275/74

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HEATHCOTE M.M. YAKOBI ..... Appellant

and

THE STATE ..... Respondent

Coram: Van Blerk, A.C.J., Wessels et Trollip, JJ.A.

Heard: 9 September 1975

Delivered: 29 September 1975

J U D G M E N T

WESSELS, J.A.:

The appellant was convicted in the Transkeian regional court of the theft of R2 000-00 from Barclays Bank, and sentenced to eighteen months imprisonment. His appeal to the Transkeian High Court (MUNNIK, C.J.) was unsuccessful in so far as the conviction was concerned. The sentence of eighteen months imprisonment was, however, altered by conditionally suspending nine months thereof.

The appeal.....2/

The appeal to this Court is against both the conviction and the sentence (as altered by the Court a quo).

The facts which were common cause both in the court of first instance and in the Court a quo are summarised as follows in the judgment of MUNNIK, C.J.:

> " The appellant was at all times relevant hereto the pensions pay clerk on the staff of the Magistrate at Umzimkulu. On 13 days in every second month commencing in January of each year, pensions and other social welfare payments are paid out at various centres in the district, and for this purpose it was the appellant's duty to present the local agency of Barclays National Bank at Umzimkulu on each of the days in question, a warrant voucher signed by the additional magistrate for the amount of cash to be drawn by appellant to cover such welfare payments. Prior to the day in question, early in each month, a minute of the amount required on each of the dates on which money is to be drawn during such month and the denominations in which such amounts would be required, is sent to the bank, since this is an agency operating from the neighbouring town of Ixopo and clearly practical considerations for the mutual convenience of both bank and customer that the bank be forewarned not only as to the amount

required.....3/

required by the Magistrate at Umzimkulu, but also as to how the amount has to be made up.

This advance notice for May was dated the 7th May and according to the appellant it was copied by the typist in the Magistrate's Office from the March letter containing the same information. Apart from this minute (which was Exhibit E at the trial) the details of the amount of cash and the manner in which it was to be made up also appear on Form No. 98 in a book of 100 forms each of which is headed 'Payment of Social Benefits' and which is in the form of a receipt by the appellant acknowledging receipt of the warrant voucher and the amount mentioned in the form in the denominations detailed therein."

It was indicated in Exhibit E that on 10 May 1973 the following denominations would be required:

R10	-	R1000
R5	-	R2800
R1	-	R2000
20c	-	R 30
10c	-	R 10
5c	-	R 5
		R3845

The amount of cash required in terms of Exhibit E was incorrectly totalled, and should have been reflected as

R5 845.....4/

R5 845. In the minute dated 7 March 1973 the same mistake occurs in respect of denominations required on 9 March 1973. It is necessary to refer to Form No. 98 (Exhibit D, which is a page in a book which was handed in at the trial as Exhibit F). Exhibit D is divided into two columns. The column on the left-hand side reflects the following information (the underlined words are those appearing in print in the form; those not underlined represent the information filled in in appellant's own handwriting) :

*Date of payment: 10th May 1973
Centres visited: 1. Zamani 2. Corinth
3. Dumakude 4. Cabone
Drawings:
(a) By cheque: Cheque number Date Signature of officer to whom handed
72144 10/5/73 H.M.M. Yakobi
(b) Cash I H.M.M. Yakobi hereby acknowledge receiving from expenditure the sum of R3 845 Rand R 3845.00 made up in the following denominations

R.....5/

	R.	c.
R10	1000	00
R5	2800	00
R1	2000	00
50c		
20c	30	00
10c	10	00
5c	5	00
2c		
1c		
Total	3845	

Date 10th May, 1973

Signature H.M.M. Yakobi."

It is to be noted that in detailing the denominations required, it is reflected that the sum of R2 800 was to be made up of R5 notes. In his evidence appellant denied that the figure "2" in the entry of R2 800 was in his handwriting. I shall revert to this evidence at a later stage.

It is also common cause that when appellant returned to his office after having made payments to pensioners, etc. he had a surplus of R200 which was handed over to the expenditure clerk. On appellant's version, the only explanation for the surplus is that it represented an

over-payment.....6/

over-payment to him by the bank teller, i.e., that he received R4 045 instead of R3 845, which was admittedly the amount reflected on the relevant warrant voucher which appellant had handed to the teller on 10 May 1973.

