IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.CJ., ODER, J.S.C. & , J.S.C.

CRIMINAL APPEAL NO. 30/1994

BETWEEN

KASSIM MPANGA==========APPELLANT

AND

UGANDA========== RESPONDENT

(Appeal against dismissal by the High Court (G.M. Okello) of
High Court Crim. Appeal No.21/1994, dated 25th November, 1994
arising from a conviction by Mengo Chief Magistrate's Court in
Criminal case No. U.1561/1992

JUDGMENT OF THE COURT:

The appellant was charged with and tried for three of offences before a Magistrate Grade I in Mengo Chief Magistrate's Court. The particulars of the three counts on the charge sheet against the appellant were as follows:

Count 1: Statement of offence

Causing Financial Loss contrary to Section 258(1) of the Penal Code Act as amended by Statute 5 of 1987.

Particulars of offence

Kassim Mpanga between November, 1989 and May, 1992 at Libyan Arab Uganda Bank, Masaka in Masaka District being employed as a Manager of Libyan Arab Uganda, Masaka branch while in due execution of his duties knowingly did an act or omission to wit he authorised without authority from the General Manager of the Bank the payment of overdrafts of Shs. 150m/= thereby causing financial loss to the said Libyan Arab Uganda Bank.

Count II. Statement of offence

Embezzlement contrary to Section 257(a) of the Penal Code Act as amended by Statute No.5 of 1987.

Particulars of offence

Kassim Mpanga, between November, 1989 and May, 1992 at Libyan Arab Uganda Bank, Masaka Branch in Masaka District, being a person employed in the Public Service as a Branch Manager, stole cash totaling to U.shs.84 million the property of the said Libyan Arab Uganda Bank which came into his possession by virtue of his employment.

Count III: Statement of offence

Abuse of office, contrary to Section 83(I) of the Penal Code Act.

Particulars of offence,

Kassim Mpanga between, November 1989 and May, 1992 at Libyan Arab Uganda Bank, Masaka Branch, in the Masaka district, being employed in the said Libyan Arab Uganda Bank as a Manager did in abuse of the authority of his office, an arbitrary act prejudicial to the interests of his employer the said Libyan Arab Uganda Bank to wit, by giving overdrafts totaling Shs. 150m/= without security thereby causing actual loss of the said amount to the Bank.

The appellant was convicted on all three counts as charged and sentenced to four years' imprisonment on each count. The sentences were to run concurrently. The learned trial Magistrate also made a consequential order that the appellant should pay Shs.84m/= as compensation to the Bank. The learned trial Magistrate, however, did not specify the conviction or convictions in respect of which he made the compensation Order; nor under what law he did so. But it may be assumed that he made the compensation Order under section 259 of the Penal Code.

Section 259 of the Penal Code as amended by Statute No.5 of 1987 under which the order for compensation was presumably made imposes a mandatory duty upon a Court convicting an accused person under Sections 257 & 258 to make an order for compensation to the aggrieved party in addition to any other punishment provided therein. This meant that in the instant case, the appellant having been convicted on counts I and II for the offences under Sections 258(1) & 257(a) respectively the learned trial Magistrate ought to have ordered him to pay compensation to the Bank as the aggrieved party in respect of each of the two counts. However, as already pointed out, in the order which was made the learned trial Magistrate did not specify under which count he made the order for compensation of Shs.84m/=. This is a

matter to which we shall return when dealing with ground three of the present appeal.

The appellant was dissatisfied with the decision of the learned trial Magistrate and appealed to the High Court. Nine grounds of appeal were set out in a very narrative and argumentative memorandum of that appeal.

The were that:

> ***"1. The trial Magistrate grossly misdirected himself in fact and in law when he made a finding that the Accused had caused financial loss to the Bank when evidence from all the witnesses including both the prosecution and defence indicated undeniably that the Bank was actually still recovering monies including interest from the loans advanced by the appellant which occasioned a miscarriage of justice.***
>
> ***2. The learned trial Magistrate erred both in law and fact when he convicted the appellant on the charge of embezzlement contrary to section 257 of the Penal Code without any proof of theft as the only evidence on record indicated the monies in issue to have been advanced to Bank customers/clients as loans. Refer to evidence of Auditor Accountant P. W.4 Kalule on page....***
>
> ***3. The learned trial Magistrate grossly misdirected himself in law occasioning a serious miscarriage of justice, when in complete disregard of factual evidence as adduced and admitted by the parties, he went at great length in speculative reasoning as per pages 8 and 9 of the judgment as to what constitutes a bad debt, and this speculation resulted in fanciful and false reasoning to the resulted in to the effect that the money had become bad debts even though the proper procedure for declaring the same bad debts had not declared so.***

4. ***The learned trial Magistrate made a great error in law that resulted in a serious miscarriage of justice when by his over simplification of clear evidence relating to interpretation of BAD DEBTS substituted the requirements for PROOF BEYOND reasonable doubt to proof on balance of probabilities particularly on the second paragraph of judgment on page 9 whose effect is shifting of the burden of proof to the appellant which is in itself is a fundamental breach of the principle in criminal practice and on which alone the conviction should be quashed.***

