

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

OTTO KOCH First Appellant

ELIZABETH RAMSAY Second Appellant

IVAN NORMAN RAMSAY Third Appellant

AND

THE STATE Respondent

Coram: E.M. GROSSKOPF, EKSTEEN et NIENABER. JJ A

Heard: 1 November 1990

Delivered: 23 November 1990

J U D G M E N T

EKSTEEN, J A :

The three appellants were charged before a regional court with 47 counts of fraud. Despite their pleas of not guilty they were all convicted - the first and the third appellants on all 47 counts and the second appellant on 38. The first appellant was thereupon sentenced to 8 years' imprisonment of which 2 years was conditionally suspended. The second and third appellants were each sentenced to 5 years' imprisonment of which 2 years was again conditionally suspended. Their appeal to the Witwatersrand Local Division was unsuccessful. That Court also refused to grant them leave to appeal to this Court. Their petition to the Chief

Justice was, however, successful, and they are now before us in an appeal both against their convictions and sentences.

From the evidence adduced at the trial it appears that during 1980 the first appellant ("Koch") was employed by a firm called "Work Force" owned by one Ronnie Katz. This firm was engaged in supplying labourers to various firms on an ad hoc basis. Towards the end of 1980 or the beginning of 1981 Koch discussed the activities of this firm with his sister, the second appellant ("Mrs. Ramsay"), and the two of them decided to start a similar business on their own. Mrs. Ramsay sold her house to obtain the initial capital required to start the business, and the company

known as Ramsay's Artisan and Draft Hire (Pty.) Ltd.

("Ramsay's") was established and registered as such on

28 February 1981. Mrs. Ramsay held 51% of the shares,

and Koch 49%. Mrs. Ramsay, it appears, looked after

the administration side of the business while Koch

went out to recruit artisans and to make contact with

prospective firms that required artisans on a short

term basis as opposed to becoming full time employers.

Ramsay's would then supply these artisans and pay them;

at the same time charging the employer a pre-specified

wage rate on a weekly basis. Each week a time-sheet

would be submitted by the client-employer showing the

number of artisans employed and the times worked.

The client would then pay Ramsay's at the pre-arranged

rate.

Very soon Koch and Mrs. Ramsay began to experience liquidity problems by reason of having to wait for payments from their clients. So in April 1981 they approached a factoring firm in Cape Town known as Redfin Factors ("Redfin") and concluded an agreement with them. In terms of this agreement Ramsay's would continue to supply labour to their client employers, and would present to Redfin the invoices to the individual debtors, together with time-sheets reflecting the hours worked by each artisan and the wage rate agreed upon. Redfin would then pay cash against the invoices and collect the debt directly from the client-employer. It was

a term of the contract that Ramsay's would instruct their clients to pay directly to Redfin and not to Ramsay's. On receipt of Ramsay's invoices and time-sheets Redfin would immediately pay 75% of the amount reflected and retain 25%, which would only be paid over once the debt had been collected from the client and after deduction of a factoring fee.

The factoring agreement was signed by Koch on behalf of Ramsay's and at the same time he and Mrs. Ramsay both signed an "Instrument of Suretyship" by which they bound themselves as sureties and co-principal debtors for the fulfilment by Ramsay's of all its obligations in terms of the factoring agreement.

At more or less the same time Koch sold 10

of his shares to Mr. Neil Gilmour for R10,000. This sum, he says, he "left" in Ramsay's account at the request of Mrs. Ramsay. This may well have been another attempt to overcome the firm's liquidity problem.

Mrs. Ramsay also sold 10 of her shares to a Mrs. Mantuchi and she too apparently paid the proceeds into Ramsay's account. Both Koch and Mrs. Ramsay refer to these loans to the company as "loan capital".

The injection of funds, together with the effect of the factoring agreement on Ramsay's, apparently cleared up all liquidity problems and the company seemed to be in a strong financial state. So much so that during or about June 1981 Mrs. Ramsay, with Koch's concurrence, decided to withdraw her

"loan capital" together with an additional unspecified amount in order to take a prolonged vacation of some three months "overseas". Koch says this vacation cost some R60,000 but Mrs. Ramsay says it was much less.

