



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No. A129/11

In the matter between:

RAZAK ALABI

Appellant

and

THE STATE

Respondent

Coram: STEYN J et ROGERS AJ

Judgment: ROGERS AJ

Heard: 24 August 2011

Delivered: 24 August 2011

For the Accused:

Adv JC Marais

For the State:

Adv S Raphels

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

High Court Appeal No. A129/11
Regional Court Appeal No A(R/01/11)
Regional Court Case No. 27/49/2009

In the matter between:

RAZAK ALABI

Appellant

and

THE STATE

Respondent

JUDGMENT 24/08/2011

ROGERS AJ

Introduction

1. The appellant was charged and convicted in the Cape Town Regional Court on one count of theft and three counts of fraud. The charge of theft alleged that on or about 10 February 2009 and at or near the South African

Bank of Athens in Johannesburg ("SABA") the appellant stole 209 USD travellers cheques and 240 Euro travellers cheques belonging to SABA. The counts of fraud alleged that on 12 February 2009 and at three different locations in Cape Town the appellant unlawfully, falsely and with intent to defraud pretended to be the lawful possessor of certain of these stolen travellers cheques and that he was entitled to cash them, to the prejudice or potential prejudice of the persons to whom he presented them for encashment.

2. On the count of theft the appellant was sentenced to eight years imprisonment of which three years were suspended for five years. On the three counts of fraud, which were taken together for purposes of sentence, he was sentenced to a fine of R60 000 or two years imprisonment.
3. The appellant appealed to this court against the convictions and sentences. At the hearing of the appeal Mr Marais, who appeared for the appellant, wisely abandoned the appeal against the fraud convictions and the related sentence. What remains in issue is the theft conviction and the sentence imposed in respect thereof.

Uncontentious facts

4. The following facts were proved at the trial and were not ultimately contentious. Overnight on 9/10 February 2009 there was a break-in at SABA's Roodepoort branch. A quantity of cash and blank USD and Euro travellers cheques issued by American Swiss were stolen ("the stolen travellers cheques").
5. On 11 February 2009 the appellant encashed some of the stolen travellers cheques with a combined value of €1000 at Rennies in Norwood

Johannesburg. The appellant encashed these travellers cheques by pretending to be one Nenu Majawa. In the course of doing so he exhibited a falsified Malawian passport in the name of Majawa and signed the travellers cheques in the name of Majawa.

6. Early the next morning (12 February 2009) the appellant flew from Johannesburg to Cape Town. A parking voucher established that he had entered the parking garage at OR Tambo in Johannesburg at 06h18. At about 09h30 on 12 February 2009 the appellant arrived at the offices of Master Currency in Vangate Mall and cashed three stolen travellers cheques with a combined value of \$2 000. Before cashing the travellers cheques the staff at Master Currency phoned American Swiss to obtain authorisation. This is done through an automated telephonic service which provides an authorisation code to the dealer unless the travellers cheques in question have been recorded on the automated system as stolen or lost. The requisite authority was received and the travellers cheques in question were thus cashed.
7. Later that morning the appellant cashed five stolen travellers cheques with a combined value of \$3 000 at Bidvest Bank at the Waterfront. Again the requisite authorisation code was obtained by the staff attending to the appellant.
8. At about 15h15 the appellant arrived at Rennie's Sea Point branch where he presented for encashment two further stolen travellers cheques with a combined value of \$1 500. Ms Mbalo, the employee who was attending to the appellant, phoned American Swiss and obtained the requisite authorisation code, indicating that the travellers cheques in question had still not been recorded on the automated system as stolen or lost. However, the Sea Point branch had recently received a notification from

American Swiss concerning the theft of SABA's travellers cheques. Ms Mbalo noticed that the two travellers cheques that the appellant had tendered were on the list. She managed to notify Rennie's head office without alerting the appellant. Shortly after 15h30 a Captain Van Ede of SAPS arrived at the Sea Point branch and arrested the appellant. In addition to the two travellers cheques which the appellant had attempted to encash the appellant was found to have in his possession a further eight stolen travellers cheques with a cumulative value of \$4 000.