5. ***The learned trial Magistrate caused a serious miscarriage of justice when he contrary to principles EVALUATION of evidence proceeded to believe the prosecution 's story in respect of 29 A CCOUNTS as EXHIBITED to be unsecured and unrecoverable giving rise to the loss of Shs.150m/ when the same was EVALUATION contradicted immediately, by the same prosecution witness upon being confronted by the facts regarding KAMUGUNDA's Account as a random instant where in the same prosecution witness admitted that and he was as one of the consequences accorded instructions to carry out recovery on the other defaulters. Reference is hereon made 13 and 14 of judgment wherein the trial magistrate labours to justify the CONTRADICTION ends up by SHIFTING THE BURDEN OF PROOF.***

6. ***The learned trial Magistrate further failed to evaluate the evidence properly when he chose to believe the prosecution evidence first and then proceeded to examine the defence in isolation. Ref Page 9 of judgment. And for the very credible defence given on oath, there were no reason adduced for not believing the same particularly as regards the issue of financial loss whereby the defence adduced evidence in respect of the balance sheet nor other rebuttal evidence was adduced to challenge the same.***

7. ***The total failure by the prosecution to produce balance sheets in a case involving embezzlement and allegations of financial loss left a very big and doubtful situation on the prosecution 's case which could not be sufficiently***

filled by another evidence and the trial Magistrate's comments on page.. .. that the prosecution was at liberty to call only such evidence as it pleases was an erroneous statement in law as deliberate omission in this situation could only cast a serious doubt on its case that the balance sheets were actually omitted because they would definitely represent serious contradictions in the prosecution as all the loaned monies is still to-date being reflected as being big profits in the bank and which profits are constantly compounded as opposed to allegations of loss.

8. All the charges as preferred against the accused were premature, ERRONEOUS and MISCONCEIVED in law in as far as the Bank continues to earn interest on the loans advanced though unauthorized by the appellant, and supported by the balance sheet as stated in defence; the said charges can only arise after declaration of the monies as bad debts in which situation the same would be hence the appellant liable causing such a loss but only then.

9. That the learned trial Magistrate was clearly biased against the appellant and the same is clearly manifested in his attempts to justify the serious doubts cast on the prosecution case i.e. page 14 of judgment where instead of rejecting as inconsistent the evidence of the 20 ACCOUNTS places the burden of proving the inaccuracy of each and every one of the alleged 28 ACCOUNT on the appellant i.e. that it was not enough to disprove only one A CCOUNT of the 29, etc."

The High Court appeal was heard by Okello, J. who dismissed the appeal against the convictions on Counts I and III. He allowed the appeal against the conviction on Count II, quashed the conviction in respect thereof and set aside the sentence.

Regarding sentences for the convictions he upheld, the learned appellant Judge of the High Court simply said this:

"Since the sentences were ordered to run concurrently the setting aside of the sentence in Count 2 would not affect the order of sentence."

Of the Criminal Procedure Code Act, which states that either party to an appeal from a Magistrate's Court may appeal against the decision of the High Court in its appellate jurisdiction to the Supreme Court on a matter of law, not including severity of sentence, but not a matter of a fact or mixed fact and law.

Three grounds of appeal were set out in the memorandum of the present Appeal. The first ground complained that the learned appellate Judge erred in law in holding that the act of giving out unauthorised and unsecured loans was sufficient to sustain the charge under Section 258(1) of the Penal Code without regard to certain factors which showed the contrary.

These were that no loss actually occurred; recovery of monies continued; and there were land securities. These factors, it was contended, negatived guilty knowledge, a necessary ingredient of the offence under section 258(1). Mr. Paul Byaruhanga, assisted by Mr. Nsubuga-Mubiru (who had represented the appellant at the trial and on appeal to the High Court) argued this appeal. In his submission under this ground, he made two main points. First, he challenged what, according to him, was the learned appellate Judge's interpretation that loss occurred at the time of granting the overdrafts without approval and securities. The learned Counsel contended that there was no actual loss and knowledge by the appellant that loss would occur, which were ingredients of the offence under Section 258(1). In his view, the moment the appellant gave out the overdrafts without authority as he did, it did not mean that loss was occasioned, yet that is what the learned Appellate Judge meant when he said in his judgment:

"It was established that the appellant gave out without authority unsecured overdrafts totaling Shs.326m/. This was the initial loss. The subsequent recovery which reduced the figure to Shs.150m/= only reduced the loss."

By so concluding, ii: was contended the learned appellate Judge erred in his interpretation of what amounted to “loss” under Section 258(1). In the learned Counsel’s view, “loss” there meant actual loss. That was why Section 259 provided for compensation for loss suffered by an aggrieved party under Section 258(1). In the instant case there was no loss, because the Bank continued to recover overdrafts granted by the appellant. In the circumstances, so it was contended, the charge was brought prematurely. The second main point made by Mr. Byaruhanga was that Section 258(1) of the Penal Code should be construed together with Sections 43, 10(3) and 41 of the Banking Act 1969 in order to determine whether or not the appellant had committed the offence in Count 1 of the charge sheet. This was because under Section 258(2) the word “bank” had the same meaning assigned to it by the Banking Act.