Koch, too, decided to withdraw his "loan capital" in order to do some renovations and alterations to his house. This he says he did by employing labourers and telling Ramsay's to pay their wages. This likewise was done with the concurrence of Mrs. Ramsay. It would appear that the total wage bill in respect of these alterations came to some R14,000. Instead of simply paying the labourers on behalf of Koch, as had been agreed upon, Ramsay's appears to have factored the wage-bill to Redfin in the name of B & O Construc-

tion. B & O Construction was a company which had been formed by Koch but which never seems to have operated at all. At the time this wage-bill was factored to Redfin, B & O Construction was entirely dormant. Koch says that the first intimation he had that Ramsay's had factored the wage-bill to Redfin, was when Redfin forwarded payment from B & O Construction. He says that he immediately took the account to the third appellant ("Ivan Ramsay"), Mrs. Ramsay's son, who was employed by Ramsay's as an assistant to his mother, and demanded an explanation, insisting at the same time that Ramsay's pay the account. This seems to have occurred towards the end of August 1981 just before Mrs. Ramsay returned

from her trip overseas. She then suggested that a bank account be opened for B & O Construction, and that Ramsay's pay R14,000 into that account so that B & O could pay Redfin. Koch seems to have agreed to this suggestion, and it would appear that the matter was settled in that way. This transaction did not form the subject matter of any of the charges preferred against the appellants.

The fraudulent dealings with which they were charged commenced on 8 December 1981 and continued until 7 December 1982. The gist of the State's allegations against the appellants was that on the dates set out in the charge sheet they presented invoices and time sheets purporting to emanate from

Ski Construction, B & O Construction and Electro-board to Redfin in terms of the factoring agreement and thereby induced Redfin to pay to Ramsay's various amounts totalling R336,181.37, whereas the appellants knew that Ski Construction and Electro-board were fictitious entities and that no labour had been supplied by Ramsay's to either of these entities or to B & O Construction. Some of these invoices were repaid by Ramsay's apparently in the names of these entities mentioned above, but in the end Redfin suffered a nett loss of R190,887.87 which was not recovered at all.

At the trial it was common cause that the invoices listed in the charge sheet for the amounts

alleged, together with the supporting time-sheets were indeed submitted to Redfin by Ramsay's on the dates alleged, and that the information reflected in these invoices and time-sheets was false. It was also common cause that Ski Construction and Electroboard were fictitious firms and that B & O Construction had not been supplied with any labour by Ramsay's. Koch denied all knowledge of any of these invoices or time-sheets, or that he had ever heard of Ski Construction or Electroboard before January or February 1983 when he was approached by Greyling, the then managing director of Redfin. Mrs. Ramsay alleged that the whole fraudulent scheme had been conceived and initiated by Koch; that she had only become aware

of it about May or June 1982; and that thereafter she allowed it to continue because of threats made by Koch. Ivan Ramsay, who it was common cause was responsible for writing most, if not all of the false invoices and time sheets, and for appending a variety of signatures in order to give a verisimilitude of authenticity to them, contended that he had initially acted on the instructions of Koch on the assumption that there was nothing wrong with what he was doing until his mother told him that all this documentation was fraudulent. Thereafter he continued to do so because of threats by Koch to his personal safety.

From the judgment of the regional magistrate

it would seem that he approached the evidence of the appellants on a wrong basis. Initially he says that -

"The onus rests upon the State to prove beyond a reasonable doubt that the accused had the necessary intention to commit the offences of fraud."

Immediately thereafter however he refers to section 332(5) of Act 51 of 1977 and concludes from this that -

"The onus therefore rests upon the accused to prove on a balance of probabilities that they did not take part in the fictitious transactions; secondly, that they could not have prevented it."

In the present case each of the appellants was charged in his or her individual capacity with having committed fraud. Ramsay's was not charged with any of the offences. The charge sheet made no reference to section 332(5), nor did it allege that

Ramsay's had committed the offences with which the appellants were charged. In these circumstances

the Court a quo, relying on the decision in S. v.

Deal Enterprises (Pty.) Ltd. and Others 1978 (3) SA ..

302 (W), held that the section could find no appli-

cation, and that no reliance could be placed on the

presumption therein contained. This view was accept-

ed in argument before us. It follows therefore

that the magistrate was wrong in seeking to place any

reliance on the section, and, insofar as it affected

his view of the onus, which he held rested on the

appellants, he clearly misdirected himself.

The magistrate also misdirected himself in holding that -

"The only element of the offence which is being placed in dispute by the three accused is the element of mens rea."