9. In presenting the stolen travellers cheques for encashment at Vangate Mall, the Waterfront and Sea Point the appellant again passed himself off as Mr Majawa, using the falsified Malawian passport and signing the travellers cheques in the name of Majawa.
10. Upon his arrest the appellant initially claimed to be Mr Majawa. The following day he confided to Van Ede that he was in fact Razak Alabi.

The appellant's explanation

11. In an attempt to explain these highly suspicious events the appellant offered the court *a quo* the following somewhat remarkable account. He had conducted business since about 2003 through a close corporation called Alabi Trading Co. He dealt in merchandise such as blankets, duvets and clothing. In November 2008 he began to give consideration to switching to transportation business. He started looking for a truck to buy. Through internet research he identified, among other potential suppliers, a Mr Alex Young of Cape Trucks in Kraaifontein in the Cape Peninsula. He communicated telephonically with Young in December 2008 and January 2009. Initially Young did not have anything suitable for him but things apparently changed in early February 2009.

12. On 9 February 2009 the appellant thus flew to Cape Town to meet Young and to view trucks for possible purchase. He took two trucks for a test drive. However, he was not prepared to make his decision without input from his driver, one Bomfius Pele. The appellant stayed at a hotel in Cape Town on the night of 9 February 2009 and Pele flew to Cape Town the next day. On 10 February 2009 the appellant and Pele finalised their choice (an Isuzu vehicle) and the appellant then negotiated a price with Young.
13. The appellant and Young settled on a price of R258 000. The appellant was to pay R200 000 immediately as a deposit. The balance of R58 000 he was to pay on 25 February 2009 after Young had done some further work on the truck. The appellant accompanied Young to Standard Bank in Kraaifontein where he paid Young R200 000 in cash. (The evidence did not reveal whether the appellant had bank notes or whether he organised an electronic funds transfer at the bank.) The appellant flew back to Johannesburg on the evening of 10 February 2009. (Although his attorney Mr Gess put it to Van Ede in cross-examination that the appellant had only flown back at midnight, the appellant himself said he left Cape Town at about 18h00.)
14. On 11 February 2009 two Zimbabwean ladies arrived at the appellant's business premises, which at that time were located at 228 Von Wielligh Street in the Johannesburg CBD. They wanted to buy a truck load of duvets, apparently amounting to 100 bales at R1 200 per bale. In payment of the total price of R120 000 they tendered, and the appellant accepted, blank USD travellers cheques to the value of \$12 500 (for which the appellant was willing to offer them R10 to the dollar). They also had to pay the appellant to organise transportation of the bales to Zimbabwe and

to this end paid him a deposit in the form of two blank travellers cheques with a combined value of €1 000.

15. The appellant knew the American Swiss hotline number from which he could ascertain whether the travellers cheques were legitimate. He telephoned this number and ascertained that the cheques were not stolen or lost. He then went to Rennies Norwood branch and encashed the two travellers cheques worth €1 000. He paid the cash to his driver who was to organise the transportation. He and his staff loaded the truck, a process which they completed at about 22h00 that evening.
16. Later that night the appellant and his wife fell into conversation about what he should do with the \$12 500 he had received from his Zimbabwean customers. Should he buy further stock or should he rather settle the balance owing to Mr Young? His wife was in favour of the latter course, because if the money was spent on further stock there could be no guarantee that the appellant would achieve sufficient further sales before 25 February 2009 to raise the balance of R58 000 he owed Young. As an added attraction to this particular option there was the fact that his wife just so happened to want an Indian dress called an enju which was only to be had at a particular outlet in Vangate Mall.
17. True to this decision the appellant hurried to OR Tambo first thing the next morning, arriving there (as Van Ede had said) at 06h18. He boarded a flight to Cape Town. His first order of business upon landing in Cape Town was to take a taxi to Vangate Mall to buy the dress for his wife. After doing this he noticed that a branch of Master Currency was conveniently situated across the way. Why not encash some travellers cheques there? And so it was that he went to Master Currency and

presented travellers cheques to the value of \$2 000, limiting himself to this amount because they were not offering a very attractive exchange rate.

