IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CHARLES PETER VAN NIEKERK ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM: VILJOEN, HOEXTER, GROSSKOPF, JJA

HEARD: 7 MAY 1985

DELIVERED: 23 MAY 1985

J U D G M E N T

VILJOEN, JA

The appellant was indicted and stood trial in the Court a quo on 14 counts of fraud and 3 alternative counts. On each of counts 1 to 11 he was

convicted/.....

convicted of fraud. On the main count 12 (fraud) he was found not guilty and discharged but he was convicted on the alternative charge of theft. On counts 13 and 14 he was found not guilty and discharged on both the main charges of fraud and the alternative charges brought under the Insolvency Act. On count 1 to 11, taken together, the accused was sentenced to 9 years imprisonment and on the alternative count 12 the accused was sentenced to an additional 3 years imprisonment. It was ordered, further, that two years of the sentence on counts 1 to 11 would run concurrently with the sentence of two years imprisonment passed and suspended in Pretoria on a prior date, should that sentence be

brought into operation. An application by the appellant for leave to appeal against his convictions and sentences was refused by the trial Court but this Court granted the appellant leave to appeal against his conviction and sentence on count 12.

In respect of all the counts the period covered by the indictment ran from the beginning of December 1979 to the end of March 1980. Throughout that period the appellant was a director of a concern carrying on business in Krugersdorp under the name of Torqueflo (Proprietary) Limited. He was also, at all material times, the sole shareholder of Torqueflo. Torqueflo had entered into a factoring agreement with Anglo African Factors. Count 1 to 11 arose from the

factoring/.....

factoring by Torqueflo of false invoices with Anglo African. They were false in that they showed debts owing to Torqueflo by its debtors which did not exist. Many of the debtors shown did not themselves exist; they were fictitious. Other invoices bore the name of real concerns, but they were not debtors of Torqueflo and the transactions so shown were fictitious. The trial Court held that the appellant was personally responsible for all these fraudulent factoring transactions.

Count 12 related to a batch of invoices factored by Torqueflo to Anglo African at the end of March 1980. In contrast with the transactions relating to counts 1 - 11 these, subject to one

qualification, were all genuine invoices. The debtors and the debts concerned all existed. The debts were owed, however, not to Torqueflo, but to a company in Natal called A W I Engineering (Proprietary) Limited (hereinafter referred to as A W I). The qualification was that the invoices wrongly showed Torqueflo, not A W I, as the creditor.

In finding the appellant guilty of the theft of R110 000 the Court a quo reasoned as follows:

> "Anglo African paid Torqueflo R110 000,00 as the proceeds of the factoring. It was clearly proved that the accused knew all about this, indeed gave instructions for the batch of invoices in question to be factored by Torqueflo and for Torqueflo to be paid the proceeds. Indeed that was not seriously disputed.
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> The factual background to all this is the following. During March 1980, the accused entered into a contract with the sole shareholder of A W I, a man

called/.....

called Fisher, in terms of which the accused purchased all the shares in A W I. The price for them was payable in instalments, and there was the usual provision for cancellation in the event of a default in any payment. The accused defaulted and the contract was cancelled. It lasted not even 6 weeks. In the meantime A W I's claims against its debtors, its genuine claims against its debtors, had been factored to Anglo African By Torqueflo. Fisher, or someone acting on his behalf and authorised to do so, had supplied the accused with a list of these debtors and particulars of the claims against them. This had been done with knowledge that the accused intended to factor the claims, and in order that he might do so. The permission to do so was granted, however, subject to an express and very important condition. It was that the proceeds were all to go to A W I. That was hardly surprising. The deal might have fallen through. Indeed, as we now know, it did. In that event it was a matter of the greatest importance to Fisher that the proceeds of the factoring should be paid to A W I.

The main charge against the accused under the heading of Count 12 is one of fraud against

Anglo African. The fraud is said to have been committed in the same way as the frauds covered by Counts 1 to 11. In our view, however, this was no fraud on Anglo African. We say this because, apart from all else, we cannot infer at all, let alone beyond reasonable doubt, that on this occasion there was any intention to defraud Anglo African. There was clearly a false representation to Anglo African that the debts in question were owed to Torqueflo, when in fact they were owed to A W I. The reason was, however, that A W I had no factoring agreement with Anglo African. It seems likely and at least possible that, had the accused asked Anglo African to factor A W I's debts, it would have agreed, subject to the conclusion of the standard factoring agreement and, what is more, that the standard factoring agreement would then have been concluded between A W I and Anglo African. Anglo African, after all, had such agreements already, not only with Torqueflo, but with a number of other companies with which the accused was associated. Instead, a short-cut was taken by Torqueflo. These debts were factored as if they were owed to Torqueflo. At the same time however, and this is important, the accused wrote to the debtors of A W I telling them that Torqueflo had taken A W I over. It had

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not, of course. He had, but that does not matter for present purposes. He also told them their debts had been factored to Anglo African, and that they must pay Anglo African. They would, however, have indeed been obliged to pay Anglo African. A W I, temporarily represented by the purchaser, had factored these debts, and that had been done in pursuance of an authority to factor the debts given by A W I, represented by the seller. There was, it seems, an effective cession of the claims to Anglo African and, once that is so, it is impossible to say that the accused had any fraudulent intent, vis-a-vis Anglo African.

