CASE NO 292/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

RICHARD CHRISTOPHER DU PLESSIS Appellant

and

THE STATE Respondent

CORAM: HEFER, F H GROSSKOPF JJA et MAHOMED AJA

DATE OF HEARING: 23 MAY 1994

DATE OF JUDGMENT: 1 JUNE 1994

J U D G M E N T

MAHOMED, AJA:

The appellant was charged with fraud in the Regional Division of the Cape at Parow. The offence was committed during the period July 1988 to November 1988 and involved an amount of R55 035,31. He pleaded guilty to the charge and was sentenced to five years imprisonment of which three and a half years was suspended on certain conditions. In terms of section 300 of Act 51 of 1977, the Magistrate also directed the appellant to pay an amount of R20 000.00 to the complainant, (which was the First National Bank of South Africa Limited). He appealed against that sentence to the Cape Provincial Division of the Supreme Court which dismissed his appeal but gave leave to the appellant to appeal to this Court.

The offence involved what is known in commercial parlance as "kite-flying". The appellant operated a business in Cape Town. He found himself short of funds to pay his employees on one occasion. He sought

to obtain a loan of R800.00 from the bank. This was refused. He then put a scheme into operation. In terms of this scheme he would draw a cheque on a bank account which he had in Windhoek but in which there were no funds to his credit. The bank in Cape Town would immediately credit his account at the Cape Town bank on the deposit of the cheque drawn by the appellant on his bank account in Windhoek but before that cheque was cleared in Windhoek. The appellant was aware that it would take some five days before the cheque was cleared in Windhoek. Before the date of the clearance arrived he would draw a cheque for a slightly larger amount on the Cape Town bank and deposit that cheque in his account in the Windhoek bank. The result was that the Cape Town bank would credit his account on the strength of the deposit of a cheque drawn on the Windhoek bank which had no funds and five days later when the Windhoek bank was presented with the cheque for clearance it would honour it on the

strength of the cheque which the appellant had meanwhile drawn on the Cape Town bank. In truth both the banks were mislead. The appellant had no funds of his own in either bank.

The appellant operated this scheme for some five months. Approximately two hundred cheques were involved in the process. It came to an end when transfers between banks became computerised. Transfers were now effected within twenty-four hours and the disappearance of the delay in the clearing of cheques which the appellant had so successfully exploited previously, effectively ended the "kite-flying" operations. By this time, however, he was in debit to the First National Bank in Cape Town to the extent of more than R55 000.00 which he was unable to repay.

The appellant who was thirty-six years old when he was charged in 1991 was treated by the Magistrate as a first offender notwithstanding a previous conviction for

theft in 1977. He has a standard ten education. He was and still remains unmarried and has no dependants.

Once the fraud which the appellant had been perpetrating was uncovered, he gave his co-operation to the bank and police and explained to them fully what he had been doing, and what documents and cheques were involved. When he appeared in Court, he pleaded guilty and again explained in detail why and how he had operated the fraudulent scheme in which he was involved. He also disclosed that he had repaid to the bank a capital amount of R18 000.00 on account of his indebtedness and that he had offered to repay the balance in instalments of Rl 000 per month but that this had not been acceptable to the complainant which apparently required monthly instalments of Rl 800, subsequently to be increased to R3 000. He said he could not afford this. At the trial he said that he could afford to pay only R500 per month. At that time his indebtedness to the bank was in excess of R41 000 and

the instalments suggested by him would not have been sufficient even to pay the interest on the debt.

Both the trial Court and the Court a quo were fully alive to the mitigating features relied upon by the appellant including his co-operation with the police and the complainant, his repayment to the bank in partial discharge of his indebtedness, his offer to pay further instalments, his plea of guilty, and his expressions of remorse. The Court also had regard to the fact that the complainant was interested only in obtaining compensation from the appellant and that it therefore preferred this to a jail sentence for the appellant. The appellant, who appeared in person on appeal, contended nevertheless that we should set aside the sentence, and substitute therefor some other sentence, which would ensure that he was not incarcerated. It was pointed out to him during argument, that this Court was not entitled to interfere with the sentence which had

been imposed, unless it was satisfied that the sentence had been influenced by a misdirection or unless the disparity between the sentence which was imposed and the sentence which we would have imposed if we had been sitting as the Court of first instance, was so striking as to permit the inference that the sentencing Court had not properly applied its mind to all the relevant facts or had otherwise committed some irregularity.

The appellant did not contend that the sentence was influenced by any misdirection. He could not do so because all the relevant facts pertaining to a proper sentence were carefully considered and taken into account.

The appellant did nevertheless contend that the sentence was so unreasonably harsh, that it justified our interference. I am unable to agree.

The mitigating factors relied upon by the appellant must be balanced also against the aggravating

factors. The offence was a serious offence. It was cunningly perpetrated with full knowledge that the bank was being deceived. The offence of the appellant was not perpetrated on an isolated occasion. It was repeated on scores of occasions over a period of several months, involving some 200 cheques. The amounts were not trivial. The bank lost over R55 000. Nor did the appellant stop the fraud on his own volition. The sophistication of computer technology simply caught up with him. Otherwise he would probably have simply continued to repeat his frauds, insensitive to the accelerating losses of the bank, and with no real belief that he could ever undo the damage.

Although the amount of R18 000 repaid by him was correctly taken in account in mitigation of sentence, it appears largely to be influenced by the expectation that no criminal charges would be preferred against him and that if they were, he would not be sent to jail if he

had made some compensation to the complainant. Significantly he paid no instalments to the bank after his conviction, save for monthly instalments of only R200 which commenced in January this year, a few months before the date for the hearing of his appeal. Even before his conviction, he paid no instalments even in the amounts he said he could afford.

I am also not persuaded that the appellant appreciates the seriousness of his conduct. In his written argument he complains that the State was

> "to argue about the facts of the case and about an individual relating to an incident that occurred five years ago"

The description of his sustained and systematic fraud on the bank as an "incident that occurred five years ago" does not, in my view, betray any proper understanding of the wickedness of his actions or provide

any substantial foundation upon which a real feeling of remorse must rest. Nor is it permissible for the appellant to contend that because the offence was committed five years ago he should no longer be punished with the severity his conduct justified. The sentence imposed by the trial Court was a fair and proper sentence. The delay in its execution was largely because of the appeals which the appellant sought to pursue before the Cape Provincial Division and before this Court. Those appeals were without merit. He cannot therefore be in a better position than he would have been if no appeals had been pursued by him.

In the result it is ordered that the appeal be dismissed.

I. MAHOMED ACTING JUDGE OF APPEAL J HEFER JA) F H GROSSKOPF JA) Concur