CASE NO 447/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

DOROTHY ELAINE LISTER Appellant

and

THE STATE Respondent

CORAM: SMALBERGER, VIVIER, NIENABER JJA

DATE HEARD: MAY 24, 1993

DATE DELIVERED: MAY 28, 1993

J U D G M E N T

NIENABER JA:

NIENABER JA:

The appellant, a 34 year old bookkeeper, then married, soon to become a widow, pleaded guilty in the regional court at Randburg to a charge of theft of R95 700,00 from her employer. She was sentenced to an effective period of imprisonment of 4 years. This is the ultimate stage of her endeavours to escape imprisonment.

Part of her duties as an employee was to prepare cheques for signature or approval by her superior. She did so with ink which she could afterwards erase. Once the cheque was signed, she altered the particulars, increasing the amount of, say, a cheque for petty cash. She would then cash the cheque and pocket the difference. In this manner she managed, over a period of some eleven months, to skim off the not inconsiderable sum mentioned earlier.

In sentencing her to a term of imprisonment the

regional court was heavily influenced by her list of previous convictions. This was not her first transgression involving dishonesty with cheques. On 15 September 1983 she was convicted of the theft of a cheque to the value of R0,50c - for which she was cautioned and discharged - and of fraud involving R27 600,00, no doubt perpetrated with the stolen cheque - for which she received a sentence of 3 years imprisonment, suspended for 5 years on condition that she was not convicted of theft or fraud, committed during the period of suspension, in respect of which she received a sentence of imprisonment without the option of a fine. Nine months later, within the period of suspension, she was again convicted on 3 counts of fraud involving cheques. The amounts involved, according to the SAP 69, were R1 091,95, R981,08 and R3102 (sic). The passing of sentence was postponed for 5 years on condition that she refunded the amount of R981,08 in instalments of R150 per

month. Less than a year later she was again convicted, this time on 63 counts of theft involving a total cash amount of R58 168,97. In terms of s 285 of the Criminal Procedure Act, 1977 a sentence of 1 500 hours of periodical imprisonment was imposed.

The current offences were also committed during the period of suspension.

The regional court had the benefit of the views of a probation officer in the service of the Department of Health Services and Welfare, one van Staden, who was called by the State, mainly, so it would seem, because the appellant was the mother of a 14 year old daughter who was at boarding school in Nelspruit. The appellant, though represented by an attorney, did not testify or call any evidence. From the report and the evidence of van Staden it appeared that the appellant had admitted to him that the present series of offences was carefully planned and executed over a period stretching from June

1987 to May 1988. At the time she was earning a gross salary of R2 075,00 per month. She was married to a man whom she had met in 1981. She commenced her criminal career in 1983, so she explained to van Staden, "om haar man te beindruk", although she also told van Staden that she used the money "om ander te vermaak, en haarself, man en kind uit te rus met alles wat nodig is." On being questioned by the magistrate she admitted that she had spent the money on herself. Her husband was suffering from terminal cancer of the liver and died in August 1988, shortly after she had pleaded guilty but before she was sentenced. Van Staden recommended a long term of imprisonment during which she could receive specialised and intensive counselling. The regional magistrate had regard to this suggestion in sentencing her to 6 years imprisonment of which 2 years was suspended for 5 years "on condition that the accused is not again convicted of fraud, theft, or of an attempt to commit these offences,

committed during the period of suspension."

The appellant appealed against her sentence to the Transvaal Provincial Division. The sole ground advanced was that it was an unreasonably heavy sentence which induced a sense of shock. But she did combine her appeal with an application to lead further evidence from a psychiatrist, Dr Sidley, as to her psyche and motivation. The court a quo, somewhat charitably I would think, acceded to the request. The sentence of the regional court was set aside and the matter remitted for the hearing of the evidence of Dr Sidley, as well as "further evidence by the appellant and such further evidence as the state may deem fit to call in regard to the aspect of sentence". Whether such an open-ended order was appropriate in the circumstances of this case is another matter but not one on which it is necessary to comment. The appellant at any rate capitalized on it and, at the resumed hearing, duly represented, led the evidence of Mr

Wood, a minister of the Baptist Church and of Dr Sidley, after which she herself testified. The evidence of Mr Wood related largely to her involvement with the activities of the congregation after her conviction. Not much turns on his testimony, and I accordingly leave aside the question whether the circumstances were such that newly constituted evidence, as opposed to newly discovered evidence, ought to have been admitted.