On 10 May 1973 Mr. Greco was the teller in charge of the Umzimkulu agency of Barclays Bank. He was assisted by Mr. Hourquebie. Greco stated in his evidence that during the morning a cheque for an amount of R3 845 was presented to him. He satisfied himself that the cheque had been made out correctly, and that the amount thereof agreed with the total appearing on Exhibit E. He then "proceeded to pay out according to the denominations on the requisition" - i.e., Exhibit E. Normally he would add up the several amounts detailed in the requisition before paying out the cheque, but he failed to do so on that occasion. He stated that at "the time of paying, it didn't strike me that there's a difference in the requisition and the cheque". On his version, Greco therefore

paid out.....7/

paid out the sum of R2 800 in R5 notes. He handed over bundles of notes which had been made up the day before at Ixopo on the information contained in the requisition. He did not count the notes in the bundles before handing them to appellant. At appellant's request he changed the R5 notes for R10 notes. He did not have a sufficient number of R10 notes, and obtained R2 000 in R10 notes from Hourquebie, who had previously accepted a deposit containing a substantial number of R10 notes. The appellant left, and Greco attended to several clients. He only noticed that he had overpaid appellant the sum of R2 000 when he entered the cheque in his books. When he noted that the cheque was for R3 845, he recalled that he had paid out R5 845 according to the requisition. On his instructions, Hourquebie phoned the magistrate (Mr. Barnes) and informed him that R5 845 had been paid out, whereas the cheque was for R3 845. Later that day, the

magistrate.....8/

magistrate furnished him with a cheque for R2 000. At the close of business that day, Greco's books balanced. But for the cheque for R2 000, his books would have revealed a shortage in that amount.

It was put to him in cross-examination that he did not have the requisition (Exhibit E) available when he paid out the cheque, and that the register (Exhibit F) had to be obtained from the magistrate's office to enable him to pay out according to the denominations entered in Exhibit D. His reply was:

> * I would say that is not true because I worked according to this, this is the notice that I work by. I have signed it noting the value and have crossed it out as I always do in the filed notes.*

It was also put to him that he had mentioned to a policeman accompanying appellant that he was*R1 000 short* that day. When the policeman asked him what he was going to do about it, he replied that he didn't know. Greco denied that this conversation had taken place.

Hourquebie.....9/

Hourquebie stated in evidence that on 10 May he was on duty as a "Waste/Check Clerk". He confirmed Greco's evidence about the exchange of R5 notes for R10 notes. He saw the bundles of notes being handed to appellant. About 15 to 20 minutes after appellant had left, Greco told him that he "was going to be short", and showed him the cheque and the requisition. He (Hourquebie) reported the matter to Mr. Barnes, who later handed over a cheque for R2 000.

He was cross-examined as to evidence which he had given at a preparatory examination. As to this, the record reads as follows:

> "Q. There you said, in your evidence-in-Chief in cross-examination, the Bantu Male produced a requisition for that day and was handwritten on a paper and further on, when the Court asked you questions, you said I see the requisition before Court Exhibit A; this requisition remained in the suitcase on that day and the money.....from it;

but from.....10/

but from another requisition for that day which was only handwritten---can you remember saying that?

A. I remember there was that one and there was also another thicker handwritten one.

Q. But under Re-examination, why were you so emphatic that it was not a typewritten one, it was a handwritten one? And you said that the Bantu Male produced the one and yours was in the suitcase?

A. I remember I said it was handwritten one, it was that one.

Q. The handwritten one was it just a piece of paper or was it in a book form?

A. I am not sure, I think it was on a piece of paper.

Q. You also mentioned there at the Preparatory Examination that you didn't have your requisition there; and that bearer had to turn back to his office to go and get his handwritten one - do you know anything about that?

A. As far as I know that requisition, the typed one we were given is always kept in a suitcase where the teller uses it to draw the money for the next day - he uses it and takes it back in the suitcase and is always kept in the suitcase.

Q. Couldn't it have happened that he had left it behind in Ixopo?

A. As far as I know it was in the suitcase.

Q. But you cannot remember seeing it in the suitcase - can you?

A. There's a lot.....11/

A. There's a lot of books in the suitcase; I don't remember 100% that it was there; but I know that it is always kept there and the normal procedure for the teller is to see that it is taken back there."

Mr. Barnes, who was the additional magistrate at Umzimkulu, gave evidence on behalf of the State. He dealt at some length with the administrative procedure involved in drawing money from the bank for the purpose of making payments to pensioners, etc. It is, however, not necessary to refer thereto in any detail. He confirmed Hourquenie's evidence regarding the telephone call and the furnishing of a cheque for R2 000. The following day (11 May) he stopped payment of this cheque. He also stated that he he had determined that appellant did not require any R5 notes for the purpose of paying out pensions. He was asked, in cross-examination, whether the register (Exhibit F) could have been removed from the office on 10 May and taken to the bank. He replied that if it were to have been removed, "it was highly irregular".

Mr. Kondlo.....12/

Mr. Kondlo, a clerk employed at the magistrate's office, Umzimkulu, testified on behalf of the State. He and two Bantu policemen accompanied appellant into the district in order to assist in paying out pensions. Under cross-examination he stated that they also accompanied appellant to the bank. At the request of the appellant he returned to the magistrate's office in order to obtain the register (Exhibit F). He handed it to appellant at the bank. He did not know why the register was required and did not observe it being handed to the teller.

