OP BORG

87/75

G.P.-S.   J. 44

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

(Cape Provincial DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

Mnnnie Newsky
Appellant.

versus/teen

Respondent.

Appellant's Attorney Lövius, B.M.& S *Respondent's Attorney* A.G. (C.T.)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate H. Snitcher Q.C. *Respondent's Advocate* C.D.H.O. Vos
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op ~~1-4-7~~ 4.3.76

(C.P.D)

Coram: Wessels, Jansen et Rabie JJ.A

9.45 am — 10.55 am

The Court allows the said appeal against the sentence imposed by the Court a quo and alters the order of that Court to read:-

"The accused is sentenced:

(1) to a fine of R1000.00 which is to be paid by not

PTO.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MINNIE NEVSKY ..... Appellant

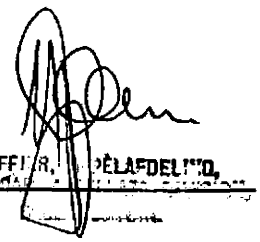
and

THE STATE ..... Respondent

Coram: Wessels, Jansen et Rabie, JJ.A.

Heard: 20 November 1975

HANDED IN ON 28 NOVEMBER 1975



REASONS FOR JUDGMENT

WESSELS, J.A.:

After hearing argument, this Court gave a judgment upholding appellant's appeal against the sentence imposed upon her in the Cape of Good Hope Provincial Division on 29 April 1975. The following order was issued:

> "The appellant's appeal against the sentence imposed by the Court a quo succeeds, and the order of that Court is altered to read:

The accused.....2/

The accused is sentenced:

(1) to a fine of R1 000,00, which is to be paid by not later than 20 March 1976; and

(2) to five years imprisonment, the whole of which is suspended for three years on condition that the accused is not convicted of a common law offence of which dishonesty is an element and which is committed during the period of suspension."

The Court intimated that the reasons for its judgment would be filed in due course. They follow hereunder.

It appears from the record of the proceedings that, consequent upon a plea of guilty, the Court a quo convicted appellant on 128 counts of theft. The indictment covered the period from 7 February 1972 to 19 March 1973, and the total amount involved was the substantial sum of R38 800,00. After evidence in mitigation of sentence had been led, and argument in regard thereto addressed to the Court a quo, the matter was postponed to enable the learned Trial Judge to consider the question of sentence. Upon the resumption of

the hearing.....3/

the hearing after an intervening weekend, the Court a quo stated that all the counts would be taken together for the purpose of sentence. It thereafter sentenced appellant to 5 years imprisonment of which 4 years was suspended for 3 years on condition that the appellant was not convicted of a common law offence of which dishonesty is an element and which is committed during the period of suspension. The learned Judge thereafter granted appellant's application for leave to appeal to this Court against the sentence imposed by him.

In so far as the question of sentence is concerned, the relevant factual background and the reasons which caused the learned Judge a quo to impose the punishment set out above, are detailed in his judgment on sentence, which I quote in full hereunder:

> " The accused in this matter has pleaded guilty to and has been convicted on 128 counts of theft of money from O.K. Bazaars Limited. The amounts stolen vary from R100 to R1 000

and were.....4/

and were stolen over the period 7th February, 1972, to the 19th March, 1973. The total amount stolen is R38 800.

It appears from an agreed statement of facts which was handed in that the accused is a married woman, 49 years of age. She has one child. She was in the employment of O.K. Bazaars for fifteen years. During the period covered by the indictment she was employed as an office cashier. During the day till operators receive cash, cheques, what is known as "O.K. money", Christmas Club and buy-aid vouchers from customers. At the end of the day the till operators enter the details of the cash and vouchers received on to a cash account slip. This slip is then placed in a bag together with the cash and other documents received. All the bags, 60 - 65 in number, are kept in a safe overnight. On the following day the bags are divided amongst the office cashiers of which accused is one. It is the duty of the office cashiers to check the contents of each bag against the cash count slip and then to complete a cash count slip themselves and show the amount of cash and vouchers received by them. The figures reflected on the office cashiers' cash count slips are then entered on a daily bank deposit slip. In addition a Christmas Club voucher deposit slip must be completed in duplicate showing the total number and value of Christmas Club vouchers received. This is checked and signed by the Administrative Branch Manager. The original slip

is placed.....5/

is placed in a container together with the Christmas Club vouchers. The container is handed over to Fidelity Guards for checking. The duplicate copy of the slip is retained.

