209/55

G.P.-S.384–1953-5–10,000. U.D.J. 445.

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

(_____ DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.

_____

Appellant.

versus

_____

Respondent.

Appellant's Attorney Kolbe
Prokureur van Appellant

Respondent's Attorney E. Nicholls
Prokureur van Respondent

Appellant's Advocate [illegible]
Advokaat van Appelant

Respondent's Advocate [illegible]
Advokaat van Respondent

Set down for hearing on: Monday, 7th May, 56
Op die rol geplaas vir verhoor op:—

1, 4, 6, 8, 10

Appeal dismissed

[illegible]

14/5/56.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

R. R. G I B S O N — Appellant

&

R E G I N A — Respondent

CORAM : Centlivres C.J., Fagan, de Beer, ~~Reynolds~~ Hall JJ.A. et van Ellenbogen A.J.A.

Heard : 7th May 1956. Delivered : 14 - 5 - 56

J U D G M E N T

CENTLIVRES C.J. :- The appellant was convicted in a regional magistrate's court on 22 counts of stealing various sums of money from the Eastern Province Building Society. Each count was in respect of a specific period ~~ranging from~~ and all the periods fell between October 1949 to July 1951. The total amount alleged to have been stolen was £25,425. 14. 11d. It was, however, clear from the evidence that the shortage which existed at the end of July 1951 was considerably less than that sum. The magistrate held that in the final result the appellant had stolen £2,690 and for the purpose of sentence he treated the 22 counts as one count. He imposed a sentence of twelve months imprisonment with compulsory labour.

Counsel to the Transvaal Provincial Division that the amount alleged to have been stolen in each of the 22 counts "did not represent an amount actually stolen but really "only various amounts employed to make xxxx money 'available' "to be stolen. In fact no attempt was made in evidence to "establish what amount the appellant actually drew out in each "period against the false credits established or what amount of "cash was withdrawn. The total sum of £25,495 charged may or "may not have been passed through various entries in the whole "period ; but it was not shewn that a total of that amount was "ever extracted from the funds of the Society. In other words, "these various items going to make up the figures in each count "really only expose the method adopted from time to time to make "moneys available for extraction. Detailed extractions were "never proved ; only a total extraction over the whole period "which was reduced to £2690 by certain replacements. It be-"comes clear therefore that unless the charge can be amended "there is a variance between the offence charged and the offence "proved to have been committed. "

On application made by counsel for the Crown the Provincial Division amended the charge so as to make it read as follows :-

" The said accused is guilty of the crime of theft in that during the period October 1949 to July 1951.....

" he did fraudulently and unlawfully steal the sum of £2,690, such sum of money being the property of the Eastern Province Building Society and representing a general deficiency, as at July 1951, in moneys collected by the accused for and on behalf of the said Society and for which moneys it was the duty of the accused to account to the said Society. "

The Provincial Division corfirmed the conviction on the charge as amended and left the sentence unchanged as it did not think that "the alteration of the conviction from one of "guilty on 22 counts of theft could, in the light of the magis- "trate's reasons, have possibly affected his decision as to the "sentence merited by the offence. "

Leave to appeal having been granted by the Provincial Division, the matter now comes before this Court.

I am not quite sure what the Provincial Division meant by saying that what was proved was "only a total extraction over the "whole period which was reduced to £2,690 by certain replacements." If by this it is meant that an employee, who without authority from his employer appropriates, say £100, from the funds of his employer and a week later pays into the latter's account £50, is guilty of stealing only £50 and not £100 then I cannot agree. But be that as it may, it is always open to the Crown to avail

itself of the provisions of Secs. 279(2) and 317 of Act 56 of 1955 (Secs. 313(2) and 129 of Act 31 of 1917) and to charge an accused with the theft of the amount of a general deficiency - an amount which may be less than the amount actually stolen over a period.

