227/79

WHN

A. A. LEWIS ..... Appellant

and

THE STATE ..... Respondent

JOUBERT, J.A.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

A. A. LEWIS .....Appellant

and

THE STATE .....Respondent

Coram: RUMPFF, C.J., et JANSEN, JOUBERT, JJ.A.

Date of Hearing: 19 November 1979

Date of Delivery: 29 November 1979

J U D G M E N T

JOUBERT, J.A.:

This is an appeal against sentence only. On 8 June 1976 the appellant was charged in the regional court at Johannesburg on eight counts of

/fraud .....

fraud and five charges of theft. He was represented at the trial by his attorney, Mr Michel. On 27 July 1976 he was acquitted on one count of fraud but convicted on the remaining counts. The fraud counts related mainly to the presentation by the appellant during 1975 and 1976 of cheques which he knew he had no right to present or which he knew would not be met. The amounts involved total approximately the sum of R2 700. The theft counts related to the theft by the appellant of certain cheques. The appellant who was born on 13 December 1904 was almost 72 years of age when he was convicted. The State proved the previous convictions of the appellant. The regional magistrate, having convicted the appel= lant of fraud and theft, was obliged by sec. 335 (2) (b) of Act 56 of 1955 (hereinafter referred to as "the Act") to declare him an habitual criminal, since fraud and theft fall within Group III of

Part 1 of the Third Schedule to the Act, and the appellant had previously been declared an habitual criminal, unless the regional magistrate was of the opinion that there were circumstances as contemplated by sec. 335 A of the Act which justified the imposition of a lighter sentence than the prescribed declaration as an habitual criminal. Evidence was then led by the defence in mitigation of sentence. Mr Jackson, the Secretary of the Johannesburg Jewish Helping Hand and Burial Society, gave evidence and handed in two medical certificates. The appellant also testified on his own behalf. After having considered the evidence led in mitigation of sentence as well as the relevant factors and circumstances the regional magistrate came to the conclusion that there were no circumstances in terms of sec. 335 A justifying a deviation from the prescribed sentence. The appellant was

/accordingly .....

accordingly declared an habitual criminal. In terms of paragraph 4 (f) of the Fifth Schedule to the Act such a declaration is equivalent to nine years imprisonment for the purpose of deter= mining the "unexpired portion" of such sentence.

On 22 December 1976 the appellant obtained a Judge's certificate in pursuance of the provisions of section 103 (6) of Act 32 of 1944 which enabled him to appeal against his sen= tence to the Transvaal Provincial Division as a Court of Appeal on the grounds that his age and state of ill-health possibly justified a lesser sentence. On 28 February 1977 the Transvaal Provincial Division dismissed his appeal after having come to the conclusion that "in all the circumstances we cannot say that the trial court in coming to the conclusion that Section 335 A

could not be applied in any way erred." Subse= quently, on 5 April 1979 the Court a quo granted the appellant leave to appeal to this Court on the sole ground that there was a reasonable possibility "that the Appellate Division might come to the con= clusion that in the case of a man of the age of the applicant, a court, in the exercise of its discretion under Section 335 A, should impose a determinate, rather than an indeterminate sentence."

It is trite law that Section 335 A conferred on the regional magistrate in the present matter a very wide discretion since he could, in the exercise thereof, consider any relevant circumstances which would in his view justify the imposition of a lighter sentence than the prescribed one. A Court of Appeal has a limited right to interfere with the exercise of such a judicial discretion. As was said by HOLMES, J.A., in S. v. Letsoko and others, 1964(4) SA 768 (AD) at p 777 E-F :

"When .....

> "When a trial Court gives a decision on a matter entrusted to its discretion, a Court of Appeal can interfere only if the decision is vitiated by irregularity or misdirection, or is one to which no Court could reasonably have come - in other words if a judicial discretion was not exercised."

It was submitted on behalf of the appellant in this Court that, in view of the appellant being almost 72 years of age and having regard to the state of his health, the trial court should have considered the imposition of a determinate sentence and that in failing to do so the trial court acted unreasonably. It was accordingly contended that no reasonable court would in the circumstances have imposed the prescribed sentence.

A review of the appellant's previous convictions shows that he has a bad record which is composed of a gloomy catalogue of crimes, such as

/housebreaking .....

housebreaking with intent to steal and theft, fraud and theft by false pretences, all of which involved dishonesty and which he persistently committed over a period of 40 years. The indeterminate sentence was passed on several occasions, viz. on 13 November 1952, 19 August 1963, 25 November 1963 and 2 March 1964. When the appellant was convicted on 4 October 1974 on two counts of fraud the provisions of Section 335 A were applied in consequence of which he received, in lieu of the indeterminate sentence, a sentence of nine years of imprisonment suspended for three years on certain conditions. In the light of his previous convictions the appellant may with justification be described as an incorrigible rogue. The appellant was, moreover, represented by an attorney who stressed inter alia personal factors relating to the appellant which were duly considered

by the trial court. The latter took cognizance of the appellant's advanced age and that he had lately taken to religion. There is no general rule that ill health or advanced age as such are factors which automatically relieve a criminal from being imprisoned. Compare S. v. Berliner, 1967(2) SA 193 (AD) at p.199 F - H, S. v. Du Toit, 1979(3) SA 846 (AD) at p. 858 E-F. The mere prospect or probability that a criminal may perhaps not survive his sentence of imprisonment is as such no justification for the imposition of a light determinate sentence. It also appears from the record of the trial court's written reasons for sentence that due regard was also had to the interests of society especially in view of the fact the suspended sentence of nine years imprisonment which was imposed on 4 October 1974 apparently did not

/have .....

have any deterrent effect on the appellant from committing the serious offences of which he was convicted on 27 July 1976. The trial court rightly made the following comment:

> "The court will be failing in its duty if today it does not do something to at least keep you away from the public. To place you in a position where you are not in a position to defraud the public or to steal from the public."

On a reconsideration of all the relevant circumstances I am of the view that the contentions advanced on behalf of the appellant are untenable and that it cannot be said that the trial court in coming to the conclusion that the provisions of Section 335 A could not be applied in the present matter to impose a lesser sentence than the prescribed sentence misdirected itself or acted unreasonably.

/In .....

In the result the appeal is dismissed.

C.P. JOUBERT, J.A.

RUMPFF, C.J.)
JANSEN, J.A.) concur.