Dr sidley's evidence does merit consideration. What the appellant manifested, according to him, was anti-social behaviour (which can likely be cured by psychotherapy) rather than an anti-social personality disorder (which cannot). And since the emphasis was on psychotherapy, and since prison conditions would not be conducive to such treatment, Dr sidley recommended that the appellant be given a suspended sentence or a sentence of periodical imprisonment rather than a sentence of imprisonment, which he believed would be counter-

productive.

The appellant also testified. She sought, in evidence, to explain her conduct: some of the money, some R3 000,00 to R4 000,00, she spent on herself; the remainder was used for her husband's medical expenses. Her family, she said, was unresponsive when she approached them to take care of her daughter should she be imprisoned. Finally it was also accepted, without evidence being led, that some R34 000,00 had been repaid to her erstwhile, employer and that she had been re-employed by a building society which regarded her as a competent and valued employee.

The regional magistrate considered all the evidence afresh. The appellant, according to the court, was not a truthful or, at best for her, not a reliable witness and Dr Sidley had not been fully briefed with all the relevant information about her criminal career. On material issues his evidence, so it was held, was rather

vague. So for example he was not emphatic about either the need or the nature of the psychotherapy which he had in mind for the appellant. In all the circumstances the court remained unpersuaded by the new evidence and re-imposed its original sentence.

Once again the appellant appealed to the Transvaal Provincial Division. In a comprehensive, meticulous and balanced judgment Swart J (with whom Coetzee J agreed) came to the conclusion that there were insufficient grounds for interfering with the regional magistrate's assessment of sentence. Only in one respect did the court a quo adjust it: it directed that any imprisonment which the appellant, pursuant to her prior convictions, may be ordered to serve in future - should either the sentence suspended in 1983 or postponed in 1984 be resuscitated - be served concurrently with her present sentence of 4 years imprisonment.

The appellant thereupon applied for leave to

appeal to this court. Her application, rather surprisingly, was granted by Coetzee J, Labuschagne J agreeing.

Heads of argument were prepared by counsel on both sides but at the hearing of the appeal the appellant appeared in person. She assured the court that she had mended her ways and appealed to it not to confirm the sentence of imprisonment because of the harmful effect it would have on her relationship with her daughter, now 19 years old. She told the court that she was now employed by a construction company and enjoyed the support of her employer. She nevertheless accepted, she said, that this court was bound by the record and that considerations of this kind, recounted in this fashion, did not per se warrant interference with the judgment of the court below.

In his heads of argument her counsel, in the main, repeated the submissions made to the court a quo. These

are dealt with convincingly and in extenso by Swart J, I do not propose to cover exactly the same ground. For present purposes I mention only the following:

The appellant was clearly not a truthful witness. She consistently contradicted herself on a number of issues such as her motive for the theft, and on why she lied to the trial court on how she spent its proceeds. One must therefore approach her statements to the court and to Dr Sidley - and on which he based some of his views - with a measure of caution.

As for Dr Sidley I can do no better than to quote a passage from the judgment of the court a quo:

> "I think, with great respect to Dr Sidley, that his views as to the treatment of appellant are advanced on the basis of an expert's faith and expectation of benefit in the case of somebody who has been guilty of anti-social behaviour. He does know, in all probability, that her behaviour was not caused by an in-born personality disorder. Thus the suggestion of environmental factors which may have played a large role. In this connection he seems to have felt that the circumstances of the husband were such an environmental circumstance, but then she also used money for other purposes and he conceded that

greed could supposedly come into the picture. Apart from the husband there is the possibility of other environmental factors like broken homes etcetera, including the fact that she felt rejected by her family. Ultimately it really appears that Dr Sidley, although possessed of vast general experience and expertise, was at a disadvantage as far as appellant is concerned. He ostensibly has consulted her only once. He didn't have the full picture as far as her previous convictions are concerned, although he had the general picture. He hadn't treated her up to that stage. He doesn't really know what is wrong with her apart from the fact that she had been guilty of what he calls anti-social behaviour and the indication that there were certain environmental factors which to a larger or lesser extent could have motivated her behaviour. This appears inter alia from what he envisaged as 'going to as deep a level to find out the motivation behind any idea of her being anti-social' . This also appears from his prognosis that she might be using her anti-social behaviour as a form of compensation or aggression towards for instance society or her family. This ultimately appears from his views that prolonged intensive psycho-therapy would very possibly reinforce a feeling he has that she has 'a conflict which translates itself into some kind of vengeful behaviour'. The latter, if it should be the result of environmental circumstances, which Dr Sidley seemed to regard a distinct possibility, is in any event in sharp conflict with other environmental circumstances such as the condition of the husband which would have dictated her actions due to pure economic reasons. I think Dr Sidley was not put in a position where, from his expert point of view, he could tell the court what caused appellant's behaviour. Moreover, apart from

> benefits which may in principle result from psycho-therapy, I do not think that he was put in a ' position to make out a case that psycho-therapy for appellant outside a prison environment should be regarded as an over-riding factor or necessity by a court imposing a sentence. It must be remembered that Dr Sidley was not testifying as an expert on sentence but was giving the expert views he had at that stage relating only to appellant's conditions. The function of a court imposing sentence is different. The court has to consider other interests, including that of society and has to consider the objects of punishment in arriving at a proper sentence. In doing so, a court would see appellant's behaviour as criminal and not as merely anti-social. As far as treatment goes, if imprisonment is the appropriate sentence, the report and evidence of Mr Van Staden indicate the availability of a wide range of specialised services under the prison conditions."