It was quite clear from the evidence that insofar as Koch was concerned the actus reus on each count was very much in dispute. He denied participating in any of the fraudulent activities and contended that he was completely unaware of the fact that they were taking place. Mrs. Ramsay also alleged that she was unaware of the fraudulent transactions until she was told about them during May or June 1982. It was therefore not correct to say that mens rea was the only element of the offences that was in dispute.

These misdirections of the magistrate are

of so fundamental a nature that the appeal must succeed unless this Court "considers on the evidence (and credibility findings if any) unaffected by the irregularity or defect, that there is proof of guilt beyond a reasonable doubt". (Per Holmes J.A. in S. v. Tuge 1966 (4) SA 565 A.D. at 568 F-G.) The evidence of the appellants must be considered on the basis that the onus rested throughout on the State to prove their guilt beyond a reasonable doubt.

The magistrate was not very impressed with Koch as a witness. He describes him as being "very nervous in the witness box" and "very evasive". It appears from the record though, that Koch suffered from dyslexia and had considerable difficulty in

reading and writing. He was not entirely illiterate but his writing, it appears, was barely legible, and he did not readily read or understand bank statements or other documents. The record also tends to reflect an inability to express himself clearly and logically, so that often his evidence does appear to be somewhat confused. In her argument before us Miss Borchers, who appeared for Koch, submitted that Koch was not the only one at the trial who appeared to be confused at times. The prosecutor too seems to have become confused about certain aspects of the evidence and in his cross-examination, based on mistaken premises, he tended to make Koch's apparent confusion worse confounded. She also submitted

that at times the prosecutor evinced a measure of impatience to such an extent that his cross-examination verged on rudeness. I do not propose analysing Koch's evidence in any detail, but suffice it to say that these submissions do not appear to be without substance.

In weighing the probabilities the magistrate devoted much of his judgment to criticizing Koch for allowing Ramsay's to pay the amount of R14,000 into the bank account of B & O Construction before repaying it to Redfin. It must be borne in mind, however, as I have indicated above, that this transaction did not form the subject of any of the charges preferred against Koch. Moreover on a careful reading of all

the evidence relating to this transaction I find it difficult to see what adverse inferences, if any, can justifiably be drawn against him.

The magistrate also sought to draw an adverse inference against Koch by reason of his failure to make enquiries from Ramsay's after he had been confronted with the fraudulent invoices and time-sheets by Greyling. This confrontation, however, occurred during January or February 1983 some 3 or 4 months after Koch had left Ramsay's. At that stage all the fraudulent transactions had already been exposed, and there was not a great deal Koch could have done other than to reproach his erstwhile associates at Ramsay's.

The submission by counsel for the respondent

that by reason of the familial relationship of most of those concerned in Ramsay's, and the active part played by Koch in the company, albeit in a sphere removed from the administrative side of things, makes it improbable that he did not know about the fraudulent transactions which stretched over a considerable period of time and generated a considerable amount of money for Ramsay's, is equally not without substance. More than a balance of probabilities, however, is required to found guilt in a criminal trial. Nowhere in his evidence does Koch concede that he knew anything about the perpetration of these fraudulent transactions until January or February 1983 when he was approached by Greyling, nor can any

justifiable inference be drawn against him on his evidence taken alone, to found a conviction.

In order to justify the conclusion to which he came the magistrate relied on the evidence of Mrs. Ramsay and of Ivan Ramsay. He found Mrs. Ramsay to be a credible witness and accepted her evidence that Koch had initiated the whole fraudulent scheme and that she had only become aware of it during May or June 1982 when he himself had informed her about it. Thereafter she was compelled to go along with the scheme by reason of the dire threats uttered to her by Koch. So too he accepted that Ivan Ramsay had been instructed by Koch from the start to draw up the false time sheets and to append false signatures to

them. This evidence, he held, proved that Koch knew about the fictitious invoices and knew that Ski Construction and Electroboard never existed. Nowhere in his judgment does it appear that the magistrate warned himself against the uncritical acceptance of the evidence of these witnesses who were not only accomplices but also co-accused. (Cf. R. v. Ncanana 1948 (4) SA 399 (A.D.) at 405-6.) Their relationship with Koch was clearly acrimonious, and they had a powerful motive to implicate him in the way they did in order to minimise their own guilt in the whole scheme. Neither the evidence of Mrs. Ramsay nor that of Ivan Ramsay was without blemish. Mrs. Ramsay's persistent allegation that after her return

