

(APPELLATE DIVISION)

In the matter between:-

JOHN FREDERICK BARRIE RYANAppellant.

AND

THE STATERespondent.

CORAM: HOLMES, POTGIETER ET TROLLIP, JJ.A.

HEARD: 24th September 1970. DELIVERED: 30th September 1970.

J U D G M E N T.

POTGIETER, J.A.:-

Appellant in this appeal was charged in the Cape Provincial Division on nine counts of fraud, three counts of theft and fourteen counts of contravening section 225 bis of the Companies ¹ Act. To these charges he pleaded not guilty but was convicted on the first four charges of fraud. He was acquitted on all the remaining charges. A sentence of eight years was imposed by Corbett, J., who refused an application for leave to appeal to this Court on the sentence only. Leave having been granted by a Judge of this Division on the sentence only, the appellant is now on appeal to this Court.

I set out hereunder briefly the four counts on which appellant had^s been convicted as they appear in the indictment. In the first count appellant was charged with the crime of fraud, in that, at Cape Town, on or about 3 December 1958, and thereafter on various occasions until 5 January 1965, he did wrongfully, unlawfully, falsely and with intent to defraud, give out and pretend to Azriel ^FFine, in his capacity as director of Joseph, Bond & Jeans (S.A.)(Pty.) Ltd., that financial statements of Lola Zinn Furniture (Pty.) Ltd. (hereinafter referred to as the "Company") for the periods 1 July 1957 to 30 June 1958, 1 July 1958 to 30 June 1959, 1 July 1959 to 30 June 1960, 1 July 1960 to 30 June 1961, 1 July 1961 to 30 June 1962, 1 July 1962 to 30 June 1963 and 1 July 1963 to 30 June 1964, copies of which statements were annexed to the indictment, were in agreement with the books of account of the Company, and that in his opinion they gave a true and fair account of the financial position of the Company for the said periods; and did by means of the said false pretences induce the said Azriel Fine, in his aforesaid capacity, to the prejudice of the said Joseph, Bond & Jeans (S.A.)(Pty.) Ltd., to make available to the Company during

3/ the

the period 13 December 1958 to 31 May 1966 credit facilities and to advance to the Company the total amount of R797350; whereas in truth and in fact, when the accused so gave out and pretended, he well knew that the said financial statements were not in agreement with the books of account of the Company and that in his opinion they did not give a true and fair view of the financial position of the Company for the said periods. Particulars referring to schedules annexed to the indictment ^{were} ~~are~~ given relating to the respects in which the entries in these accounts did not agree with the books of the Company.

The allegations in the indictment relating to the other three counts are substantially similar to those in the first count, save that they refer to different complainants and that the amounts of the advances in each case are different. In count 2 the complainant is a company known as M.H. Goldschmidt (Pty.) Ltd. and the amount of the advances is alleged to be R1,761,828.75.

~~In the third count the complainant is a firm known~~
as Neville Griffen & Co. and the total amount of advances is alleged to be R138,554.68. In the fourth count the Standard

4/ Bank

Bank of South Africa is the complainant and the total amount of the advances is alleged to be R612,309.32.

The facts giving rise to these charges as found by the trial Judge are set out by him as follows:

" At all material times the accused, a chartered accountant, practised in Cape Town as an accountant and auditor under the style of J.F.B. Ryan & Company. In August, 1956, a company known as Lola Zinn Furniture (Pty.) Limited (which I shall hereinafter refer to as the Company) was formed by two persons, Lola Zinn and Edide Smith. The purpose of forming this company was to take over an insolvent furniture manufacturing business, previously run by Edide Smith and one Factor through the medium of a proprietary company known as Fablo (Pty.) Limited. The company evidently purchased the business from Fablo and did not take over any of the latter's liabilities. The company commenced business as bedroom furniture manufacturers in September, 1956. The accused was appointed accountant and auditor to the company at the first meeting of the company held on the 10th September, 1956.

Zinn, who was one of the prime movers in the formation of this company, had previously worked for another furniture manufacturer, I. Kernoff & Company for 22 years and had

very considerable knowledge and experience in regard to the design, manufacture and marketing of bedroom furniture. He, together with Smith was appointed a director of the company and Smith, it appears, was virtually illiterate, although a skilled and experienced cabinet maker. From the outset Zinn supervised the factory generally, worked on furniture designs and attended to the administration and financing of the business while Smith devoted himself mainly to the running of the machine shop and the technical side of furniture manufacture. Smith does not appear to have had any real say in the spheres of administration and ~~finace~~ finance.

