Case No 23/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GREGORY LEX BLANK Appellant

and

THE STATE Respondent

CORAM: E M GROSSKOPF, KUMLEBEN, F H GROSSKOPF, JJA

HEARD: 23 August 1994

DELIVERED: 15 September 1994

J U D G M E N T E

M GROSSKOPF, JA

The appellant pleaded guilty in the Witwatersrand Local Division on 48 counts of fraud and was found guilty in terms of his plea. The trial judge (Cloete J) took all counts together for purposes of sentence, and sentenced the appellant to eight years' imprisonment. The trial judge refused leave to appeal against this sentence, but leave was granted pursuant to a petition to the Chief Justice. This appeal is now before us. In addition, by a late submission of additional heads of argument, the appellant has taken the point that a sentence of imprisonment in this case offends against the constitution, and asks that, if a custodial sentence were to be imposed or confirmed by this court, implementation of such a sentence be postponed to enable the appellant to approach the constitutional court for relief.

I deal first with the appellant's appeal against

his sentence. It has repeatedly been emphasized by this court that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial judge and that a court of appeal can interfere only where such discretion was not properly exercised. One of the ways in which it may be shown that a trial court's discretion was not properly exercised is by pointing to a misdirection in the court's reasons for sentence. The principle in this regard is expressed as follows by Trollip JA in S v Pillay 1977 (4) SA 531 (A) at p 535 E-F:

> "Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not

> exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

In the present case the appellant contends that the trial judge was guilty of several misdirections. To understand and assess this submission it is necessary to have regard to the learned judge's reasoning, and to this end I propose setting out a conspectus of his thorough judgment. I shall concentrate on those parts which were criticized in argument before us.

The judgment commences with an introduction in which the court set out the manner in which the matter came before it and what factual and other material was available to it. Included in the latter was a document entitled " Agreed Factual Submissions in Mitigation". The broad nature of the offences of which the appellant was convicted is expressed in the judgment as follows:

> "The accused was a stockbroker. He participated in two schemes with senior employees of the Old Mutual to purchase shares, to sell those shares to the Old Mutual at a profit and to receive part of the proceeds.
>
> As an agent of the Old Mutual, a member of the Johannesburg Stock Exchange and a partner of Frankels, Max Pollock, Vinderine Incorporated ('Frankels') the accused was under a duty to disclose his personal interest in these share dealings to each of the aforesaid entities. He failed to do so and foresaw that his failure could prevent a fully informed judgment from being exercised regarding the said sales."

Then follows a section headed "The Crimes and the Accused's Participation". After stating that fraud is a serious crime, the judgment analyses the offences committed by the appellant. Forty-eight fraudulent transactions took place. They spanned a period of some 17 months. Some of the transactions were enormous. The total profits exceeded R9,75 million. The appellant himself received nearly Rl,5 million. This was in addition to the amounts which he legitimately earned as a stockbroker, which, in the

year preceding his arrest, amounted to approximately Rl,5 million and averaged over a million rand a year during the last four years that he was with Frankels.

The appellant's participation in the scheme, the judgment continues, was prompted by no laudable purpose. In this regard particular attention is given to the submission that the appellant was, as it were, blackmailed into participation by senior Old Mutual employees. It was common cause that senior Old Mutual employees, and, in particular messrs Celotti, Schapiro and Harper, were already carrying on the scheme before they invited the appellant to join it. When first approached to join them, he refused. What happened later is expressed as follows in the Agreed Facts:

> "In approximately August 1989, Blank was again approached to participate in the scheme. This time, however, Schapiro was more insistent. It was made perfectly clear to Blank that should he decline to participate in the scheme the Old Mutual would take much of its work elsewhere.

> Blank was aware that this was the course of conduct when another firm of stockbrokers, A. Martin & Co, fell out of favour. A timeous delegation from Martins to Old Mutual at senior level, once the threat became known, averted this consequence.
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> Since the Old Mutual was one of the biggest institutional clients of Frankels, the impact of its loss would have been enormous. Brokerage earned from Old Mutual constituted approximately 10% of the firm's brokerage as well as a significant commission for Blank. As the overheads of the firm were substantial, the loss of Old Mutual as a client would have had a greater impact on the firm than on him personally."

The trial court's comment on the submission that the appellant was "blackmailed" into joining the unlawful scheme, is as follows (Mr Cohen, to whom reference is made in this passage, was the appellant's senior counsel in the trial court):

> "But what should an honest person in the position of the accused have done in the face of the threat from Schapiro? Surely he should have reported this threat to his partners to enable them to send a delegation to the senior management of Old Mutual - the more so as, to the accused's knowledge, such a delegation had been sent previously and the threat had been averted.

> And what would Old Mutual have done? Surely it would not have held the honesty and incorruptibility of its brokers against them. There could have been no prejudice to the accused: his untarnished image as the 'whizz kid' of the Stock Exchange could only have benefitted; the reputation of his firm could only have increased; and the Old Mutual would have been able to eradicate the dishonesty that was present in the ranks of its employees.
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> I put this argument to Mr Cohen. His answer was that I would be speculating, as no-one can now predict what would have happened had the accused done what I have suggested he ought to have done. That is so; but the likely consequences of honesty, it aeems to me, would have held little danger or disadvantage for the accused and what danger or disadvantage they might have held, pales into insignificance when compared to the prejudice which dishonesty would entail to Old Mutual and the accused's own firm. Even if the consequence to the accused were to have been that his firm lost the Old Mutual account altogether, that is the course which he was obviously obliged to adopt."

It is then demonstrated in the judgment that the appellant not only agreed to participate in the scheme but was actively involved in setting it up and operating it. It was the appellant himself who

approached an innocent third party to open an account in the latter's name with a finance company, to arrange a R3,5 million revolving credit facility to finance the purchase of shares by the participants in the scheme and to operate the account at Frankels through which the shares were purchased and sold, directly or indirectly, to the Old Mutual.

Not content to participate in only one scheme, the appellant agreed to join a further scheme which entailed operating through an off-shore account. This enabled shares to be bought and sold through the medium of the financial rand. The appellant himself gave instructions to the persons who handled the administration of the off-shore account. On four occasions he instructed those persons to transfer to an account in Switzerland his share of the profits, which amounted to US $297 782. These funds have been repatriated and the appellant fined by the Reserve Bank for contravening the foreign exchange

provisions. Although the appellant's contraventions in this regard were not included in the charges before the court they do illustrate his active involvement in the scheme.

After shares had been purchased for on-sale to the Old Mutual, it was the appellant himself who ensured that there would be an increase in their market price by either manipulating the market price with the assistance of other stockbrokers, or by aggressive buying of the stock in the name of the account opened at Frankels, or the off-shore account, or for friends or colleagues whom he wished to favour.

Finally, once profits had accrued to the participants in the illegal scheme, it was the appellant himself who was responsible for their distribution. He did so by purchasing Kruger Rands. This meant that the flow of funds from one account to another could not be detected "and the accused's

obvious motive was concealment" (these quoted words were the subject of criticism, as will be seen).