The procedure adopted by the accused was to insert the correct number and value of the Christmas Club vouchers on the original slip. She thereafter inserted a carbon and presented it to the Administrative Manager for signature. Thereafter she would inflate the number and value of Christmas Club vouchers on the duplicate. She then removed a number of R10-notes equivalent to the difference.

The only way a theft carried out in this way could have been detected is if the original and duplicate Christmas Club vouchers were compared or the totals of the R10-notes and Christmas Club vouchers on the cash count slips prepared by the till operators were checked against the totals of the cash count slips completed by the accused.

Two witnesses gave evidence in mitigation of sentence, Mr. Nevsky, the accused's husband, and Dr. Zabow. Mr. Nevsky stated that he occupies a responsible position as Manager of a motor spares firm. His salary is R800 per month. His wife has had as many as eight miscarriages as a result of which she became most depressed. She became more depressed as a result of certain bereavements in the family. She suffered from headaches and had a fear of darkness. She became very

tense.....6/

tense and was given to violent outbursts. There was no need for the accused to steal. She did not gamble and they lived quietly. He had no idea that the thefts had been committed until representatives of the O.K. Bazaars interviewed him. He ascertained that some of the money had been invested with a bank. He found other money in a shoe-box. All the money stolen plus interest was repaid to O.K. Bazaars some time ago. Ever since the matter came to light he and his wife had withdrawn from society completely.

Dr. Zabow, a specialist psychiatrist, stated that he had interviewed the accused and her husband during August, 1974, and again recently. In addition the accused's private doctor, Dr. L. Bass' notes were made available to him. He came to the conclusion that, although Mrs. Nevsky had not been attended by a psychiatrist until August, 1974, it was clear that for many years she has been a chronic psycho-neurotic with phobias and anxieties. She also has had psycho-somatic symptoms relating to her chest and gastro-intestinal tract. At the time of the meno-pause she became not only anxious but depressed and did not cope well. Dr. Zabow states: 'In my view she is a chronic neurotic with depressive symptoms and is basically an unstable personality whose health has been affected by her repeated miscarriages and psycho-somatic symptoms.' Dr. Zabow further stated that the accused could give him no explanation as to why she had stolen. In his opinion the

accused.....7/

accused has had severe losses during her life and that she must have stolen as some form of compensation.

In addition a statement of Dr. Bass, who is presently overseas, was handed in by consent. It is dated the 31st July, 1974. Dr. Bass states that in 1971 the accused started having symptoms of the menopause syndrome which manifested itself as depression, emotional crises and functional bronchospasm. He further stated: 'During 1971 and 1972 she complained of a multiplicity of ailments, but the basis was purely functional - of nervous origin. There were times when her behavious was confused and irrational. On the 22nd March, 1973, I visited Mrs. Nevsky and found two representatives of the firm concerned - O.K. Bazaars - present. I found Mrs. Nevsky in a confused, distressed and highly emotional state.'

A letter was also handed in from O.K. Bazaars in which it was stated that: ' In view of the fact that Mrs. Nevsky has cooperated in clarifying all queries to the satisfaction of our client, that our client has no objection, and in fact would appreciate all charges being dropped and/or withdrawn against her.'

All the evidence tendered is accepted and I am now faced with the unenviable task of deciding what sentence should be imposed in the light of this evidence. There are, of course, a number of mitigating factors:

1. The accused.....8/

1. The accused has no previous convictions.
2. All the money stolen has been repeid with interest.
3. The offences were committed at a time when the accused was in a nervous and depressed state. Her health had been affected by repeated miscarriages and by bereavements. The accused cannot explain why she took the money. The money has not been spent on high living or lost in gambling.
4. Her conviction and any sentence of imprisonment will press very heavily not only on the accused but also on her husband and family.
5. The accused has co-operated with her former employer and has clarified all queries and their attitude is that the charges should be withdrawn. Moreover, the accused has freely admitted her guilt.
6. These proceedings have been pending for some two years.