Section 43 of the Banking Act is the definition Section. It provides:

> ***“43. In this Act, unless the context otherwise requires;***
>
> **……**
> **……**
>
> ***“Banking business” means the business carried on as a principal business of,***
> ***(a)* ……**
> ***(b) Employing such deposits wholly or partly by lending or any other means for the account und at the risk of person accepting such deposits.”***

Section 10(3) provides;

> ***“3. Nothing in subsection of this Section shall prevent a Bank from accepting as security for a loan or advance made in good faith without security or upon security since found to inadequate, a mortgage, deed of trust, or other such instruments upon immovable property.” (The underlying is ours).***

Section 41 of the Banking Act provides:

> ***"41. The provision of this Act shall prevail not withstanding the provisions of any other law."***

In this connection the appellant's learned Counsel contended that the combination of Section 258(1) of the Penal Code and the Sections of the Banking Act just referred to mean, first, that it was the Bank as a whole, not the appellant as an individual Branch Manager, who granted the overdrafts or loans in question in the course of carrying out its banking business at the Masaka branch, as defined by Section 43. Secondly, it meant that it was legitimate for the Bank to make advances or loans without security. In the circumstances, it was contended, the overdrafts given by the appellant in the instant case were not illegal. His acts, therefore, did not constitute an offence under Section 258(1) of the Penal Code, especially as the provisions of the Penal Code and the Bank's regulations prohibiting lending money by branch Managers without the General Manager's authority and without security were subject to Section 41 of the Banking Act.

Thirdly, it was contended that Section 43(b) allowed banks to take risk in employing deposits in their possession, and that is what the appellant said he did in this case. He said that banking and lending was a risky business. He took risks, relying more on the integrity of borrowers than on securities.

Mr. Byamukama Mugenyi, Principal State Attorney (P.S.A.), represented the respondent in this appeal. In his reply, he submitted that the prosecution had proved by incontrovertible evidence that the Bank had lost the sum of money mentioned in count I of the charge against the appellant and that the appellant knew or had reason to believe that his act of giving out the overdrafts in question would cause financial loss to the Bank. The learned Principal State Attorney then referred to certain pieces of evidence which he contended proved the loss and the appellant's knowledge. In the circumstances it was contended, the learned appellate Judge was justified to uphold the appellant's conviction on count I. We shall revert to the evidence referred to by the learned Principal State Attorney shortly.

Section 258(1) under which the appellant was charged and convicted provides as follows:

> ***"258(1) Any person employed by the Government, a bank, credit institution, an insurance Company or public body, who is the performance of his duties, does an act or omits to do any act knowing or having reason to believe that such act or omission will cause financial loss to the Government, bank, credit institution, insurance Company, public body, or customer of credit institution shall be guilty of the offence of causing financial loss and shall be liable on conviction to a term of imprisonment of not less than three years and not more than fourteen years."***

The gist of the prosecution evidence on which the learned trial Magistrate relied to convict the appellant on counts I and II with which we are now concerned, was that the appellant, who had worked as an employee of the complainant Bank since 1976, was posted as the branch Manager of the Bank's Masaka branch in 1989. On 28/5/1992, the General Manager (G.M.) of the Bank, Abdulgader Moruk (P.W.2) was checking Accounts of the Masaka Branch of the Bank at Head office in Kampala, when he noticed something not clear to him. He then called in the Manager of Central Accounts, Abdelrzik Mohamed (P.W.1). The General Manager instructed the latter to form a team to go to Masaka and check the branch accounts.

P.W.1 selected key officials from the Kampala Branch of the Bank and went with them to Masaka. These were Ali Abdu, Sam Mukibi and Sam Bwogi. The last three did not testify at the trial. The team left for Masaka the same day. On arrival at the Branch, the team did not immediately find the appellant. He was later found in the strong room, alone. The Chief Cashier was absent. The appellant informed P.W.I and his team that he (the appellant) was in the strong room preparing cash to send to Head Office for depositing in the Bank of Uganda. The appellant asked why he had not been informed of the team's visit to the branch. He was told that he had no right to be so informed and that the team was under the General Manager's instruction to check accounts at the branch. P.W.I and his team left the appellant and went to the head of the Current Accounts Section, one Mariam Senyonga. P.W.1 asked Mariam Senyonga to give him all the ledger cards for the current accounts those in debit as well as those in credit. She gave P.W.I. all of them and said that there no other ledger cards kept elsewhere.

P.W.I. and his team of Inspectors checked the balances of all the accounts as at 27/5/1995, as appearing on the ledger cards. They totalled the debits and credits and found that they did not balance. There was a debit difference totaling Shs.326m/=. This was abnormal, because the net total between the credits and debits on current accounts should have balanced and agreed with the control ledger card on a daily basis. The work of balancing the accounts was done daily. P.W.I was surprised about the deference, and he instructed the team to re-confirm. They repeated the checking and came up with the same difference of Shs.326m/=.

P.W.I had also taken to Masaka several monthly returns of overdrafts of that Branch as of 30/4/1992. Such returns were normally forwarded to the Head Office routinely by all the branches of the Bank. The returns reflected the balances of overdrafts as appearing on the ledger cards. In the case of Masaka Branch, P.W.I found on this occasion that some balances were not the same. Most of the ledger cards were showing credit balances while the returns showed some debit accounts which were not supposed to be in the monthly returns. On 30/4/1993 some customers applied for loans and the General Manager approved them, but those who had not used the loans were indicated by the Appellant as having taken the approved facilities, whereas they had not. In the returns, these were shown as debits.

Another abnormality about the monthly returns was that for four consecutive months the 65 accounts on which the unapproved and unsecured overdrafts had been granted by the appellant were omitted from the returns. It was the responsibility of the appellant as the Branch Manager to ensure the accuracy of the monthly returns.