Sergeant Elliot Gcolotela was one of the policemen who accompanied appellant to the bank and thereafter into the district to pay out pensions. He saw the money being paid out to appellant at the bank, and confirmed that R5 notes were exchanged for R10 notes. In his evidence in chief he confirmed that Kondlo returned to the magistrate's office to obtain the register (Exhibit F). He testified as follows:

"I went.....13/

" I went with the accused into the bank. On tendering the cheque to the teller there was a hold up because it appeared that the specification notes was missing. As a result of that someone was sent to the office to fetch the book where these requisitions are made. This book was later brought to the bank and it is the Exhibit 4 now before Court. Mr Kondlo was sent to fetch it.

As to Greco's conversation regarding the shortage of R1 000, he testified as follows under cross-examination:

"Q. Whilst you were waiting for Mr Kondlo to bring this book, did the teller speak to you in the bank?
A. Yes.
Q. Can you remember what he said?
A. I remember that very well.
Q. What did he say?
A. The Teller intimated to me that he had a shortage of R1000.
Q. Did you say anything to that?
A. I expressed my surprise and asked how he was going to recover this deficiency.
Q. Did he say anything to that?
A. He said he didn't know.
Q. Did he mention where that deficiency occurred?
A. He didn't elaborate on the issue.
Q. He didn't tell what day that shortage occurred?
A. Yes.

Re-exam. by P.P.....14/

Re-exam. by P.P.:

Q. When you discussed this matter of R1000 shortage with the Teller, who else was present?

A. The Accused plus some customers in the bank were present.

By Court:

Q. Do you mean to tell me that the Teller of the Bank would discuss with you, a member of the Public that he is R1000 short?

A. Nevertheless this did happen.

Q. Why?

A. My inference was that he was expressing his distress."

After the close of the case for the State, counsel for the appellant applied for his discharge. The application was refused. Thereupon appellant gave evidence. As to what took place at the bank, appellant testified as follows in his evidence in chief:

" At the bank I submitted the cheque to the teller. There was a slight hold-up because the teller told me that he had left his requisition paper; and on that score we had to send Mr Kondlo to fetch our copy from the office here. Mr Kondlo brought back Exhibit D. I put it at the disposal of the Teller so that he might get his figures from there. Then the teller handed me the money. I remember requesting the

teller.....15/

teller to convert some of the R5 notes into R10 notes; but I don't remember now the amount involved. He did not have enough R10 notes in his box and was subsidised by his colleague whose designation is "Waste Clerk". I know something about the Strachan deposit. I suggested that the required change been taken from the Strachan deposit which they told me had already been made. I didn't convert all the R5 notes, as they are also needed in the payments. I counted the whole lump sum; but I didn't count the R10 notes I got from the Waste Clerk. I made a bulk-check by counting the clips. I was satisfied that I received the correct amount from the bulk checking.

Whilst we were waiting for the register from the office, the teller told the Sgt. that they were some thousands of Rand Short. The Sgt. said to him, 'How are you going to reimburse this discrepancy'. He said that he didn't know and was apparently at a loss."

Upon his return, after paying out pensions and other social benefits, he discovered that he had a surplus of R200. This was handed over to the expenditure clerk, and the amount was entered in Exhibit D. He concluded his evidence in chief as follows:

"I deny.....16/

"I deny all knowledge of the sum of R1800 of which I am alleged to have stolen. If I wanted to misappropriate any money at all, I could have taken the R200 as well. At the counter, I didn't discover the R2000 surplus. As far as I am concerned my figures were correct. I noticed that 3 totals in Exhibit E were, in fact, wrong only when the investigations started. I agreed that there was a discrepancy when it was pointed out to me. I don't know how it originated."

Under cross-examination appellant stated that when the teller paid out the cheque, he did so in accordance with the denominations specified in Exhibit D. His evidence reads as follows:

"Q. So now you had to send somebody to get Exhibit D now before Court?
A. Yes.
Q. Is that for denominations according to the requisition?
A. Yes.
Q. Did the teller look at these requisitions of yours, these denominations and did he pay out according to these denominations on this Exhibit?
A. He must have paid according to those figures.

Q. But did you.....17/

Q. But did you check it, you said you checked the money?
A. I also counted the figures.
Q. So you are certain that you received the money according to the requisition now before Court?
A. Yes.
Q. Did you check whether the teller gave you these amounts, so many R10 notes, so many R5 notes and so many R1 notes on Exhibit D?
A. Yes, I satisfied myself about that.
Q. Do you agree that according to this requisition, you received R5 800 in notes?
A. At that stage, there was no alteration, I see some alteration today."

The "alteration" referred to by appellant relates to the entry in Exhibit D reflecting that R2 800 was to be paid out in R5 notes. He stated that the figure "2" was not his handwriting. I.e., when he filled in Exhibit D he specified that R800 (and not R2 800) was to be paid out in R5 notes.

