74/70

G.P.-S. J. 445.

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

(Appèl DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

MARTHINUS CORNELIUS GLOY

Appellant.

versus/teen

DIE STAAT

Respondent.

Appellant's Attorney Kriek & Cloete *Respondent's Attorney* P.G.(Pretoria)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate W.J. Hartzenberg *Respondent's Advocate* St J A [illegible]
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 31-8-70
Op die rol geplaas vir verhoor op 2-7-8

(T.P.A.)

Hofsaak 2-9-70 per Jansen A.R.
appèl word afgewys.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

APPÈLAFDELING

In die saak tussen:

MARTHINUS CORNELIUS GLOY ..... APPELLANT

EN

DIE STAAT ..... RESPONDENT

Coram: Ogilvie Thompson, Jansen et Trollip, A.RR.

Verhoordatum: 31 Augustus, 1970

Leweringsdatum: 22 September, 1970.

UITSPRAAK

JANSEN, A.R. :

Die appellant is in die Landdroshof te Nigel aan oortreding van art. 14 (1) (a) van Wet 23 van 1957 skuldig bevind, nl. dat hy met 'n meisie onder die ouderdom van 16 jaar ontug gepleeg het. Hy was ten tyde van die verhoor maar 18 jaar oud en is gevonnis tot 'n matige lyfstraf van 6 houe met 'n ligte rottang. Die Transvaalse Provinsiale Afdeling het 'n appèl teen die skuldigbevinding afgewys, maar die straf gewysig deur dit vir 2 jaar op sekere voorwaardes

op te ..... /2

op te skort. Met verlof van lg. Hof voer die appellant die saak nou verder, slegs wat die skuldigbevinding betref.

Dit staan vas dat iemand met die betrokke dogter, Anesta, wat eers op 20 April 1969 sestien jaar oud sou word, tussen die einde van Desember 1968 en die einde van Januarie 1969 gemeenskap gehad het: sy het op 2 Oktober 1969 aan 'n baba geboorte geskenk en volgens die mediese getuienis moes bevrugting binne genoemde tydperk geskied het. Anesta het getuig dat die appellant geweet het dat sy net 15 jaar oud was, dat hy in dié tydperk meermale met haar gemeenskap gehad het, en dat sy as gevolg daarvan swanger geraak het. Daarenteen het die appellant ontken dat hy ooit met haar gemeenskap gehad het. Die Landdros het haar geglo en die ontkenning van die appellant verwerp.

Dit word betoog dat die Landdros die versigtigheidsreël, wat op gevalle van hierdie aard van toepassing is, nie in ag geneem het nie, en dat hy in elk geval tot 'n verkeerde bevinding geraak het.

Weliswaar verwys die Landdros in sy

redes ..... /3

redes nie na die versigtigheidsreël nie, maar sy benadering blyk tog voldoende. Hy sê o.a. (my onderstreping):-

> "Die Hof het die Klaagster n betroubara getuie gevind en <u>in die omringende omstandighede van hulle verhouding</u> kan die Hof net tot die gevolgtrekking kom dat die Appellant wel vleeslike gemeenskap met die Klaagster gehad het ten gevolge waarvan sy swanger geword en n kind gebaar het".

Die "omstandighede van hulle verhouding" wat die Landdros in gedagte gehad het, blyk uit die feite wat hy bewys bevind het:-

> "3. Dat die Appellant en Klaagster n liefdesverhouding gehad het gedurende die maande Desember 1968 tot einde Januarie 1969.
>
> 4. Dat Appellant en Klaagster mekaar gesoen en gedruk het tydens hulle verhouding."

In die lig hiervan is dit duidelik dat die Landdros deur Anesta as getuie gunstig beïndruk is, maar dat hy nie slegs op daardie indruk die saak beslis het nie - hy het stawing van haar relaas gesoek en dit in die omringende omstandighede van haar en die appellant se verhouding gevind. Dit is opmerklik dat die aard van hierdie stawing,

anders ..... /4

anders as in Rex v. W. (1949 (3) S.A. 772 (A.A.)), nie slegs is om Anesta se relaas in sekere opsigte te bevestig nie, maar wel ook om die appellant te impliseer. 'n Intieme liefdesverhouding oor die kritieke periode eind Desember tot eind Januarie, 'n verhouding wat uiting vind in druk en soen, maak dit in 'n mate waarskynliker dat die appellant wel die persoon is wat dit met Anesta tot die uiterste sou gevoer het. Die Landdros het dus inderdaad die saak beoordeel met 'n versigtigheid wat gelei het tot die soek van stawing wat die appellant impliseer. Gevolglik kan nie gesê word dat hy die saak verkeerd benader het en aldus misgetas het nie.

Die hoofbetoog namens die appellant is egter dat Anesta se getuienis in sekere belangrike opsigte mank gaan en dat met die oog daarop die stawing (indien enige) nie voldoende was vir die Landdros om sonder meer die ontkenning van die appellant te verwerp nie. Alvorens die gebreke in Anesta se getuienis te ontleed, is dit egter wenslik om die agtergrond, veral die onderlinge verhouding tussen Anesta en die appellant, nader te bespreek.