It was contended on behalf of the appellant that the Crown had not proved that there was a general deficiency of £2,690. One of the witnesses who deposed to a general deficiency was Mrs. Sutton who kept the books for the appellant who was the local representative at Johannesburg of the Eastern Province Building Society. She was an accomplice in that she assisted the appellant in his defalcations. The acceptance of her evidence by the magistrate was attacked on the ground that there was nothing in the reasons given by the magistrate to show that he had warned himself of the special danger of convicting on the evidence of an accomplice. See R. v Mcanana (1948 (4) S.A. 399 at p. 405.) The magistrate did not in his reasons in so many words warn himself against accepting the evidence of Mrs. Sutton, but in those reasons he directed "that a certificate be endorsed on the record that "Mrs. Sutton, having given satisfactory evidence, will be "absolved from prosecution as an accomplice." It is clear

therefore that the magistrate was fully aware that Mrs. Sutton was an accomplice. In his grounds of appeal to the Provincial Division the appellant did not take the point that the magistrate had not warned himself of the danger of accepting Mrs. Sutton's evidence : had that point been taken the magistrate would doubtless have dealt with it in the reasons he furnished in answer to the grounds of appeal. But, be that as it may, there was ample corroboration of Mrs. Sutton's evidence to the effect that in July 1951 there was a general deficiency of at least £2,690. I do not consider it necessary to refer to the evidence of the other witnesses who deposed to that deficiency. The appellant himself in giving evidence at the trial admitted that in an examination in insolvency he was asked the following question: "There was £3,000 or something like that, "wasn't it, that you took from the Eastern Province Building "Society ?" and that his answer was :- "Yes, that wouldn't "have happened but for this pressure on me. They were press-"ing me to make me insolvent. "

By agreement between the legal advisers of the appellant and the Crown certain portions of the record of the proceedings in the magistrate's court were omitted from the record prepared for this Court. It was suggested by counsel for the

appellant that if the record were amplified by making it a complete record he might be able to show that there was no general deficiency in July 1951 and that in these circumstances the further argument should be postponed until the completion of the record. This suggestion which, to say the least, is extraordinary, cannot be acceded to. In view not only of the Crown evidence which is before us in the record but also of the admission by the appellant in the insolvency proceedings that the general deficiency was in the neighbourhood of £3,000 no good purpose can be served by postponing the case for further argument.

Counsel for the appellant contended further that the Provincial Division, sitting as a Court of Appeal, had no power to amend the charge. He referred the Court to Sec. 180 of Act 56 of 1955 (Sec. 225 of Act 31 of 1917) and contended that a Court of Appeal is given no power under that section to amend a charge. The correctness of that contention is not open to doubt but the matter does not end there. Under Sec. 103(4) of Act 32 of 1944 a Court of Appeal has the powers set out in Sec. 98(2) of that Act. One of those powers is to "correct the proceedings of the magistrate's court or generally "give such judgment..... or make such order as the magis- "trate's court ought to have given..... or make any matter

"

"which was before it at the trial of the case in question.... "and may make such order.....touching any matter or thing "connected with him" (the accused) "or the proceedings in "regard to him as to the said Court seems calculated to pro- "mote the ends of justice."

Section 98(2) of Act 32 of 1944 is the same as section 95(2) of Act 32 of 1917 as substituted by Sec. 92 of Act 46 of 1935 and gives a Court of Appeal wider powers than were given to it in the original Sec. 95(2) of Act 32 of 1917. In particular, as far as the present case is concerned, a Court of Appeal is now empowered to give such judgment or make such order as the magistrate's court ought to have given or made in any matter which was before it at the trial.

A matter which was prominently before the magistrate's court at the trial was the question whether there was a general deficiency in July 1951 and, if there was, the amount of that deficiency. That this is clear is shown by the following facts :

(1) The prosecutor said in his opening address :"The allegation by the Crown will be..... that at the end of the period covered by the charges, the accused was still in debit with the Eastern Province Building Society to an amount of £4,053. 7. 6. That is the general deficiency over the whole period."

(2) The General Manager of the Society, after giving detailed evidence on each of the 22 counts, stated that there was a general deficiency of £2,690.

(3) When the auditor of the Society was giving evidence on each separate count the appellant's attorney interposed with the remark : "I don't know why my learned friend does not take the final figure instead of splitting it up all the time. On all the counts. I am quite agreeable to that."