After hearing argument, the magistrate postponed the matter in order to consider his verdict. In his written reasons for judgment the magistrate made the following

findings.....18/

findings in regard to the credibility of the State witnesses:

* The main witness for the State was M. Greco. He was rather nervous in Court, and although it was sometimes difficult to understand him (he is apparently of Greek origin), he at no stage gave the impression of not speaking the whole truth. He was a good, reliable witness and his evidence was consistent throughout. The second important witness was Hourquebie. He too gave a good impression, although he was sometimes unsure of himself in his evidence. This can easily be understood when one bears in mind that he had no direct interest in the incident which took place nine months prior to the date of trial. However, he did not in any way try to mislead the Court. Their evidence differs from the witnesses Kondlo, Gcolotela and Yakobi on two important points:-

(a) Whether Greco paid out from the requisition (i.e. the original of Exhibit E) or book T.F. 107 (page 98 - Exhibit D); and

(b) They both deny that Greco told Gcolotela and Yakobi that he was R1000 or "thousands of rands" short that day

The other witnesses for the State also gave their evidence in a straight-forward, satisfactory manner.*

The magistrate.....19/

The magistrate does not in terms refer to what impression appellant made on him while he was in the witness-box.

Principally because of Hourquebie's evidence, the magistrate held that it was not possible to make a positive finding on the question whether Exhibit D was used by Greco in paying out the cheque. As to this, he concludes:

> " However, both the lists of denominations (i.e. in Exhibits D and E) are ostensibly the same, with the result that the matter need not be pursued."

It is a necessary implication of this conclusion that appellant's evidence that the figure "2" in the entry of "R2 800" was not his handwriting was rejected as false. The possibility that Greco might have altered R800 to R2 800 (upon the assumption that he was in possession of Exhibit D when he paid out the cheque) was considered by the magistrate. He found it totally unacceptable that

Greco.....20/

Greco could have done so as part of a scheme to make good an existing shortage or to misappropriate R2 000 of the bank's money. The evidence of appellant and Gcolotela that Greco had spoken about a shortage was rejected by the magistrate. The evidence of Greco and Hourquebie that at appellant's request, R5 notes to the value of R2 800 were exchanged for R10 notes was accepted by the magistrate. He held, further, that appellant's conduct in showing a surplus of R200, and his evidence that Greco had mentioned that he had a shortage of thousands of rands, were intended "as a smoke-screen to direct suspicion away from himself towards Greco". In the result, the magistrate held that it had been proved beyond any reasonable doubt that appellant had stolen the R2 000 which Greco had overpaid him.

The appellant was not called to give evidence in mitigation of sentence. His attorney did, however, during

his address.....21/

his address in regard to sentence, refer to a number of extenuating circumstances which were apparently accepted and considered by the magistrate. The following is a summary of the circumstances referred to by appellant's attorney:

1. It was not a premeditated theft.

2. The negligence of Greco created the opportunity to commit the theft.

3. The appellant was 52 years of age and a first offender.

4. He was a policeman for 22 years until he was transferred to the Department of Justice during 1965.

5. He was a married man with 8 children of whom 6 were still in a primary school.

6. Appellant would almost certainly be dismissed from the Public Service.

In sentencing.....22/

In sentencing the appellant, the magistrate referred to the extenuating circumstances. In dealing with the submission that the theft was not premeditated, the magistrate remarked as follows:

> " Mr Brereton, on your behalf, referred to the fact that this matter was not preconceived in any way. Well, I am not quite sure on that point. The question does arise whether it was a thing which took place on the spur of the moment or whether it was part of a carefully-prepared plan before hand. My reason for saying so is that, when you took that requisition to the bank in March or rather when you got the money from the bank in March, the teller did not overpay you, therefore, he must have observed that there was an error in the Requisition; and he might have told you of it so that he could be advised by you how the money must be reduced to bring it down to R3845 from R5845: but in spite of that, the same error was repeated in the Letter which went to the bank at the beginning of May and you were responsible for that matter although you did not type it yourself."

In my opinion, the magistrate indulged in somewhat unwarranted speculation as to what might have happened on 9 March 1973. After referring to certain mitigating circumstances, the magistrate concluded:

*But on.....23/

> "But, on the other hand, I have a Public duty to perform and here, in the Transkei there are numbers and numbers of thefts of money by Clerks and similar men in the employ of the Transkei Government. Now if a suspended sentence were imposed upon you, it would encourage that sort of thing amongst them - there are so many others who are doing this sort of thing as well."

After sentencing the appellant, the magistrate, acting in terms of the provisions of section 357 of the Criminal Procedure Code (Act No. 56 of 1955) ordered appellant to repay the amount of R1 800 to Barclays Bank. It was, further, ordered that the amount of R200 held in the Deposit Account of the magistrate, Umzimkulu, be refunded to the complainant bank.