Uit die ..... /5

Uit die getuienis as geheel kan hiervan n beeld verkry word. Die ouers van Anesta en appellant was huisvriende. Vanaf November of begin Desember 1968 het Anesta en die appellant pal saam begin uitgaan. Hulle was toe "gekys", en nadat appellant beswaar gemaak het, het Anesta selfs vir vier polisiebeamptes wat vir haar op n Saterdagmiddag besoek het, gebel om hulle te sê dat sy en die appellant "nou uitgaan". Appellant het baie middae na skool vir Anesta by haar huis kom kuier, en feitlik elke tweede naweek het sy by appellant en sy ouers op lg. se plaas deurgebring. Volgens die appellant het hy "baie gehou" van Anesta en sy van hom, hulle verhouding was n "liefdesverhouding" en hy het haar "gesoen en gedruk", hulle het "gevry". Die appellant het egter volgehou dat lg. slegs "ordentlik" was, terwyl Anesta gesê het:

> "Beskuldigde het my baie gevra om gemeenskap te hê en as ek weier het hy gesê ek het hom nie lief nie en ek het hom baie lief gehad".

Dat daar op die plaas geleentheid sou gewees het om gemeenskap te hou as die lus daartoe bestaan het, ... /6

het, skyn duidelik te wees. Volgens Anesta was die twee dikwels alleen in mekaar se geselskap, en alhoewel die appellant slegs wou toegee dat dit "selde" was, moes hy tog erken dat dit somtyds wel gebeur het. Die reëlings oor waar elkeen moes slaap, is nie so duidelik nie, maar tog skyn dit die geval te wees dat beide alleen geslaap het en moontlik onbemerk mekaar kon besoek het. Die appellant se vader se getuienis maak dit duidelik dat nòg hy nòg sy vrou geweet het "wat hulle doen of hoe hulle slaap" gedurende die nag.

'n Poweregpoging is deur die verdediging gedoen om aan te toon dat Anesta tydens die kritieke tydperk ook op intieme voet met ander mans omgegaan het. Volgens Anesta se moeder (en haar getuienis is nie noemenswaardig in kruisverhoor betwis nie) het Anesta eind November of begin Desember nie meer van ander seuns besoek ontvang nie. Sy sê selfs dat sy daaroor ontevrede was - sy het gemeen dat Anesta haar nie tot een seun moes beperk nie. Alhoewel sy werksdae gedurende die dag nie by die huis was nie, het Anesta se moeder tog per telefoon in die middag probeer toesig hou, en sy het Anesta

nie ..... /7

nie toegelaat om uit te gaan nie. Dit is nie aan haar gestel dat Anesta ooit saans sonder toesig was nie. Anesta self het omgang met ander seuns of mans ontken. Al wat die verdediging hom op kon beroep om die teendeel aan te toon, was die getuienis van ene Calitz, wat vanaf begin Desember 1968 tot eind Mei 1969 by Anesta hulle geloseer het, en die getuienis van ene W.J.N. Gloy. Calitz het getuig dat hy o.a. gesien het dat 'n sekere Dr. Moll vir Anesta in die sitkamer omhels gedurende Januarie, en dat Dr. Moll baie by Anesta in die kamer was. Sy getuienis is egter klaarblyklik onaanvaarbaar. Nie alleen het hy onder druk erken dat hy Anesta se ouers nie meer goedgesind is nie, maar hy het homself direk weerspreek deur te sê "nooit het iemand haar (Anesta) geliefkoos voor my nie". Trouens, sy relaas is nooit aan Anesta se moeder gestel nie, en van die omhelsing het hy eers onder kruisverhoor melding gemaak. Lg. was klaarblyklik 'n nagedagte wat ook nooit aan Anesta gestel is nie, alhoewel sy oor Dr. Moll ondervra is. Selfs op die blote notule wek Calitz se getuienis 'n sterk indruk van 'n versinsel te wees. Volgens W.J.N. Gloy (skynbaar 'n jonger broer van die appellant) het Anesta vroeg in Desember 1968

hom ..... /8

hom gevra vir blousel en melk, wat hy later van sy niggie moes verneem 'n vrugafdrywingsmiddel is. Anesta erken dat sy hom dit aan die einde van Januarie gevra het. Dit is egter moeilik om in te sien dat hierdie getuienis enigsins afdoen aan Anesta se relaas. Die getuie het erken dat hy enigiets sou doen om die appellant te beskerm, hy was baie vaag oor wanneer Anesta die blousel en melk gevra het, en bowendien is dit duidelik dat Anesta eers in Januarie swanger geraak het. Dit is hoogs onwaarskynlik dat sy voor Januarie sodanige middel sou wou gehad het.

Op die getuienis as geheel is daar hoegenaamd geen rede om te vermoed dat Anesta nadat sy en die appellant "gekys" geraak het, op intieme voet met enige mansmens behalwe die appellant omgegaan het nie. Op die beskikbare gegewens kom die bestaan van 'n geheime minnaar uiters onwaarskynlik voor. Anesta en die appellant het minstens van mekaar "gehou", hulle verhouding was 'n "liefdesverhouding" en, behalwe vir die powere poging deur Calitz, is dit nooit gesuggereer dat Anesta 'n losbandige meisie was nie.

Trouens ..... /9

toe dié haar ondervra het nadat dit geblyk het dat iets met haar verkeerd was, met wat sy in haar hoofgetuienis gesê het en, na 'n verdaging van ongeveer 'n maand, onder kruisverhoor. Die belangrikste van hierdie gebreke in haar getuienis is sekerlik dié wat betrekking het op wanneer gemeenskap vir die eerste keer plaasgevind het. Ondanks die feit dat Anesta aanvanklik altyd gepraat het van eind Desember of begin Januarie het sy dit uiteindelik onder kruisverhoor gekoppel aan die dag van 'n sportbyeenkoms, wat sy toe onder verdere kruisverhoor skynbaar toegegee het nie eerder as 18 Januarie kon plaasgevind het nie.