P.W.I then discussed the matter with the head of facilities at the Branch, pointing out that the balances of the ledger cards did not agree with the control ledger card. P.W.I returned to the appellant and told him about the debit difference of Shs.326m/ and that this meant that the ledger cards corresponding to that difference were missing. Consequently, the appellant took P.W.I to his office and informed the latter that the deference of Shs.326m/= represented overdrafts which he (the appellant) had granted to borrowers without the approval of the General Manager. The appellant pulled from his drawer in his office 72 ledger cards corresponding to the 65 accounts, and handed them over to P.W.I. All the ledger cards were overdrawn, totaling Shs. 326m/=, which P.W.I and his team had earlier discovered. According to P.W.I, it was unusual for ledger cards to be kept in drawers in the Branch

Manager's office. The ledger cards which the appellant pulled out from his office should have been kept in the current accounts department on the banking floor. These normally should have been kept there during banking hours and locked up in the strong room at the end of each working day. All these ledger cards found in the appellant's office related to the unapproved facilities granted by the appellant on the *65* accounts. If the facilities had been approved by the General Manager, the ledger cards in question would have been kept in their proper place, like others. The overdrafts in question were not only not approved, but they were also unsecured.
The normal procedure in granting an overdraft was that the customer would complete the relevant application form. The application would then be forwarded to the Head Office for consideration by the General Manager, whose decision was final. If approved by the General Manager., the application would then be returned to the branch. Following this the customer's account would be credited with a loan if the facility applied for was a loan. But if it was an overdraft, the customer would overdraw his account to the limit approved.

After P.W.I and his team had reported the results of their mission to Masaka Branch to the General Manager, the latter called in the appellant and asked him what he intended to do about what the team had discovered. This was because the appellant had infringed instructions in a circular from the General Manager dated 18/3/1987 (exhibit P.6). The circular prohibited all branch Managers of the Bank from granting loans or overdrafts without the General Manager's prior approval. From 1989, requirement for securities for loans and overdrafts was made compulsory. This was also known to the appellant. Securities had to be in the form of land titles which were valid and had to belong to the borrowing customers. They also had to have recognised values assessed by valuers. When securities were given, the General Manager's decision was final, irrespective of the amount of money borrowed. In no cases did the Bank give loans or overdrafts without securities.

The appellant admitted to the General Manager that he had acted contrary to instructions, at first verbally and then in writing, On 29/5/1992 he voluntarily wrote exhibit P.1 in the following terms:

I, Kassim Mpanga 40 years old, the Manager of Libyan Arab Uganda Bank, Masaka branch states that:

> ***"In my capacity as a Branch Manager, I misused the signatory powers granted to me the Bank Manager, and granted unauthorized overdrafts to several customers and members of staff of the Branch which totalled Shs.326m/= as at 28/5/1992. These facilities were granted between 1990 and to-date. I did this to attract customers from other Banks since there were many of them in Masaka and business there is not very big. Also to enable the Bank increase its earnings by way of interest and this helped me a great deal to off-set the deficit which I found in the branch in 1989. It also helped to increase the deposits and its only our branch which has never experienced liquid shortage and the other Banks have been getting cash from our branch.***
>
> ***In view of the afore-mentioned, I granted the overdrafts in good faith and I wholly shoulder the responsibility of recovering that money. I shall do every possible means to recover in the shortest possible time, at least within 6 months. All the people are around and they will pay. I also undertake to get securities either movable or otherwise from the debtors as the first measure."***

To this written admission was attached a list of all the 65 accounts on which the appellant had granted the unauthorised overdrafts.

Following the written admission the General Manager gave the appellant an opportunity to recover the overdrafts, with the assistance of Abubakar Kigongo Kalule (P.W.4) and one Sam Bwogi, as the new Masaka branch Manager and Acting Manager respectively. The appellant was attached to them to carry out the recovery exercise, but without authority to sign anything unless authorised to do so by the new branch Manager.

On subsequent occasions, the appellant voluntarily wrote and signed in the office of the Bank Secretary, Eli Rugasira, (P.W.3) other admissions similar to the one he had written on 29/5/1992 (exhibit P.1). In exhibit P.2 dated 14/10/1992 he said that he had diverted some of the interest from the overdrafts to some over drawn accounts to cover up liabilities thereon. The overdrafts had been granted by him without approval from Head Office and the defaulters had disappeared and could not be traced.
In exhibit P.3 dated 22/10/1992, he repeated what he had stated in P.2 about diverting interest and added that the customers concerned had refused to settle their indebtedness. Further, to hide the information, he had destroyed the ledger cards. He had noted the accounts in his note book. He then listed 17 accounts as involved, the total of the debit balance on that list being Shs.67,260,l 80/=

In exhibit P.4 dated 9.11.1992 the appellant stated that in a bid to conceal the anauthorised overdrafts which the borrowers had failed to repay, double ledger cards were opened.

All these written statements were proved against the appellant as admissions under Sections 21 of the Evidence Act.

Having been sent back to Masaka by the General Manager to recover the unauthorised overdraft, the appellant made some efforts to do so, assisted by Kalule (P.W.4), who arrived at Masaka branch on 2/6/1992, armed with the list of the 65 overdrawn accounts. By that date the total debit on those accounts was Shs.342,363,931/=. Between 2/6/1992 and 20/8/1992, when he, the appellant left, on suspension from employment with the Bank Shs. 100m/= had been recovered.