This part of the judgment concludes with the following paragraph:

> "In short: although the accused did not join the scheme when first approached, he did so subsequently and participated in that scheme and later, in another scheme as well; he did so over a prolonged period; he did so actively; he took positive steps to conceal the enormous frauds he was perpetrating on his client, Old Mutual; and he was actuated by greed for money and a desire for recognition."

The next section of the trial court's judgment is headed "The Accused's Personal Circumstances". It mentions that the appellant is 34 years old and a first offender. He is an educated man. He obtained a B Comm degree, and whilst doing military service attained the rank of full lieutenant. His rise as a stockbroker was meteoric. At the age of 24 he was one of the youngest, if not the youngest, stockbroking member of the Johannesburg Stock Exchange. At the age

of 25 he became a director of Frankels. Within a very short time he assumed responsibility for all that firm's dealings on the floor of the stock exchange. He became responsible for the firm's institutional clients. He worked enormously hard and was responsible for facilitating a series of investment decisions by the Old Mutual which resulted in substantial benefits for the Old Mutual and his firm. The court then considered, and dismissed, two arguments in mitigation, viz, that the shares bought for the Old Mutual were good shares which it may well have wanted to purchase in any event, and that the appellant enabled the Old Mutual to acquire large blocks of shares.

Returning to a consideration of the appellant's personal circumstances, the judgment mentions that he is unmarried and contributes to the support of his mother and sister. He has also supported numerous charities. The court took into account the evidence

of Mr Reynolds, a senior and well-respected attorney, who gave evidence in mitigation. I need not repeat the evidence herein - the judgment deals with it extensively. In short Mr Reynolds had a high opinion of the appellant's character and expressed the view that he was contrite. Imprisonment, Mr Reynolds considered, would have a devastating effect on the appellant.

The judgment then states that the appellant has disgorged the profits that he made from the scheme, and that the Old Mutual will probably not be out of pocket in consequence of the frauds, as funds from the other participants in the fraudulent schemes were also available to compensate the Old Mutual.

The appellant's career as a stockbroker has been ignominiously terminated and he will never be able to practise as a stockbroker again. The court took into account the humiliation and stigma suffered by the appellant consequent upon his conviction for fraud

and the wide publicity which the case has received.

The judgment then deals with an argument relating to the manner in which other persons have been dealt with for the same or similar offences. Firstly, there were the appellant's associates in the scheme. The senior Old Mutual employees who participated in the schemes were Celotti and Schapiro. Both fled the country and were beyond the jurisdiction of South African courts. Other participants, in particular Harper, Greyling and Rawson, were offered indemnities from prosecution. The appellant, on the other hand, stayed in South Africa despite the obvious temptation to flee and utilise the substantial funds in the Swiss bank account. He is the only participant who has been prosecuted.

The trial court took note of the fact that the accused came before the court and pleaded guilty. It also accepted, not without some difficulty, that the

plea of guilty was a sign of remorse, and referred to the evidence of Mr Reynolds in this regard. The court pointed out, however, that the appellant did not give evidence to express his remorse, and referred to a passage from a MICRO report which was before the court and which may be thought to cast some doubt on the extent of his remorse. I return to this passage later.

Reverting to the participants who escaped prosecution, the court stated:

> "The fact that other persons are not being prosecuted or cannot be prosecuted does not redound to the accused's advantage. It is unfortunately necessary for the State to offer indemnity from prosecution in certain cases to ensure that not all criminals who together engage in unlawful activities, go unpunished. Those who have been offered indemnity did not have executive positions at Old Mutual as did Celotti and Schapiro, and they have disgorged their profits. The fact that two of the senior participants in the fraudulent scheme are at present beyond the jurisdiction of the South African courts and therefore cannot be punished, is in my view irrelevant.

> It may well be, as argued by Mr Cohen, and it appears to be so from the agreed facts, that Celotti and Schapiro, who invited the accused to join the scheme or insisted that he do so and who participated in similar schemes over a longer period of time, are even more deserving of censure than the accused. But that is a reason (other factors being equal) for sentencing them more severely than the accused, if they are ever brought to justice. I shall accordingly be careful not to impose a sentence upon the accused which, on the facts presently available, would be more appropriate for Celotti or Schapiro."

The judgment then deals with the cases of Coetzee and Fouche. They were also stockbrokers. The precis of material facts relevant to the charges against them and the indictment served upon them were before the court. The Attorney-General of the Witwatersrand Local Division allowed them to pay admission of guilt fines of R1000 in respect of each of 200 counts of contravening sec 2(a) of the Financial Institutions (Investment of Funds) Act no 39 of 1984. These admission of guilt fines appear to be less than the profits made by them in the

transactions in question and this aspect aroused the ire of what the Agreed Facts calls "the financial press". The argument which the defence based upon the cases of Coetzee and Fouche is summed up as follows in the judgment:

> "Calling in aid a principle which he termed 'equality of justice', Mr Cohen urged on me: firstly, that all of the considerations which actuated the Attorney-General to accept admission of guilt fines (as expressed in a press interview by the Attorney-General, Annexure B to the 'Agreed Factual Submissions in Mitigation') apply in equal measure, if not to a greater degree, to the accused before me; secondly, that the offences which the indictment alleged against Coetzee and Fouche were in numerous respects more serious that the charges to which the accused pleaded guilty in this matter; and thirdly, that in sentencing the accused, I should strive for equality of treatment in the sense that in sentencing the accused I should have particular regard to the fines imposed on Coetzee and Fouche."

In considering these arguments, the trial court dealt fully with a number of relevant authorities referred to it, or considered by it mero motu. First there were the cases of In Re Marechane (1882) 1 SAR

27 at 31 and those collected in the argument in S v Rudman and Another: S v. Mthwana 1992 (1) SA 343 (A) at 347C-348D dealing with the proposition that equality before the law is a fundamental principle of the South African common law. Then there were a number of cases concerned with the extent to which a court of appeal can interfere with a sentence imposed on an appellant which differs from the sentence imposed by another court on another accused who participated in the same crime as the appellant. These cases are S v Giannoulis 1975 (4) SA 867 (A); S v Marx 1989 (1) SA 222 (A); S v Reddy 1975 (3) 757 (A); S v Goldman 1990 (1) SACR 1 (A) and S v Malepe 1991 (1) SACR 114 (A). The court's conclusion on this aspect is the following:

> "The principle of equality before the law does not necessarily entail the consequence that equal punishment should be imposed for the same, much less similar, crimes. Uniformity of sentence is desirable only to the extent that the sentence imposed by one court for a particular type of offence

should not be strikingly disproportionate to the sentence imposed by another court for the same type of offence, provided that the circumstances of the offences and the circumstances of the accused are similar. I stress the qualification. The courts, and in particular the Appellate Division, have emphasised for decades the importance of individualisation of sentence to suit particular offenders and have further stressed that so-called standard sentences for particular crimes are unacceptable. In addition to the remarks of BOTHA JA in the Reddy case, supra, ... I need refer in this regard only to the following statement by SCHREINER JA in R_v Karg 1961(1) SA 231 (A) at 236 G-H:

'It may be accepted that sometimes a succession of punishments imposed for a particular type of crime provides useful guidance to a court dealing with such a crime. But each case should be dealt with upon its own facts, connected with the crime and the criminal, and no countenance should be given to any suggestion that a rule may be built up out of a series of sentences which it would be irregular for a court to depart from.' I therefore derive no assistance from Marechane's case or the cases referred to in argument in the Rudman/Mthwane case. My duty in terms of those cases goes no further than this: I must treat the accused before me in the same way as I would treat another person who has committed the same crime under the same circumstances and who

has the same relevant personal circumstances as the accused. I must not penalise, or prefer, the accused because of some attribute which he has, or lacks, that is not relevant to the crime which he has committed, or to the sentence which I must impose.

