worked at the Treasury at the relevant time as a clerical assistant in the bank reconciliation section. In his capacity as such he had access to cheques sent there for cancellation because they lacked supporting documentation. He claimed to have been a friend of accused 2 for a number of years and that they had a good relationship. He had been forewarned by accused 2 that a cheque made out to Metropolitan Services in an amount of about M486 700 would be returned to the bank reconciliation section. PW8 had access to the box in which returned cheques were deposited. He was asked by accused 2 to uplift the cheque and hand it over to him.

PW8 did as he was asked, duly intercepting the cheque and handing it over to accused 2. This occurred in about November 2002. Accused 2 told him that the cheque was going to be "processed somewhere" without telling him the name of the person who would be involved. Some months later he was asked to repeat the same process in relation to another cheque made out to Metropolitan Services. After handing over the cheque on that occasion he and accused 2 proceeded to Nandos where he met PW11 for the first (and only) time. The three of them had a meal together and as they left accused 2 handed over an envelope containing the cheque to PW11. According to PW8 he was given M30,000.00 by accused 2 some four weeks later. The cheques that had been cashed later found their way back to the bank reconciliation section. After they were filed they were uplifted by PW8 and handed over to accused 2, at the latter's request, in order to be destroyed.

[12] PW8 made two statements to the police, the first on 17 March 2004 and the second on 14 March 2005. In the first statement he claimed that accused 2 had approached him at the beginning of 2003 and asked him "to give him two cheques which I did." He made no mention of the critically important meeting at Nandos, and also claimed that "I never saw the cheques since then." In his second statement he mentioned the meeting at Nandos with PW11. According to him "the meeting was held after the cheques [had] been sent to Bloemfontein." He made no mention of anything having been handed to, or handed over by, PW11. In his second statement he mentions having uplifted the cheques after they had been cashed and handing them to accused 2. From the above it is apparent that there were a number of significant differences between his evidence at the trial and his earlier statements.

[13] According to PW11, he first met accused 2 in Bloemfontein in August 2002 at his place of business, a Bistro and Tavern, situated next to a taxi rank. The accused asked him to open an account in the name of Metropolitan Services into which were to be deposited Lesotho government cheques. Effectively PW11 was being requested to "launder" the cheques, to which he appears to have readily agreed. That two allegedly complete strangers, neither of whom had any reason to trust the other, would without further ado enter into a nefarious arrangement of this kind, invites suspicion. The evidence of their dealings with each other, in the words of the trial judge, "left much to be desired."

[14] PW11 duly opened a cheque account. He received the first cheque from accused 2 on 12 November 2002 when he came to collect it. He again came to Lesotho on 26

February 2003 to collect the second cheque. On both occasions he met accused 2 at the Lancer's Inn where the cheques were handed over to him. He duly deposited the cheques in the account he had opened, made certain withdrawals from the account, and paid over the bulk of the money to accused 2, retaining some for himself. Money in respect of the first cheque was paid over to accused 2 in Bloemfontein, apparently some time in January 2003. In respect of the second cheque the money was paid over to accused 2 on 14 March 2003 in Maseru. This happened at Nandos and PW8 was present on that occasion.

[15] Accused 2 responded to the evidence of PW8 and PW11 by denying their evidence insofar as it implicated him. He also denied a past friendship with PW8 and ascribed as a possible motive for PW8 falsely implicating

him the fact that PW8 was jealous because he, accused 2, had been promoted ahead of PW8.

[16] As I have previously mentioned, the evidence of PW8 and PW11 does not overlap save with regard to the events at Nandos. It was argued by the Crown that they corroborated each other in that regard. But, as has been pointed out, there was a material contradiction in their respective versions regarding what was handed over and by and to whom, which was never resolved. Moreover, the evidence of PW8 is open to criticism arising from the discrepancies between his evidence at the trial and his earlier statements. He was an unsatisfactory witness and it would in my view be dangerous to regard his evidence as acceptable corroboration of the evidence of P11.

[17] While the evidence of PW11 is less open to criticism, he remains an accomplice whose evidence must be approached with the necessary caution bearing in mind that he is a self confessed criminal, he may be shielding the true culprit and that by reason of his inside knowledge he has "a deceptive facility for convincing description" (per Holmes JA in S v HLAPEZULA AND OTHERS 1965 (4) SA 439 (A) at 440 D – F.)

[18] It appears from her judgment that the trial judge was concerned about the risk of false incrimination of accused 2 by PW8 and PW11, neither of whom seems to have made a favourable impression on her, and sought corroboration of their evidence. Where corroboration is required (corroboration not always being essential to satisfy the cautionary rule) it must be corroboration implicating an accused. In the present case there was no corroboration

implicating accused 2 apart from what happened at Nandos, which I have already discounted. There was no evidence of any relationship or connection between accused 1 and accused 2, no other evidence to connect him with the stolen cheques, and no evidence of recently acquired wealth. He was not even asked to produce his passport which might have shown that he could have been in Bloemfontein in August 2002 and January 2003. In my view the Crown has not shown that the trial judge misdirected herself in any respect in concluding that she could not place sufficient reliance on the evidence of PW8 and PW11 to convict accused 2. In the circumstances there are no legitimate grounds for interfering with her acquittal of accused 2.

Order

[19] The following order is made:

1) The appeal of accused 1 (KHOLU MANYALA) against her conviction and sentence is dismissed.

2) The appeal of the Crown against the acquittal of accused 2 (NEO NTSEKE) is dismissed.

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J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

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D.G. SCOTT
JUSTICE OF APPEAL

For accused 1 : Mr. H. Nathane

For accused 2 : Adv P.V. Tśenoli

For the Crown : Adv G.H. Penzhorn SC