For the reasons appearing from the judgment of MUNNIK, C.J., the Transkeian High Court dismissed the appellant's appeal against his conviction. In dealing with the appeal against the sentence, MUNNIK, C.J., stated, inter alia:

The Magistrate.....24/

"The Magistrate went on to say after listing certain mitigating factors such as the appellant's age, family circumstances, prospective loss of his position and concomitant consequences, that he had a duty to perform 'and here in the Transkei there are numbers of thefts of money by clerks and similar men in the employ of the Transkei Government and if a suspended sentence were imposed it would encourage that sort of thing amongst them - there are so many others who are doing this sort of thing as well.'

It seems to me that whilst the Magistrate's observations about the incidence of thefts by clerks in the employ of the Transkei Government are, to my own knowledge gained upon the bench in dealing with appeals and reviews, fully justified he has fallen into the error of placing the present theft in the same category of that of a theft by a clerk who embezzles government funds. The appellant in the present case did not use his position to steal from his employer, that is he did not abuse a position of trust vis-à-vis his employers. He was enabled, as a result of the circumstances of his employment to steal from somebody else. It seems to me therefore that to have approached the matter of sentence on the basis of it being a deterrent to would-be embezzlers in the public service, amounted to a misdirection on the part of the Magistrate and therefore this Court is at large in the matter of sentence."

After referring.....25/

After referring to factors on "the credit side in favour of appellant", MUNNIK, C.J., stated:

> "In so far as the question as to whether this was a planned theft or a sudden succumbing to temptation is concerned, it appears to me on the probabilities that the appellant must have been aware of the error previously made and that he optimistically hoped for an overpayment by the bank clerk based upon the figures for the various denominations appearing in the requisition. It is true that he must have inserted the figure '2' in front of the figure '800' in the Exhibit A, but this may well have been done ex poste facto to cover up and to strengthen the case subsequently put forward by him. To this extent it would appear that there was a certain amount of temptation, but on the other hand it is not entirely a case of sudden temptation."

In the ultimate result, MUNNIK, C.J., altered the sentence in the manner indicated earlier in this judgment.

On appeal before this Court, appellant's counsel, having in mind the magistrate's findings on matters of fact and credibility, referred to what was said by MILLER, A.J.A. in Protea Assurance Co. Ltd. v. Casey, 1970(2) S.A. 643 (A.D.) at p. 648E, namely,

"But, when.....26/

> "But, when applying the principle which underlies the well-defined approach of a Court of Appeal to such findings over-emphasis of the advantages which the trial Court enjoyed is to be avoided, lest the appellant's right of appeal becomes illusory."

Nevertheless, an appeal court will ordinarily be loath to interfere with such findings unless it is satisfied, upon a rehearing of the matter on appeal, that the trial court has, e.g., overlooked, or failed to give due weight to, material probabilities, contradictions and discrepancies in the evidence, or has misdirected itself as to the effect of evidence led before it.

In the course of his argument, counsel for the appellant referred this Court to a number of probabilities which, so he contended, favoured the appellant's case. Save for one matter, to which specific reference will be made later on, it appears that the suggested probabilities were adequately dealt with both by the magistrate and the Court a quo. I have reconsidered the effect to be given thereto.

I am unpersuaded.....27/

I am unpersuaded that the magistrate in any way erred in his assessment of the weight to be given to them.

Appellant's counsel, understandably so, made much of the magistrate's conclusion that he was unable to make a positive finding as to whether or not Exhibit D was produced to Greco for the purpose of selecting the right denominations to be paid out. The magistrate did not consider it necessary to pursue the matter because he held that the information about the denominations contained in Exhibit D would have corresponded with that in Exhibit E. It is a necessary implication of this finding that the magistrate rejected appellant's evidence that when he filled in Exhibit D he indicated that he required R800 to be paid in R5 notes. On appellant's version, the R800 must have been altered to R2 800 during the time that Exhibit D was in Greco's possession. The additional magistrate, Mr. Barnes,

stated.....28/

stated in evidence that as a result of Hourquebie's telephone call (between 10 and 11 a.m.) he referred to Exhibit D, and noted that the several denominations totalled R2 000 more than the amount of the cheque he had signed earlier that morning. He, therefore, issued a cheque for R2 000. The appellant was not asked, either in his evidence in chief or under cross-examination, on what information he specified the denominations required by him. It is, at least, possible that he had simply copied it from the office copy of Exhibit E. The veiled suggestion, which was not put to Greco when he was cross-examined, that he had inserted the figure "2", so as to alter the figure of R800 to R2 800, appears to me to be so far-fetched as not to merit serious consideration. The suggestion would imply that when Greco saw the entries in Exhibit D, he immediately decided to alter the figure of R800 to R2 800 so as to enable him either to make good a