In the decisions of the Appellate Division to which I have referred, that court stressed that when the lighter sentence can be characterised as being unreasonable or clearly inappropriate, and the heavier sentence is in all the circumstances appropriate, interference with the heavier sentence would not be proper, notwithstanding the fact that the sentences are disproportionate. As SMALBERGER JA said in the Marx case at 226 B:

> 'Geregtigheid vereis dat gepaste strawwe opgelê moet word'; and as NIENABER JA said in Malepe's case at 119 e-f, with reference to the sentences imposed on others (who had participated in the crime with the appellant) and which were far more lenient than the sentence which the Appellate Division considered appropriate for the appellant:
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> '... dan lê die fout by die vonnisse daar en nie hier nie.' I do not feel called upon to embark on an analysis of the similarities and differences between the crimes in which the accused participated and the crimes with which Coetzee and Fouche were charged, or the reasons given by the Attorney-General as they appear in the newspaper report

> which is before me. I in no way wish to criticise the Attorney-General for the course which he adopted. Not all of the factors which motivated him to exercise the discretion vested in him are relevant to the exercise of the discretion vested in me. All I need say for the purposes of this case is that the fines to which the Attorney-General agreed were not imposed by a court; and that if - and I emphasise if -the allegations contained in the indictment had been proved against Coetzee and Fouche, then (in the absence of compelling personal circumstances) I would have been astonished had a court imposed such apparently lenient sentences.
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> In the circumstances, I do not consider that my wide discretion to determine a suitable sentence for the accused in this matter is in any way affected by the admission of guilt fines fixed by the Attorney-General in the Coetzee and Fouche cases."

In concluding his analysis of the appellant's personal circumstances, the trial judge took into account that the appellant was in a position of trust in regard both to the Old Mutual and his own firm, as well as the Stock Exchange. Both the Old Mutual and his partners trusted him as they were entitled to do. He betrayed that trust repeatedly and on a large

scale.

The next section of the judgment is headed "The Interests of Society". It commences with a discussion of various legislative enactments and common law rules pertaining to persons who perform financial services for others and, more particularly, those pertaining to stockbrokers. The effect of these provisions is summed up as follows:

> "There is therefore a formidable body of law, some statutory, some common law and some made by regulation under Act of Parliament, aimed at ensuring the honesty of, inter alios, stockbrokers. Severe maximum penalties are provided for statutory contraventions. The thrust of the rules of the Johannesburg Stock Exchange and the Act I have quoted is to prevent a stockbroker acting in his own interests and against those of his client. This principle is fundamental to any relationship of agency, but its enforcement on the Stock Exchange is of particular importance because of the opportunities that exist there for easy concealment and for the defrauding of investors. An investor has to trust his broker. He can only invest on the Stock Exchange through a broker. Absolute honesty, and nothing less, is required from a broker; and if a

> broker falls short of this standard, he must expect the full rigor of a severe sentence to be visited upon him both as a punishment and to serve as a deterrent to others."

The judgment then turns to the questions of deterrence and retribution. This passage was much criticized in argument before us and I quote it in full. It reads:

> "I am appalled to find the following statement in the facts agreed between the defence and the prosecutor:
> 'Blank had reason to believe, as did or should most stockbrokers on the JSE, that certain portfolio managers and dealers of financial institutions, including Old Mutual, dealt secretly for their own account on the JSE.' I take note of the fact that Advocate Marais (who led the prosecution team) is attached to the Office for Serious Economic Offences and of the fact that Advocate Cohen (who led the defence team) is very experienced in financial matters that come before the courts. I therefore have no hesitation in accepting the accuracy of the statement I have just quoted.
>
> I am equally appalled to read in the second passage which I quoted from the Nicro report above that the accused views his offence as 'part of the stock exchange culture, a practice engaged in by many

others in similar positions to himself'. That such a practice is prevalent, according to the accused, is confirmed by what the accused told Mr Reynolds as testified to by Mr Reynolds in cross-examination.

I am aware of the fact, and take judicial notice of it, that so-called 'white collar crime' is on the increase in South Africa; and that it has taken on such proportions that a special task force, the Office of Serious Economic Offences, has been set up to combat it.

So far as the Stock Exchange in particular is concerned, counsel were agreed (and I was informed from the bar) that since the accused's arrest, at least two other stockbrokers have lost their licences for dishonest dealings with their clients; and there are also the cases of Coetzee and Fouche to which I have already referred.

In view of all these facts, I feel fully justified in imposing a sentence which will deter not only the accused and other stockbrokers from committing crimes similar to those of which the accused has been convicted, but also others involved in business who may be tempted to indulge in large-scale crimes of dishonesty. The time has already arrived when the severity of punishments imposed for this sort of crime, while of course taking the personal circumstances of a particular accused into account, should proclaim that society has

> had enough and that the courts, who are the mouthpiece of society, will not tolerate such crimes and will severely punish offenders: cf S v Zinn 1969(2) SA 837 (A) at 542 D-E.
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> In addition it is not wrong, as SCHREINER JA said in R v Kara 1961(1) SA 231 (A) at 236 B, that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences which the courts impose; and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute."

The last section of the judgment is headed "The Appropriate Sentence". This section commences by setting out the trial court's general approach as follows:

> "I now embark on the difficult task of considering what sentence would be appropriate in this case. In so doing, I have attempted to achieve a balance between the interests of society and the interests of the accused; and I bear in mind the purposes of judicial punishment. In particular, as I have just emphasised the seriousness and prevalence of the crimes of which the accused has been convicted, I must guard against the danger highlighted by MILLER JA in S v Maseko 1982(1) SA 99 (A) at 92 E-G and repeated recently in S v

> Collett 1990(1) SACR 465 (A) at 471, namely, that an excessive devotion to the furtherance of the course of deterrence may so obscure the relevant considerations as to result in very severe punishment of a particular offender which is grossly disproportionate to his deserts.
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> In addition, in considering the deterrence and retributive aspects of punishment in the sentence which I impose, I shall attempt not to lose sight of the caution sounded by HOLMES JA in S v Rabie 1975(4) SA 855 (A) at 862 C-F, where the learned Judge said that whilst fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided. I shall also bear in mind the guidelines laid down in the three judgments given in the Rabie case which set out my duty to have regard to the element of mercy as that concept is judicially defined."

