101/71

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.

1. DEREK WHITEHEAD, 2. WILLEM ANTHONIE VAN DER MERWE

Appellant.

versus/teen

DIE STAAT

Respondent.

Appellant's Attorney [illegible] *Respondent's Attorney* Adj.P.G.)Jhb.)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate 1. J.C. Kriegler, 2. E.W. Lichtenberg *Respondent's Advocate* M.M. Beukes S.C., C.D. Cilliè
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 9-9-1971
Op die rol geplaas vir verhoor op

(W.P.A.) 3. 4. 9

BOTHA, A.R., WESSELS, A.R., MULLER, A.R.,

9.45 - 11.05
11.20 - 11.30
11.30 - 12.17
12.17 - 12.45

C.A.V.

28.9.71. per Botha A.R. – Sentences reduced [illegible] [illegible] 10 years [illegible]

[illegible]

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

DEREK WHITEHEAD.......................FIRST APPELLANT.

and

WILLEM ANT(H)ONIE VAN DER MERWE.......SECOND APPELLANT.

AND

THE STATE...................................RESPONDENT.

CORAM: BOTHA, WESSELS et MULLER, JJ.A.

HEARD: 9th SEPTEMBER, 1971. DELIVERED: 23rd SEPTEMBER, 1971

J U D G M E N T.

BOTHA, J.A.:

The appellants, Whitehead and van der Merwe, and Whitehead's wife, were charged before Theron, J., sitting

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in the Witwatersrand Local Division, with the theft, at Johannesburg on 28 April 1971, of a motor vehicle and a cash amount of R241 000, the property of the Trust Bank of Africa Ltd. All three pleaded guilty and were found guilty as charged. Whitehead and van der Merwe were each sentenced to 14 years' imprisonment, while in the case of Whitehead's wife sentence was postponed for a period of three years. With the leave of the court *a quo* Whitehead and van der Merwe now appeal to this Court against the sentences imposed upon them.

Whitehead's wife testified at the trial, but Whitehead and van der Merwe did not do so. They had however made reasonably full confessions which were handed in at the trial.

Whitehead is 30 years old and has a wife and four small children. Van der Merwe is also 30 years old and has a wife and two small children.

It appears from the evidence that on 28 April 1971 officials of the Trust Bank left from the Eloff Street

branch of the bank with an amount of R1 000 in R1 notes in an armoured van used by the bank for collecting money at the Reserve Bank in Johannesburg for distribution to the various branches of the bank in the city. At the Reserve Bank an amount of R320 000 was collected. The money was placed in metal boxes and loaded into the van. Their first stop was the Fox Street branch of the bank where a box containing R80 000 was taken from the van, and carried into the bank. The van was left unattended, but locked. When the officials returned about five minutes later, the van with the rest of the money was missing. It is common cause that the van with the balance of the money, viz. R241 000 was removed by the appellants.

The circumstances leading up to the removal of the van with the money by the appellants appear from their confessions and the evidence of Whitehead's wife. After having been employed for some time in a paint contracting

business belonging to Whitehead's uncle in Johannesburg, the two appellants formed their own company and started their own paint contracting business towards the end of 1968. The business prospered in the beginning but ran into financial difficulties in the second year, due largely to the failure or inability of building contractors to pay the appellants for work done by their company. From December 1970 things became increasingly difficult for them, and they decided to dispose of their business but they were unable to do so. Little, if any, money was then coming in and the appellants found it more and more difficult to provide for their families and pay their domestic accounts. They then decided to sell their homes and purchase land at the coast on which to build holiday cottages. They inspected land on the Natal coast and near East London. In the beginning of March 1971 they motored down to Knysna to look at land there. On their way there and back they passed through, inter alia, Uniondale and Aberdeen at night time when there

were no people about, and everything was quiet. The idea then occurred to them that it would be a simple matter to break into a bank in either of those villages at night, and to steal the money they desperately needed. Back in Johannesburg they discussed the matter further and decided to acquire the necessary breaking equipment and to return to Uniondale. They did so two weeks later, taking with them the necessary equipment and a Bantu by the name of Gilbert to assist them in the planned burglary.