Zinn himself is a person with a very limited education and virtually no knowledge of book-keeping or accounting or company administration. It was for this reason that the accused's firm was appointed, not only as auditor to the company but also as bookkeeper and also to do a good deal of the secretarial work related to the company's business. In accordance with this appointment the accused's firm kept all the books of the company, apart from certain books of original entry such as receipt books, Bill books, invoice books and cheque books. The accused's firm also attended to other administrative matters such as Income

Tax, Company's Act returns, the keeping of company Minutes and so on.

From the outset the business of the company was ~~the~~ hopelessly undercapitalised. The directors were initially each allotted 100 £1 shares and their participation in the issued share capital was increased from time to time by the conversion of portions of their Directors' Loan Accounts into share ~~capital~~^{cop}, but this was the limit of the share capital available to the company.

Another problem which manifested itself later and became progressively more acute arose from the fact that the company accumulated huge stocks of raw materials. This was a deliberate policy on Zinn's part and apparently flowed, partly, from a fear that he might run short of vital materials, and partly from an optimistic belief that the company was always on the verge of great financial success. Having regard to the company's chronic shortage of capital the financing of these large stocks of raw materials presented a major problem and one which Zinn sought to overcome by obtaining short term loans and credit facilities from various sources, including the company's banker (the Standard Bank of South Africa Limited, Caledon Street branch) and certain

financial houses, referred to generally in this case as the Shippers, inter alia, Joseph, Bond & Jeans, later name~~d~~/ Allied National Corporation, M.H. Goldschmidt and Neville Griffin.

Certain of the persons providing the company with short term loans, other than these shippers, demanded what are alleged to have been extortionate rates of interest, either in cash or in kind, and the cost of thus acquiring the necessary working capital became disproportion^fately high. Zinn himself contends that the large sums which the company had to pay annually by way of interest and other similar finance charges constituted one of the main reasons for the company's inability to establish a profitable business.

Reverting to the early stages of the company's existence the record shows that in the first accounting period, that is, the nine months from September, 1956, to the 30th June, 1957, the business produced a loss of £108.9. This is reflected in a set of financial statements drawn and certified by the accused's firm. At this stage it is necessary to digress slightly to describe how the company's books were kept and how the annual financial statements were prepared.

The actual keeping of the company's books was done by various clerks in the accused's

employ, notably one R.A. Wilson, who became a State witness in this case. These clerks would visit the company's factory periodically, usually once per month, and stay two or three days bringing the books up to date. Wilson was generally in charge of the work and he would discuss any queries and problems with Zinn. The accused himself would not usually participate in these monthly visits to the factory. At the end of the financial year the following procedure would be adopted in regard to the preparation of the annual financial statements which always related to the year ending at the 30th June. Firstly, Wilson would go through the books and make all necessary adjustments and about in October or November of each year prepare a trial balance and draft financial statements relating to the financial year ending on the previous 30th June. These draft financial statements would include a Manufacturing Account, a Trading Account, Profit and Loss and Appropriation Accounts and a balance sheet. At that stage many of these accounts would be incomplete because they could not be finalised until certain further information was obtained. A meeting would then take place at which Zinn, Wilson and the accused would be present. At this meeting Zinn would provide Wilson with the necessary closing stock figure as ascertained from his annual stock taking. With

this information Wilson would then, at the meeting, complete the various draft financial statements and when he had done so they would be laid before the meeting. The accounts would then be discussed and the year's trading generally reviewed. The draft accounts so finalised would then be prepared in final form and certified.

In regard to the financial period of nine months, that is, the period from September, 1956 (when the company commenced business) to the 30th June, 1957, this is all that happened.