then existing.....29/

then existing shortage or to steal the sum of R2 000 in circumstances where he would be able to claim that he had handed over the sum of R2 800 in R5 notes to appellant. Such a finding would also be inconsistent with the evidence of Hourquebie, which was accepted by the magistrate, that Greco had obtained R2 000 in R10 notes from him in order to exchange appellant's R5 notes for R10 notes. Appellant admitted that, at his request, R5 notes had been exchanged for R10 notes. Shortly after appellant had left the bank, Greco made a report to Hourquebie concerning the overpayment, and the latter immediately telephoned Barnes. In the circumstances, I am unpersuaded that the magistrate erred in finding it proved beyond any reasonable doubt that Greco had overpaid appellant the sum of R2 000, and that the former had misappropriated the sum of R1 800 (having paid in the sum of R200 to the expenditure clerk as a "surplus").

In my opinion.....30/

In my opinion, the appellant's appeal against his conviction cannot be upheld.

As to the appeal against the sentence imposed upon the appellant, I have already referred to the reasons why the Court a quo ordered that it be altered so as to conditionally suspend 9 months thereof. With due respect to MUNNIK, C.J., I am of the opinion that the evidence did not warrant a finding that, on the probabilities, appellant "must have been aware of the error previously made and that he optimistically hoped for an overpayment by the bank clerk" and that it was, therefore, "not entirely a case of sudden temptation". I am of the opinion that the evidence in this case does not exclude the reasonable possibility that when the appellant presented the cheque to Greco his thoughts were not directed to the possibility that he might be overpaid an amount of R2 000. It is, at least, reasonably possible that, at

the earliest.....31/

the earliest, he only became aware of the overpayment when he checked the money he had received from Greco. This overpayment resulted from gross negligence on the part of the bank officials (i.e., Greco and the official at Ixopo who acted on the requisition, Exhibit E). Neither of them timeously detected the rather obvious error in addition. It follows, in my opinion, that appellant should have been sentenced on the basis that gross negligence on the part of the bank officials placed appellant in a position of sudden temptation to which he, unhappily for him, succumbed.

This Court is, therefore, at large to determine an appropriate punishment. Because of a lack of relevant information, this Court is unfortunately not in a position to do so. From the above-quoted passage in the magistrate's reasons for judgment, I infer that, but for the misdirection on his part, he might well have considered

a suspended sentence.....32/

a suspended sentence. Such a sentence would, in my opinion, not have been inappropriate in all the circumstances, coupled as it was with an order that appellant repay the sum of R1 800 to the bank. The appellant was convicted and sentenced twelve months after he had committed the theft. Although the magistrate took into account the fact that appellant would in all probability be dismissed from his employment, he made no enquiry as to the appellant's position as at the date of his conviction, e.g., whether he had been suspended pending the outcome of the criminal prosecution and, if so, whether he had secured other employment. No enquiry was directed to appellant's financial ability to repay the amount of R1 800 to the bank - albeit in instalments. Appellant was probably a member of a pension fund. If so, information should have been placed before the magistrate as to appellant's financial position in

the event.....33/

the event of his being dismissed. It is possible that he might on his dismissal become entitled to a repayment of his contributions towards the pension fund and that he might on that account be able to compensate the bank. It was submitted by counsel appearing for the State that there was an onus on the appellant to place the full facts bearing on the question of sentence before the court. I cannot agree with this submission. The imposition of an appropriate sentence is always a matter of the greatest difficulty. The sentencing authority should, in my opinion, be at pains to elicit all such information as might be relevant to the determination of an appropriate sentence. If information of the kind referred to above were to have been placed before the magistrate, he might well have considered the imposition of a fine, provided account was taken of the appellant's financial ability to pay it, albeit in monthly instalments, and with due regard to his liability to repay R1 800 to the

bank.....34/

bank and to maintain a family consisting of a wife and 8 minor children. In addition, it might have been appropriate to have imposed a sentence of imprisonment, suspended on such conditions as the magistrate may have seen fit to determine. Such a sentence would, in my opinion, have had a sufficient deterrent effect.

In my opinion, in the circumstances of this case, it would seem fair to both the State and the appellant to set aside the sentence, and to remit the matter to the magistrate to enable him to consider and impose an appropriate sentence in the light of what has been set out above.

In the result, the appeal against the appellant's conviction is dismissed. The sentence, as altered by the Court a quo, is set aside, and the matter is remitted to the court of first instance to hear such evidence as the State or the appellant might wish to place before it, and thereafter to impose an appropriate sentence in the light of the remarks set out herein.

D. Kuny C.

Van Blerk, A.C.J.) concur
Trollip, J.A.)

272/74

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(APPÈLAFDELING)

In die saak tussen

PETRUS PRINSLOO STOLS.....APPELLANT

en

D I E S T A A T.....RESPONDENT

Coram HOLMES et JANSEN A.RR et KOTZÉ, Wn. A.R.