Is hierdie ernstige swakhede in Anesta se getuienis nou 'n aanduiding dat sy, ondanks die agtergrond hierbo geskets, in die algemeen tog nie die waarheid vertel, nl. dat die appellant met haar gemeenskap gehad het nie? Is dit die ontmaskering van 'n opsetlike poging om die appellant valslik met vaderskap te belas, of bloot die jammerlike, onbeholpe rondvallery van 'n geteisterde, skugtere kind wat onder kruisverhoor verstrik raak in die beskrywing van gebeure wat in pynlike herinnering saamvloei, gebeure waaroor sy liefs nie sou

praat ..... /11

praat in 'n geding wat sy self liefs nie sou voer nie? Hieroor sou die Landdros, wat haar gehoor en gesien het, wel die beste kon oordeel. Toe hy tot sy bevinding geraak het kon hy nie onbewus van die gebreke in haar getuienis gewees het nie - tog het hy haar as "betroubaar", vermoedelik in die algemeen, beskou. Ondanks die gebreke in Anesta se getuienis sou dit moeilik wees om nou te bevind dat hy 'n foutiewe indruk gekry het. Selfs op die notule, waar die teensprake en ongerymdhede so duidelik blyk, gee Anesta se getuienis in die algemeen toe 'n indruk van egtheid, veral waar sy vertel dat sy aan die appellant toegegee het omdat sy "hom baie lief gehad" het. Toe sy gevra is of sy bereid sou wees om 'n bloedtoets te ondergaan ten einde te bepaal of die appellant die vader van haar kind kon wees, het sy onmiddellik toegestem. Daar is geen aanduiding dat Anesta gesofistikeerd is nie. Trouens alles dui op die teendeel: sy sê dat sy nie van voorbehoedmiddels geweet het nie en haar swangerskap dui op die nie-gebruik daarvan; haar moeder het dit moeilik gevind om met haar te praat oor die

aangeleentheid ..... /12

aangeleentheid omdat sy histeries geword het; haar naïewe poging om van die appellant se broer melk en blousel te kry getuig eerder van onkunde as wêreldwysheid. Inderdaad, haar weersprekings skyn eerder te rym te wees met kinderlike onbeholpenheid en verdwaaldheid as die openbaring van n voorbedagte poging om die appellant valslik te impliseer. Dit is moeilik denkbaar dat as lg. die geval was, Anesta met haar kennis van omstandighede en gebeure by die appellant se huis, oor besonderhede van hierdie aard sou struikel.

Word die getuienis as geheel beskou, die lig wat gewerp word op die liefdesverhouding tussen Anesta en die appellant, die onwaarskynlikheid van n geheime minnaar, dan kan m.i., ondanks die gebreke in Anesta se getuienis, allermins bevind word dat die Landdros fouteer het toe hy die appellant se ontkenning verwerp het en hy Anesta geglo het dat sy aan die appellant toegegee het omdat sy hom lief gehad het. Die strekking van die getuienis as geheel dwing tot die gevolgtrekking dat die appellant se skuld bo redelike twyfel bewys is.

Die appèl word afgewys.

E.L. JANSEN
APPÈLREGTER

Ogilvie Thompson, A.R.)
Trollip, A.R.) Stem saam.

4-9-70

1 95 | 70

C.P.S. J. 465

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

(APPE LATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

HENNIE JEREMIAH PRINGLE CLOETE

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney _____ *Respondent's Attorney* _____
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate _____ *Respondent's Advocate* _____
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 9 - 11 - 70
Op die rol geplaas vir verhoor op
2 . 12 . 70

(E. C. D.)

Postea 1-12-70 per Corbett A.J.A:—
Conviction remains undisturbed. Sentence is altered to 9 months imprisonment suspended for 2 years.

REGISTRAR.
1.12.1970

IN THE SUPREME COURT OF SOUTH AFRICA.
(APPELLATE DIVISION)

In the matter between:

HENNING JEREMIAH PRINGLE CLOETE.....APPELLANT.

AND

THE STATE.....RESPONDENT.

Coram:

Ogilvie Thompson, Wessels, JJ.A. et Corbett, A.J.A.

Heard: 9th November 1970. Delivered: 1/12/70

J U D G M E N T.

CORBETT, A.J.A.

The appellant in this matter was convicted on five counts of theft in the Regional Magistrate's Court for the Eastern Cape (sitting in East London) and sentenced to 18 months' imprisonment, the five counts having been taken together for the purposes of sentence. An appeal to the Eastern Cape Division against the conviction and sentence having failed, the matter now comes before this Court with the leave of the Court a quo.

At the time of the events which gave rise to the

charges...../2.

charges of theft against the appellant, he occupied the office of Bantu Affairs Commissioner for the district of Peddie, which falls within the area of the Ciskei Bantu territorial authority. In this capacity he also held the position of sub-accountant of the Department of Bantu Administration and Development. The appellant was appointed to this office in January, 1966 and continued to hold the post until he was transferred to Brakpan on the 25th March, 1969.