from overseas in August 1981 and throughout 1982 she did practically nothing at all in Ramsay's and had no responsibilities despite being a director and the major shareholder in the company sounds most improbable. So too does her evidence of the exaggerated threats by Koch which she says compelled her to conceal and persist in the fraudulent scheme. A mere reading of Ivan Ramsay's evidence does likewise not impress one with its veracity. The magistrate's failure, therefore, to approach this evidence with greater care and to warn himself of the dangers inherent in its uncritical acceptance, taken together with the misdirections to which I have already referred leads me to the conclusion that it would be

dangerous to place any reliance on the evidence of Mrs. Ramsay or of Ivan Ramsay. On the magistrate's line of reasoning, therefore, he ought not to have been satisfied that the State had proved Koch's guilt beyond a reasonable doubt, and he ought not to have convicted him.

The Court a quo did not rely on the evidence of Mrs. Ramsay or of Ivan Ramsay in dismissing Koch's appeal but sought to do so with reference to the evidence of Sive and Greyling - the only two witnesses called by the prosecution. Sive appears to have been the managing director of Redfin at some stage or other. The evidence is not very clear about this but he would seem to have held this office during

1981 when the factoring agreement between Redfin and Ramsay's was concluded. He conducted the negotiations with Koch and Mrs. Ramsay and signed the agreement on behalf of Redfin. He says that at these negotiations Koch took the lead and appeared to him to be running Ramsay's. He regarded Koch as the managing director.

Initially performance by Ramsay's of the factoring agreement was entirely satisfactory. Then (if one has regard to the charge-sheet this must have been from December 1981) when invoices and time-sheets from B & O Construction, Ski Construction and Electro-board were submitted the agreement was not strictly complied with, in that payments to Redfin were not

made by the debtors, but by Ramsay's instead. These

payments were made promptly on due date ini-

tially, but later on they began to fall in arrear.

Attempts were then made to get in touch with the

debtors without any success. Eventually somebody

gave Redfin a telephone number in Zimbabwe purport-

edly of Electroboard and "they" spoke to a Mr. Gil-

mour. This, Sive says, was "towards the beginning

of December 1982". Subsequently during the same

month Gilmour presented himself at Redfin's offices

in Cape Town and informed Sive that he had pur-

chased shares in Ramsay's, and "that he had financial

means to support the company and any indebtedness

owing by the company to ourselves would be sorted

out in a very short period of time." Greyling then drew up a deed of suretyship which Gilmour signed.

At about this time Sive says there was "an open admission of the fraudulent nature of these invoices, the non-existence of these debtors". These admissions were made by Gilmour and by Mrs. Ramsay. Mrs. Ramsay alleged that she had collaborated in the scheme because of "various threats from her partner Mr. Koch".

On 17 February 1983 a meeting was held in the offices of Redfin's Johannesburg attorneys, Saul and Weiner, attended by Sive, Gilmour, Mrs. Ramsay and Koch. At this meeting Koch "claimed that he had no hands on dealings day to day with the company"

and blamed Gilmour and Mrs. Ramsay "as being in collusion with these invoices". Gilmour and Mrs. Ramsay, on the other hand, blamed Koch and "claimed that they had operated under various threats of one sort or another by Mr. Koch". At this meeting, Sive says, there was no dispute about the fact that these invoices were "fictitious invoices raised on non-existing companies". The upshot of the meeting was that Gilmour and Koch "undertook to raise funds to settle the indebtedness".

Referring to Sive's evidence the Court a quo says:

"According to the evidence of one Sive, an

official of Redfin Factors, enquiries had been made by that company, or rather members of the staff of that company, concerning the background of the three so-called debtor companies that I have mentioned (that is, Electroboard, B & O and Ski Construction), and the suspicion had been formed that they might not exist and that the debts were in fact fictitious. So a meeting was called with the executives of the Ramsay company and the first and second appellants were specifically challenged. Sive says that the fact that fictitious invoices were raised on non-existing companies was not disputed by these two persons. That in itself postulates knowledge on the part of the first appellant, although only at the stage of the meeting. But the fact that he did not deny involvement until a subsequent meeting with Sive and his attorney when he blamed the other two appellants for the fictitious invoices suggests that he must have known for some time of the irregularities and his silence could be said to manifest guilt on his part."