Vis-a-vis A W I, the accused's behaviour is, however, another matter. the alternative charge focusses on this. It is a charge of theft from A W I, the theft of the R110 000,00 that ought to have been paid to A W I and never was, the theft in short of the proceeds of the factoring of A W I's claims. That this offence was committed by the accused is as plain as a pikestaff. The case is a straightforward one of theft by conversion. The claims belonged to A W I. The proceeds ought to have gone to A W I. That was the case, quite apart from the condition subject to which permission to factor was given. But the

conditon underlined what the position was in any event. Instead of accounting to A W I for the proceeds, the accused converted them to his own use by causing them to be paid to Torqueflo, from the augmented funds of which, incidentally, he then drew cash for the deposit payable by him for the purchase of the very shares in A W I. The accused gave no explanation whatsoever for his and Torqueflo's failure to account to A W I for the proceeds of the factoring. The best he could do in his evidence was to say he did not know why this had never been done. There was no suggestion that he had ever given instructions or arranged for it to be done, that he had ever intended that it should be done, that he had ever contemplated that it would be done. That he did not is the only inference to be drawn."

In view of the argument addressed to this Court on appeal it is necessary to have regard to the trial Court's reasons for acquitting the appellant on the main counts 13 and 14 - the counts alleging fraud. These reasons are:

"Count 13 relates to the accused's purchase of the shares in A W I, and Count 14 to his purchase of the shares in the company owning Atlas Engineering. The main count under each charge is one of fraud. The accused is said to have misrepresented to the seller in each case that he had the means to purchase the shares, that he had the intention to pay the full price, and that he was able to pay the full price, when, so it is alleged, he knew that he could not afford to buy and he had no intention of performing."

.....

"There is no real reason to believe, and it was certainly not proved, that when he contracted the accused did not intend to implement both contracts, and that he did not truly believe that he would be able to find the necessary cash. Whether the belief was reasonable or not is neither here nor there. The accused, one gathers, is a sort of Micawber character. What we have learnt of his business activities shows a high degree of optimism. Money is shuffled around from one place to another and back again. That he may have been careless, negligent, in the conduct of his affairs, is one thing. Negligence cannot suffice for fraud.

Nothing/.....

> Nothing less will suffice than proof, on the allegations in this indictment, of an actual subjective lack of intention to implement the contracts, and a subjective lack of any honest belief in his ability to do so. While there may be circumstances in this case which suggest the possibility that one or the other or both these states of mind were present, while there may be circumstances in this case which tend to suggest that the accused may have entered into agreements to buy A W I and Atlas for no other purpose than to plunder these companies and then to get out, there is nothing more in that regard than suspicion. That such was in truth the case was not proved. Far less was it proved beyond a reasonable doubt."

On behalf of the appellant it was submitted, firstly, that the Court a quo misdirected itself in finding beyond a reasonable doubt that the appellant had committed the crime of theft by conversion of the amount of R110 000 inasmuch as the Court a quo accepted, in acquitting the appellant on counts 13 and

14 that the appellant might reasonably possibly genuinely have intended to purchase and manage A W I; secondly, that the State had failed to show what portion of the amount of R110 000 could be directly attributed to the A W I invoices which were factored ; thirdly, that the payment of the proceeds of such factoring by the appellant was only outstanding for a period at most of one week from the time of factoring namely 26 March to the time that other frauds on Anglo African were uncovered; and consequently, in view of the fact that the appellant had firmly intended to manage A W I himself and not to "get out" (as the learned trial Judge put it) after a while, that mens rea had not been proved.

The first submission cannot be sustained.

The intention of the appellant to purchase and manage A W I affords no guarantee that he intended to do so properly. What the learned trial Judge said in the course of his judgment in the context of the fraud charge is, in my view, not relevant at all to the theft charge. As appears from the extract quoted above the trial Court came to the conclusion that the State had failed to prove, on the allegations in the indictment relating to fraud, an actual subjective lack of intention on the part of the appellant to implement the contracts, and a subjective lack of any honest belief in his ability to do so. There was not sufficient evidence to support a finding that the

appellant/.....

appellant entered into the agreement for no other purpose than to plunder A W I and then to get out, the Court held. This finding does not, in my view, assist the appellant. The appellant did plunder A W I by stealing from it but might have stayed on to manage it, however irregular such management might have been.