As a result of efforts by P.W.4 to recover, 27 of the 65 overdrawn accounts were fully repaid, 7 were hoped to be repaid, but the remaining 29 accounts, with a total debit of Shs.151,105,281/= as on 3 1/3/1993 were completely hopeless. There was no hope of recovering any payment from the customers concerned. The Bank tried to approach them, but they failed to pay. They had no securities.

It was the unrecoverable overdrafts on the 29 accounts which formed the basis of the charges on Counts I and II against the appellant.

Abdel Mohamed (P.W. 1) said that as the overdrafts on those accounts were unsecured, the Bank considered the money lost, and the appellant was accused by the Bank because of granting money without authority and without security. The money was treated as lost. The General Manager, Abdulgader Mohuk (P.W.2) said that the bank had done everything within its power to recover all the Shs.151,105,481/=, but without success. The money was counted as doubtful and bad debts, which meant that it was impossible to collect the money. He elaborated that a bad debt *was* unpaid money lent without security or on security which was unrealisable. And bad debt was a debt impossible to collect. In the instant case, the Bank did not expect to recover the money involved because there were no securities. The Bank had not yet written off the debt, but did not expect to recover it. Technically it was the Board to write off the bad debt, but that was only a formality.

Kalule (P.W.4) who involved in recovery of the unauthorized overdrafts said regarding the 29 accounts, having total balance of Shs.151,105,281/= as at 31/3/1993, that the Bank had tried to approach the customers concerned but they had no securities and failed to pay. On the list (exhibit P.14) containing the three categories of 27,7 and 29 accounts, were shown particulars of two accounts, operated by the appellant, on which was owed a total of shs.48,240,774/=. The appellant had given his land titles to secure them but had entered caveats on them in his names, rendering it impossible to realise the securities.

In his defence, the appellant testified that he gave out the unauthorised overdrafts while he was aware of the policy not to give facilities without approval. The idea of prohibiting granting facilities was to prevent risk. So, there was need to get authority so that the General Manager was in touch with what went on in a branch. It was a risky business if one gave out money without authority because one would be personally liable for the loss, but any gain would go to the Bank.

He further said that the 65 ledger cards found in his cabinet was normal practice at his branch, especially those of overdrafts. He was going through them to assess the performance

of his branch . The cards found in his office were 120, not 65. The appellant also said that P.W.l was interested in the 65 ledger cards because they were the ones on which he (the appellant) had granted overdrafts.

The appellant denied that there was any diversion of funds from one account to another, or that interest had been eaten.

He also said that after he had been stopped being the branch Manager, he recovered Shs.200/= between June and August, and not Shs. 100/= as P.W. I had said. He was not aware that legal proceedings had been taken against any of the defaulters, which was the final step in a recovery process.

With regard to the admissions which it was said he had made in writing, the appellant said that he made them in a friendly atmosphere when the General Manager called him to discuss the unauthorised overdrafts. The General Manager told him that in order to save his (the General Manager's) face at the Board meeting, the appellant should make an incriminating statement to support the General Manager's decision that there was a loss of profit at the branch. In return, the General Manager would defend the appellant's case before the Board, and the most serious action would only be a caution of the appellant. According to the appellant, all this was done in such a friendly atmosphere that the General Manager asked him (the appellant) to surrender his personal car to show to the Board meeting as a sign of the appellant's cooperation in recovery of the Bank's money. There was an understanding that the appellant would receive his car back after the board meeting. Consequently, he was terribly shocked when an order was made for his arrest immediately after handing in his keys.

The appellant further said that the written admission he had made was wrong. What he told the Court was the truth.

With regard to the 29 accounts listed in exhibit P.14 and explained by Kalule (P.W.4) the appellant said that the contents of that document was false, because, first, it does not reflect

the correct figures taken by the customers, secondly it included one Fred Kamuganda who had already settled his account; thirdly it was not true that the borrowers had no security, because the appellant knew, for instance, that Hajjati Nalubega and Namba Investments and others had securities. The appellant also said that in practice what mattered most was integrity of a borrower. Security came second, because integrity was the most important. That was why some of the accounts were unsecured. The list of 29 accounts included one Fred Kamuganda, a lawyer in Masaka, whose integrity qualified him to be assisted. He had paid off his indebtedness to the Bank although his name still appeared on the list.

The appellant laid blame on his members of staff for what happened. He said that the best officials of the branch to give evidence regarding how money was paid out were the heads of current accounts and of facilities. If figures had been falsified it was the head of facilities who did so, and falsification of returns would be the responsibility of the head of current accounts. He (the appellant) had admitted responsibility as the branch Manager on the basis of the principle of collective responsibility, not because he was personally responsible for the mistakes which had happened. He did not, for instance, omit from the monthly returns the 65 overdrawn accounts as claimed by the prosecution.

The learned trial Magistrate preferred the prosecution evidence to that of the defence, which he rejected. The learned appellant Judge agreed with that finding of fact, upholding the appellant's convictions on counts I and III of the charge. This being a second appeal our duty is only to deal with the application of the law by the learned appellate Judge to that finding of fact with which he agreed in respect of the two counts in questions.

We shall now turn to the appellant's complaints against the learned appellate Judge made under ground one of the appeal. We have already gone through those complaints and the reply of the learned Principal State to them. The first point concerned whether the unauthorised overdrafts given by the appellant caused "financial loss" to the Bank. The operative word here is "loss". Was loss occasioned to the Bank?