Verhoor : 14 November 1975.

Gelewer : 26 -11- 1975

U I T S P R A A K.

K O T Z É , Wn. A.R. :-

Gedurende Januarie 1974 het n streeklanddros die appellant, toe 34 jaar oud, te Randfontein skuldig bevind aan huisbraak met die opset om te steel en diefstal van n kompressor en elf buitebande (ter waarde van R2 000,00) uit n pakhuis van A.A. Lundgren. Hy was n eerste oortreder en n vonnis van agtien maande gevangenisstraf is

hom opgelê. Op appèl na die Transvaalse Provinsiale Afdeling (COLMAN en MOLL, RR) is die skuldigbevinding tersyde gestel en vervang met 'n skuldigbevinding van ontvangs van gesteelde goed (nl. twee buitebande) wel wetende dat dit gesteel is. Die waarde van gemelde twee buitebande kom op ongeveer R160,00 te staan. By oorweging van 'n gepaste vonnis vir hierdie misdryf het die Hof a quo, met inagneming van sekere voorgelegde feite wat deur die Staat en namens die appellant as korrek aanvaar is, die appellant 'n vonnis van ses maande gevangenisstraf opgelê. Verlof tot appeal is deur die Hof a quo geweier maar is deur die Hoofregter toegestaan.

By die aanhoor van die appèl is die ondervermelde bevel uitgereik :-

> "The sentence of imprisonment for six months imposed by the Court a quo is suspended for two years from date of conviction. The Court's reasons will be filed later and the conditions of suspension will be stated in the Court's reasons.
> The appeal is allowed".

Hierdie Hof se redes volg.

Getuienis in die saak is voor die landdros op 26 September en 24 Oktober 1973 aangevoer. Op gemelde twee datums het 'n advokaat namens appellant opgetree. Op 28 Januarie 1974 het die landdros uitspraak gelewer. Die appellant se advokaat was nie teenwoordig nie en sy prokureur het namens hom opgetree maar die landdros meegedeel dat hy niks ter versagting van vonnis wou aanvoer nie. Die appellant beweer dat hy verstom was aangesien sy eggenote en ander persone namens hom kon getuig en sy nood kon lenig. Die voormelde vonnis is terstond opgelê.

Die appellant het in hoër beroep gegaan maar, weens 'n fout, is daar nie teen die vonnis appèl aangeteken nie. Dit het tot gevolg gehad dat 'n aansoek aan die Transvaalse Provinsiale Afdeling gerig is vir die tersydestelling van die vonnis en die terugverwysing van die saak na die landdros om getuienis ter versagting aan te hoor. 'n Aantal eedsverklarings is ter stawing van die aansoek voorgelê. Op 2 Augustus 1974 het die Hof die saak uitgestel tot 'n datum gereël te word om die landdros

'n geleentheid te gee om te handel met 'n gewysigde kennisgewing van appèl wat o.a. 'n appèl teen die vonnis ingesluit het.

Die rede vir die vermelding van die feite in die twee voorafgaande paragrawe ontstaan uit 'n terloopse betoog in hierdie Hof gebaseer op die feit dat 'n vonnis van gevangenisstraf reeds sedert 28 Januarie 1974 "soos die swaard van Damokles" oor die appellant hang. Hierdie oorweging is, na my mening, nie van pas by 'n appèl teen die strengheid van vonnis nie - altans nie in 'n geval soos die onderhawige nie, waar die vertraging in hoë mate te wyte is aan die versuim van die appellant se regsverteenwoordigers om voor die landdros 'n betoog ter versagting aan te voer en om nougeset ag te slaan op die samestelling van die kennisgewing van appèl.

Uiteindelik, en wel op 4 November 1974, is die saak in hoër beroep voor Regter COLMAN en Regter MOLL, met die reedsvermelde resultaat, afgehandel. Die Hof het 'n groot aantal feite, wat by monde van die appellant

se advokaat voorgelê is en wat in die bovermelde stawende eedsverklarings vervat is, met toestemming van die verteenwoordiger van die Staat as die tersaaklike omstandighede ter strafversagting aanvaar. Hieronder volg 'n opsomming van die betrokke feite :-

(a) Die appellant onderhou sy eggenote, ses kinders (waarvan die oudste 14 is) en sy skoonmoeder.

(b) Die appellant staan bekend as 'n eerlike en betroubare sakeman.

(c) Die appellant en sy gesin is gereelde kerkgangers.

(d) As werknemer vervul die appellant sy pligte eerlik en doeltreffend.

(e) Die appellant se werkgewers is bereid om hom aan te hou indien sy vonnis opgeskort word, maar indien hy gevangenisstraf ondergaan verloor hy sy betrekking.