It is quite apparent from this passage that the Court a quo misdirected itself on the facts.

Koch only attended one meeting with Sive and that was the meeting of 17 February 1983. The earlier meeting in December 1982 with Sive was only attended by Gilmour in his capacity as a shareholder in Ramsay's, and not by Koch or Mrs. Ramsay. Sive's evidence that "the fact that fictitious invoices were raised on non-existing companies was not disputed" relates to the meeting of 17 February 1983 and not to his earlier meeting with Gilmour. The inference which the Court a quo seeks to draw against Koch in this passage is therefore unwarranted.

The Court a quo then goes on to consider the evidence of Greyling and comes to the conclusion that the evidence points strongly to Koch's guilt.

It says:

"More important is that Greyling says that he started trying to contact the three appellants in about September 1982 to ascertain why the particular debtors, Ski Construction, B & O and Electro-board, were not paying their debts. The excuse given by all three appellants was that the debtors were in the field and not easily 'contactable'. These were false answers for all three appellants knew that two of the companies did not exist and that the third (B & O) had not contracted any indebtedness. A false answer of this nature, in my opinion, imports the irresistible conclusion that the first appellant knew that the invoices were fictitious."

After referring specifically to certain passages in Greyling's evidence, the learned Judge a quo goes on to say:

"Greyling said that he spoke to the first appellant on more than one occasion about Electro-board and he says the first appellant had undertaken to get payment effected. This answer against

the knowledge that the company did not exist again postulates knowledge of the falsity. The evidence disclosed that the first appellant was the person who went out into the field to drum up business, as it were, that is, to gain the custom of particular contractors. He must have known, by virtue of his position in that connection and by virtue of his position generally in the company, of the names of all the customers with whom the company dealt. When the name 'Electroboard' was specifically mentioned to him by Mr. Greyling, his reaction that he would obtain payment serves to show, in my opinion, that he recognised that invoices of Electroboard had reached the creditor company. His reaction would have been otherwise if he had never heard of Electroboard and there would have been no undertaking on his part, as I see the matter, to get payment effected."

Greyling also describes himself as the managing director of Redfin but says that he only joined the firm in January 1982. He presumably succeeded Sive as managing director at some un-

disclosed time. He says that he only started to get involved with Ramsay's round about September 1982 in an attempt to recover the money owing by Electroboard, Ski Construction and B & O Construction. He says that he got in touch with Ramsay's by telephone on various occasions and then the following passages appear in the evidence.

"At that particular occasion, who did you speak to? --- I cannot recall who I spoke to first, but on various occasions I spoke to all three.

So all three of the accused had spoken to you? --- Yes definitely.

All right, and can you tell the Court what reason they forwarded for the nonpayment of their clients as it were? --- Well initially they said that they were the debtor was going to pay, but Mr. Koch was going to visit them in the field, the one case I think near Witbank somewhere and they were not contactable by telephone. So

he had to go and visit them himself. Mrs. Ramsay gave me a similar story as did Ivan Ramsay, till eventually that was unacceptable to us.

.....

Right when you decided to get to the bottom of the matter when there was nonpayment and you were not satisfied with the reason forwarded, what did you do? ---- Well I had spoken to all three of the accused on prior occasions, and had been given reasons which were no longer satisfactory, so everytime Mr. Koch was out in the field and Ivan was running around trying to get the money, eventually I confronted Mrs. Ramsay on the telephone from Cape Town and said I would like to know what the truth was with these accounts, when she admitted that they had been fictitiously factored invoices."

As a result of this confession by Mrs. Ramsay Greyling flew to Johannesburg early in December 1982 where he met Mrs. Ramsay and her son Ivan Ramsay. They conceded that they had "created" the

fictitious invoices but alleged that they had done so under duress from Koch. Thereafter Gilmour flew down to Cape Town, met with Sive, and signed a deed of suretyship. "Later on" Greyling says, he and his attorney met Koch. Koch says this meeting took place about the end of January 1983 or early in February when he started his "fast food outlet" called Peter's Kitchen. Greyling agrees that he met Koch when he was busy opening his new "restaurant".

Greyling says that this was the first time that he had met Koch. In cross-examining Greyling Koch denied that he had ever spoken to Greyling on the telephone, and suggested to Greyling that he must have spoken to someone else who may have pretended

to be Koch. Greyling was emphatic:

"Mr. Koch I spoke to you and I recognized your voice."

