220/56.

G.P.-S.117539—1954-5—5,000. U.D.J 445.

220/56

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

EILEEN LONG
Appellant.

versus/teen

THE QUEEN.
Respondent.

Appellant's Attorney / *Prokureur van Appellant* — *Respondent's Attorney* / *Prokureur van Respondent*

Appellant's Advocate / *Advokaat van Appellant* — *Respondent's Advocate* / *Advokaat van Respondent*

Set down for hearing on: / *Op die rol geplaas vir verhoor op:* — Monday, 3rd Dec., 1956.

(WLD) 1,2,5,10,11

(9 a.m. 10/5)

Court does not call upon the Crown

— Appeal dismissed (Conviction & Sentence)

3/12/56

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :

EILEEN LONG Appellant

and

REGINA Respondent

Coram:Centlivres C.J.,Schreiner,Steyn,Beyers,JJ.A.et Hall A. J.A
Heard:3rd December,1956. Reasons handed in: 6-12-56.

J U D G M E N T

SCHREINER J.A. :- The appellant appealed on a question of law reserved by BEKKER J. sitting in the Witwatersrand Local Division. After hearing argument for the appellant this Court answered the question of law in favour of the Crown, intimating that reasons would be furnished later. Those reasons follow.

On the 31st October 1955 the appellant was brought to trial before RUMPFF J. in the Witwatersrand Local Division on an indictment which alleged that during the period 1st June 1950 to 9th December 1952 she stole 31,200 shares in nine different companies from Messrs. Bamford and Athol Frank, a firm of stockbrokers by whom she was employed.

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The Crown led evidence which showed that the appellant was a clerk in the firm's scrip department. Two clients of the firm were a certain Mrs. Haywood and a certain Mrs. Lundie. The appellant successfully persuaded these ladies to transfer their sharedealing transactions to another firm and then proceeded to use their names and their accounts in the books of Messrs. Bamford and Athol Frank as the basis of a series of lucrative malversations. She instructed other members of the staff to sell shares on behalf of one or other of the two ladies, and obtained the certificates required for delivery in fulfilment of these sales from the certificates which the firm was holding on behalf of other clients. The appellant caused entries to be made in the firm's books recording fictitious transactions which, if genuine, would have justified the removal of the clients' certificates. While Mrs. Haywood and Mrs. Lundie were dealing with the firm cheques for the proceeds of shares sold were always, to the appellant's knowledge, made out in their favour with the crossing cancelled. This enabled the appellant, after she had embarked upon her criminal course, to obtain the proceeds of the sales by forging or causing to be forged the

endorsements/.....

endorsements on the cheques.

At the close of the Crown case the appellant's counsel applied for her discharge on the ground that the evidence did not make out a prima facie case of theft of the shares because delivery to the purchasing broker had in each case taken place pursuant to a sale by the firm, the latter having authorised both the sale and the delivery. RUMPFF J. then invited the Crown to apply for an amendment of the indictment under section 180 of Act 56 of 1955 by alleging, instead of theft of the shares, theft of the monies received therefor. Counsel for the Crown was not, however, prepared to make such an application and, according to the record, submitted that an amendment of the kind proposed would operate to the prejudice of the appellant. In view of the Crown's attitude RUMPFF J. granted the discharge of the appellant.

The appellant was then re-indicted on ninety-five counts of fraud, it being alleged that she falsely represented in respect of each count that either Mrs. Haywood or Mrs. Lundie had placed an order with the firm for the sale of the shares mentioned in the count. She was also charged on one hundred and fourteen counts of theft, it being alleged that she stole the proceeds of the

sales of the shares in the form either of the cheques or of the money represented by the cheques. Alternatively to the theft counts, she was charged with forging and uttering the endorsed signatures of the payees on the cheques.

There was advanced on behalf of the appellant under section 169(2)(d) of Act 56 of 1955 a special plea that she had already been acquitted of the offence with which she was now being charged. The trial on the new indictment came before BEKKER J. in June 1956. The learned judge, after overruling the special plea, postponed the trial and also reserved a question of law in the following form -

"That the Court erred in finding that the accused was not in jeopardy at her previous trial in the Supreme Court (W.L.D.) held on 31st October, 1st and 2nd November, 1955, on all or any of the charges now preferred against her; and that the Court erred in rejecting her plea of autrefois acquit."