18. He then took a taxi to the Waterfront. There he first tried to encash travellers cheques to the value of \$5 000 at FNB but they were not willing to encash more than \$1 000 because they needed cash on hand for the tourists who frequented their establishment. They directed him to Bidvest Bank where he tried to encash \$5 000 but they were only willing to exchange \$3 000.
19. After enjoying lunch at the Waterfront the appellant travelled by taxi to Rennies' Sea Point branch where events unfolded as already indicated. The appellant testified that at the time of his arrest his taxi was waiting outside. In that taxi was his overnight bag containing among other things the dress he had bought for his wife and the cash of nearly R48 000 he had obtained at Vangate Mall and the Waterfront. He had been intending to spend the night of 12 February 2009 at a hotel in Cape Town though in the event and on account of his arrest his accommodation arrangements that evening was somewhat less salubrious. Upon being arrested he told Van Ede that his bag was in the taxi to which Van Ede allegedly replied that he could explain everything at the police station. And so, it seems, the taxi together with the dress and the cash disappeared, never to be seen again.
20. Although his preferred means of completing the purchase of the truck had been thwarted by his untimely arrest, the appellant arranged via his wife to borrow the money needed to pay the balance owing to Young. Delivery of the truck was taken but it had, he said, been resold by the time of his trial.

21. It is perfectly true, acknowledged the appellant, that he had made use of a fake Malawian passport when cashing the travellers cheques. The difficulty was that in December 2008 he had been required to hand in his own genuine Nigerian passport to the Nigerian High Commission because that country was converting to a new type of passport. There was some delay in the arrival of his new Nigerian passport and in the meantime he needed to be able to travel in Africa on business. He had a contact who was able to secure for him an alternative passport if only he would provide a photograph of himself. Thus it was that in January 2009 he came into possession of what purported to be the Malawian passport of Nenu Majawu and containing the photograph of Razak Alabi.
22. The appellant testified that he knew a fair amount about travellers cheques because he had previously been what he described as a merchant for Travelex and Thomas Cooke. A travellers cheque makes provision for the bearer to sign twice. Immediately beneath the first space for signature are the words "*sign here immediately upon receipt of this cheque*". Beneath the space provided for the second signature are the words "*countersign here in presence of person cashing*". He knew that generally the purchaser of travellers cheques would sign for the first time when receiving the travellers cheques from the bank and then sign for the second time when cashing a cheque or tendering it in payment of goods or services. This was, however, merely a security feature in case the cheque was lost or stolen after the bearer had received it but before he had used it. It was the appellant's belief, so he said, that there was nothing irregular about dealings in blank travellers cheques. For example, a person might want to acquire blank travellers cheques as a gift for someone else.
23. He also knew that because he had taken out South African citizenship (presumably he had dual Nigerian and South African citizenship) he was

not entitled to exchange travellers cheques in South Africa for cash. He could only pay them into a bank account. This he found rather inconvenient, because travellers cheques that are paid into a bank account take between four to eight weeks to be cleared. An added attraction, therefore, of the fake Malawian passport was that he could encash travellers cheques in South Africa as if he were a foreigner.

24. The appellant did not know the name of the two Zimbabwean ladies who bought the duvets on 11 February 2009. He was not able, at the time of giving evidence, to produce any documents regarding the sale of the duvets or the purchase of the truck so as to corroborate his version. It may be noted, in this regard, that he was arrested on 12 February 2009 and testified about 16 months later on 23 June 2010. The appellant was in custody during this period but was represented throughout his trial, which began on 6 November 2009, by an attorney Mr Gess. The appellant said that he was not able to produce the documents to substantiate his version because he had been in prison and his wife did not have his power of attorney.

The theft conviction

25. Theft is the unlawful and intentional appropriation of another's property (Snyman *Criminal Law* 5th Ed 484). The appropriation need not be the first act by which the owner is deprived of his property. If X unlawfully and with the requisite intention appropriates A's property by removing it from A's possession and if X then delivers the property to Y who takes possession of it for his own benefit and knowing it to be stolen, Y's act of taking possession is itself an act of appropriation by which A continues to be deprived of his property. The result is that in our law a person who receives stolen property knowing it to be stolen commits theft (*Ex Parte*

Minister of Justice: In Re R v Maserow & Another 1942 (AD) 164 at 170; *R v Correia* 1958 (1) SA 533 (A) at 544A; *Snyman op cit* 522).