During this period there existed in Peddie an old-age home, known as the Ekuphumleni Old Age Home. This institution had originally been run by the Nederduits Gereformeerde Sendingkerk, as agent for the Department of Bantu Administration, but as from the 1st July,1967, the administration thereof was transferred to the Ngqusawa regional authority. The inmates of the home, whose numbers varied at different times from about 150 to about 200, were entitled to old age and disability pensions which were made payable every other month. Because the pensioners were receiving

free...../3.

free care and accomodation in the home, only R2-00 was paid to each pensioner every other month and the balance of the pension accruing to him was paid to the authority administering the home - at first the N.G. Sendingkerk and, after the 1st July, 1967, the Ngqusawa regional authority. These payments fell within the responsibility of the office of the Bantu Affairs Commisioner at Peddie and appear normally to have been handled by the Commissioner himself.

After the appellant's transfer to Brakpan it was discovered that, in respect of a number of months during his period of office, the amounts actually paid to pensioners and to the authority administering the old-age home fell short of the total amount of the pensions which had accrued and which had been drawn for payment by the office of the Commissioner. The details of these shortfalls may be summarized as follows:-

Month of payment.	Total sum drawn.	Paid to pensioners.	Paid to Home.	Shortfall.
May '68	R1,464-35	R384-00	-	R1,080-35
July '68	1,162-15	306-00	722-15	134-00
Nov. '68	1,450-45	378-00	813-00	259-45
Jan. '69	1,525-90	400-00	817-20	308-70
March '69	1,512-95	398-00	850-95	264-00
		Total shortfall		R2046-50

There is no indication that any of the pensioners did not duly receive the R2-00 accruing to him and consequently these shortfalls totalling R2,046-50 all represented non- or short-payments to the authority administering the old-age home, at that stage the regional authority. It was these shortfalls that formed, individually, the subject-matter of the five charges of theft against the appellant, it being alleged in each case that instead of paying the amounts in question over to the old-age home, as he was obliged to do, he wrongfully, unlawfully and fraudulently misappropriated it to his own use.

At the trial the appellant admitted that the amounts in question had been drawn for payment to the regional authority for the benefit of the old-age home and that they had not been paid to the regional authority. He admitted further that he was responsible for these non-payments but he denied that he had appropriated the monies to his own personal use. He explained, however, during the course of his evidence, that all the amounts had been expended by

him...../5.

him in the provision of recreational facilities for the inhabitants of Peddie and in the expansion and improvement of the accomodation and facilities at the old-age home and at the offices of the regional authority and of various tribal authorities in the region. The regional magistrate rejected the appellant's explanation and held that on the evidence there was no doubt that the appellant had appropriated the money to his own personal use. It was upon this factual basis that the sentence of 18 months imprisonment was imposed.

The appeal to the Provincial Division was in effect an appeal merely against the sentence inasmuch as appellant's counsel, Mr. Smalberger, conceded that even on the appellant's version of the facts he had been guilty of theft and in this connection reference was made to the decision in R v. Kinsella (1961(3) S.A. 519(E)). Counsel contended, however, that the magistrate had erred in rejecting the appellant's version and in holding that the appellant had appropriated the monies to his own use. This erroneous

finding..../6.

finding on the facts - so counsel argued - had very materially influenced the sentence imposed by the magistrate and a reversal of this finding by the court of appeal would justify, and indeed require, the substitution of a much lighter sentence. The Provincial Division refused to reverse the magistrate's factual findings and dismissed the appeal. Before this Court Mr. Smalberger made the same concession as to his client's guilt and advanced the same general submission in regard to the sentence imposed. The basic issue for decision in this appeal is, accordingly, whether the trial court correctly held that the State had established beyond a reasonable doubt that the appellant misappropriated the monies for his own use or whether it should have held that the appellant's version of what he did with the monies could reasonably be true. In order to examine the merits of the trial court's decision upon this issue it is necessary to make somewhat fuller reference to the evidence.

In the course of his testimony the appellant deposed to his serious resolve to implement government policy

within...../7.

within the area under his jurisdiction and in a letter of explanation written to his Department on the 25th June, 1969, i.e. after the misappropriations had been discovered, he ascribed his admittedly irregular conduct to a blind enthusiasm to establish this policy in the homelands ("tuislande"). That the appellant was serious and enthusiastic in his implementation of government policy does not seem to admit of any doubt. One of the documents handed in, an extract of a Ministerial speech (Exhibit "O"), contains a number of very flattering references to the appellant's achievements in the establishment of regional and tribal authorities in his area and in the encouragement of self-government among the local inhabitants; and in a letter dated the 30th March, 1967, and addressed to the appellant by one Engelbrecht, a senior official in the head-office of his Department, similar praise is to be found. Crossman, the assistant Bantu Affairs Commissioner at Peddie, confirmed that while the appellant was there the development or implementation of government policy progressed at a great

rate...../8.

rate.

The appellant voiced a general complaint that there were considerable delays in the receipt of departmental grants to finance his development schemes. One such instance, according to him, related to certain tennis courts which were constructed upon a site near the old-age home. He stated that in March, 1967, he commenced, in terms of government policy, to build sports facilities at Peddie. An amount of R453-00 had been collected by the Bantu in the district and it was decided to build two cement tennis courts, together with a club-house and toilets. While this work was in progress and apparently during March, 1967, the appellant received a visit from certain departmental officials, including Engelbrecht. At that stage it had become clear that the R453-00 afore-mentioned was insufficient to finance the project. The matter was discussed with the visiting officials and the senior of them, one Liebenberg (subsequently to become deputy-secretary of the Department), requested appellant to proceed with the project and promised

to...../9.

to see to it that appellant received the necessary funds immediately. Certain correspondence upon this topic thereupon passed between appellant and his head-office and on the occasion of a visit by appellant to Pretoria in July that year he was verbally assured that he would receive the necessary funds and that the matter would be placed before the Minister for his final approval on the 8th August. Despite these assurances and divers telephone calls and letters, the money was not immediately forthcoming and in fact official notification of a grant of R3,000 for sports facilities was eventually received by the appellant only during the first week of September, 1968, ie. approximately 18 months after it had originally been promised. Even then, according to the appellant, it was forthcoming solely because he had raised the matter with the Secretary of the Department, while on an official visit to Pretoria at the end of August, 1968.