The court then turned to consider in considerable detail the various sentencing options available to it. The first was a fine, with or without an order of community service. The court's conclusions in this regard are set out as follows:

> "A fine - particularly a fine of the magnitude suggested by Mr Cohen, or even a fine substantially higher than the higher figure mentioned by Mr Cohen (which on Mr

> Cohen's argument based on the accused's balance sheet would be well beyond the accused's means), would not serve the interests of society. In my view, if the most that an offender (if caught) could face for defrauding a client of sums approaching R10 million, and personally pocketing Rl,4 million, was an order to restore his share (plus interest) and a fine of R500 000,00, potential criminals would be tempted to regard the fine as venture capital.
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> I go so far as to say that in the circumstances of this case a fine coupled with community service, even if the rendering of such community service were to be made a condition of the suspension of a period of imprisonment, would not only fail to serve the interest of the community but would bring the system of the administration of justice into disrepute. Such a sentence would be unbalanced and too lenient. The game would still be worth the candle."

The judgment then deals with the submissions of the prosecutor. The court's approach was that it is as little bound by those submissions as it is by the submissions on behalf of the accused, although, it added, "as I trust will appear from this judgment, I have considered both carefully."

The submission of the prosecutor was, in essence, that the appellant should be sentenced to a substantial fine, larger than that suggested by the defence, and to the maximum term of correctional supervision competent in terms of sec 276 (1) (h) of the Criminal Procedure Act, viz, 3 years.

This submission required a consideration of the law relating to correctional supervision. I do not propose repeating the careful analysis of the trial court. For present purposes one legal issue only need be considered. Sec 276 (1) of the Criminal Procedure Act provides inter alia

> "... the following sentences may be passed upon a person convicted of an offence, namely -
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> (h) correctional supervision;
> (i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner."

Like the trial court I propose referring to these paragraphs simply as paragraphs (h) and (i).

A sentence of correctional supervision under

paragraph (h) "shall only be imposed ... for a fixed period not exceeding three years" (sec 276A (1) (b)). Punishment under paragraph (i), on the other hand, shall only be imposed

> "(a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and (b) for a fixed period not exceeding five years." (sec 276A (2)).

The question which arose was this: when the section speaks of an offence which justifies the imposition of imprisonment for a period not exceeding five years, does it contemplate unsuspended imprisonment, or would punishment under paragraph (i) be excluded even where a wholly or partially suspended sentence of imprisonment for more than five years is considered appropriate? The trial court adopted the latter construction. Its conclusion is expressed as follows:

> "If, therefore, I am satisfied that direct imprisonment should be imposed, and if I am

> further satisfied that the period of such imprisonment should be longer than 5 years, I cannot sentence the accused under paragraph (i). This would be so even were I to suspend a portion of the sentence so that the effective term of imprisonment would be 5 years ..."

After considering the relevant legislative provisions, the judgment proceeds to analyse the evidence bearing on the suitability of correctional supervision. It discusses a report by NICRO to which it accords "considerable respect". It deals with the evidence of Lieut Serfontein, a correctional officer in the service of the Department of Correctional Services, who interviewed the appellant and concluded that he was a suitable candidate for correctional supervision. Finally, careful attention is given to the views of Lieutenant-Colonel Smit, one of the authors of the white paper that led to the introduction of the concept of correctional supervision in South Africa.

The judgment then reverts to the question: would

a sentence under paragraph (h) or (i) be a suitable sentence in this case? It mentions "the shift in legislative policy enabling semi-custodial sentences ... to be imposed". It also refers to S v Van Vuuren 1992 (1) SACR 127 (A) in which it was suggested that retribution, as a factor in punishment, would carry less weight in cases where stolen money has been paid back at the offender's expense, and that in appropriate cases of that type, a sentence other than one of imprisonment might have sufficient retributive effect. The comment on Van Vuuren's case is as follows:

> "The effect of the introduction of types of sentence other than imprisonment is simply to require a sentencing officer to consider whether any of these alternatives would be a suitable sentence in the particular case before him. I understand the effect of the Van Vuuren judgment to be that these alternative options will usually be appropriate in the type of case considered in that matter, and that they should accordingly be employed. But I have no doubt that the Appellate Division did not by the Van Vuuren judgment intend to

> circumscribe the wide discretion vested in the judicial officer who passes sentence by excluding in every case the possibility of imprisonment as a sentence for economic crimes."

This then cleared the decks for the court's final conclusion, which I quote in full. It reads as follows:

> "I return to the question: is this an appropriate case for the imposition of a sentence other than direct imprisonment?
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> In matters which come up on review and on appeal, these courts daily confirm sentences of a fine plus several years imprisonment, conditionally suspended, for shoplifting, where items worth a few rand are involved; and also sentences of unsuspended imprisonment, frequently of four or five years, where a motor vehicle has been stolen. The justification for the severity of sentences such as these is seen in the prevalence of the offences and the deterrent effect which severe sentences are supposed to have. The crimes of which the accused stands convicted are far more serious than the types of crime I have just mentioned and the increase in this type of crime, as the experience in these courts and the reports in the media show, has been alarming. In cases of this type of crime also, personal circumstances must yield in my judgment to the requirements of deterrence; and whilst retribution does not

have to consist in imprisonment, and whilst the impact of the availability of the options provided by sections 276(1) (h) and (i) on the type of sentence that will be imposed in future for shoplifting and motor vehicle theft remains to be seen, there will be cases - and this is one - where the magnitude of the offence is so great that a sentence under either of those paragraphs would simply not be adequate.

The Legislature set limits of three and five years respectively in the case of sentences under paragraphs (h) and (i). These cut-off points are significant. They give an idea of the seriousness of the crimes for which these sentencing options would be appropriate. But in the same way as the Appellate Division emphasised in Van Vuuren's case that the options constituted by those paragraphs should be used in appropriate cases, so a court should not be seduced by the availability of these new options to impose a sentence which would be unbalanced and inappropriate when proper regard is had to the (often competing) purposes of judicial punishment. In serious crimes, including crimes of the nature considered in Van Vuuren's case, imprisonment also falls to be considered as an option and the more serious the crime, the greater the possibility that imprisonment will be the only suitable sentence.

So far as rehabilitation is concerned, Mr Cohen submitted that the accused is a well-

rounded and responsible individual and that rehabilitation is not necessary. The Nicro report supports this approach but Colonel Smit, although careful to emphasise that he had not personally interviewed the accused, nevertheless disagreed that the accused did not require to undergo a rehabilitation programme and he based his option on certain passages in the Nicro report. His evidence in this regard was not challenged in cross-examination and I accept it. In doing so, I do not wish to be understood to be calling in question the bona fides of Mr Reynolds, who said that in his opinion the accused is very unlikely to commit a similar crime in the future. I unhesitatingly accept that Mr Reynolds genuinely has this view. But even if the accused is not likely to commit a similar crime in the future, it does not follow that he should not be subjected to, or would not benefit from, a rehabilitation programme; and because Colonel Smit is an expert in the field of correctional punishment and Mr Reynolds is not, I shall be guided by the views of Colonel Smit on this aspect.