After the end of the 1958 financial year the usual meeting was held for the finalisation and discussion of the accounts. After being furnished with the stock figures Wilson produced draft financial statements showing a profit of £196.13.10. At that stage the company had become dependent upon credit facilities provided by one of the firms of shippers, namely, Joseph, Bond & Jeans, and Zinn adopted the attitude that it was necessary to present the shipper with, what he perhaps somewhat euphemistically described as, a more favourable balance sheet. At Zinn's suggestion Ryan made a number of adjustments to Wilson's draft financial statements and in this way there was produced a second set of financial statements. This second set re-

flected a profit for the 1958 financial year of £5,296.13.10. The original financial statements showing a profit of £196.13.10 were prepared in final form, duly certified, and submitted together with the usual Income Tax Return to the Receiver of Revenue while the second more favourable financial statement was also certified and submitted to the shipper.

In the 1958 financial statements the increased profit figure in the second set of accounts was achieved by a few simple adjustments. Included among the expenses in the Profit and Loss Account were items in respect of advertising and items each included both actual out of pocket expenses, for which there were vouchers, and also estimated allowances to the directors for expenses incurred by them personally in the interests of the company. One of the adjustments made in the second set of accounts was to omit these estimated allowances, which totalled £2,100, and the other adjustment was to reduce the Purchases figure by 3, £3,000, that is, from £53,319.14.3 to £50,319.14.3. These adjustments account for the difference in profit on the two sets of financial statements of £5,000. The increase in net profit resulted in a corresponding increase in the Appropriation Account figure and in the balance sheet this was compensated

for by a reduction of £3,000 in Bills Payable and a reduction of £1,050 in each of the directors' Loan Accounts. None of these adjustments was ever reflected in the company's books and it is stated by Zinn and Wilson that the resultant profit figure was a fictitious one.

What was done in regard to the 1958 financial statements set the pattern for subsequent years. In 1959 Wilson did not attend the annual meeting because he was studying for accounting examinations, but he drew up a draft set of accounts which was completed and amended by the accused. Thereafter, in the years following, the annual meetings were attended by the three of them. The normal procedure would be that after the accounts had been laid before the meeting and discussed, the accused would take them away with him. He would then keep them a few days, sometimes consulting the books of account during this period. And then he would return them to Wilson with a list of adjustments written out on a sheet of paper. These would always have the effect of improving the profit figure. Wilson would then incorporate the adjustments in the draft in order to produce the so-called second set of financial statements destined for the shippers and for the Standard Bank. The draft, as it was prior to such amendment, would constitute the form of the financial statement submitted to the

Receiver of Revenue. These adjustments had no factual basis and would not be incorporated in the books of the company.

In these subsequent years the scope and number of such adjustments increased considerably and embraced, in addition, such items as stock figures, sales discounts, etc. Moreover, the Appropriation accounts were made to include fictitious provisions for taxation based upon the adjusted profit figure and similarly the balance sheet was altered so as to list such tax payable amongst the liabilities. In certain years provision was also made for fictitious loan levies.

At the beginning the discrepancy between the profit figure reflected in the second set of financial statements and the true profit as reflected in the financial statements submitted to the Receiver of Revenue was not a large one, but as the years went by and the financial success of the company deteriorated this discrepancy began to widen very substantially. Thus, in 1962 the financial statements submitted to the Receiver of Revenue reflected a loss of R1,040.81, while the financial statements to the shippers showed a profit of R16,959.19. The total discrepancy between these two sets of accounts insofar as the profit figure is concerned being R18,000.

In 1963 the Receiver's financial statements reflect a loss of R28,017.52 whereas the financial statements ~~by~~ submitted to the shippers reflect a profit of R23,135.57, a discrepancy totalling R51,153.09. And in 1964 the gap was widened even greater because the financial statements submitted to the Receiver show a loss of R41,804.14 and the financial statements submitted to the shippers a profit of R28,303.56, a difference of no less than R70,107.70.

These annual^{al} discrepancies in the net profit figures had accumulative effects upon the Appropriation Account so that by 1964 the difference between the two sets of financial statements in this respect amounted to R160,846.74.

Eventually matters were brought to a head by a fire which occurred on the factory premises on the 29th April, 1966, and caused very considerable damage and destruction as regards the factory premises, the machinery and equipment and the stocks. Thereafter certain investigations were made by the shippers which eventually brought to light the discrepancy between the financial statements presented to them and the company's books. "

The learned Judge a quo then proceeded to state

14/ that

that the ^hskippers and the bank agreed to make substantial credit facilities available to the Company and that, in pursuance thereof, they advanced considerable amounts to the Company from time to time. He also found that in allowing certain of these credit facilities and making certain of these advances they were influenced, if not wholly, at any rate to a very substantial degree by the various fictitious financial statements presented to them each year. The learned Judge found that they would not have granted these credit facilities and made these advances had they been informed of the financial position of the company as reflected in its books.