In the meanwhile the work on the tennis courts, etc. had proceeded and they were completed in May, 1968.

The...../10.

The departmental tardiness already described placed the appellant in a position of embarrasment in that he did not have the funds with which to pay the contractor. It was in these circumstances that he decided to use portion of the monies accruing to the regional authority from the pensions payable to residents in the old-age home to meet the outstanding amounts due to the contractor. The amount of this payment is not clear from the evidence. According to appellant, it amounted to approximately R500-00 or R550-00 but this is inconsistent with the evidence of the contractor himself, Wilmot Tengwa (which evidence I shall consider in more detail later) in that the latter deposed to having received R600-00 in cash as a final payment in respect of the tennis courts. Moreover, some support for the figure of R600-00 and for this story generally is to be found in the evidence of the State witness Moolman, an accountant in the Department, who examined and analysed the books and financial records in the office at Peddie. His investigations revealed that on the 7th May, 1968 a cash treasury draft was drawn in an

amount..../11.

amount of R1,200, the counter-foil indicating that it was in respect of the pension monies accruing to the inmates of the old-age home. On the following day a portion of this, viz. R600-00, was re-deposited in the bank, leaving an amount of R600-00 which was unaccounted for and represented a cash deficit. This may well have been the amount paid to Tengwa, though naturally, the possibility of appellant and Tengwa having tailored their story to fit in with these financial records must not be overlooked.

The appellant further stated that at the beginning of 1968 a start was made with the building of a residence for the superintendent of the old-age home. Although a grant of R6,000-00 had been requested for this purpose, an amount of only R3,000-00 was allowed by the Department. This was related to a plan of the proposed residence which the management of the old-age home considered inadequate for its purpose. It was accordingly decided to build a larger house. This necessitated the provision of additional funds and to meet the requirements in this respect the

appellant...../12.

appellant in June, 1968, paid an amount of R550 out of pension monies to the contractor, who again happened to be Wilmot Tengwa. Subsequently, in July, 1968, appellant paid a further amount of R200-00 to Tengwa for work allegedly done in building offices for the Myanisos tribal authority. The reason for doing this was again that there were no official ~~official~~ funds available.

During November, 1968, the transfer of administrative authority from the Department to the regional authority was taking place and instructions were given that the necessary office accomodation and facilities be provided as soon as possible. Some of the tribal authorities possesed the necessary funds to do this, others did not. Where funds were not available, the appellant assisted them from pension monies, these amounts being paid either to the tribal authority itself or to the building contractor concerned. In this way amounts of R150-00 and R100-00 respectively - were paid during November, 1968, to Ella Dolitha - representing the Magelitwana tribal authority - and to Chief Douglas

Msutu...../13.

Msutu - representing the Tsego tribal authority. In January, 1969,a further R30-00 was paid to the contractor working on the Magelitwana tribal authority offices, one May Mbolo.

Appellant states further that as part of the new deal the Peddie Bantu school board received the old magistrate's residency as a residence and that in November, 1968, he expended R60-00 on having it renovated, this amount being paid to the contractor, the ubiquitous Tengwa.

The remaining irregular payments out of the pension funds related, so appellant avers, to certain extensions to the old-age home, consisting of a number of rondawels and a block comprising bathrooms and toilets. Funds had been granted by the Department for this purpose and contractors were engaged to erect the rondawels at a price of R75-00 each. (It would appear that this price excluded the cost of materials which were paid by the regional authority from the monies granted). Eventually it transpired that the contractors, Jacob Dwingi (otherwise known as "Jacob

Johnie")..../14.

Johnie") and May Mbalo, were unable to complete their work at the contract price and it was agreed to pay them an extra amount of R15-00 per rondawel. This amounted in each case to an additional payment of R105-00. Because no funds were available appellant paid these amounts out of pension monies. This occurred in January, 1969. The same problem arose in regard to the bathroom block and the contractor, May Mbalo, was paid an additional amount of R250-00 from the same source. in March, 1969. In aggregate all these payments total R2,150-00, which is approximately R100-00 in excess of the total shortfall in respect of the pension monies. The appellant stated in evidence that the actual misappropriations committed by him exceeded the total amount alleged in the charges against him.

The evidence reveals a considerable measure of support for appellant's version of the facts. I have already referred to the testimony which tends to substantiate his alleged energy and enthusiasm in implementing governmental policy and developing local institutions and facilities

within...../15.

within his area of jurisdiction. Departmental tardiness in providing funds was confirmed by Crossman, who added that one usually had to wait before commencing any work. The delay in the receipt of the R3,000 for sports facilities appears to be substantiated and undisputed. There is no doubt that the tennis courts and ancillary facilities were built and Crossman confirms that they were completed in the first half of 1968. It also seems to be clear that the regional authority did not have sufficient funds to pay for this work. In this connection an important defence witness was Gideon Stemper. He held a responsible position as a member of the regional authority council. He was a member of the old-age home committee and of the tennis building committee (apparently sub-committees of the regional authority). He gave corroboration of the fact that the regional authority had only an amount of just over R400-00 for this project and that this proved insufficient. The problem was put to the appellant who promised that he would endeavour to obtain funds from the authorities. The contractor

complained...../16.

complained that he had not been paid but subsequently he was paid. This additional money was not provided by his committee. The tennis courts were completed in about May, 1968.

