157/78

OP BORG
15. 8. 78.

157/78

G.P.-S. J 445

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

(APPEL DIVISION)
AFDELING)

APPEAL IN CRIMINAL CASE
APPÈL IN STRAFSAAK

R. H. WEARNE.

Appellant.

versus/teen

DIE STAAT.

Respondent.

Appellant's Attorney ISRAELS ~~[illegible]~~ *Respondent's Attorney* P.G. KAAPSTAD.
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate [illegible] *Respondent's Advocate* C. J. S. Muller
Advokaat van Appellant *Advokaat van Respondent*

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

(KPA) [illegible]

Coram: Rumpff HR, Hofmeyr JA et Trengove AJA

10.45 am — 11.00 am
11.15 am — 11.25 am

C. a. v.

The Court dismisses the said appeal
(Judgment per Hofmeyr JA)
78 11 27

[illegible]
Registrar

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ROBERT HENRY WEARNE — APPELLANT

and

THE STATE — RESPONDENT

Coram: Rumpff, CJ., Hofmeyr et Trengove, AJJA.

Heard: 13 November 1978

Delivered: 27 November 1978

J U D G M E N T

HOFMEYR, AJA:

The appellant was on a plea of guilty convicted by the regional magistrate of Bellville on two counts of fraud. He was sentenced to imprisonment for corrective

training ...../2

training. He appealed unsuccessfully to the Cape Provincial Division against this sentence and is now with the leave of the Court a quo on appeal before this Court also against the sentence.

The main submission on appeal is that the magistrate erred in finding that there were no circumstances as contemplated by Section 335A of Act 56 of 1955 which justified the imposition of a lighter sentence than the compulsory punishment prescribed by Section 334 ter (2) of the abovementioned Act.

It is submitted on behalf of the appellant that the following factors which apply in his case should have been regarded as "circumstances" in terms of the abovementioned section.

(1) The fact that the appellant was engaged in repaying the money at the time of the trial and that he undertook also to pay the balance back.

(2) ...../3

(2) The imposition of a prison sentence would break up the appellant's family life.

(3) The appellant was in fact repaying the money to one of the institutions prior to his arrest, and would in the nature of his modus operandi have repaid the money to the institutions concerned.

Counsel relied on the principle stated in S. v. Harrison, 1970(3) 684 (A) that since Section 335A of Act 56 of 1955 refers only to circumstances justifying a lighter sentence, exceptional or special circumstances should not be required for the purposes of the section. It was also submitted that the magistrate should not have drawn the conclusion that the appellant was obdurate from reading his record of previous convictions. They were the following:-

"Hof en plek ...../4

"Hof en plek van Verhoor Hofsaak-No.	Datum van Skuldigbevinding Datum van Vonnis.	Vonnis	Oortreding
Roodepoort B 731/68	18. 9.68 18. 9.68	R30 of 3 dae G.S. op elke klagte	Bedrog - 2 Klagtes tjeks - R16.20 en R40
B. Kaapstad B 390/71	22. 4.71	3 Maande G.S. opgeskort vir 3 jaar op voorwaarde dat die beskuldigde nie skuldig bevind word aan 'n misdaad waarvan oneerlikheid 'n element is nie, gedurende tydperk van opskorting. Dat hy die bedrag van R50 aan die Beach Hotel, Woodstock terug betaal op of voor 24.4.71.	Bedrog - tjek - R50
Streek Kaapstad SHR 421/71	15. 9.71 15. 9.71	2 maande gev. op elke aanklag. Opgeskorte vonnis gedateer 22.4.71 word in werking gestel.	Bedrog - 8 Klagtes tjeks - R35 R23.54 - R8.83 - R42.95 - R110 - R6.61 - R65 - R21."

Since the dates April 1971 and September 1971 are the dates of conviction and not the dates upon which the offences were committed, the magistrate is said to

have ...../5

have given undue weight to the fact that the appellant was convicted in April and September 1971 of fraud. The importance attached to the appellant's previous convictions by the magistrate was in fact that he had committed eleven frauds all told; that he had in 1971 been sent to gaol for 19 months and, further, that he had not behaved after he was given a suspended sentence in April 1971 and waited only a few months before he started on his career of fraud again. It is only the very last proposition which may not have been entirely accurate, otherwise the appellant's previous convictions were accurately assessed by the magistrate.

The appellant was a man of 33 at the time of the trial in April 1977 who was earning about R1 000 per month as a motor car salesman. He was the sole support of his wife and daughter then aged 2 years and 9 months. If he is sent to prison his chances of obtaining employment on his release are slim. After his release, probably

during ...../6

during 1973, it appears that the appellant was in financial difficulties. He had entered into business ventures which had failed and he may therefore have been subject to considerable temptation.

It goes without saying that the fact that an accused was in financial difficulties at the time, that a prison sentence would break up his family life and that he was engaged in making restitution should be treated as substantial factors in deciding whether or not to impose a sentence of imprisonment. The weight to be attached to these circumstances will depend, however, upon the facts of each particular case. The pros and cons should be weighed against each other and considerations against the imposition of a prison sentence may be neutralised by aggravating circumstances attaching to the offences to be punished or to the person of the accused.

In order to complete the factors to be placed in

the ...../7

the scale, it should be stated that the two offences of fraud of which the appellant was convicted involved a total of over R5 000 (of which the sum of R1 645 had been repaid to one of the complainants at the time of the trial). The method employed by the appellant was to submit to banks bogus hire purchase agreements relating to the supposed purchase of motor cars. The two offences were committed six months apart and were thus certainly not committed on the spur of the moment but must have been deliberately planned over a considerable period. Whereas the offences committed at the commencement of the appellant's criminal career involved small sums of money, the present offences concerned the substantial amount mentioned earlier in this judgment.

The magistrate stated that he endeavoured to take into account all the relevant factors to meet the deterrent, preventative, reformative and retributive ends of justice. In addition to the personal circum-

stances ...../8

stances already mentioned herein, the magistrate also took into account that the appellant's employer at the time of the trial, testified that the appellant had then been with his firm for six months, that he was one of the firm's top salesmen and that he would like to retain his services. The magistrate took all the circumstances into account and weighed the mitigating circumstances against the aggravating factors. He was, however, unable to find that there were sufficient reasons or circumstances to justify the imposition of a lighter sentence than the one prescribed by the legislature.

I cannot find any fault with the magistrate's decision. Although the short term advantages of keeping an accused in the position of the appellant out of gaol may superficially appear to be impressive, the long term interests of society and possibly even of the appel-

lant ...../9

lant himself demand that the sentence prescribed by the legislature should be undergone by the appellant.

The appeal is accordingly dismissed.

HOFMEYR, AJA

Rumpff, CJ)
Trengove, AJA) Concur