As against all these factors is the seriousness of the offences. The total amount stolen is, as I have stated, R38 800. During December, 1972, alone an amount of R13 000 was stolen. The thefts were committed over a period of a year. The scheme was carefully planned and each theft was accompanied by the completion of a false and fraudulent document. Moreover, the accused was in a position of trust.

As was stated in S. v. Sparks & Another, 1972(3) S.A. 396 punishment should fit the criminal as well as the crime, be fair to the

State.....9/

State and to the accused and be blended with a measure of mercy. There can be no doubt that the crimes committed by the accused are very grave. The question is whether in the light of the other factors which I have mentioned which mostly relate to the accused herself, this is a case in which the accused should be sent to gaol.

I have given this question most anxious thought and consideration. There is clearly no necessity to send the accused to gaol in order to deter her from committing further similar crimes. The likelihood of her ever again being in a position to commit such thefts is so remote as not to merit further consideration. Nor does this appear to me to be the type of case where society would demand that the accused be sent to gaol. The attitude of the company from which the money was stolen has also been made clear, but it is the deterrent effect which calls for emphasis. Commercial and other large concerns are today an essential part of our existence, they have of necessity to rely on the honesty of their employees. Employees in a position of trust must not be brought under the impression that if caught they can escape punishment by repaying monies that they have stolen. Notwithstanding this consideration if this had been a substantially less serious series of offences or the offences had, for instance, been committed in less serious circumstances I could nevertheless have extended leniency and not sent the accused to gaol. But unfortunately this is not the case.

Taking.....10/

> Taking all the circumstances into consideration, in my view, a substantial gaol sentence, the greater portion of which I shall suspend, would be appropriate."

It was contended by counsel on appellant's behalf that, having correctly held that this was not "the type of case where society would demand that the accused be sent to gaol", the Court a quo overemphasised the gravity of appellant's criminal conduct in deciding that an effective sentence of one year's imprisonment would be appropriate in the circumstances of this case. It is to be noted, however, that the Court a quo was also concerned with the deterrent effect of any sentence imposed by it in relation to others employed in a position of trust. The Court a quo stated that employees "in a position of trust must not be brought under the impression that if caught they can escape punishment by repaying monies they have stolen". In my opinion, however, the fact (important though it may be) that the victim of appellant's misdeeds suffered no financial loss, is but one

of the.....11/

of the circumstances bearing upon the question of sentence. In so far as other persons employed in a position of trust might seek to draw an inference as to the sentencing policy of the courts in matters of this kind, they must inevitably have regard to the rather peculiar personal circumstances of the appellant which attended her criminal conduct. If so, they could not conclude that, if caught, they can escape punishment merely by repaying the monies they have stolen.

It does not appear from the judgment of the Court a quo that the imposition of a punishment other than imprisonment was considered by it. Counsel for the appellant submitted that, having regard to the rather unusual circumstances of this case, it would not only be an adequate, but also an appropriate, punishment to impose a fine and to conditionally suspend the whole of the period of 5 years imprisonment. In my opinion, counsel's submission is acceptable. A substantial fine, indicating the measure of the court's condemnation, but related.....12/

but related nevertheless to appellant's financial ability to pay it, would, in my opinion, be an adequate and appropriate punishment in the circumstances of this case. Along these lines the appellant does not escape punishment, but is diverted from prison. This Court considered that a fine of R1 000 would be an adequate and appropriate punishment. Counsel for appellant informed this Court that appellant would be financially able to pay such a fine, provided she were given time to do so. As to form, the punishment which this Court regarded as appropriate, differs so materially from that imposed by the Court a quo, that interference with it is warranted.

For these reasons, the appellant's appeal was upheld and the order issued which is set out at the commencement hereof.

P.J. Wessels, J.A. E.L. Jansen, J.A. P.J. Rabie, J.A.