They arrived in Uniondale on a Saturday night during March 1971. They succeeded in breaking a window in the Volkskas Bank building which they entered. They however abandoned the completion of the burglary when they realised that it was already early morning and that people would soon be about. They went on to Knysna. They returned to Uniondale on the Sunday and noticed that the broken window and an outside door in the yard which they had left open, had apparently not been discovered. They then went to

Herold's Bay for the rest of the day and returned to Uniondale on Sunday night with the intention of completing the burglary, but abandoned the idea at the last moment, and went on to Aberdeen.

On the Monday van der Merwe made a reconnaissance of the banks in Uniondale and they decided to break into the Volkskas Bank that night. They first drove to Graaff-Reinet to purchase aerosol to spray the bank's windows as the strongroom was on the ground level and they were apparently afraid of being seen. That night van der Merwe broke a window and he and Gilbert entered the bank with cutting torches while Whitehead kept watch outside. Van der Merwe was unable to open the door of the strongroom with the cutting torches. They then abandoned the idea and returned to Johannesburg.

Back in Johannesburg the appellants tried unsuccessfully to sell their homes. They then had practically no income to live on. Because they had fallen into arrear with

the payments, the Trust Bank had attached two motor vehicles which the appellants had acquired under hire-purchase agreements. They still had some money on fixed deposit with the bank but they were told that they could not use that money to settle their account. They had been to discuss the matter with an official of the bank at its Hillbrow branch, when they noticed the bank's armoured van offloading money at the bank. They noticed that while the persons in charge of the van carried the money into the bank, the van was left unattended outside. They discussed the possibility of getting the van to break down on the road in order to get hold of its keys. They knew that if they could obtain keys for the van, it would be a simple matter to drive off with it when it was left unguarded in front of the bank. Van der Merwe followed the van for several days apparently to become acquainted with the usual route taken by it.

One evening they found the van parked unguarded at the Trust Bank building and poured two gallons of oil

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into its petrol tank. They followed the van the next day but the oil did not have the desired effect. They then on another night poured water into the tank. That had the desired effect, for the next day the van broke down, and later the same day they saw the van being taken to Hunt's Garage. They went to the garage. They saw the keys in the van but they could not gain possession thereof. They went to the garage again early the next morning. Van der Merwe managed to get hold of the keys and they had duplicates made. The van's keys were returned to it. The van was closely watched from then onwards. They realised that they would require another vehicle for the successful execution of their plan. They accordingly arranged for the hire of a Volkswagen Combi from Grosvenor Car Hire, and had false number plates made for it. At this stage Whitehead's wife was brought into the scheme - apparently unwillingly - and it was arranged that when the bank's van was taken possession of and driven away, she would follow in Whitehead's Mercedes

motor.../9

motor car so that if anything went wrong they would have a car to get away in. About two weeks after they had the duplicate keys made, the first attempt was made to take possession of the van. That attempt failed as did the second attempt the next morning. On the third morning the third attempt was made. The van had stopped in front of the Fox Street branch of the bank, and while the two men in charge of the van were taking money into the bank, van der Merwe succeeded in getting into the locked van with the duplicate keys and driving off with it. Whitehead followed in the combi. They drove to a pre-arranged spot where the money was transferred from the van to the combi. The van was left there and the two appellants drove off in the combi to Parktown where the money was loaded into van der Merwe's car. That night they dumped the boxes, in which the money had been, and the false number plates made for the combi, in the Vaal River near Van Der Byl Park. Later the money was packed into Whitehead's caravan and taken down to Knysna.

Some of the money was spent in Johannesburg and in Pretoria. Later van der Merwe and his family also arrived in Knysna where Whitehead gave him some of the money. Both appellants and Whitehead's wife were arrested approximately two weeks later. All the money was recovered except for an amount of R1 539. R1 523 was found in van der Merwe's possession and R1 288 in Whitehead's possession. The rest of the money was still in Whitehead's caravan at Knysna.