Later on in cross-examination when Koch returned to this point and put it pertinently to Greyling that he had never spoken to him and that he must have spoken to somebody else, Greyling reiterated that he had recognized Koch's voice. This answer seems to me to be very strange in the light of the fact that Greyling did not know Koch at all at the time and only met him in January or February 1983. In these circumstances Greyling could not possibly have recognized Koch's voice when speaking to Ramsay's on the telephone.

That Koch did not speak to Redfin on the telephone seems to be borne out by Mrs. Ramsay who in her evidence in chief, referring to the telephone calls from Redfin to Ramsay's seeking information about the non-payment of the invoices, says:

"and every time they asked for Mr. Koch, Mr. Koch said he was not there. They would speak to Ivan "

or to the bookkeeper, Mr. Fouche.

In my view the State, on Greyling's evidence, has failed to show that Greyling ever spoke to Koch on the telephone prior to Mrs. Ramsay's confession to Redfin early in December 1982, and the Court a quo was wrong in seeking to draw the conclusions it did on this assumption.

Finally the Court a quo, like the trial court, drew adverse inferences against Koch in respect of the R14,000 B & O Construction transaction which, as I have indicated, took place before the commencement of the fraudulent scheme referred to in the charge sheet, and which did not form the subject of any charge against Koch. In any event I do not think that any adverse inferences can justifiably be drawn against him on this aspect.

Although therefore the probabilities may favour an inference that Koch must have known about the whole fraudulent scheme which benefit Ramsay's to such a considerable extent, they are not, in my view, sufficiently strong to amount to proof beyond

a reasonable doubt. The State has therefore failed to make out a case against Koch and the appeal against his conviction must succeed.

As far as Mrs. Ramsay is concerned she concedes that she knew about the fraudulent scheme and allowed it to continue. She says she only discovered this during April or May 1982, and the magistrate, believing her, only convicted her in respect of invoices issued after the end of May 1982. Greyling, as I have pointed out deposed to Mrs. Ramsay's attempts to deceive Redfin as to the fraudulent nature of the invoices, and her subsequent confession that she and Ivan Ramsay had "created" the fictitious invoices. At the end of Greyling's evidence Mrs. Ramsay indicated

a reasonable doubt. The State has therefore failed to make out a case against Koch and the appeal against his conviction must succeed.

As far as Mrs. Ramsay is concerned she concedes that she knew about the fraudulent scheme and allowed it to continue. She says she only discovered this during May or June 1982, and the magistrate, believing her, only convicted her in respect of invoices issued after the end of May 1982. Greyling, as I have pointed out deposed to Mrs. Ramsay's attempts to deceive Redfin as to the fraudulent nature of the invoices, and her subsequent confession that she and Ivan Ramsay had "created" the fictitious invoices. At the end of Greyling's evidence Mrs. Ramsay indicated

her acceptance of his evidence insofar as it referred to her, and merely sought to ameliorate her son's part in the scheme. In her evidence, however, she set out to deny that she had made out any of these invoices and contended that she was merely aware of the fact that they were false. When pressed in cross-examination she alleged that after her return from overseas in August 1981 she still came in to Ramsay's offices but did hardly anything at all. Later on she conceded, very reluctantly, that she might well have compiled some of the invoices. She also concedes that she participated in submitting the false invoices to Redfin after she knew that they were false. These denials of hers sound most unconvincing.

Ultimately her sole defence was that of duress.

The magistrate rejected this defence. So did the Court a quo, pointing out that after she had, on her own evidence, become aware of the fraudulent scheme during May or June 1982, she allowed it to continue until December of that year. The defence was not strenuously pressed before us, and I see no reason to differ from the conclusion to which the trial Court and the Court a quo came to on this aspect. The conviction of Mrs. Ramsay must therefore stand.

Ivan Ramsay conceded in his evidence that he made out the vast majority if not all the false time-sheets, and that from "the very beginning" he used to "sign somebody else's name on the bottom of

of a time-sheet" in order to deceive Redfin as to its authenticity. All this he says he did at the request of Koch, although he realized that what he was doing was wrong. When it was pertinently put to him that he must have known that he was "busy with something fraudulent" and that it was possible for him to have desisted at any stage if he had wanted to, his only reply was:

"I did not willingly take part in it."