On the 20th August 1956, to which date the trial had been postponed by BEKKER J., the Crown withdrew seven of the counts of theft, and the appellant then pleaded guilty to the remaining one hundred and seven counts. Her counsel informed the court, NESER J., that she had not abandoned her right to test the judgment

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of BEKKER J. under the question of law reserved. The Crown having accepted the appellant's plea, she was sentenced by NESER J. to five years' imprisonment with compulsory labour.

The plea recognised by section 169 (2) (d) of the Criminal Code is "that he has already been "acquitted of the offence with which he is charged." It is not enough to support the plea that the facts are the same in both trials. The offences charged must be the same, but substantial identity is sufficient. If the accused could have been convicted at the former trial of the offence with which he is subsequently charged there is substantial identity, since in such a case acquittal on the former charge necessarily involves acquittal on the subsequent charge. Another way of putting it is that he must legally have been in jeopardy on the first trial of being convicted of the offence with which he was charged on the second trial. (Rex v. Manasewitz, 1933 A.D.165, at pages 169,173,178 and 179; Ex parte Minister of Justice:in re Rex v. Moseme, 1936 A.D. 52 at page 60; Rex v. Barron, 1914 2 K.P.570 at pages 574 to 576).

It is clear that in the first trial, when the appellant was charged with the theft of the shares, she could not have been convicted of the theft

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of the cheques or money, without an amendment of the indictment. The same, of course, applies to the charges of fraud and forgery but we are not concerned with them as the appellant was not convicted on them. But it is contended on her behalf that the charge might have been amended, as RUMPFF J. suggested, and in that event the appellant might have been convicted of the theft of the cheques or the money. That is true but not, I think, relevant, for it is the offence with which she was actually charged that must be looked at, not any offence with which she might have been charged in an amended indictment. This was the view taken in Rex v. Green, 169 E.R. 940 relied on by BEKKER J. It was applied by KOTZE J. in Rex v. Twalatunga, 20 S.C. 425. The same ~~view~~ conclusion was reached by CURLEWIS and STRATFORD JJ. in Rex v. Koegelenberg, 1924 T.P.D. 594. We were referred to the case of Halsted v. Clark, 1944 K.B. 250, where a plea of autrefois acquit was upheld on appeal, an amendment of the charge having been sought at the first trial and refused. But the ground of the decision was that the amendment had been refused because it would have been useless, since the evidence did not support the charge in the form which it would take if the amendment were granted. The case

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has no bearing on the present one.

Some point was sought to be made in argument of the fact that RUMPFF J. was apparently willing to grant an amendment of the indictment if the Crown applied for it and indeed would have been prepared to amend mero motu had the Crown not opposed the amendment. But these considerations cannot affect the position. It is not known what line the appellant's counsel would have taken had the Crown applied for and not opposed an amendment. And it cannot of course be stated with any certainty what the learned judge would have done in the face of opposition by defence counsel to the amendment. But, however that may be, the fact that RUMPFF J. was apparently willing to make the amendment could not create a situation amounting to an actual amendment.

For these reasons the question reserved was answered in favour of the Crown.

J.D. Schreiner
6.12.56

L.C.
L.C.J.

IN THE SUPREME COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG, the 2nd November, 1955.

Before the Hon. Mr. Justice RUMPFF.

In the matter of :

REGINA versus EILEEN LONG

J U D G M E N T

RUMPFF, J: In this matter the charge sheet alleges that the accused is guilty of the crime of theft in that, about or during the period 1st June, 1950 to 9th December, 1952, and at or near Johannesburg in the district of Johannesburg, the accused did wrongfully and unlawfully steal the undermentioned shares - and then follow the names of certain shares and the number of shares - and the charge sheet continues: "the property or in the lawful possession of Messrs. Bamford & Athol Frank."

The accused pleaded not guilty. The Crown has closed its case, and application has been made for the discharge of the accused on the ground that the accused did not commit any theft of the shares.

According to the evidence for the Crown the accused was a clerk in the scrip department of Messrs. Bamford & Athol Frank, a firm of stock and share brokers. In 1950 she suggested to two clients of the firm - Mrs. Haywood and Mrs. Lundie - that they transfer their shares to another firm where her husbsnd was employed and where, it was suggested, they would

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get better attention than at Bamford & Athol Frank. This they did. They thereafter ceased to have any dealings through the firm of Bamford & Athol Frank. The accused then embarked upon a series of frauds selling shares in the name of both Mrs. Lundie and Mrs. Haywood and using their accounts for this purpose. Her modus operandi was to instruct the staff concerned at the stock exchange tosell shares on behalf of the two ladies referred to. The accused had no authority to do that. She knew that the two ladies had always received their cheques with the crossing cancelled. She continued with this procedure and the cheques in respect of sales were made out in favour of Mrs. Haywood and Mrs. Lundie, and the crossings cancelled. The endorsements on these cheques bear the names of Mrs. Haywood and Mrs. Lundie. Prima facie the inference from the evidence is that the accused endorsed the cheques herself or caused somebody else to endorse them. Further, that the cheques were cashed by her and that she took the money.