When considering the question of rehabilitation, I shall bear in mind the evidence of Colonel Smit that although there are programmes for the rehabilitation of offenders in prison, similar programmes outside prison (to which an offender can be compelled to submit) are more effective, firstly because they can be individualised and secondly because, in prison, there is

little (if any) possibility of an offender being able to repeat a crime, even should he wish to do so.

When I balance the interests of the accused against the interests of the community and when I have regard to the factors and principles I have mentioned against the background of the purposes of judicial punishment, I am left in no doubt that the only appropriate sentence in this case is a long period of direct imprisonment. A semi-custodial sentence of even five years in terms of section 276(1)(i) of the Criminal Procedure Act (even if coupled with a fine) would, in my view, both by reason of its nature and by reason of its duration, be totally inadequate to reflect the seriousness of the crimes committed by the accused. In addition and for the same reasons, such a sentence would fall far short of providing the deterrence to others tempted to participate in the vast number of white collar crimes being committed in South Africa.

I have already dealt with the effect which imprisonment is likely to have on the accused, but in my view he deserves to go to prison and the requirements of society demand it.

I have considered the possibility of suspending a portion of the sentence for any of the purposes summarised in S v Herold [1992(2) SA CR 195 (W)] at 197 d -198 a. I have, however, decided not to do

6 so.

I take all the counts together for the purposes of sentence. THE ACCUSED IS SENTENCED TO EIGHT (8) YEARS IMPRISONMENT."

The above summary of the trial court's judgment gives some impression of the meticulous thoroughness with which the learned judge a quo dealt with the various issues before him.

I turn now to consider the various misdirections relied upon by the appellant's counsel, Mr Burger. They were as follows:-

1. The trial court failed to give proper consideration to the possibility of imposing a sentence of correctional supervision;

2. The trial court improperly imposed an exemplary sentence;

3. The trial court imposed a sentence which was disproportionate to the fines paid by Coetzee and Fouche;

4. The trial court failed to give proper

attention to the submissions of the State. For convenience I shall refer to these alleged misdirections as the major misdirections. Counsel contended, as I shall show, that the major misdirections contained within themselves also misdirections of detail.

I start with the first alleged major misdirection - the court's consideration of the possibility of imposing correctional supervision. At the outset it must be emphasized that the court gave the most painstaking consideration to this matter. It considered the legislative provisions concerning correctional supervision and their underlying philosophy. It discussed relevant authorities and analysed fully the evidence bearing on this subject. And, save in one immaterial respect with which I deal presently, there is no suggestion that the trial judge committed any error of fact or law in deciding that correctional supervision was not appropriate in

the present case. Stripped to its essentials, the appellant's case is not based on any misdirection, but amounts merely to a contention that the trial judge should, on the evidence, have exercised his discretion in a different way: he should not have held that this matter was so serious that corrective supervision was an inadequate punishment. However, in the absence of any misdirection, the assessment of the seriousness of an offence and the determination of an appropriate punishment are matters falling squarely within a trial court's discretion. A court of appeal can interfere only on the limited grounds which I considered earlier. And the present is clearly not a case in my view in which it can be said that the sentence imposed is so inappropriate that it shows, by itself, that the trial judge did not exercise his discretion properly.

The one respect in which the trial judge was said to have committed a misdirection in regard to

correctional supervision related to the interpretation of sec 276A (2) (a) of the Criminal Procedure Act which, it will be recalled, provides that punishment may only be imposed under paragraph (i) if the court is of opinion that the offence justifies the imposing of imprisonment for a period not exceeding five years. The trial court interpreted this provision to include suspended sentences of imprisonment. A sentence under paragraph (i) would therefore be precluded if the court considered that a sentence of more than five years imprisonment was justified, even if, in its view, the whole sentence or a part thereof should be suspended. The appellant's counsel contended that this interpretation is wrong. "Imprisonment" in sec 276A (2) (a) should be read as unsuspended imprisonment, he said. Paragraph (i) would accordingly be available for offences justifying, in the court's view, far longer periods of imprisonment, provided that an

unsuspended portion of more than five years is not considered justified.

It is true that, perhaps in an excess of thoroughness, the trial judge did decide this matter, but the precise interpretation of the section clearly played no role in the imposition of sentence. The trial judge considered that an unsuspended sentence of eight years' imprisonment was justified in this case. On any interpretation of sec 276A (2) (a) this fell outside the terms of the section. But, in any event, in coming to his final conclusion concerning sentence, it was not sec 276A (2) (a) which influenced him but sec 276A (2) (b), which lays down that punishment under paragraph (i) may not exceed five years. It was this provision inter alia which led him to the view that a sentence in terms of paragraph (i) would be totally inadequate to reflect the seriousness of the crimes committed by the

appellant. In these circumstances I do not consider it necessary to decide whether the trial court's interpretation of sec 276 A (2)(a) was correct or not.

In argument counsel for the appellant referred us to a number of recent authorities on the application of the provisions relating to corrective supervision. From these authorities it appears that corrective supervision represents a new approach to the punishment of criminal offenders; that it is a form of sentencing which has a considerable deterrent effect; that it may be imposed in suitable cases for the punishment of any type of offence, but that it is perhaps most suitable for non-violent crimes; that it has considerable advantages over other forms of punishment (and, in particular, imprisonment) both for the offender and for society, and that courts should not allow the provisions concerning corrective supervision to become a dead letter. These principles

must of course be borne in mind by a sentencing officer. They do not, however, entail that no non-violent crime can ever be serious enough to justify the imposition of imprisonment. In the present case the trial judge was fully aware of these principles, considered them carefully in the light of all the evidence, and concluded that correctional supervision would not be an adequate punishment for this offence. In my view this was a perfectly proper exercise of his discretion.

The second major misdirection relied upon by the appellant was that the trial court improperly imposed an exemplary sentence. Now the court did not use the expression "exemplary sentence" and in argument before us there was some argument about its meaning. I do not propose answering this semantic question. The real point is that the court was influenced by what it considered the prevalence of this type of offence to impose a sentence that would have a strong

deterrent effect. I have quoted the relevant part of the court's judgment above. On behalf of the appellant it was contended that this passage contains several misdirections.

Counsel firstly objected to the court's statement that there has been an increase in "white collar crime" because, counsel contended, the term has no clear meaning. 1 should have thought its meaning was clear enough. Certainly, the type of white collar crime committed by the appellant, i e fraud or theft committed by a person in a fiduciary position, has, as any judicial officer or even newspaper reader knows, become increasingly and disturbingly common. I think the learned trial judge was entitled to take judicial notice of this feature and to have regard to it in imposing sentence.

In addition to taking judicial notice of the increase in white collar crime, the court referred to certain specific matters illustrating this increase.