Evidence adduced on behalf of Whitehead revealed an extremely tragic background. His parents were divorced when he was four years old. He first lived with his mother who became an alcoholic and associated indiscriminately with men. He afterwards went to live with his father who had remarried. Neither parent showed him any love and he felt neglected and rejected. He started work when he was 16 years old, and first met his present wife when he was 17. For the first time he experienced the warmth of being wanted and of being of some account. He left his father's home

to live in a boarding house. He worked in a bank and at his request was transferred to Rhodesia where his present wife later joined him. They eventually returned to South Africa, got married and settled in Johannesburg. During this time he and his wife built their first home, practically with their own hands. It became for him, so it was alleged by Dr. Woolf, a psychiatrist, a symbol of protection against the rejection he experienced in his youth, and he could not countenance losing it. His medical history showed that he was living in a continuous anxiety state, due to his make-up and a sistolic murmur of the heart. This condition, according to Dr. Woolf, worsened when he was faced with the imminent failure of his business and the prospect of losing his home. Dr. Woolf thought that he had neither the background nor the upbringing to resist temptation when it should present itself.

Van der Merwe's upbringing was, on the other hand, apparently quite different. He is a university graduate

and a qualified teacher. He actually taught for four years before entering upon a business career. Neither van der Merwe nor Whitehead has sustained any previous convictions.

Counsel for the appellants launched their attack against the sentences imposed by the trial court on two grounds, viz., (a) that the sentences are so excessive as to be "startlingly inappropriate" (S. vs. Ivanisevic and Another, 1967 (4) S.A. 572 (A.D.) at page 575), or, as the test has also been stated, that the sentences imposed "induce a sense of shock" (S. vs. Hlapezula and Others, 1965 (4) S.A. 439 (A.D.) at page444), or what amounts to much the same thing, that there exists between the sentences imposed and the sentences which this Court would in all the circumstances have imposed, a "striking disparity" (S. vs. Whitehead, 1970 (4) S.A. 424 (A.D.) at page 436), and (b) that the trial court has misdirected itself in material respects in assessing the punishments imposed (S. vs. Letsoko and Others, 1964 (4) S.A. 768 (A.D.) at page 777).

In developing their argument on the first ground, counsel drew attention to the fact that both appellants stated in their confessions that, in laying their plans, they expressly excluded the use of violence. The trial court took this fact into consideration. It cannot, however, carry much weight. If violence had in fact been contemplated or employed, the charge might have been robbery or attempted robbery, which would normally have attracted severer penalties. The appellants cannot have it both ways merely because they were able to execute their evil design without the use of violence. In any event their allegations, made ex post facto, that in laying their plans they expressly excluded the employment of violence, do not carry conviction. Violence had no part in the scheme evolved by them, and it is difficult to appreciate how they can piously rely on the absence of any violence as a mitigating factor.

It was conceded that in the event the sum of money involved in the theft was very substantial, but it was

contended that this was largely fortuitous, and that that fact should have been taken into account in assessing the punishments imposed. As far as the appellants are concerned, the sum of money involved was, of course, fortuitous. They could not have had the slightest idea of the amount of money carried in the van. But they must have known that the amount would be substantial. As already indicated, the van was closely followed by van der Merwe for several days before the keys were obtained, and again after that by apparently both appellants. They must therefore have become acquainted with the normal route taken by the van, and must be assumed to have known that the stop at the branch of the bank in Fox Street was the first stop after the van had left the Reserve Bank with its full load. They surely would have made certain that they did not remove an empty van. In any event they made no attempt to leave some of the money boxes behind in the van. They appropriated the full amount.

It was next contended that, though the amount stolen

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was substantial, in the result all but R1 539 was recovered, and the loss suffered was therefore relatively insignificant. The trial court also took this fact into consideration, but rightly pointed out that it was largely due to the prompt and effective action taken by the police, rather than the assistance rendered by the appellants.

Counsel criticised the lax security measures taken by the Trust Bank in relation to their van, and contended that by leaving the van unattended in a public street while unloading money from it, temptation was laid in the way of the weak or the desperate. By leaving the van locked but unattended in the street for a few minutes while money was unloaded from it, certainly made it possible for the appellants to execute their design, but it cannot be said that in the circumstances they succumbed to temptation. When their attempted burglary of the Volkskas Bank in Aberdeen failed, the appellants, so they alleged in their confessions, abandoned all ideas of obtaining money by dishonest means.

Yet soon after they returned to Johannesburg they were quick to observe the possibilities presented by the unattended van of the Trust Bank parked in the street while money was being unloaded from it. After that, and over a period of at least three weeks, they, as the learned trial Judge observed, "in a cold, calculated and ingenious way, set about a scheme which might well have been foolproof."