26. Theft is a continuing offence (*Snyman op cit* 509). Accordingly a person who commits theft may be charged in a court having jurisdiction in the place where the initial appropriation occurred or in any other place where the person is found in possession of the stolen goods (see *S v Kruger en Andere* 1989 (1) SA 785 (A) and cases there discussed).
27. The appellant was proved to have had possession of 18 stolen USD travellers cheques while in Cape Town on 12 February 2009 – the ten presented at the three exchange bureaus and the eight cheques in his possession at the time of his arrest. The appellant also had possession of the two stolen Euro travellers cheques to the value of €1 000 which he cashed in Norwood on 11 February 2009 but this did not occur within the court *a quo*'s area of jurisdiction.
28. There was no direct evidence that the appellant ever had possession or control over the remaining travellers cheques referred to in the theft count, whether within the Cape Town area or at all. Mr Marais submitted that there was thus no basis for the conviction in respect of the balance of the USD travellers (191 out of 209) or of any of the Euro travellers cheques.
29. I agree with that submission. Even if it had been proved that the appellant came into possession of the other stolen travellers cheques referred to in the theft count, there is no basis for finding that he ever brought them to Cape Town. They were not found in his possession when he was arrested here. It was in any event not proved beyond reasonable doubt that the appellant came into possession of any other travellers cheques. There was

no evidence linking him directly to the break-in that occurred at SABA's premises in Roodepoort. Assuming for the moment that he received stolen travellers cheques knowing them to be stolen, it by no means follows that he was complicit in the break-in at SABA or that he received all of the stolen travellers cheques. Those responsible for stealing the travellers cheques may have offered them to a number of different recipients.

30. The theft conviction thus cannot be sustained in respect of any of the stolen travellers cheques other than (at best for the State) the 18 USD travellers cheques which the appellant was proved to have had in Cape Town on 12 February 2009. Ms Raphels, who appeared for the State in the appeal, correctly conceded this.
31. The question which remains is whether the appellant was properly convicted of theft at least in relation to the said 18 USD travellers cheques. These travellers cheques were proved to have been stolen from SABA. On any view of the case the appellant performed an act of appropriation in respect of them. His guilt thus turns on whether or not he knew they were stolen.
32. I have little hesitation in rejecting the appellant's exculpatory version. In material respects his version could not reasonably be true. The cumulative considerations that lead me to this conclusion are the following.
33. Firstly, the travellers cheques supposedly tendered to him by his Zimbabwean customers were blank. The evidence of the State witnesses was that the practice of the banks in supplying travellers cheques is to require the purchaser to sign them in the first space provided for signature (and see also, in this regard, Cowen *The Law of Negotiable Instruments in*

South Africa 5th Ed Vol 1 p297 and 312-313). This is what the travellers cheques themselves in the present case stipulated. The appellant on his own version was aware of this practice. Even if it does sometimes occur that a bank supplies travellers cheques without requiring the purchaser to sign them, a private person's possession of blank travellers cheques would be unusual and a cause for suspicion.

34. Secondly, the appellant's version of the transaction with the Zimbabwean ladies is inherently implausible and unsatisfactory. He was unable to give their names. He failed to produce any documentation to vouch for the transaction or even to prove that he ever owned stock of the kind he allegedly sold to them. Since he was confronted at his trial by undisputed facts of a highly suspicious character, I find it inconceivable that he would not have arranged for corroborating documents to be produced if they existed. He had an attorney and a wife who could have organised this for him. If a power of attorney was needed he could have supplied it. I also find it inconceivable that his attorney would not in consultation have asked him whether documentation existed. If the attorney had received an affirmative answer he would have taken steps to obtain it.
35. The implausibility of the transaction with the Zimbabwean ladies is compounded when one adds the further consideration that in order for the appellant's version to be true one would have to suppose that the Zimbabwean ladies had themselves somehow come into possession of the blank travellers cheques within a very short time after the break-in at SABA. How did they come to have the travellers cheques? The appellant, despite claiming to have considerable experience in the workings of travellers cheques, does not appear to have asked them any questions about the provenance of the cheques.