The correctness or relevance of some of these illustrations was impugned. Even if some of them were misplaced it does not in my view detract from the undoubted fact that there has been such an increase. However, I do not think they were misplaced. The learned judge referred to the creation of the Office for Serious Economic Offences. The reason for this must be that the commission of serious economic offences has become such an evil in our society as to require special machinery to combat it, and the court saw it in this light. Then the judge referred to two stockbrokers who had been suspended since the appellant's arrest. In argument before the trial court there was some discussion about four stockbrokers who allegedly got into trouble. To set the record straight the appellant's counsel said

> "that the information indicates that two stockbrokers who stole from their clients, stole clients' money or stripped (scrip ?) away, lost their licences ...". For the rest counsel had no detailed information

and suggested that it would be unsafe to have regard to the fate of the four stockbrokers to whom earlier reference had been made. The facts concerning the two, however, seem to be clear enough to justify passing reference.

Then counsel cavilled at the use by the learned judge in aggravation of sentence, of a fact (the practice of some stockbrokers to deal secretly on the Johannesburg Stock Exchange) which had been placed before the court as a mitigating circumstance in the "Agreed Factual Submissions in Mitigation". There is nothing in this point. If counsel place information before the court which they consider mitigating there is nothing to prevent a court from giving such effect to it as it considers appropriate, whether mitigating, aggravating or a bit of both.

Finally, objection was made to the use by the court of a passage from a NICRO report. The relevant part of the judgment is quoted above, but for

convenience I set out the full passage from the MICRO report. It reads as follows:

> "However, in detailing the offence and reasons for committing the offence, it is apparent that the client (i e, the appellant) is not particularly remorseful about having transgressed the law in this manner. Whilst he feels that he would avoid in every way coming into conflict with the law again, he views his offence as part of the stock exchange culture, a practise engaged in by many others in similar positions to himself. He expressed the feeling that whilst he recognised the wrongness of his action, that he felt unduly victimised".

This passage speaks for itself. The manner in which it was used by the trial court appears from the summary of the judgment set out above. In my view the court was entitled to view the contents of this passage as a part of the material which justified a sentence with a strong component of deterrence.

Then counsel complained that the trial judge did not warn the defence that he was considering imposing an exemplary sentence. Now, as I have already said, there was some dispute before us whether the learned

judge did in fact impose an exemplary sentence. The more accurate way of phrasing counsel's complaint would be that the trial court did not indicate that it was taking account of the prevalence of this type of offence and might impose a sentence with a strong deterrent flavour. Thus stated the complaint has no substance in my view. The appellant was represented by senior and junior counsel. They could hardly have been unaware that deterrence is one of the aims of punishment and that the prevalence of an offence is an important factor in this regard. That this type of offence has indeed become prevalent can in my view not be disputed, as I have already said. And the judge a quo made it clear during argument (which was recorded in the appeal record) that, in view of the seriousness of the case, he was considering imposing a sentence of imprisonment. What more did counsel need to enable them to present their case?

Counsel also objected to the court's drawing

8 inferences from facts set out in the "Agreed Factual Submissions" because, so it was contended, these facts were placed before the court for a particular purpose and were not necessarily complete enough to warrant their use for drawing inferences of fact unrelated to the purpose for which they were adduced. It is of course correct that, in principle, a court should not draw inferences of fact unless all relevant primary facts are before it. The inferences to which counsel objected in the present case were, however, in my view, either properly drawn or unimportant. Thus, counsel objected to the court's finding that the appellant was not prompted by any laudable purpose in committing the frauds in question, but that he was "greedy for money" and "burning with ambition". In my view this was a perfectly reasonable and proper inference. The crimes were certainly not induced by poverty or need. The defence suggestion that the appellant was somehow

blackmailed into committing these offences was rejected by the trial court in the passage quoted above, and I entirely agree with it. What possible motives remain in the circumstances of this case other than greed and ambition?

The next inference to which counsel objected related to the conversion of profits into Kruger Rands. The court found that the "obvious motive was concealment". I suppose it might be possible that if the appellant's motive in this regard had been placed in issue in the trial court some further evidence might have been adduced which might have suggested the possibility of some other less damaging motive. It is difficult, however, to imagine what further evidence might have been led or what other motive might have been suggested. It does not seem likely that the appellant would have been induced by this limited dispute to enter the witness box or that he would have called any of his co-conspirators as

witnesses, and it seems doubtful that Kruger Rands were selected purely for their investment value or for some other legitimate reason. Be that as it may, however, even assuming that the court's inference in this regard may be open to some doubt, the effect in its overall reasoning is insignificant.

The third major misdirection relied upon by the appellant turns on the disproportion between the sentence imposed by the trial court in the present matter and the admission of guilt fines set by the Attorney-General in the matters of Coetzee and Fouche. In my view the trial court dealt with this matter in a proper and correct manner. There are substantial differences between the present case and those of Coetzee and Fouche; we do not know the full reasons for the apparently lenient fines set by the Attorney-General; the Attorney-General is an official, albeit an important and powerful one, and not a court of law, and his decisions do not have the

authority of court judgments; and if the similarities between this case and the Coetzee and Fourie matters are as striking as counsel contends, and there is no significant difference in the mitigating factors, the possibility exists (I put it no higher) that Coetzee and Fourie were treated too leniently. Consequently the trial court did not err, in my view, in holding that the Coetzee and Fouche matters did not prevent its imposing what it considered a proper sentence in the present case.

The final major misdirection alleged by the defence was that the trial court failed to give proper attention to the submissions of the State. It will be recalled that the State had asked for the imposition of a large fine and a sentence of corrective supervision. In its judgment the trial court stated that it had given careful consideration to the contentions advanced by the State, but that it was not bound by them, and, for reasons given in the

judgment, did not accept them. It was not contended before us that the court's expressed approach to the State's contentions was in any way wrong. The argument was that the substance of the court's judgment did not bear out its averment that it had properly considered the State's contentions. This is another way of saying that the court did not properly consider the imposition of a sentence of corrective supervision in conjunction with a fine. I have already considered and rejected this contention.

The appellant's counsel, however, went further and contended that principles recognized in the United States of America and Great Britain relating to so-called plea bargaining should have been applied in the present case. At the outset I should say something about the manner in which this issue was raised. By plea bargaining I understand a procedure in which the prosecution and defence (sometimes involving also the trial judge) agree about the plea

to be tendered by the accused and the sentence to be asked for by the prosecution. On the record of the present case there is no indication that a plea bargaining in this sense took place. There is no suggestion on the record that the appellant's plea of guilty and the State's contentions concerning sentence were the subject of agreement between the parties, nor that the trial judge was in any way involved in these matters. If the defence wanted to take the point that there was some irregularity or illegality in the proceedings before the trial court in that a plea bargaining agreement had not been dealt with properly by the court or the prosecution, it should have done so by way of an application for a special entry on the record in terms of sec 317 of the Criminal Procedure Act, duly supported by evidence, usually on affidavit, setting out the relevant facts. See R v Nzimande 1957 (3) SA 772 (A) at 774B and compare the procedure followed inter alia

in S v Alexander and Others 1965 (2) SA 796 (A) and S v Mushimba en Andere 1977 (2) SA 829 (A). In fact the matter of a plea bargain was not raised before the trial court at all, not even in the application for leave to appeal. It was first raised in the petition for leave to appeal to the Chief Justice. This petition was submitted under cover of a letter from the appellant's attorneys dated 4 November 1992. Paragraph 2 of this letter reads:

> "We would be grateful if you would draw to the attention of the Chief Justice the fact that the matters contained in paragraphs 1.5 - 1.13 of the Petition have been settled by Advocate C Z Cohen SC and Advocate G J Marcus who appeared for the Petitioner, and by Advocate P Marais who appeared for the State and Advocate Henning, the Deputy Attorney General of the Witwatersrand Local Division. Counsel are agreed that the facts contained in these paragraphs are correct."