The word “loss” as used in Section 258(1) is not defined. We must, therefore, assign to it the plain and ordinary meaning The Shorter Oxford Dictionary defines “loss”, inter alia, as detriment or disadvantage resulting from deprivation. Put differently, to suffer loss is to cease to posses something, to be deprived of or part with something of one’s possession.

Blacks Law Dictionary 5th Edition, page *851* states that “loss” is generic, and relative term. It signifies the act of losing or the thing lost; it is not a word of limited, hard and fast meaning, and has been held to be synonymous with or equivalent to **“damages” “damage” “deprivation” “detriment” “injury”** and **“privation”.**

A thing may properly be said to be lost after a reasonable time has elapsed to allow diligent search and of recovery and such diligent search has been made and has been fruitless. This meaning of “loss” was given by Roche, J. in ***Holmes v. Payne (1930) 2 KB. 301 at 310,*** to which the learned P.S.A. referred us. That case was concerned with the loss of a neck-lace, whose owner subsequently sued her insurers under an agreement for replacement of the lost necklace. The learned Judge in that case said this on page 310.

> ***“In this connection, it is, of course, true that a thing be mislaid and is missing, or has disappeared and a reasonable time has elapsed to allow of diligent search and of recovery and such diligent search has been made and has been made fruitless, then the thing may properly be said to be lost. The recovery of the thing is at least uncertain and, I should say, unlikely***
> ***Subsequent discovery or recovery of the thing assured is, or course, of itself no disproof of loss.”***

In our view, this interpretation of “loss” applies with equal force to the instant case. In the instant case, we agree with the learned appellate’s Judge conclusion that the facts as found by the trial Court proved that the appellant caused financial loss to the tune of Shs. 150m/= to the bank within the meaning of Section 258(1) of the Penal Code. In addition to the overdrafts from which the loss arose having been granted by the appellant without the General Manager’s approval and without security, all possible efforts were made to recover the overdraft for several months. Those which were recoverable, were full recovered. For

others, there was hope of recovering them, but recovery was impossible in respect of the 29 accounts, inspite of efforts by the appellant and other Bank staffs to do so. The total amount lost in respect of the 29 accounts formed the basis of the charge in counts I and III as we have already said.

For emphasis we shall refer to each specific evidence proved that the appellant's act caused financial loss to the Bank. P.W.l said on page seven:

> ***"The bank does not expect to recover all this money which has no security."***

On page eight, he again said:

> ***"The bank is convinced the shs.150m/= cannot be recovered. We tried to send out our officers from June, 1992 to recover but up to now we have not got it. The profit does not have any relation with the overdrawn accounts,"***

P.W.2 said;

> ***"In the beginning, money was recovered. About Shs.200m/=. The balance is not recoverable. We have done everything in our power to recover the money but without success. In the first place we count it as doubtful and bad debts. It is worth 150m/=.***
>
> ***Bad debts means they are impossible to collect ……..."***

P.W.4, who was involved for several months in the efforts to recover the overdrafts on the 29 accounts, said:

"There is no property as security to talk of which can be sold to recover the money on these accounts. Since 31/3/93 none of these customers on the 29 accounts has shown signs of paying."

Then there was further evidence in this connection from the appellant's written statements which, though not confessions, were admissions proving the charges against him nevertheless. In exhibit P.21 dated 14.10.92, he said:

"……..the overdrafts had been granted by me without approval from Head office and the defaulters had disappeared and could not be traced."

On the question whether the appellant knew or had reason to believe that his act would cause financial loss to the Bank, we are satisfied that the learned appellate Judge correctly upheld the trial Court's finding that the appellant did so. There was ample evidence to justify such a finding of fact. This was, firstly, because the appellant granted the overdrafts on the 29 accounts in complete disregard of the Bank's instructions not to give unauthorised and unsecured overdrafts. This was well known to him. The prosecution evidence, his own written admissions and sworn testimony clearly indicated so. In his own evidence the appellant said:

"When giving out these overdrafts I was aware that I was flouting the bank's policy."

His explanation that the General Manager knew about the authorised overdrafts and said that he (the appellant) could not be dismissed was never put to the General Manager in cross-examination.

Secondly, in his defence the appellant said that he gave the overdrafts without security because it was integrity, not security which was important. This indicated that what the

appellant did was deliberate.

Thirdly, the appellant hid the ledger cards of the accounts in question and others in the drawer in his office, contrary to the normal practice. The appellant also concealed the overdrawn accounts from four consecutive monthly returns. These were not the acts of an innocent person. His claim that it was the Bank staff under him who falsified the returns and he only signed them was a lame excuse.

In cross-examination, the appellant said this:

> ***"Banking is a sensitive business I had to make sure what are done by all heads of departments were correct. Most entries were figures and it was my duty to make sure they are correct. Each head of department would make entries and I trusted what they presented was correct. . .monthly returns of overdrafts is a very vital document so with me I had to cross-check the total figure on the returns if they I agreed with the general ledger when I would counter-sign. I would satisfy myself from the general ledger and then counter-sign the returns.***
>
> ***Lending money is a risky business. The risk is not great when the bank lends without security because money is lent on the integrity of a person."***

In cross-examination, he also said:

> ***"One of the easiest ways to find out about the overdrafts was through the monthly returns I had submitted to them. The 65 accounts were not included so as to keep headquarters in the dark."***

All this showed that the appellant did not act merely as a rubber stamp which his earlier evidence suggested he had been. His own evidence showed that he was in actual control of affairs in his branch and that he acted deliberately in granting the unauthorised and unsecured

overdrafts and that he took deliberate risks in not insisting on security before lending the money.