Each set of the relevant annual accounts was verified by the ^{usual}~~annual~~ auditor's certificate signed by or ^{on}_^ behalf of the appellant stating that the accounts were in agreement with the books of account and in the appellant's opinion gave a true and fair view of the state of the Company's affairs as at the end of the particular financial period.

Mr. Mendelow, for appellant, urged that the sentence ~~imposed was vitiated by irregularity or misdirection and/or was~~ so severe that no reasonable Court would have imposed it.

It has been authoritatively laid down by this

Court
15/ ~~can~~

Court in several decisions that the imposition of an appropriate sentence is pre-eminently in the discretion of the trial Judge and that the power of interference by this Court is relatively limited. The basic enquiry is always whether it can be said that the judicial discretion was not properly exercised. When can this be said, seeing that reasonable men may differ in the matter of sentence? In answering this question some yardstick is desirable; and an accepted test, in the ~~absence~~^{absence} of irregularity or misdirection, is whether there is a striking disparity between the sentence passed and that which the Court of appeal would have passed. This test was propounded by this Court in S. v. de Jager and Another, 1965(2) S.A. 616 (A.D.) at p. 629. It was applied by this Court in S. v. Berliner, 1967(2) S.A. 193 (A.D.) at p. 200; S. v. Masala, 1968(3) S.A. 212 (A.D.) at p. 214; and very recently in S. v. Whitehead (A.D.) (31 August 1970).

Mr. Mendelow, for appellant, advanced several grounds upon which he relied as constituting misdirections committed by the learned Judge a quo. I do not find it necessary to deal with these ^{alleged} ~~misdirections~~ ^{misdirections}, because, as I shall endeavour to show hereunder, there is a striking disparity between the sentence passed and the sentence this Court would have passed. On that footing this Court is, as

in the case of a misdirection by the trial Court, at large and is therefore entitled to substitute its own sentence for that passed by the Court below.

Before I deal with the considerations which induce us to ameliorate the sentence passed by the Judge a quo, I would stress the fact that appellant had indeed committed four serious offences. I find myself in respectful agreement with the following remarks made by the learned Judge a quo when he passed sentence:-

" In assessing the gravity of what you have done I am compelled to take cognizance of the fact that you are a professional man, that you are and were at all material times a member of an important and honourable profession. Because of that I believe that you could see and realise far better than Zinn the real consequences of the dishonest path upon which you and he embarked together. You are not only a professional man but you were also Zinn's professional adviser. You were in a position to advise a man with very little background, very little education, very little real conception of what goes on in business. When the test arose and an improper course was proposed by Zinn you did not avail yourself of that important opportunity to advise your client upon the wrongness of what he was proposing to do, to impress upon him the potential consequences of what he was proposing; and, who knows,

had such advice and warning been tendered to Zinn at that stage, all his trouble, all this unpleasantness might not have been avoided? Generally speaking, too, it is of the utmost public importance that the public and the commercial world generally should be able to rely implicitly upon the integrity of auditors' certificates. Without such integrity commercial life can be very seriously impaired and that is a matter which strikes at the very roots of organised society. It is, therefore, the duty of the Court when sentencing an accountant for acts of professional dishonesty such as these, to bear in mind the importance of emphasising to members of the profession and to the public, generally, the trust and reliance which is placed upon such practitioners by society and the very grave and onerous duty which rests upon them to ensure that such trust is well founded. "

It cannot be over-emphasised that an auditor who perpetrates frauds by issuing false financial statements certified by him as being true, when he knows them to be false, is guilty of a betrayal of his professional trust. He therefore commits a most serious offence and it is in the interests of society that a heavy punishment is called for in order to have the necessary deterrent effect. There can

be no doubt that appellant, over a period of six years, deliberately ~~paper~~ prepared false balance sheets for the purpose of aiding his client in obtaining enormous monetary advances from the complainants on the strengthth of those false financial statements. Although the evidence shows that the advances were made, not only as a result of the production of those false financial statements, but in addition as a result of fictitious statements and invoices submitted to the complainants by Zinn personally, presumably without the knowledge of appellant, it is clear that, without the production of the false financial statements prepared and certified as correct according to the books of the company, those advances would never have been made.