The third contention must similarly be rejected. As appears from the excerpt from the judgment above the Court pointed out that the appellant gave no explanation whatsoever for his and Torqueflo's failure to account to A W I for the proceeds of the factoring, and drew the inference, correctly, in my view, that the appellant never intended to account to A W I for such proceeds.

The/.....

The second submission must be partially upheld. The evidence reveals that payments made to Torqueflo by Anglo African did not always relate to a particular or the most recent offer of receivables because Torqueflo's requests for payment were not always made with each offer submitted. Regard being had to the evidence and the schedule containing particulars of invoices accepted, customer payments and drawings, it is, however, possible to calculate what amount available to the supplier (in this instance Torqueflo) relates specifically to the A W I invoices. The effect of such calculation is that, but for the A W I invoices, an amount of R71 992 was as at 26 March available to Torqueflo. The amount of R110 000

drawn by Torqueflo does not, therefore, relate to A W I invoices alone. The amount has to be reduced to R38 008 (R110 000 - R71 992). The appellant should, therefore, have been found guilty of the theft from A W I of R38 008 only and not R110 000. To this extent the appeal against the conviction succeeds.

In considering the sentence to be imposed on the appellant the learned trial Judge had regard to his personal circumstances and his previous convictions. From the latter he drew certain inferences. He came to the conclusion that the appellant was a persistent criminal who did not learn from experience. He described the appellant as "obviously one of these people who gambles on getting away with it." His

record was regarded as a positively aggravating factor, and a major one. The learned Judge said:

> "His record shows him to be a crook who cares very little about the interests of society, when those interests are in conflict with his opportunity to make a fast buck".

The learned Judge assumed in the appellant's favour that the suspended sentence passed in November 1977 would be brought into operation. Two factors which, in the view of the learned Judge, affected the sentence, were these:

> "The first is that I obviously must and do take account of the cumulative effect of the sentences to be passed on the different counts. I should say that, for reasons I shall give in a moment, I intend to take Counts 1 to 11 as one for the purpose of sentence, and to treat Count 12 separately. Had either of those counts (or series of counts in the case

of Counts 1 to 11) stood alone, I would have imposed a heavier sentence for each category than the one I intend passing, in the light especially of the accused's record. But the sentence under each heading will be somewhat reduced, and I believe appropriately reduced, to take account of the cumulative effect.

The second point is the one to which I referred a moment ago, the question of taking Counts 1 to 11 together. Counts 1 to 11 all relate not to one transaction, true, but to a single series of transactions of precisely the same kind. The fact that the accused was charged with and convicted on 11 counts is somewhat fortuitous. The State could have elected to make these 28 counts, taking each separate invoice as the basis for a single count. On the other hand, it could have elected to charge all of these transactions as one count. It chose to make what might have been one count at the one extreme and 28 counts at the other extreme, 11 by taking separate batches of invoices as the criterion for a particular count, a convenient thing to have done, but an entirely arbitrary basis. So this is, in my view, a classic case for doing what is often considered unsuitable, but which is eminently

suitable in the special circumstances of this case, that is to say treating a number of counts, in this case Counts 1 to 11, as one for the purposes of sentence."

The learned Judge described counts 1 to 11 as massive frauds. He proceeded as follows:

"Over a period of some 4 months, the accused deliberately, systematically, with ample opportunity for reflection, reconsideration or a plain failure of nerve, succeeded in fraudulently extracting from Anglo African Factors the very large sum of R458 000,00. This was done not as some frauds are by exceeding the bounds of reasonable optimism about what the true situation is, or what one's expectations in that regard are, but by a coldblooded system of falsification of documents. I view counts 1 to 11 in the most serious light."

Count 12 was treated differently, as follows:

"Count 12 was more of a spur of the moment

affair. It was a single incident on its own, but the sum involved was very substantial, R110 000,00. The accused knew full well that this money was not his. He pocketed it and Mr Fisher, a man who I am sure could not have afforded the loss, whould have suffered it had Anglo African not been in a position to and been willing to recede his company's claims against their debtors."

In view of the conclusion of this Court that the Court a quo erred in finding the accused guilty of R110 000, it is competent for this Court to interfere with the sentence imposed. That the amount of R110 000 influenced the learned Judge to impose a sentence of three years appears from the words:

"..... but the sum involved was very substantial."

Regard being had to this fact and to all

other/.....

other considerations mentioned by the learned Judge a quo - above all the cumulative effect of the sentence - a sentence of 1 year imprisonment on count 12 would, in my view, be a proper one.

In the result the appeal against the conviction on count 12 succeeds to the extent that the appellant is found guilty of the theft of R38 008. On this count a sentence of one year imprisonment is imposed. When this is added to the sentence imposed on counts 1 - 11, the total sentence is one of ten years imprisonment. Two years of this sentence will run concurrently with the sentence of two years imprison-

ment passed and suspended in Pretoria on 10 November 1977 should that sentence be brought into operation.

JUDGE OF APPEAL

Hoexter, JA)
Grosskopf, JA) - agree