(f) Voor die misdryf het die appellant sy eie vervoersaak teen 'n verlies gedryf as gevolg van 'n instorting in die boubedryf en moes hy noodgedwonge twee trokke teen 'n geweldige verlies verkoop ten einde die lisensiegelde op sy oorblywende trokke (wat R6 000,00 beloop het) te kon betaal.

(g) By alles het sy eggenote twee ernstige siektes deurgemaak :-
Sy moes n duur histerektomie en n duur operasie vir die verwydering van n bors weens kanker ondergaan.

(h) Die appellant moes verbandafbetalings op sy woonhuis maak.

(i) Sy inkomste was R100,00 per week.

Die verwerping deur die Hof a quo van n betoog dat die omstandighede van die betrokke geval sodanig is dat gevangenisstraf vermy behoort te word, is deur COLMAN, R., met volledige redes omklee. Die geleerde Regter het o.a. verklaar :-

"In view of the fact that the conviction for housebreaking has been set aside and replaced by a conviction for an offence of somewhat lesser seriousness, the Magistrate's sentence of imprisonment for eighteen months require consideration. I have said somewhat lesser seriousness because the offence of receiving stolen property, although not as grave an offence as housebreaking and theft, is in itself always to be regarded as a grave misdemeanour. It has been said, perhaps rightly, that the receiver is a greater evil to society even than the thief".

"We cannot see that, by reason of the facts which

had been placed before us, we would be justified in treating what remains a very serious offence on so lenient a basis that the appellant would be kept out of prison. We have not overlooked the fact that he has a clean record, but there are certain offences which, even when committed by a person who has not been convicted before, call for substantial punishment. This is one, and, giving the greatest weight which we feel proper to the mitigating circumstances, we have come to the conclusion that the proper course for us to take is to set aside the sentence imposed by the Magistrate and to substitute a sentence of imprisonment for six months".

Die Hof a quo se opmerking dat heling 'n vry ernstige misdaad is, gaan akkoord met 'n beskouing wat die howe deurentyd konsekwent huldig - "receiving is a serious crime meriting in appropriate cases severe punishment" (my kursivering) (R. v. Arbee, 1956 (4) S.A. 438 (A.D.) op 443 G - H). Die sinsnede uit die vonnis-uitspraak "it has been said, perhaps rightly, that the receiver is a greater evil to society even than the thief" dui daarop dat die benadering van die Hof a quo tot die probleem van vonnis van die standpunt uitgaan dat die heler minstens net so goed is as die steler en gevolglik daartoe neig om 'n onbuigsame reël aan te wend

(R. v. Sonday, 1954 (4) S.A. 487 (A.D.) op 489 G-H en 490 B. Hierdie benadering het, na my mening, daartoe gelei dat die besondere omstandighede betreffende die appellant as individu en van die gepleegde misdaad oorskadu geraak het deur die ernstige lig waarin die Hof a quo heling as misdaadsoort aansien. Die aanvaarde feite bevestig dat die appellant, reeds in sy dertigerjare, n waardevolle en voorbeeldige lid van die samelewing was toe hy hierdie - sy eerste - misdaad gepleeg het. Die geheelbeeld van die tersaaklike faktore skep, na my oordeel, die indruk van n geisoleerde lapsus wat gedeeltelik die gevolg van finansiële teenspoed was of, om die woorde van SCHREINER, A.R., op bl. 491 van Sonday se saak aan te wend, gemelde faktore skep -

> "the picture of a generally good man yielding to a sudden temptation".

Met inagneming van bogemelde geheelbeeld sou ek, by die uitoefening van my eie diskresie, geneë gewees het om, ter bevordering van die belange van die samelewing

en die appellant, 'n matige boete sowel as 'n tydperk van gevangenisstraf (in sy geheel opgeskort) opgelê het. Die verskil tussen die opgelegde vonnis en die vonnis wat hierdie Hof sou opgelê het, openbaar, na my mening, 'n treffende dispariteit. Dit volg dat, hierdie Hof nie slegs geregtig was om in te gryp nie maar verplig was om dit te doen. (S. v. de Jager, 1965 (2) S.A. 616 (A.D.) te 629 A-B; S. v. Berliner, 1967 (2) S.A. 193 (A.D.) te 200 G-H; S. v. Whitehead, 1970 (4) S.A. 424 (A.D.) te 436 C-D. Die rede waarom 'n boete nie aan die straf, soos gewysig, gekoppel is nie lê hoofsaaklik in die optrede van die Prokureur-generaal van Transvaal wat by die aanhoor van die appèl persoonlik 'n sterk aanbeveling om genade namens die appellant gerig het.

Die voorwaardes van opskorting is as volg :-

> "On condition that he is not during that period convicted of any offence, committed during that period, involving fraud, theft or receiving

stolen property well knowing it to have been stolen".

A.P.E. van S.

WAARNEMENDE APPÈLREGTER

HOLMES, A.R.)
JANSEN, A.R.) stem saam.