36. The appellant claimed, as if it were an exculpatory factor, that he had checked via the American Swiss hotline whether the travellers cheques in question were suspicious. I have no reason to doubt that he did so, probably on more than one occasion. The fact that he knew about the hotline confirms his familiarity with travellers cheques. However, I do not regard this as an indication of innocence. On the contrary, it is precisely what I would expect a shrewd thief to do. The appellant no doubt knew that it was the standard practice of exchange bureaus to phone American Swiss for authorisation. The last thing a thief would want to risk is for an exchange bureau to discover, while he was standing at their counter, that he was in possession of stolen travellers cheques. He would want to know beforehand that when they phoned American Swiss they would be given the all-clear. In short, by phoning the hotline the thief would determine whether the window of opportunity for encashing the stolen cheques had closed or not.
37. The next inexplicable feature of the appellant's version is the late-night discussion with his wife on 11 February 2009 and the haste with which he flew to Cape Town early the next morning. I shall assume in his favour that there was a transaction with Young for the purchase of a truck. After all, and even though he produced no documentary corroboration for that transaction, he furnished the seller's name to the police. The genuineness of the transaction could have been investigated. What is not explicable is the haste with which the appellant acted. On his own version he only needed to pay the balance of the purchase price of the truck on 25 February 2009, i.e. about two weeks later. On his version he had only arrived back in Johannesburg from Cape Town late in the evening of 10 February 2009. Why, after the supposedly fortuitous transaction with the Zimbabwean customers on 11 February 2009, would he have decided, late

at night on 11 February 2009, to fly to Cape Town at dawn's crack on 12 February 2009? Even if he wanted to use the travellers cheques (which he supposedly believed were legitimate) to pay off the balance of the truck, there was no need to do so with great haste on 12 February 2009. He still had two weeks at his disposal. He could have cashed them at his leisure in Johannesburg.

38. What makes his alleged course of conduct even more implausible is that on his version he could not yet have purchased his airline ticket to Cape Town at the time he and his wife were discussing the matter late in the evening of 11 February 2009. He did not say how he did in the end acquire the airline ticket but on his version he must have either booked it by phone late at night on 11 February 2009 or simply arrived at OR Tambo early the next morning in the hope of getting a flight. Why follow such a curious and manifestly inconvenient course when there was no urgency to be in Cape Town in the first place?
39. The appellant also did not explain how he knew, when taking his decision late in the evening of 11 February 2009, that the truck would be ready for him on 12 February 2009? According to the appellant, Young still had to do some work on it. The appellant did not claim to have phoned Young late at night or before flying early the next morning. It seems most unlikely that he did so, since it would have been outside of business hours and Young was merely (on the appellant's version) a recent business contact who was not particularly well known to him.
40. Furthermore, the cost of flying to Cape Town would have added significantly to the overall cost of buying the truck. He had, on his version, already made one return flight to Cape Town just a day or two earlier to view and test-drive the truck. He had also presumably paid for

Pele to fly to Cape Town to inspect the vehicle. Why fly yet again and incur the cost not only of the further flight but of staying over at a Cape Town hotel for another night? The natural way of doing things would have been to cash the travellers cheques in Johannesburg and transfer the money electronically to Young.

41. Accordingly, and whether or not there was a transaction with Young that needed to be completed, the only plausible explanation for the appellant's haste in flying to Cape Town is that he knew the travellers cheques were stolen and that there was a limited window of opportunity in which to cash them.
42. Then there is the fact that the appellant cashed (or tried to cash) the travellers cheques at three different outlets in Cape Town. The appellant's explanation was that the exchange bureaus have floor limits, which meant that he could not cash the full amount at any one outlet. However, on his own version he could have done so had he gone to one of the bureau's head offices in Cape Town. That would have been the obvious thing to do, rather than taking a succession of taxis to Vangate Mall, the Waterfront and Sea Point (adding yet further expense to the acquisition of the truck). It appears from the evidence that if he had attempted to encash the full amount supposedly needed for Young at a bureau's head office, the authorisation procedure would have required the bureau to speak to an American Swiss consultant – the authorisation could not have been given via the automated service. From the perspective of a thief this would increase the risk of detection. The appellant could, by phoning the hotline, check whether the theft had already been logged on the automated system. What he could not know is what would happen if a bureau employee spoke to an American Swiss consultant.

