CO CASE NUMBER: 96/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

EDWARD DURANT PHILIP Appellant

and

THE STATE Respondent

CORAM: E M GROSSKOPF, F H GROSSKOPF et

VAN DEN HEEVER JJA

HEARD ON: 1 SEPTEMBER 1995

DELIVERED ON: 19 SEPTEMBER 1995

J U D G M E N T

VAN DEN HEEVER JA

Appellant was charged in the Regional Court with 20 counts some of which were withdrawn before he pleaded guilty to the remainder: three counts of theft and twelve counts of fraud. The trial court was satisfied of his guilt by his statement tendered in terms of section 112(2) of the Criminal Procedure Act No 51 of 1977, and convicted him. He was a first offender. Evidence was given by i.a. a psychologist and a criminologist urging that appellant be sentenced to community service or correctional supervision rather than imprisonment, on the grounds of appellant's personal circumstances and psychological make-up. The regional magistrate set out the facts admitted and evidence tendered, and concluded that direct imprisonment was the only appropriate sentence in the circumstances of the case. He grouped the theft counts together and imposed a sentence of 3 years for those. He imposed sentences of 10, 10 and 4 years imprisonment respectively (to be served concurrently) on fraud counts 8, 9-18 taken as one, and 20; thus, a total of 13 years.

On appeal to the Witwatersrand Local Division of the Supreme

Court, appellant's counsel urged that the sentences should be set aside and replaced by one of correctional supervision; alternatively, that the total of those imposed was startlingly severe. The court a quo held as follows:

> "In my view whatever else can be said about sentence, correctional supervision for a period of three years is wholly inadequate or inappropriate in the circumstances of this case ... In my view it cannot be said that the trial court erred or misdirected itself in that regard ... I am further of the view that the sentence imposed is not so startlingly severe or inappropriate that I would be prepared to interfere with it."

It accordingly dismissed the appeal but, surprisingly, granted leave to appeal on the grounds that

> "there is a reasonable prospect that another court may take a different view of the matter especially concerning the operation of the section of the Criminal Procedure Act dealing with correctional supervision, the section being a relatively new one".

The main thrust of the argument before us, was that appellant (on bail pending the outcome of these proceedings) is presently, instead of

being a burden on the taxpayer, supporting his family, being gainfully employed where his services are highly regarded. Overcrowded prisons should house only those whom it would be dangerous to society not to remove from its midst. Appellant, by reason of his personality or temperament, would be destroyed, not rehabilitated, within our prison system.

The provisions of section 276(l)(h) and to a lesser extent (i) of the Criminal Procedure Act 51 of 1977, have ushered in a new phase in the South African criminal justice system (S v R, 1993 (1) SA 476 (A), 487 D-E). The statement in that judgment at p 488 G that

> "Die Wetgewer het ... duidelik onderskei tussen twee soorte misdadigers, naamlik die wat deur gevangesetting van die gemeenskap afgesonder moet word en did wat strafwaardig is maar nie uit die gemeenskap verwyder hoef te word nie"

should not be taken too literally. It is qualified by what follows. Courts are rightly encouraged to make use of the sentencing options now afforded them, to avoid where feasible the imposition of short term

imprisonment (p 488 I-J). Sub-sections 276 (1)(h) and (i) however have their limitations, arising i.a. from the restrictions imposed by sub-sections 276 A (l)(b) and (2)(a). There was, and could be, no suggestion that correctional supervision, up to the full term permitted - three years - is the option that should always be taken, where a term in prison as our prisons presently are will probably do the offender himself more harm than good. No judicial officer worthy of a seat on the bench but must regret ordering a person's incarceration in a "correctional institution" knowing not only that it will be nothing of the kind for the particular person to be sentenced, but also that his incarceration is probably not necessary to protect society against his future activities. However, the nature and consequences of the offences in respect of which sentence is to be determined and the interests of society may demand that such an order nevertheless be made. One of the aims of both bench and correctional services is to give content to the adage, wearing thin of late, that crime does not pay. Others tempted to follow along paths similar

to those trodden by appellant, as well as appellant himself, should receive an unequivocal message that that adage is not yet obsolete. The obligation to provide a milieu where prisoners guilty of serious crimes, yet not thugs by nature, will be uncontaminated and unharmed by thuggery, burdens the Department of Correctional Services. It cannot be relieved of that obligation by courts undermining respect for law and order through imposing quite inadequate sentences.

Appellant was at the relevant time a man in his early forties, married to a qualified community nurse who had no need to and did not work outside their home. Two daughters were born of their marriage, aged 10 and 12 at the time of the trial. Appellant qualified as a chartered accountant. Two years after starting his career as such appellant in 1980 joined his brother-in-law Hawes who effectively owned a company dealing in tyres. When appellant was invited to join Hawes (later also joined by O'Ehley) in the business, it was because control was inadequate, financial records were not up to date, and the bank was

unhappy with the way the business conducted its overdraft facilities.

Hawes was portrayed at the trial as a forceful man, intent upon expanding the scope and quality of his business and relying on appellant to manage the financial side of things to enable this to be done. In the process of satisfying both Hawes and the bank - and its successors; the overdraft was moved on a number of times as it increased - appellant indulged in creative bookkeeping. Funds were also raised by a JSE listing of a holding company of two operational companies, and the issue of shares of which a not inconsiderable number were allocated to trusts created for the families of the three directors.