Paragraphs 1.5 to 1.13 of the petition, to which reference is made in the letter, are as follows:

> "1.5 Approximately a month before the commencement of the trial, your petitioner's legal representatives entered

into discussions with counsel for the State concerning your petitioner's case. A Cape Town attorney representing Old Mutual managers who had participated in the syndicate (Celotti and Shapiro) informed your petitioner's legal representatives that counsel for the State would entertain discussions concerning the 'settlement' of your petitioner's case. He further informed your petitioner's legal representatives that the Attorney-General for the Witwatersrand had entered into an agreement with Fouche and Coetzee on the basis set out hereafter.

1.6 There were protracted negotiations between counsel for the State and your petitioner's legal representatives. At various discussions, the auditors advising the State were present as was the investigating officer.

1.7 During the period of these discussions it was announced in the press that in the case involving Fouche and Coetzee, the Attorney-General had accepted admission of guilt fines of Rl 000,00 on each of 200 counts, reduced from the 570 counts which they originally faced.

1.8 These negotiations culminated in a meeting in the office of the Attorney-General for the Witwatersrand, Mr Klaus von Lieres und Wilkau S.C. at which he had present, Mr Manning, the Deputy Attorney-General dealing with commercial matters in the Witwatersrand Local Division as well as counsel for the State and your petitioner's counsel. At this meeting, an agreement was reached, the material terms of which were

the following:

1.8.1 Your petitioner would plead guilty to 48 counts of fraud based upon a failure to disclose his interests in the sale of the shares to the Old Mutual. The 49th count of fraud would be withdrawn.

1.8.2 The State would not seek a sentence involving any period of imprisonment and would indicate its attitude on sentence to the Court. This term was considered by your petitioner to be fundamental since his standpoint was consistently that no arrangement with the State would be possible if it entailed a term of direct imprisonment.

1.8.3 Full restitution to the Old Mutual would have to be made, alternatively, could be imposed as a condition of a suspended sentence. At the time of meeting with the Attorney-General, negotiations were already taking place in this regard.

1.8.4 The Reserve Bank would require a penalty of R250 000,00.

1.8.5 A substantial fine, within the financial capability of your petitioner would also be called for by the State. There was to be a full investigation by the auditors acting on behalf of the State, and the auditors

representing your petitioner, consequent upon which agreed financial statements were to be prepared.

1.8.6 It was known that the new system of correctional supervision (more fully dealt with below) would take effect on 1 October 1992 in the Witwatersrand and the State would seek a period of correctional supervision in terms of Section 276(1) (h) of the Criminal Procedure Act 51 of 1977. Your petitioner's legal representatives would be entitled to contend that no period of correctional supervision was appropriate but that either community service or no further punishment (beyond restitution to the Old Mutual, a forfeiture to the Reserve Bank and a fine) would be appropriate.

1.8.7 A statement of agreed facts would be prepared incorporating the summary of substantial facts to the indictment.

1.8.8 The fact of the agreement and its terms would be communicated to the presiding Judge in chambers as soon as he was available to see counsel for the respective parties.

1.9 Approximately two weeks before the trial, your petitioner's legal representatives, together with counsel for the State, informed Mr Justice Cloete at a meeting in

his chambers of the following:

1.9.1 The nature of the agreement between the State and your petitioner's legal representatives and the terms thereof.

1.9.2 The only issues in dispute between your petitioner and the State were whether or not a term of correctional supervision would be appropriate having regard to the fact that the Old Mutual would be fully compensated, the Reserve Bank requirements satisfied and that your petitioner would be in the position to pay a fine which the Court considered appropriate, having regard to his financial capacity and secondly, the extent of the fine.

1.10 The presiding Judge informed counsel that he would advise the Judge President that the trial would now be shorter than the anticipated duration of several months for which provision had already been made on the roll.

1.11 Following upon the negotiations with the Attorney-General and the reaching of the agreement as aforesaid, your petitioner reached agreement with the Old Mutual that the extent to which your petitioner personally profited from the share transactions in question was Rl 408 511,00. It was agreed that this amount, together with an additional amount of R521 297,00, representing damages and interest, would be

paid to the Old Mutual. In addition, your petitioner agreed to meet the Reserve Bank requirement of the imposition of a fine of R250 000,00 in terms of the exchange control regulations. At the time of signing this petition, your petitioner has complied with his obligations to both the Old Mutual and the Reserve Bank.

1.12 At no time prior to your petitioner's plea of guilty did the presiding Judge (who three days before the trial had been furnished with the agreed factual submissions in mitigation, more fully discussed below) indicate any disquiet or objection to the terms of the agreement aforesaid.

1.13 The agreement reached with the Attorney-General as aforesaid and the presiding Judge's reaction thereto were decisive in your petitioner's plea of guilty."

The trial judge and attorney-general were quick to react. On 13 November 1992 the trial judge submitted a report to this court in which he said inter alia:

"2. The petition seeks to suggest:

2.1 that I was aware of, and privy to, an agreement arrived at between the State and the defence regarding the penalty to be imposed on the petitioner;

2.2 that I conveyed some impression of my

attitude to that question to counsel for the defence; and

2.3 that I was under some duty to express or convey my concurrence or otherwise with the dealings between the State and the defence.

3. Counsel came to see me a week or two before the trial was due to commence. The meeting was at counsel's request.

3.1 At the meeting I was informed by senior counsel representing the petitioner inter alia that the accused was going to plead guilty; that the State did not intend asking for imprisonment; and that an agreed statement of facts was going to be placed before me. This information was not presented to me as the terms of a 'plea bargaining' agreement. On the contrary, senior counsel representing the petitioner emphasised that there could be no talk of a 'deal' because of the interest the media and business circles were showing in the trial.

I understood that the purpose of counsel's visit was to inform me of the manner in which the trial would proceed and of the contentions which would be advanced in regard to sentence on the basis inter alia of an agreed statement of facts which was not yet before me.

3.2 I at no stage inferred, nor was it either stated or suggested to me, that I was being asked to give an indication as to whether or not I would consider myself bound, in view of the attitude of the State on sentence, not to impose imprisonment. Had counsel requested any such indication I would have terminated the meeting forthwith.

I was careful not to say anything which could have led counsel for the State or the petitioner to form the impression that I had a view (or that I was prepared to form a view) as to what I might regard as an appropriate or likely sentence. I had at the time not done more than peruse the charge-sheet, the list of witnesses and the State's summary of substantial facts.