43. One then has the explanation for the visit to Vangate Mall, namely to buy the dress for his wife. The idea that he would have gone out of his way for this purpose seems extremely unlikely. He had been in Cape Town a day or two previously, and yet his wife had apparently not asked him on that occasion to buy the dress. Moreover, the dress was not found in the appellant's possession when he was arrested. The appellant's claim that it had been left together with about R48 000 and other personal belongings in a bag in a taxi is too preposterous to be given credence. If the appellant had truly told Van Ede that he had belongings and cash in a taxi that was waiting outside, Van Ede would have accompanied him to the taxi to fetch the bag. It was never put to Van Ede in cross-examination that the appellant had told him that he had belongings in the taxi and that Van Ede had refused to allow him to collect them.
44. Finally, there is the not inconsiderable consideration of the appellant's use of a false passport. A thief would not want to use his true identity when exchanging stolen travellers cheques because the bureau writes down on the back of the travellers cheques the name and passport number of the person presenting them. The use of a fake identity is thus just what one would expect from a thief. On the appellant's own version he acted dishonestly by presenting the false passport and signing as Majawa. He also did not dispute that immediately upon his arrest he claimed to Van Ede that he was Majawa. He did not immediately offer the convoluted version later tendered to the trial court. His use of the fake passport, when added to the other implausibilities, clinches the case against him.
45. In short, the appellant offered a version that could not reasonably be true. That points to guilty knowledge. Although one may not know the precise circumstances in which the appellant came into possession of the travellers cheques the conclusion is fully justified that he knew them to be

stolen. In reaching this conclusion I have not found it necessary to discuss or rely upon the so-called doctrine of recent possession to which reference was made by the magistrate in his judgment and by Mr Swanepoel in his heads of argument (cf *S v Parrow* 1973 (1) SA 601 (A) at 604C-F; *S v Skweyiya* 1984 (4) SA 712 (A)).

46. On the first count I would thus modify the conviction to a conviction of the theft of 18 USD travellers cheques with a combined value of \$10 500.

The theft sentence

47. The appellant was sentenced on the theft count to imprisonment of eight years, three of which were suspended for five years.
48. Because the appellant was convicted in the court *a quo* of the theft of all the travellers cheques identified in count 1, the offence (by virtue of the cumulative value of the cheques) fell within Part 2 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 and was subject to a minimum sentence of 15 years in the absence of substantial and compelling circumstances justifying a departure from the minimum sentence. The court *a quo* found that such circumstances existed and thus imposed the lesser sentence just mentioned.
49. The modification of the theft conviction pursuant to this appeal will be such as to take the appellant's offence outside the ambit of the minimum sentence legislation. There can be no doubt that although the appellant's crime remains a serious one, it cannot be equated with a theft of all the travellers cheques alleged in the theft count. This court is thus at large to reconsider the sentence on the theft count.

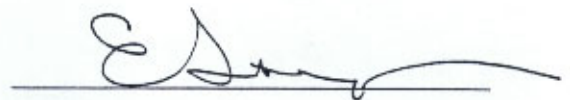
50. Having regard to all the sentencing considerations related in the court *a quo*'s judgment, it is my view that the sentence on the theft count should be altered to one of five years imprisonment, with two years thereof to be suspended on condition that the accused is not again convicted of theft or fraud committed during the period of suspension.



OWEN ROGERS AJ

24 AUGUST 2011

51. I concur. The appeal against the conviction and sentence in respect of counts 2 to 4 is dismissed. In respect of the appeal against the conviction and sentence in respect of count 1, the decision of the court *a quo* is set aside and replaced with the following: "*The accused is convicted of the theft of 18 out of the 209 USD travellers cheques referred to in count 1. The accused is sentenced in respect of the said conviction to imprisonment of five years of which two years are suspended for five years on condition that the accused is not again convicted of theft or fraud committed during the period of suspension.*"



STEYN J

24 AUGUST 2011