His grandmother, Mrs. Irene Koch, who was called as a witness by Koch, told the Court how Ivan Ramsay had told her of his intention of making out fictitious invoices in order to "make a lot of money quite fast". She sought to dissuade him, and gained

the impression that she had succeeded. She says he also asked her whether she couldn't find him a post box for his private mail. She was unable to do so. Then he asked her to persuade her daughter, Mrs. Nadig, to let him share her post box. This was corroborated by Mrs. Nadig, who was called by the Court after Ivan Ramsay had closed his case. She says that she was not very keen on sharing her post box, but eventually agreed to do so as "a temporary arrangement". About two weeks later she says a letter came addressed to Electroboard. She did not know any such firm and returned it marked "address unknown". Some 10 days later she says Ivan Ramsay phoned her and reprimanded her for having sent his

post back. Thereafter she received "about a dozen" further letters addressed to Electroboard, all of which she handed to her mother, Mrs. Irene Koch, to give to Ivan Ramsay. The magistrate accepted this evidence. Greyling's evidence also reflected Ivan Ramsay's active participation in the deceit practiced on Redfin. There was therefore strong evidence to prove his fraudulent conduct, and in the last resort his defence was essentially also one of duress. As in the case of his mother this defence could not succeed and was, in my view, correctly rejected by the magistrate.

The magistrate convicted Ivan Ramsay on all counts. In argument before us it was suggested

somewhat tentatively that he should only have been

convicted on those counts on which Mrs. Ramsay had

been convicted on the basis that he only realized

that the scheme in which he was participating was

a fraudulent one, after his mother had told him so.

However the deceit in respect of Electroboard in which,

on the evidence, he played a prominent role right

from the beginning, commenced as early as 19 April

1982 - i.e. at a time before his mother admitted

knowing about the scheme. Moreover he conceded

making out practically all the false time-sheets and

when it was pertinently put to him that he must have

known "at the time" that he was busy with "something

fraudulent" he did not deny it but simply replied

that he did not willingly take part in it. The magistrate was therefore entitled to have convicted him on all the counts and I am not prepared to say that he was wrong in doing so.

At the hearing of this appeal we also had before us an application for leave to lead further evidence either before the trial court or before us. The application was not persisted in, and, in any event had no prospect of succeeding. I need not refer to it any further.

I turn now to consider the appeals of Mrs. Ramsay and Ivan Ramsay against the sentences imposed on them by the magistrate. Both appellants are first offenders and both expressed extreme remorse

in respect of their offences. Mrs. Ramsay was 49 years old at the time of the trial i.e. in 1987.

Ivan Ramsay says he was 22 years old at the time of the commission of the offences in 1982. His employment at Ramsay's was his first job after leaving school. His father and mother were divorced and he seems to have lived with his uncle, Koch. In such circumstances he would have been particularly susceptible to suggestions from both his mother and from Koch.

In considering an appropriate sentence in respect of these two appellants it must be borne in mind, as I have indicated, that on the probabilities Koch was the originator and driving force behind the whole fraudulent scheme. At the very least this

premise cannot be ruled out as not being reasonably possible. On their evidence Koch seems to have been a somewhat domineering person and certainly overbore Mrs. Ramsay in their joint discussions with Redfin. He regarded himself as the managing director of Ramsay's and as running the company. In these circumstances there seems to be much to ameliorate the blame attaching to Mrs. Ramsay and Ivan, and the sentence imposed by the magistrate seems to me to be unduly severe. On the other hand the offence is a serious one involving a considerable amount of money, and any sentence must reflect the seriousness of their transgression. Taking all the relevant circumstances into consideration I am of the

view that a fine of R25,000 each, coupled with a suspended period of imprisonment would be a fair and appropriate sentence.

In the result:

- (1) the appeal of the first appellant (Koch) against his conviction and sentence succeeds;
- (2) the sentences imposed on the second and third appellants by the magistrate are set aside and for them is substituted in each case a sentence of a fine of R25,000 or 2 years' imprisonment, and a further 2 years' imprisonment which is suspended for 3 years on condition that they do not within that period commit the offence of theft or fraud for which a sentence of imprisonment without the option of a fine is imposed.

J.P.G. EKSTEEN, J A

E.M. GROSSKOPF, J A)
 NIENABER, J A) concur