The total amount of money collected by her over a period of about two years is approximately £20,000. The shares sold on her instructions were delivered to the purchasing broker and came mostly from floating stock in possession of the firm; shares which clients had bought and paid for and which were kept, at their request, and put in a separate filing cabinet and referred to as safe custody shares. Of these some are registered in the names of clients and others not. These are shares apparently paid for and kept as

collateral/...

collateral security. Shares so sold and not delivered would mostly come from floating stock. The details of shares sold are, inter alia, entered into a scrip ledger.

In order to cover the removal of scrip and balance the ledger, the accused caused fictitious entries to be made against names of other clients showing the reduction of their stock by fictitious delivery equalling the number of shares sold by the accused. Clients of the firm received monthly statements of their stock held by the firm, and the accused caused these statements to be given to her. She also at times pretended to Mr. Bamford, who had personally dealt with Mrs. Lundie and Mrs. Haywood, that these ladies had spoken to her and she brought messages to him purporting to have come from them. As a result of the falsification of the books and the other steps described above the accused managed to escape detection until December, 1952.

When the accused was confronted with the position by Mr. Bamford she confessed to having received the money and to having spent it on the race course. According to the evidence, when shares are sold a slip is made out containing the name and the numbers of the shares to be sold. The dealer sells and puts the name of the broker who buys on the slip. The name of the seller is put on the slip and from this the broker's note is typed. The daily transaction sheet is prepared from the slip and this goes to the scrip department. From the daily transaction sheet

dockets/...

dockets are also opened for every broker who buys, and a slip is delivered to the purchaser.

On this evidence, the defence has submitted that there was no theft of shares by the accused because delivery to the purchasing broker in every case took place pursuant to a sale by the firm; the firm authorised the sale and delivery in every case.

I have considered this matter and I have suggested to the Crown that it should amend the charge sheet by alleging the theft over the same period from the same firm of the proceeds of the shares, namely, the amount of approximately £20,000. The Crown has refused to apply for such amendment. I indicated too that the Court itself might consider amending the charge sheet in terms of section 180 of the code, the section which, to my mind, authorises the Court itself to amend the charge if it is in the interests of justice that such an amendment should be made; and subject to the provisions of the section. The Crown has not only refused to apply for the amendment but has opposed an amendment by the Court. The Crown suggested that if the amendment is allowed the facts led in evidence in the Crown case so far would not support the charge of theft of money because there was no direct evidence to show that the cheques were cashed by the accused.

I cannot understand the attitude of the Crown or its argument at all. To my mind there is <u>prima facie</u> evidence of the theft of the money; in fact, there is evidence of the confession by her to Mr.

Lawrence and the representative of the Insurance Company. The Crown also suggests that the accused will be prejudiced. That is a matter which the Court will have to consider. To my mind there is prima facie evidence that the accused committed the theft of £20,000, but in view of the Crown's attitude I am not going to effect the amendment myself.

I have set out the evidence which has been led and it is clear from that evidence that the accused induced the firm to sell shares to brokers on a false representation that she had authority from Mrs. Lundie and Mrs. Haywood. The firm did sell the shares and delivered the shares from its own stock - floating stock - to the brokers who bought; the brokers who bought then paid the firm. Prima facie the firm then handed over cheques to the accused, made out in the name of Mrs. Lundie or Mrs. Haywood. Prima facie those cheques were cashed by the accused and the money collected was stolen by her.

The Crown, in reply to the application by the defence, has suggested that there was a theft of the shares although there also may have been fraud, as there certainly was, nevertheless, there was a theft of shares by the accused. There was this theft because she utilised the machinery of the firm in order to dispose of the shares as mentioned in the charge sheet.

That, unfortunately, to my mind, is not enough. The shares were disposed of by the person who had

possession of the shares. With full approval they were sold to the brokers concerned, and in my view it could be said that the procedure followed by the accused constituted the theft of the money. But she is not charged with that, and in the circumstances a case has not been made out from the charge sheet, and the accused is therefore found not guilty and discharged.