Fourthly, another piece of evidence of knowledge by the appellant that what he was doing would cause financial loss to the Bank, was the destruction by him of some ledger cards of the overdrawn accounts, and diversion of interests to some of the unauthorised overdrawn accounts. All this was done to conceal from the Head Office the true state of affairs in the branch.

The second point made by the appellant's learned counsel regarded the effect of the provisions of the Banking Act to those of Section 258(1) of the Penal Code. Respectfully, we are unable to agree with his contentions. They appeared to be ingenious arguments but we are unable to go along with them. First because we think that it is over stretching the meaning of the phrase "Banking business" to have it exonerate the appellant from what he did in this case: Section 258(1) talks of "any person employed by... a bank." This, in our view, means that it is the individual employees of a bank who is made criminally liable under Section 258(1), not the bank as such of which the individual is an employee.
Secondly, we do not think that the phrase **"or advance made in good faith without security**", in Section 10(3) of the Banking Act means that a Bank or its employee must grant, or a bank's customer is entitled to as of right to be given, a loan or an overdraft without security. On the contrary the meaning of Section 10(3) appears to empower a bank to accept security for a loan that may be made initially in good faith without security or upon security later found to be inadequate. In our view, in the instant case the appellant could not have acted in good faith.

Finally, we do not think that it was the intention of the legislature to say in Section 41 of the Banking Act that the provisions of that Act should override the provisions of the Penal Code. Section 41 in our view must be read in the context of that Act.

In the circumstances ground one of appeal must fail.
Ground two of the appeal complained that the learned appellate Judge erred in law when he upheld the conviction on the charge of abuse of office basing himself on the finding of fact

that the act of giving the unauthorised loans was prejudicial to the Bank where there was undisputed evidence of the appellant having secured the loans by way of depositing land titles and in other instances caveats, the strength and worthiness of which securities were exhibited when the monies advanced were substantially recovered and continued to be recovered with interest to the Bank.

With respect, we would like to begin dealing with this ground by pointing out what we consider to be inaccurate assertions within the ground as framed, in the light of the evidence we referred to when considering ground one of the appeal.

First, it is not correct that,

> ***"there was undisputed evidence of the appellant having secured the loans by way of depositing title deeds and in other instances caveats."***

The second incorrect ascertain is that is that 'monies advanced were substantially recovered and continued to be recovered with interest to the Bank."

Both Counts I and III were concerned with the unauthorised and unsecured overdraft in respect of 29 accounts totalling Shs.151,105,281/=. For reasons which were not explained by the prosecution the appellant was charged with causing to the Bank loss, and abuse of office in respect, of Shs. 150m/= in counts I and III respectively, instead of the larger figure. We have already dealt with the evidence which justified the finding that the overdrafts totaling sum of Shs. 150m/= were unrecoverable and therefore, amounted to a loss to the Bank.

Section 83(1) under which the appellant was charged in count III states;

> ***"83(1) A person who, being employed in a public body or Company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his employer or of any other person, in abuse of authority of his***

office, commits an offence and shall be liable to conviction to imprisonment for a term not exceeding seven year."

It is not a requirement under the Section that the arbitrary act prejudicial to the interests of an accused person's employer which the accused had done in abuse of authority of his office must also have caused a loss to his employer. Yet, in the particulars of the charge in count III against the appellant, it was alleged that the arbitrary act he did in abuse of his office, namely, giving overdrafts totalling shs. 1 50m/= without security, also caused actual loss to his employer, the Bank, of the said amount. In our view the addition of causing loss was superfluous and unnecessary.

In the instant case the trial Court's certain findings of fact concerning count III, were not challenged on appeal to the High Court. These were that the Bank was a public body or Company in which the Government had shares, and that the appellant was employed by the Bank. The only issue that was the subject of the appeal to the High Court and the one now before us is whether the appellant's act complained of in count III of the charge against him was arbitrary, done in abuse of authority of his office, and prejudicial to the interests of his employer.

In his submission under ground two the learned counsel for the appellant generally repeated his submissions under ground one of appeal. With regard to security, he contended that there were four accounts that were secured. The learned appellate Judge, therefore, erred when he said in his judgment:

"Out of the 29 accounts 3 had given their land titles as security but these titles were rendered ineffective by the appellant who lodged caveats on the titles in his personal names. The titles then became useless as security to the Bank."

In our view even if it is assumed (contrary to the prosecution evidence that all the 29 accounts were not secured) that three out of the 29 accounts had land titles for security, as the learned appellate Judge said in the passage above referred to, it meant that 26 of the accounts

had no security. This was contrary to the policy of the Bank that all overdrafts had to be secured. In the circumstances, there could have been no doubt that appellant abused in office by granting overdrafts on all, or 26 out of the 29 accounts without security. To make matters worse the appellant entered the caveats in his own names rendering securities in respect of the three accounts unrealisable by the Bank. “The title deeds then became useless as security to the “Bank” - as the learned appellate Judge put it.

Next, the appellant’s learned counsel contended that the very act of lending by the appellant without security was not prejudicial to the interests of the Bank. He said that even if the appellant abused his office, it did not prejudice the interests of the Bank because first, money was still being recovered with interest up to the time of the trial; and second, as the Bank’s Board had not yet declared the overdrafts in question to be bad debts, no loss had yet occurred. The learned Counsel conceded that he had not authority for the contention that if no loss had been incurred there was no abuse of office. In Counsel’s view, the prosecution did not prove prejudice to the interests of the Bank, which was an essential ingredient of the offence charged in count III.