Moreover, although appellant may not have thought that the false financial statements would have placed his client in the position of obtaining those enormous monetary advances, it is manifest that he should have and had in fact foreseen that ^{the} production of his false financial statements, certified to be a correct reflection of the company's books, might potentially have caused substantial monetary loss to others.

In the case of S. v. Zinn, 1969(2) S.A. 537 at

p.540 Rumpff, J.A., said:-

" It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society. "

My remarks abovementioned dispose of the considerations as to the crime and the interests of society.

In dealing with the offender in the instant case, there are four main factors which, in my judgment, serve to ameliorate the sentence.

First, the depth of his remorse and contrition. The evidence led in mitigation manifestly demonstrates this. I need only cite a few remarks by the Reverend J.H. Boyd who was called to testify in mitigation of sentence and whose evidence was accepted by the Court a quo:-

" I know Jack Ryan is in trouble. I can gather that he is in very serious trouble. I can gather that he is in very serious trouble, but knowing Jack Ryan as I know him, I am con-
vinced that the trouble he is in has been caused not through any desire on his part to hurt anyone. I do not believe, within my very heart I do not believe, that Jack Ryan would knowingly injure anyone. I believe

he is in trouble today because he has desired to help someone Jack Ryan is a broken man. He is a man who is eating his heart out day and night with remorse, in a state of abject penitence, regret, shame. He cannot bear to think of the fact that he has done this himself, that he has caused so much sorrow to his wife, to his aged mother, who is a godly woman, to his family and the trouble that he has caused generally through what he has done. He is deeply penitent. He longs for the opportunity to make restitution. "

Second, that appellant committed the frauds without any intention to obtain, as a result thereof, any personal gain. In fact he did not gain a single cent for himself. This appears to be common cause. I consider this to be an important factor in appellant's favour in the circumstances of this case. It seems to me to be axiomatic that a fraud committed for the purpose of personal monetary gain is far more serious than a fraud committed for the purpose of such gain to someone else.

Third, and this is perhaps the most crucial factor in appellant's favour, is his undertaking to make restitution. He signed a written undertaking whereby he acknowledged himself to be indebted to the "Shippers" for the total amount of their

21/ losses

losses - i.e. more than R300 000.00. The "Shippers" were satisfied with an undertaking by appellant to repay to them an amount of R150 000.00 over a period of ten years, R30 000.00 to be paid immediately and the balance to be defrayed at the rate of R12 000.00 per year. Should appellant however fail to remit the yearly instalments the full amount of the acknowledged indebtedness would become due and payable in terms of his undertaking. Moreover his undertaking is guaranteed by two sureties. After this agreement had been signed it appeared that an amount of approximately R6 000.00 was due to the bank. Appellant also undertook to pay that amount to the bank.

^h
Fourt, the fact that specific requests were made by
the complainants in the first three counts - i.e. the "Shippers" -
that appellant should be treated with sympathy. They are the persons
who have suffered financial loss and I consider that a request by
them towards leniency is a factor which the Court should pay
attention to.

~~Mr. Lategan, for the State, urged that the offences~~
committed are of a very serious nature and this Court should
therefore not interfere with the sentence imposed. As I have

pointed out above, I am in full agreement with him that the offences are very serious. The circumstances enunciated above, do however, in my judgment, warrant an amelioration of the sentence imposed by the Judge a quo.

Mr. Mendelow drew our attention to certain other factors such as appellant's generosity, the probable permanent loss of professional status, the fact that he had a clean record and the fact, already adverted to above, that the causa causans of the advances made to Zinn was not solely the production of the false balance sheets but also the production of Zinn's fictitious statements and invoices. These factors together with the four mentioned above, justify, in my view, a suspension of portion of the sentence. I consider that one half of the sentence of imprisonment should be suspended for three years subject to appropriate conditions. Such suspension would take effect as from the date of appellant's release from prison. (See: Ex parte Minister of Justice, in re Rex v. Duze, 1945 A.D. 102). It may nevertheless be desirable to make this clear in the order. The sentence I propose to impose would, in my judgment, constitute