(4) Both the auditor and Mrs. Sutton gave evidence as to the amount of the general deficiency.

(5) In argument after the conclusion of the evidence the appellant's attorney contended that the general deficiency was only £339 and not £2,690.

If the view taken by the Provincial Division is correct viz: that the evidence does not disclose thefts amounting in all to £25,425. 14. 11d. but discloses a general deficiency of £2,690 then the magistrate ought to have exercised his powers under Sec. 225 of Act 31 of 1917 (that Act having then been still in operation) and amended the charge to one of the theft of £2,690, that amount representing a general deficiency at the close of the period in question. The power conferred on the trial court by Sec. 225 may be exercised if the court "considers "that the making of the necessary amendment in the..... charge "will not prejudice the accused in his defence." In the present

case it is idle to suggest that the appellant would have been prejudiced in his defence if the magistrate had amended the charge. He knew before any evidence was led that the Crown set itself the task of proving a general deficiency, and in the course of the proceedings his attorney requested that detailed evidence should not be given in respect of each particular count but that the evidence should be confined to showing that there was a general deficiency. Moreover in his argument to the Court he contended that there was a general deficiency of only £339. So the whole question of a general deficiency was ventilated during the evidence and argument and it cannot be said that the appellant was taken by surprise. Had the amendment been allowed by the magistrate I am satisfied that the defence would not have been differently conducted. The defence was not that there was no general deficiency but that the general deficiency was the result of some other person misappropriating the Society's funds. That defence was correctly held by the magistrate to have no foundation.

The above being the position it cannot, in my opinion be said that the appellant would have been prejudiced if the magistrate had made the amendment. On the view taken by the Provincial Division as to what the evidence disclosed the

magistrate ought to have made the amendment and it follows from Sec. 98(2) of Act 32 of 1944 that the Provincial Division acted correctly in doing what the magistrate ought in its view to have done viz: amend the charge.

Counsel for the appellant referred to the case of R. v Bruins (1944 A.D. 131). There the Court considered a Southern Rhodesia Act which contained a section which was the same as Sec. 225 of Act 31 of 1917. Tindall J.A. said :-

"Under the circumstances it seems to me that in a case like "the present where, though the nomen criminis is the same, all "the essential particulars of the offence shown by the evidence "are entirely different from the particulars alleged in the "charge the accused has been prejudiced." In that case the particulars relied on by the Crown in the charge had not been proved and the Court held that as the accused had been convicted on that charge he was prejudiced. That is a very different case from the present. The allegation in the 22 counts that the appellant stole specified sums during specified periods may be regarded as particulars of all his separate thefts. Such particulars are in no way inconsistent with the fact that at the end of the whole period there was a general deficiency. Moreover before any evidence was led the prosecutor stated that

he proposed to prove a general deficiency. Consequently when the trial began the appellant was well aware of the case he had to meet.

On the view taken by the Provincial Division as to what the evidence disclosed it seems to me that, to use the language of Sec. 98(2) of Act 32 of 1944, it gave a decision which was "calculated to promote the ends of justice." In dismissing an appeal in R. v Grundlingh (1955 (2) S.A. 269 at p. 276) this Court said that "A Court of Appeal is as much bound to see that "justice is done as a judge in a criminal trial" and cited the remarks of Curlewis J.A. in R. v Hepworth (1928 A.D. 266 at p. 277) where the learned judge said that "a criminal trial is not "a game where one side is entitled to claim the benefit of any "omission or mistake made by the other side."

Assuming that the Provincial Division was mistaken in the view which it apparently held that the Crown had succeeded in proving only a general deficiency of £2,690 and assuming further that the Crown proved that, when all the thefts during the specific periods charged are taken into account, the appellant stole more than £2,690, I find it impossible to conceive how the appellant can feel aggrieved at having been found guilty of having stolen a lesser amount than he actually stole.

The appeal is dismissed.

Fagan J.A.
de Beer J.A.
Hall J.A.
van Blerk A.J.A. } concur.