It was contended that the financial embarrassment in which the appellants found themselves in consequence of the failure of their business venture, should be regarded as a factor reducing their blameworthiness for the act charged. The learned Judge _a quo_ stated generally that "financial embarrassment is no mitigation to commit a crime." I would hesitate to subscribe to so general a statement. It may well in certain circumstances serve to reduce the blameworthiness of an offence committed under its pressure. I express no opinion on that. But I agree with the learned Judge and counsel for the State that the financial embarrassment

in which the appellants found themselves at the time in the present case, cannot reduce the blameworthiness for their act. As counsel for the State rightly pointed out, they had not been reduced to such financial straits that they could not afford the necessities of life. As recently as at the end of December 1970 when, according to the appellants, the financial position of their company had become embarrassing, Whitehead had sold some horses which he had bought for his children and used the proceeds, approximately R500, as a deposit on the purchase of a caravan which they could use for their holidays. In March 1971 the appellants still had some money on fixed deposit at the Trust Bank. Although the money may not have been readily available to them, they could no doubt have arranged for an advance on the security thereof. Both appellants or their company owned motor cars. They each had a home. Whitehead's home was, according to his wife, valued at something like R60 000, though they had an unwritten offer for R45 000, which they were prepared to accept but which

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came to nothing. There is no evidence as to the value of van der Merwe's home. During March 1971, and before they had sold their homes, they were able to go and inspect land on the Natal South Coast, near East London and at Knysna which they planned to purchase for the purpose of constructing holiday cottages thereon. They had money to purchase housebreaking equipment and to motor down to Aberdeen and Uniondale to break into a bank. In these circumstances it cannot be said that their financial circumstances were such that they were driven to commit a crime in order to provide for their families. They were both able-bodied men and the allegation, not made in evidence on oath, that they were unable to find employment, is unconvincing and unacceptable.

Counsel on behalf of the first appellant further contended that the court a quo, in assessing the punishment imposed, under-estimated the factors which were personal to Whitehead and which, so it was argued, tend to reduce his

moral blameworthiness for the offence charged. It is, of course, trite law that, in the assessment of punishment, the gravity of the offence charged should be balanced against those factors which are personal to the offender, and that proper regard should be had to all factors which tend to reduce his moral blameworthiness for the offence charged. (S. vs. Fazzie and Others, 1964 (4) S.A. 673 (A.D.) at page 684).

The first relevant factor referred to by counsel is the inherent personality of Whitehead. It is clear that the learned Judge *a quo* indeed considered "the evidence of Dr. Scott and Dr. Woolf in regard to the unfortunate and somewhat tragic background" of Whitehead, but counsel contended that the evidence in fact discloses more than that, and that it indeed discloses that, as a result of his rejected childhood, his wife and his home became symbols of protection to him which he could not countenance losing; that he did not have the background or the upbringing to resist temptation when it presented itself to him, and

that for some time before the commission of the offence the appellant had been in an acute state of anxiety by reason of the imminent failure of his business and its consequences - such as the loss of his home and his family.

The second relevant factor personal to Whitehead referred to by counsel is the financial embarrassment in which he found himself through no fault of his own, and in consequence of which he, by reason of his personality, lived in fear and anxiety that the security and warmth of his family and home would be lost to him. It was while he was in this state, so it was contended, that he succumbed to the temptation which had presented itself to him. It should be made clear that it was not suggested that Whitehead's mental balance or his appreciation of right and wrong was in any way disturbed.

The factors set out do indeed portray a pitiable character, but the difficulty I have, is to find that in the particular circumstances of this case they have the effect of reducing his moral blameworthiness for the offence

charged. If they do, his participation in the commission of the offence cannot attract the same punishment as would the participation of van der Merwe with reference to whom similar considerations do not apply. Unfortunately Whitehead did not testify at his trial, and on the evidence available I cannot come to any other conclusion but that he and van der Merwe were at all times equal and willing collaborators in the planning and execution of their joint scheme. It is true that, according to Whitehead's confession, van der Merwe appears to have played a more active roll, not only in the planning and execution of their joint scheme, but also in the attempted burglaries at Uniondale and Aberdeen, but even if it were so, Whitehead's participation would not by reason thereof necessarily be less blameworthy, though it could indicate that he was perhaps a less willing participant. In the absence of evidence to that effect no such conclusion would, however, be justifiable. Whitehead may very well have been the principal actor.