The contractor, Wilmot Tengwa, was also called as a defence witness. He gave evidence in regard to the various building contracts with which he was connected. In regard to the tennis courts he confirmed May, 1968, as being the approximate completion date and also supported the appellant and Stemper in saying that the available funds proved insufficient. He was then paid an additional amount of R600-00 in cash by the appellant in respect of this contract.

Similarly, the evidence of Stemper and the other defence witnesses provided corroboration of the payment of the other sums referred to above. Stemper was able to confirm that, for the reasons stated by the appellant, the monies available to build the superintendent's house proved insufficient, that the contractor complained, that this complaint

was...../17.

was referred to the appellant and that subsequently the complaints ceased - from which the witness deduced that the contracter's claims had been satisfied. More or less the same position obtained in regard to the rondavels. Stemper did not give evidence in regard to any of the other building works.

The receipt of these sums by either the appropriate contracter or, in two instances, by the representative of the tribal authority concerned is with one exception, substantiated by the evidence of these persons, who were all called as defence witnesses. The exception was Msutu about whose evidence I shall have more to say later. A significant feature of the evidence of those who deposed to having received these amounts was that they all stated that the payments in question had been made in cash. This was in contrast to the normal practice of payment by cheque. In some cases there is an accurate correlation between the approximate dates of payment alleged by appellant and those deposed to by the recipients; in other cases the vagueness

of...../18.

of the recipients' evidence as to date of receipt prevents a correlation; and in one instance, Dwingi, the contracter deposed to a different date, viz. March, 1969, as compared with January, 1969, as deposed to by the appellant.

A number of critisisms have been levelled at the defence evidence and there is undoubtedly substance in much of this criticism. Starting with the appellant himself, a factor of considerable significance is the untrue statement which he made in the course of an interview with Major Reyneke of the South African Police on the 20th June, 1969. At this interview the appellant was told of the alleged offence and was confronted with the documentary evidence. The statement which he then made and which was recorded in writing by Reyneke is of an exculpatory nature and contains a number of untruths, half-truths and suppressions of the truth. Broadly, it amounts to a complete denial of responsibility and evidences an attempt upon the appellant's part to pass on the blame to Makalima, a clerk in the office of the Bantu Affairs Commissioner at Peddie. This statement

reflects...../19.

reflects adversely upon the appellant's reliability as a witness and does not redound to his credit generally. On the other hand, it is common cause that the statement is untrue and there are, in addition, certain other factors to be borne in mind before the statement can be seen in its true perspective. Firstly, the appellant had an interview with the deputy-secretary of his Department, one De Wet, a few days later, i.e. on the 24th June, 1969. At this interview he gave an explanation in regard to the missing monies and he followed this up with a letter the following day. The letter purports to repeat the explanation given to de Wet. The latter was called as a witness and he did not suggest that there was any material discrepancy between the explanation in the letter and that given to him verbally. This explanation, though less detailed, accords generally with the appellant's evidence at his trial. In the letter the appellant conceded that his conduct ~~was~~ "onreëlmatig, onverantwoordelik en verkeerd was", but offered to submit "die nodige bewysstukke of verklarings" to substantiate

his...../20.

his explanation and, pending the collection of this evidence, to pay provisionally to the regional authority the full amount of the shortfall. In the event no such evidence was submitted to de Wet and the letter was handed to the police. On the 24th July, 1969 the appellant wrote to Reyneke requesting a further interview to enable the appellant to place before him "die werklike feite". At that stage the Attorney-General had already decided to prosecute and nothing came of this offer.

The appellant's own evidence in regard to this statement is far from satisfactory. He was very evasive in many of his replies but this seems to have stemmed largely from an unwillingness on his part to admit that he had lied - an unjustified but, perhaps, understandable attitude. Generally, his explanation was that he prevaricated in his interview with Reyneke because he wished first to put his case to the Department. Although not entirely convincing, the explanation cannot be summarily rejected. And, as appellant's counsel pointed out, his whole conduct in this

connection...../21.

connection must be seen against the background that even on his own story he was guilty of a serious irregularity. This is, therefore, not quite the case of an accused who fails, when confronted with an accusation by the police, to furnish the innocent explanation which he subsequently gives at the trial. The appellant's explanation was not one of complete innocence and, moreover, he did give this explanation shortly afterwards to his department. It seems reasonably possible that he did genuinely hope to smoothe out the difficulties with his Department and for this reason decided to withhold the truth from the police.

Another material criticism of the appellant's story is that not only did he fail to keep any contemporary account of these irregular payments but he also destroyed a number of receipts which he says he obtained from the recipients at the time of payment. The appellant knew that he was acting irregularly and that the receipts constituted substantiation of the fact that monies had been expended for public purposes and not been put into his own pocket.

In...../22.

In the circumstances his destruction of these receipts when he left Peddie seems so foolish as to raise serious doubts as to whether they ever in fact existed. Further doubt is cast upon this evidence by the fact that some of the recipients in question denied, or were unable to recall, having signed such receipts. On the other hand, others such as Tengwa (admittedly his evidence is somewhat vacillating on this point), Dolitha and Dwingi stated that they did sign such acquittances. This is very important because unless this evidence can be rejected as being deliberately untruthful - a matter with which I shall deal later - it supplies strong corroboration of the fact that appellant did have such receipts; and, in that event, since the receipts were not available at the trial, his explanation that he destroyed them seems reasonable.