3.3 It was in no way indicated to me that the petitioner might decide to plead guilty depending on my attitude as to a possible sentence of imprisonment. The contrary was the position. I was expressly informed at the beginning of the meeting that the petitioner had decided to plead guilty to the main charges.

3.4 I was not privy to any agreement which would in any way have fettered my discretion to impose what I might consider to be an appropriate sentence after I had been furnished with the

agreed statement of facts, heard any evidence and listened to argument in support of the sentences which were going to be proposed on behalf of the petitioner and by the prosecutor."

In a letter dated 18 November 1992 the attorney-general of the Witwatersrand Local Division wrote inter alia as follows:

"Ad paragraph 1.5 of the petition:

The terminology used in the petition, more particularly the word 'settlement', incorrectly implies the taking place of negotiations, more specifically so called plea bargaining. Representations were made to me in Johannesburg regarding the case against Messrs Fouche and Coetzee. After weighing all the facts, I decided to fix admission of guilt as appears from the record. The determination of the admissions of guilt was not the result of negotiations, but was based on an independent exercise of my discretion.

Ad paragraph 1.6 - 1.13

The terminology used in the petition, more particularly the word 'agreement', may be misconstrued to mean that my decision not to request the Court to impose a sentence of direct imprisonment, was arrived at as a result of negotiations and/or plea bargaining with the petitioner's representatives.

During the introduction of the representations made to me at the meeting referred to in paragraph 1.8 of the petition, I explicitly informed the petitioner's representatives that I had no intention whatsoever of entering the plea bargaining arena. I did not accede to the petitioner's representatives request that I accept a plea on the first alternative in respect of all counts. In view of the Reserve Bank's administratively imposed 'fine' of R250 000 I decided not to pursue that count by applying an extended interpretation of the nemo debet bis vexari pro una et eadem causa rule to Count 49.

My view that a court was unlikely to impose a sentence of direct imprisonment in the light of all the relevant facts, was conveyed to the representatives of the petitioner at the onset of the meeting.

Regarding the question of sentence, I referred them to an unfortunate episode in the past where the Court imposed a more severe sentence than the one agreed to by a former Attorney-General and the defence and stated unequivocally that I am not prepared to enter into any agreement in this respect, explicitly rejecting a 'plea bargain' arrangement.

I had no intention whatsoever to interfere with the Courts discretion in respect of sentence and made this quite clear to the petitioner's representatives. Any other impression is not correct. No agreement as implied in the Petition was ever entered into between the State and the petitioner."

It was rightly not contended before us that the facts stated by the trial judge and the attorney-general were open to any doubt.

The position then is that the alleged irregularities relating to a plea bargain were not raised timeously in the proper form in the trial court, and moreover have no basis whatever. In the pre-trial discussions the prosecution intimated that it would ask for a particular form of punishment. If the appellant was induced by this intimation to plead guilty he has no reason to complain. The prosecution did what it said it would. The trial judge was not bound by the attitude of the prosecutor, as the appellant was no doubt told by his counsel. In the course of the case the trial judge in fact made it clear that he was considering imposing direct imprisonment, contrary to the submissions of the prosecutor, and there was no suggestion by the defence that he was not entitled to do so. In these

circumstances there clearly was no irregularity whatsoever and it is not necessary for me to consider what recognition should in general be accorded to plea bargaining agreements.

For the reasons I have given the trial judge has not been shown to have committed any misdirection vitiating his sentence. It is not contended that there are any other grounds for attacking his exercise of discretion in sentencing the appellant, nor can I find any. It follows that the appeal against sentence should be dismissed.

This brings me to the constitutional point. It will be recalled that in his additional heads of argument the appellant requested inter alia that, if his appeal were to fail, the implementation of sentence be postponed to enable him to approach the constitutional court for relief. I am not aware of any rule that entitles this court to dismiss an appeal but to order that implementation of the

6 sentence be delayed pending some further event. What we can do is to refrain from giving judgment at this stage, and to postpone the appeal. This is what was done in the death sentence cases, with which I deal presently. In principle it is of course highly undesirable that a case be postponed at this late stage, i e, after the appellate division has heard full argument and reached a conclusion. It is in the interests of justice that finality should be achieved, particularly in criminal matters. Of course if there is a genuine constitutional point at issue a postponement may be justified. Thus, in a number of cases in which the death sentence had been imposed, this court postponed the appeals to enable the constitutional court to pronounce on the constitutionality of sec 277 of the Criminal Procedure Act, which authorizes the death sentence for certain offences. In this regard sec 9 or 11(2) of the Constitution may well be interpreted as

rendering sec 277 unconstitutional, and pending an authoritative decision on this point it would be undesirable for this court to continue confirming death sentences (see, for instance, S v Makwanyane en 'n Ander 1994 (2) SACR 158 (A)). The present is a different case. The appellant has not suggested that the imposition of imprisonment is in itself unlawful in terms of the Constitution. What he has contended is that he did not have a fair trial in terms of sec 25 (3) of the Constitution. The respects in which he submits that his trial was unfair correspond with some of the misdirections on which he relied in his appeal against sentence, namely that an exemplary punishment was imposed, that the trial court did not give notice that it was considering the imposition of such a sentence, that the trial court did not accept the evidence presented by the State in calling for a sentence of correctional supervision, and that the trial judge accepted the appellant's plea of guilty

without telling him that the court might not follow the recommendation of the State as to sentence. The imposition of an exemplary sentence was said also to be prohibited by sec 8(1) of the Constitution, which enshrines equality before the law.

I have dealt with all these complaints. The relevant facts are set out above. They do not in my view give rise to any constitutional principle which would justify the attention of the constitutional court. I cannot imagine that the constitutional court would hold a court disentitled to have regard, in imposing sentence, to the prevalence of the offence before it, or, in appropriate circumstances, to impose a sentence with a strong deterrent flavour; or that the constitutional court would hold that the trial court, in the circumstances of this case, was under a constitutional duty to inform the appellant to a greater extent than it did, of the nature of the punishment which it was considering; or that the

trial court was obliged under the constitution to accept the evidence adduced by the prosecution or the submissions advanced by it; or that the trial court had to notify the appellant, whether before or after his plea of guilty, of something which the appellant and his legal advisers knew, namely that the court might not accept the prosecution's submissions. In short, I do not think that, on the facts found, there is a genuine constitutional issue between the parties.

Of course, it is possible that a litigant might wish to attack a trial court's findings of fact before the constitutional court. I cannot, however, imagine that the constitutional court would enter into the minutiae of a case like the present to determine whether the evidence does not perhaps disclose some unfairness or inequality in a constitutional sense, and if the constitutional court did, I do not think it would consider that the

appellant's constitutionnal rights have in fact been infringed. One should also bear in mind that the appellant's complaints relate to proceedings which took place before the Constitution even came into force (cf sec 241(8) of the Constitution).

To sum up: I do not think that there is any possibility that the appellant would be granted relief by the constitutional court and accordingly there are no sufficient grounds for a postponement of this appeal.

The appeal is dismissed.

E M GROSSKOPF, JA

KUMLEBEN, JA
F H GROSSKOPF, JA
Concur