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I have already rejected the contention that, by reason of the lax security measures relative to the bank's armoured van, the appellant succumbed to the temptation to commit the offence charged. Those circumstances no doubt gave birth to the idea of committing the offence, but I cannot agree that irresistible temptation was thereby laid in their way. For nearly three weeks after the idea was first conceived they carefully and in a cold and calculated manner planned the execution thereof. But that is not all. On the Sunday evening preceding the perpetration of the offence Whitehead's wife, when she was for the first time told about the scheme, tried desperately to dissuade her husband from going through with it, even suggesting that their financial embarrassment did not matter and that they could start again. He therefore had the assurance of her continued love and support, the loss of which he is alleged to have feared, yet he remained adamant. It may be that he was then too far committed with van der Merwe, but in

the absence of any evidence to that effect, that would be pure conjecture. It is clear however that after this full opportunity to withdraw from the scheme, it cannot be contended that he had succumbed to the temptation which may initially have presented itself to him. I have already indicated that neither Whitehead's nor van der Merwe's financial circumstances were such that they were driven to commit the offence in order to provide for their families. It could only have been to save their business and their homes that they committed the offence. I find it difficult to believe that Whitehead, who with very little formal education had in a relatively short period achieved considerable success in his business career, was capable of losing his head when faced with adversity. In all the circumstances I cannot find that Whitehead's participation in the planning and execution of their joint scheme was by reason of the personal factors mentioned, morally less blameworthy than van der Merwe's participation.

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The question which it is the duty of this Court now to consider, is whether, having regard to all the circumstances, there exists a "striking disparity" between the sentences imposed by the trial court and the sentences which this Court would, in the circumstances, have imposed, or whether the sentences imposed are "startlingly inappropriate." The assessment of punishment is pre-eminently a matter for the discretion of the trial court, for it has obvious advantages which this Court has not. The appellants, however, did not in the instant case themselves give evidence. Only their confessions were available to the court a quo, and the advantages accordingly enjoyed by that court are perhaps not as real as they might otherwise have been. In the circumstances we are not at any appreciable disadvantage in ourselves assessing the appropriate punishment. It is nevertheless still extremely difficult for this Court at this stage to determine what in its view would have been an appropriate

sentence.../25

sentence in the circumstances. We must however do the best we can with the material available to us.

It was conceded that the elements of retribution and deterrence were properly taken into account by the learned Judge *a quo*. That persons convicted of offences of this nature should be severly punished for its deterrent effect, cannot be questioned. The learned Judge, on the other hand, took into account that neither appellants had sustained any previous convictions, that they did not contemplate the use of violence, that they made full confessions and assisted the police in every way in their investigations and in the recovery of the unspent balance of the stolen money. As already pointed out, all but R1 539 of the stolen money was recovered with the result that the appellants' escapade was a particularly unprofitable one. Having proper regard to all these considerations a sentence of 14 years imprisonment seems to us to be "startlingly inappropriate." It approxi-

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mates too closely to sentences usually imposed in cases where the circumstances relating to the offence are far more serious, and the circumstances relating to the offender are far more unfavourable, than the circumstances in the present case. One may well ponder the question what the appropriate sentence would have had to be if the perpetration of the offence had been accompanied by violence and the charge had been robbery, or if the appellants had sustained any previous convictions for dishonesty. Applying our minds as best we can to the circumstances of the case, we have come to the conclusion that an appropriate sentence would have been imprisonment for a period of ten years. Because of the "striking disparity" between the sentence imposed by the trial court and the sentence this Court would in the circumstances have imposed, we are bound to interfere.

In the view we take of the matter it is unnecessary for me to deal with counsels' contention that the trial

court, in assessing the punishments, misdirected itself in material respects. Suffice is to say that we are not satisfied that the trial court misdirected itself in any way.

The appeal succeeds and the sentences imposed upon the appellants are reduced to ten years imprisonment in the case of each appellant.

BOTHA, J.A.

WESSELS, J.A. }
MULLER, J.A. } Concurred.