The appellant was also criticised for not having regularized the position once the grant of R3,000 became available. The grant was, of course, earmarked for the provision of sports facilities and thus it is only in respect

of...../23.

of the R600-00 allegedly spent on the tennis courts that such regularization could have taken place. Portion of the R3,000-00 was apparently devoted to the provision of a rugby field, pavilion and sports equipment but at the time when appellant left Peddie there was still an amount of R1,900-00 lying unused. His explanation, in answer to a question from the court, as to why he did not rectify the position was:-

> "Toe u die R3,000-00 ontvang, waarom het u nie toe onmiddellik hierdie saak reggestel nie?-- Ek kon dit miskien gedoen het deur 'n verduideliking aan Pretoria te gestuur het en vir hulle gesê het dat ek reeds daardie gelde vir daardie doel aangewend het en dat ek nou vra dat die fondse vir daardie doel moet oorgedra word aan die Streeksowerheid, maar ek het dit nie gedoen nie. Ek voel, die geld het vir my te laat bereik en dit was aangewend. Soos hier in my brief uiteengesit, ons het nog baie werk gehad wat ons nog graag daarmee wou gedoen het."

The explanation is not entirely satisfactory but I am not

convinced...../24.

convinced that it can be rejected outright.

On the 28th May, 1968, the appellant signed a treasury draft for an amount of R859-95. The draft itself was made payable to the Magistrate and Bantu Affairs Commisioner, Peddie, but he counter-foil reflected that it was drawn in favour of "N.G. Peddie" and that the reason for payment was "sosiale pensioene". There is some support for the suggestion that at this stage there was an amount still due to the N.G. Sendingkerk in respect of the period immediately prior to the transfer of responsibility for the old-age home to the regional authority in July, 1967 and that this was why the counter-foil was made out in this way. This does not, however, appear to explain the discrepancy between the counter-foil and the draft itself. Nor is the appellant's evidence upon this aspect of the matter at all convincing. Nevertheless, the fact of the matter is that this money was misappropriated and, although these blemishes in the appellant's evidence do affect his credit-worthiness generally, they do not point decisively to the form which

the...../25.

the misappropriation took.

Finally, evidence was led to show that a total amount of R22,500-00 was granted for the erection of the rondawels and other extensions to the old-age home; and that at the time the appellant left Peddie there was still an unused balance of R5,480-95. On the face of it this evidence, which was given by Crossman, would seem to destroy appellant's story in regard to shortages of money to pay the contractors engaged upon this work. The evidence is, however, not decisive because under cross-examination Crossman made the following concession:-

> "With regard to this project of building bathrooms and lavatories, would you agree that at the time that Mr. Cloete left Peddie, there was still work to be done on that project? -- Yes, quite correct.
>
> Which hadn't been paid for? -- Quite correct."

As regards the other defence witnesses, other than Stemper, a curious feature of the defence case is the series of documents (comprising Exhibit M) which were handed

in...../26.

in and reflect the payments alleged by the appellant. Each such document contains particulars of building work done and the amount of the claim, a certification of the correctness of the claim and an acknowledgement of the receipt of the amount in question, signed by the recipient. Although in each case reflecting the date of the alleged payment, the documents were in fact drawn up shortly before the trial and signed by the recipients at pre-trial consultations. It would seem that they were supposed to represent copies of the original acquittances alleged to have been obtained by the appellant. How the appellant, with his judicial experience, or indeed his attorney, could have thought that these documents really proved anything is something of a mystery to me and I do not think that they advance his case one iota. In certain instances they proved a source of embarrassment to the defence in that one of the witnesses, Msutu, stated in court that he did not recognise the document alleged to have been signed by him and suggested that there might have been a mistake; and two others, Dwingi and

Mbalo...../27.

Mbalo, though admitting that they signed documents, professed ignorance of the purpose or content thereof. Msutu's evidence is something of an enigma in more than one respect. He commenced his evidence by saying that a contractor was employed to build certain extensions to buildings under his control, that his tribal authority did not have sufficient money to pay for the whole project, that the necessary money was obtained from the appellant's office and that he signed for the money and handed it to the builder. This might have been in November, 1968. He then proceeded under cross-examination to state that the money received from the appellant was paid to him prior to November to cover the cost of "cleaning the veld, stumping and so forth" and that no money was received for any building work. He thereafter denied his signature to the document along the lines mentioned above. I think that it can rightly be said that his evidence is quite worthless.

In dealing with the evidence of the defence witnesses the magistrate referred to the inconsistencies in

their...../28.

their evidence, both as to the signing of the original acquittances and the documents comprising exhibit M, and then proceeded:-

> "Dit is nie nodig vir die Hof om verder in te gaan op die getuienis van die vier getuies nie. Hulle het die Hof geensins beïndruk in die eerste plek as getuies nie. In die tweede plek was hulle so vaag, hulle geheue so swak omtrent wat wel gebeur het, watter gelde hulle waar en wanneer ontvang het dat geen Hof enige waarde daaraan kan heg nie.
>
> Die feit in die laaste instansie is dat hierdie persone wel gelde ontvang het van die beskuldigde. Gelde wat gemagtig was vir die werk wat hulle gedoen het. Hulle sou nie weet waar hierdie besondere geld vandaan gekom het nie, maar soos die Hof reeds genoem het, is dit nie slegs 'n feit dat die Hof geen staat kan maak op hulle getuienis nie. Dit gaan ietwat verder. Dit toon aan op die getuienis van een en ook tot 'n groot mate van 'n tweede van die getuies die mate waartoe beskuldigde uit sy weg gegaan het om sy spore te probeer dek."