We do not know when appellant's tinkering with company accounts started; but the conduct constituting the offences to which he pleaded guilty continued for almost two years. It is unnecessary for present purposes to be precise about the relationship of the companies controlled by the three men to one another. I refer to them globularly and imprecisely as Hawes's companies. Of importance is merely that in the

period April 1988 to March 1989, the merger of Hawes's now listed holding company with two others, one being Malbak Limited, was mooted. The merger was effected as the result of a series of misrepresentations made by appellant portraying their over-borrowed business as financially sound. This conduct resulted in the first of the fraud charges against appellant, count 8. The eventual financial prejudice suffered by shareholders of the companies that had merged with Hawes's holding company, upon liquidation of the latter, amounted to approximately R18 000 000.

The three theft charges arose out of large rebates certain suppliers were prepared to give the Hawes group; which were to be concealed from the staff and the public at large. To this purpose suppliers were asked to send rebate cheques to a new, different, post box, the idea being that the money in question would somehow be filtered into and so benefit the Hawes companies. When O'Ehley complained of being short of cash, appellant and he made out a cheque for R250 000 in favour of

O'Ehley, which was followed later by a further R30 000. According to appellant Hawes also refurbished his northern Transvaal farm out of company funds. Feeling that he himself was not being recompensed to the same extent as his co-directors, appellant misappropriated three rebate cheques, on 30 January, 2 May and 22 August 1989 respectively. The total amount involved was R141 176,27.

Fraud counts 9-18 arose from misrepresentations made to various financial institutions, also over a lengthy period, which induced them to give credit to Hawes's companies. The total of the monies advanced by these institutions on the strength of appellant's dishonest portrayal of the financial position of the Hawes companies, amounted to R29 500 000, of which approximately R14 000 000 proved irrecoverable.

During his association with the Hawes companies, appellant and his family lived well. He drove a BMW, his wife a Toyota, and the girls attended a private school. The entire family went overseas to visit relatives of appellant's wife. On business trips management including

appellant always travelled in the first class. Though appellant originally denied receiving any benefit as a result of the shares transferred to the trust created for his family, it was ultimately agreed that he had indeed benefitted in a total amount of R43 369 by way of dividends from these shares. Obviously he also benefitted indirectly in that his creative bookkeeping was propping up the structures which provided his salary and perks with the assistance of borrowed money that would otherwise not have been available.

Appellant found himself unable to substantiate to the auditors profits of about R6 000 000 allegedly made by the companies which employed him. He therefore presented the auditors with four false invoices, which purported to record purchases of stock by the said companies, and three forged letters purporting to come from various banks reflecting payment of the invoiced amounts by the banks to the suppliers. The auditors were misled by these cleverly created documents and accepted them as correct for the purposes of the audit they were

conducting. These facts constituted the material on which the last fraud count, number 20, was based.

Appellant left the employ of the companies, sought refuge in alcohol, was arrested and also sequestrated. The trial being postponed for a considerable time, he was treated in a private clinic and was no longer dependent on alcohol at the time of the trial. He found employment with another firm of tyre dealers which knows of his lapses but is eager to retain his services. It pays him a handsome salary which enables him to stay on in the family home which is his wife's property, and is prepared to advance him an interest-free loan of R30 000 to make some restitution for losses suffered as a result of his conduct. There is no suggestion that the trustee in his insolvent estate has had any say in this suggestion.

Appellant's counsel concedes that aggravating factors exist: 1. The offences involved a breach of trust vis-a-vis the companies which employed appellant, the complainants, and the companies' auditors.

2. The amounts lost by the various complainants are very large and the appellant is in no position to recompense them.

3. The various offences were committed over a lengthy period, commencing in April 1988 and ending in December 1989.

4. The offences were committed after premeditation and careful planning.

5. The offences of fraud and theft are prevalent. 1 add to these -

6. that appellant corrupted others in the process of his own dishonest dealings. A certain Luden was virtually totally dependent on Hawes's companies for his business, and was persuaded to assist appellant in creating false invoices; and

7. that the record evinces no sign of genuine remorse on appellant's part, as opposed to regret at having been brought to book. The late offer of R30 000 towards compensation, is a hollow gesture; appellant gave various versions at various times of what motivated him in falling into

error as he did, and admitted lying to the psychologist who was called in to report to the court in his favour. The facts in her report were in turn accepted by the criminologist. All three the expert witnesses, psychiatrist, criminologist and officer in the Department of Correctional Services stationed at Johannesburg prison dealing with correctional supervision sentences, were quite unaware when they drew up their respective reports, of the extent of appellant's dishonesty and the damage caused thereby within the community.

This court in S v BLANK 1996 (1) SACR 62, reiterated that an appellate court is not at liberty to substitute its own views regarding sentence for those of the trial court, unless the discretion of the latter has not been properly exercised. There is nothing in the record to suggest that the regional magistrate did not give full weight to all relevant factors in determining what he regarded as a proper sentence for the extremely serious offences perpetrated by appellant. The total of the sentences imposed constitute a severe sentence. So it should. Although little

purpose is served by comparing the sentence imposed in one case, with the sentence under review, since the personalities and circumstances concerned are never identical, comparison with similar cases reveals at least that this sentence is not out of line. For example, a bank official who participated in a R47 000 000 scam from which he personally benefitted only to the tune of about R30 000, the ultimate loss to the bank however being some R33 500 000, was sentenced to a total of 14 years imprisonment. (S v GUNTENHöNER 1990 (1) SACR 642 (WLD).) That appellant did not enrich himself to the same extent as he harmed others is not necessarily a mitigating factor, as was suggested on appellant's behalf. Some may even regard it as an aggravating factor: that one could cause so much damage to so many others for so little personal gain - somewhat like the murderer who robs a man of his life to misappropriate the bottle of wine in his hand.

The court a quo was correct in holding itself in law powerless to interfere with the sentence imposed by the trial court by reason of its

having been properly and judicially determined. So accordingly are we. The appeal is dismissed.

L VAN DEN HEEVER JA

CONCUR:

E M GROSSKOPF JA) F

H GROSSKOPF JA)