I agree with this analysis. I remain unpersuaded by the submission in counsel's heads of argument that the court should have adopted the opinion of Dr Sidley that a gaol sentence would undermine the treatment to which she would have to submit herself. Prison, one knows, is not a congenial place and the conditions may well be less than ideal for psychotherapy. But then, a prison is primarily an institution of punishment, not cure. As the

court a quo was at pains to point out, the approach of a sentencing officer is not the same as that of a psychiatrist. The sentencing officer takes account of all the recognised aims of sentencing including retribution; the psychiatrist is concerned with diagnosis and rehabilitation. To focus on the wellbeing of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence.

It was suggested, both in the heads of argument and by the appellant, that community service would have been a more appropriate sentence, allowing for a full range of psycho-therapeutical treatment in circumstances more conducive to it than imprisonment. This matter was duly considered by the regional magistrate and the court a quo and I find myself in agreement with the views expressed that such a sentence would be inadequate having regard to

the nature and the magnitude of the offence and the appellant's list of previous convictions for similar offences. The offences committed on this occasion were not isolated ones; they followed hard upon similar offences for which she was most leniently treated by the courts in a patent attempt to keep her out of gaol. Those sentences did not have the desired effect and the courts below were justifiably sceptical about the prognosis of another suspended sentence or a sentence of community service. Nor can it be said that the sentence, all things considered, was shockingly inappropriate. Swart J summed up the position in terms I would like to endorse:

> "The question remains whether the sentence imposed was excessive in the sense of there being a striking disparity between such sentence and what this court considers to be an appropriate sentence (see for instance S v Petkar 1988 3 SA 571 (A) at 575I.) I am not of such an opinion. The sentence is undoubtedly severe. The appellant's personal circumstances and the probable effect of imprisonment as far as she is concerned, are mitigating factors warranting serious consideration.

The real tragedy is the involvement of the minor daughter. But this is not a burden solely to be cast on the courts. An intelligent, capable woman in the position of appellant surely had in her hands the primary and ultimate means of not involving her daughter and must have knowingly taken the risk of doing so, despite repeated warnings and let offs. I also take into account that there were unhappy features in appellant's childhood and that she must have had a difficult time during her marriage, particularly towards the end of her husband's life. These are certainly mitigating factors, although not advanced on behalf of appellant as substantive reasons for her actions. I accept that persistent adverse conditions of life have a debilitating effect on judgment and values. I fail to see, in appellant's case, that it explains her persistent transgressions and if it does, I fail to see that it can be condoned by a court of law. I accept that appellant and her husband were faced with high medical expenses and that at least portion, even a substantial portion, of the stolen moneys may have been used to defray such expenses. However, personal economic necessity can, in my opinion, not be condoned when met by theft and fraud of such magnitude, committed not on the spur of the moment, but by design over an extended period more or less hot on the heels of previous convictions and chances following similar events. In any event, economic necessity is hardly a matter that can be addressed by a court of law. It will be a negation of the rights of the victim and would lead to chaos. As a mitigating factor it can, in my opinion, not be taken further than possibly the absence of aggravation in that the misappropriation had not been motivated by greed. There are, however, severe aggravating factors, particularly in the amount

> stolen, the period over which the theft was committed, the fact that numerous misappropriations must have taken place which were carefully effected, the fact that appellant was in the employment of the complainant and appellant's previous convictions. Considering these factors, with due weight accorded to the mitigating factors and considering the objects sought to be attained by the imposition of punishment, I think the learned magistrate was fully justified in rejecting the approach suggested on behalf of appellant and in imposing direct imprisonment. I also do not regard the extent of the sentence as excessive."

In the absence of misdirections or irregularities, or the imposition of an excessive sentence, this court is not at liberty to interfere with the sentence simply because it feels some sympathy towards the appellant for her present predicament. Sadly, she brought it upon herself. The appeal is dismissed.

P M Nienaber JA

SMALBERGER JA)
) CONCUR
VIVIER JA )