It seems to me that this is an oversimplification of the position and that the magistrate failed to grapple

with...../29.

with the real problems presented to the State's case by this evidence. I say this for the following reasons and with reference to the following considerations:-

(1) In regard to the tennis courts, there is no doubt whatever that they were built; and there is the evidence to which I have referred to corroborate appellant's evidence to the effect that the regional authority did not have sufficient money to pay the full cost thereof, and that the appellant provided an amount of R600 in cash to meet the shortfall. There is nothing vague about this evidence. Moreover - and this is of great importance - at the time when this payment was made, viz. May, 1968, there was no fund available to the appellant from which it could properly be made. And, it is clear that, even if the R3,000-00 which was granted in September, 1968, had been available at the time of the payment of R600-00, it was in fact not paid out of this grant. From where then did the R600-00 come? It is true that the recipient is unable to say from where the money came but the appellant can, and does. And, what is

more...../30.

more, he points to what, on the evidence, appears to be the only plausible source - other than his own pocket. To my mind, this evidence presents a very formidable obstacle to the State case and it can be removed only by a rejection, as being untrue, of the entire story concerning the financing of the tennis court project, as told by Stemper, Tengwa and the appellant. I shall return to this possibility later.

(2) As regards the amounts allegedly spent upon the superintendent's house and the offices of the various tribal authorities, there is no evidence to refute - or even cast doubt upon - the averment that this work was done. It is true that again the recipients could not say where the money came from but, on the other hand, the State did not suggest any authorized source of funds for these payments; nor was it shown that the financial records of the office reflected, or at any rate, covered these payments. That being so, the question again arises; from where did the money come, if not from the misappropriated pension monies? This question can only be obviated by a rejection

of...../31.

of the defence evidence in this regard as having been concocted.

(3) The monies paid in respect of the rondavel project fall into a different category in that there the State did put forward evidence designed to show that there was a lawful source for such monies. As I have already indicated, however, this evidence is not conclusive.

(4) A significant feature of these payments, as I have already remarked, was that they were made in cash, even where large sums of money were involved. The proper and normal procedure, as the evidence shows, is for such payments to be made by cheque and several of the contractors depose to having received previous payments (i.e. other than the payments in question) by cheque. This lends support to the suggestion that the appropriation of monies to these payments was unauthorized and could not be handled in the usual way. If this was so, then the only unauthorized source of such money that has been suggested is the missing pension monies.

The...../32.

The only way in which the State can overcome those obstacles is to contend that the evidence of all these payments - at any rate many of them - is totally untrue. This is a difficult case to advance because it postulates that, apart from the appellant himself, five other persons (I omit Msutu for the moment), acting either independently or possibly, in concert, concocted evidence corroborative of the appellant's story. Mr. Redpath, for the State, did actually contend that this was what happened but, in my view, the contention is without substance. The magistrate, himself, made no such finding and indeed it would have been difficult for him to have done so, inasmuch as such a suggestion was never put to any of the defence witnesses. Apart from saying that the defence witnesses in no way impressed as witnesses, the trial Court has not given any reasoned assessment of the creditworthiness of these witnesses. In fact I gain the impression that the magistrate really disposed of their evidence on the basis that it was vague and of no real significance. Nor does a perusal of the record convince one

that...../33.

that this was such a concoction. Some witnesses, such as Stemper and Dwingi for example, appear to have given their evidence quite convincingly; others less so but in their cases allowances must be made for other factors, such as indifferent memories, illiteracy, etc. Mr. Redpath went further and actually suggested a motive for concocting this evidence, namely, that the contractors and the appellant formulated a scheme for sharing the misappropriations and using the allegation of (non-existent) additional works as a story to cover the theft. There are many flaws in this suggestion. Not only does it sound most improbable but one imagines that, if such a plot were formulated, it would not commence with a taking of money from an unauthorized source. It also fails to dispose of the evidence of Stemper., who was not a contractor.

Having weighed all these factors as carefully as I can, I have come to the conclusion that although appellant's conduct furnishes much ground for suspicion - which was not entirely dispelled by his evidence - in view of all the

corroborative..../34.

corroborative evidence to which I have alluded, I cannot hold that the State established beyond a reasonable doubt that the appellant stole the monies in question for his own personal benefit. The magistrate appears to have overlooked the difficulties which I have elaborated above and, accordingly, to have come to a wrong factual conclusion. I am, moreover, unpersuaded by the view to the contrary, expressed by the Court a quo. In my opinion, therefore, the case must be approached on the basis that there is a reasonable possibility that the appellant's story, in its broad outline, is true. It is conceded, as I have already stated, that this does not affect the conviction but clearly it must have a very significant effect upon sentence. Taking all the circumstances into account, I consider that an appropriate sentence would be nine months imprisonment suspended upon appropriate conditions.

Thus, while the conviction remains undisturbed, the appeal against the sentence is allowed and the following sentence is substituted for that imposed by the trial court:

"Nine..../35.

"Nine months imprisonment, suspended for 2 years on condition that the accused does not during the period of suspension commit any offence involving an element of dishonesty".

.....
CORBETT, A.J.A.

Ogilvie Thompson, J.A.)
Wessels, J.A.) Concurred.

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