With respect, we are unable to accept the submission that the appellant did not act arbitrarily in abuse of his office and that his act did not prejudice the interest of his employer, the Bank. Admittedly, the Bank’s business was to lend money in order to earn interests. But the lending of money was subject to certain strict conditions well known to the appellant as a branch Manager. As proved by the evidence we have already referred to these conditions were that the General Manager’s prior approval was essential for any overdraft of loan, and secondly that overdrafts or loans had to have security. Both conditions applied to each and all overdrafts or loans, and not only to some and not to others. The purpose of these conditions was to ensure that the money lent was recovered. Lending money, as the appellant himself said, was a risky business. Requirements of the General Manager’s prior approval and of security, was to reduce or limit altogether the risk of lending money.

The appellant, while aware of these conditions, went ahead and acted in breach of the conditions. He also did things intended to cover up what he was doing. This meant that he knew that what he was doing was wrong. In our view, there could not have been a more arbitrary act and flagrant abuse of authority of the appellant’s office.

With regard to prejudice, if money was lent without approval and without security as the appellant did in the instant case, it meant that the interests of the Bank was put at great risk. The Bank stood the risk of not but it also stood the risk of not only loosing the principal sums but also the interests thereon. This was prejudicial to the Bank's interests. Indeed, as evidence proved, the money so lent by the appellant was unrecoverable although all possible efforts to that end were made, but without success.

As we said earlier no loss needed to have occurred for the appellant to be guilty of the crime created by Section 83(1). So the contention that unrecovered money had not yet been declared bad. debts by the Board was irrelevant. In any case, as evidence proved, the money was already regarded as lost even before the Board had declared the overdrafts concerned bad debts.

The learned Counsel for the appellant repeated his submission about the provisions of the Banking Act, 1969 in relations to those of Section 83(1) of the Penal Code. He contended that the Sections of the Banking Act, to which we have already referred when dealing with ground one, should be read together with section 83(1) of the Penal Code. In his view the effect would be that the appellant did not commit the offence he was charged with in Count III.

What we said about the provisions of the Banking Act in question when dealing with ground 1 of the appeal equally applies here.
Ground two of the appeal, therefore, must also fail.

Ground three of the appeal complained that the learned appellate Judge erred in law and caused a substantial miscarriage of justice when he upheld the illegal order of compensation passed by the trial Magistrate which order was unlawfully executed while this appeal was pending.

The compensation order to the Bank of Shs.84m/= was not made a subject of the appeal to the High Court. This mighty well be the reason the learned appellate Judge said nothing about

it. As we said earlier in this judgment, the learned trial Magistrate did not say whether the order was in respect of count 1, count II or to both. Having convicted the appellant of the charges in count I and count II, as he did, it was mandatory for him under Section 259 of the Code to make compensation order in respect of each of those two counts. This he did not do, which was an error in law.

The criticism now made against the learned appellate Judge in ground three was not made the subject of appeal to the High Court. With respect, therefore, the appeal in ground three cannot be made before us on this second appeal, because it was not a matter put for consideration before the High Court in the first appeal. We cannot therefore, deal with the merit of the ground. We think, however, that we can remit the case to the trial Magistrate's Court under Section 337(2) of the Criminal Procedure Code Act, to make appropriate consequential orders' in respect of count I, the conviction of the appellant on which was upheld by the High Court and has been upheld by us in this appeal.

Section 337(2) of the Criminal Procedure Code Act (Cap. 107) provides:

> ***"337(2) on any such appeal the Supreme Court may, if it thinks that the judgment of the Magistrate's court or of the High Court should be varied, make any order which the Magistrate 's Court or the High Court could have made; or may remit the case together with its judgment or order thereon, to the High Court or the Magistrate's Court for determination, whether or not by way of rehearing, with such directions as the Supreme Court may think necessary.***
>
> ***Provided that in case of an appeal against conviction, if the Supreme Court dismisses the appeal and confirms the conviction appealed against, it shall not, save as provided in sub-section (3) of this Section, increase, reduce or alter the nature of sentence imposed in respect of the conviction, whether by the Magistrate 's Court or by the High Court unless the Supreme Court thinks that such sentence was unlawful one, in which case, it may imposed such sentence in substitution therefor, as it thinks proper."***

In the instant case, we are concerned with a mandatory consequential order, which is an aspect of sentence.

In the result, we dismiss this appeal and uphold the convictions and sentences of the appellant in Counts I and III.

The mandatory consequential order under section 259 of the Penal Code is now only relevant to the appellant's conviction under count I, which was upheld by the High Court and by us. His conviction on count II was quashed and the sentence in respect thereof set aside by the High Court.

As the learned trial Magistrate did not specify the conviction to which the compensatory order he made related to, we now order that it should be, and it is hereby set aside by virtue of the provisions of Section 337(2) of the Criminal Procedure Code Act. In substitute thereof we order that the appellant should pay to Bank as compensation for the loss the Bank suffered in respect of count I the sum of Shs.84/=

Dated at Mengo this 13th day of September 1995.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT.

1 CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL,

W.MASALU MUSENE,
REGISTRAR, THE SUPREME COURT.