CG CASE NUMBER: 630/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

TONI ANN SINDEN Appellant

and

THE STATE Respondent

CORAM: VIVIER, VAN DEN HEEVER JJA et

VAN COLLER AJA HEARD

ON: 15 SEPTEMBER 1995

DELIVERED ON: 19 SEPTEMBER 1995

J U D G M E N T

VAN DEN HEEVER JA

This is an appeal against sentence. The appellant, a 26-year-old married woman with two young children, pleaded guilty to and was convicted of 43 counts of fraud. A first offender, she was sentenced by the regional magistrate to six years' imprisonment of which two years were conditionally suspended. She appealed against this to the Witwatersrand Local Division. The gravamen of her complaint was and remains that the trial court should have made use of correctional supervision instead of incarceration, in determining her punishment. The court a quo dismissed her appeal but granted leave for a further appeal on the - with respect, insufficient - grounds that in regard to correctional supervision as a sentencing option, quot homines, tot sententiae: hence there was a reasonable prospect that another court might come to a different view with regard to the sentence imposed by the magistrate.

The relevant facts may be summarized as follows. Appellant was employed as a bookkeeper by Auto Entertainment CC for some five years. She was good at her work and in time her employer came to trust

her totally. Her duties included doing the invoices for the corporation as well as being responsible for wages payable to other staff members. In October of 1991 she started on the fraudulent course by which she in effect over a period of fourteen months stole almost R138 000 from her employer, in October of 1991. She did so by drawing on the corporation's bank account by means of cheques made out either to herself or to cash, falsifying the books to reflect the money as having been drawn for wages or other legitimate purposes. The books were never audited. She started on a reasonably modest scale (R 1650,06 in that first month of dishonesty), but increased her misappropriations in volume, frequency and boldness until of the three fraudulent cheques drawn in Septemer 1992 and totalling R10154,81, two bore the same date. Of the five October 1992 counts totalling R20 078,38, two were committed by means of successively numbered cheques bearing the same date. In November of 1992 she sinned on six separate occasions, misappropriating a total of R34 104,50 during this month. The end came

after a last and modest R3225 on 4 December of that year.

She has been represented throughout by the same counsel, Mr Geldenhuys. He asked for a postponement after his client had been formally convicted, intimated that he intended asking for either correctional supervision or an entirely suspended sentence, and asked the bench to call for the requisite report.

At the resumed hearing Mr J Viljoen of Correctional Services handed in and confirmed the contents of the report he had prepared (exhibit A). The report is somewhat vague, somewhat impersonal, and contains many generalizations. Mr Viljoen recommended that appellant be sentenced to correctional supervision for the full period permitted by statute because her personal circumstances both made such a sentence desirable and were such that Correctional Services could monitor its implementation. I would hardly have regarded the recommendation as an enthusiastic one. It was preceded by this comment:

"EVALUASIE

Die beskuldigde is wel geskik vir korrektiewe toesig, maar die erns van die oortreding moet nie uit die oog verloor word nie."

After Mr Viljoen had testified, Mr Geldenhuys made one comment and asked three questions:

1. Mr Viljoen had deleted paragraph (f) relating to victim compensation in the pro forma order proposed in exhibit A because counsel had told him that a civil action was pending to recover the amount in question.

2. Had appellant been co-operative? — Yes. She and her husband both came to see him and the interview went well.

3. Did she understand the content of Mr Viljoen's recommendation? — Yes.

4. Was she prepared to submit fully to the terms suggested? — Yes, she had said she was.

The prosecutor was more inquisitive. His questioning elicited that appellant herself at no stage volunteered to repay her employer. When

Mr Viljoen raised the topic "het sy gesê sover as sy kan maar toe het ek verneem dat die terugbetaling ... in 'n siviele saak wel gehanteer word en ek het nie verder gegaan daarop nie". She had used the money "om hulle ... huislike omstandighede te verbeter. Hulle het dit gebruik vir, meubels gekoop ensovoorts". In exhibit A Mr Viljoen had proposed, as one of the conditions appellant should be subjected to, the following:

> "(d) ten einde die oortreder beter toe te rus vir haar verantwoordelikheid as lid van die gemeenskap, word aanbeveel dat sy verplig word om programme by te woon ter verbetering van die volgende probleem areas wat reeds geïdentifiseer is, asook ander programme, soos blyk nodig te wees tydens vonnisdiening:
> (i) Dat die beskuldigde 'n persoonlikheidsontwikkelings-program deurloop."

Potential second and third recommendations as to programmes, provided for by the form, were left blank. Mr Viljoen had majored in psychology but did not suggest that appellant in fact required any therapy. Indeed, he reported that "Die beskuldigde se fisiese en psigiese toestande blyk goed te wees".

Mr Geldenhuys neither re-examined Mr Viljoen, nor called appellant herself to testify.

The prosecution called two witnesses.

Mr Crause, a probation officer, handed in and confirmed his report (exhibit B). This contains a good deal of nuts-and-bolts information. Appellant grew up in a home where the children were adequately provided for despite their parents' abuse of alcohol. This led to marital conflict in the course of which the parents had the grace not to involve their children. There appeared to be no connection between that past and appellant's present offences. She and her husband had commanded a combined nett income of R5 670 per month, which fell short of their monthly expenditure of R6 000, so that they were always short of money. Appellant's parents came to their assistance financially over the years, but the details of their budget made it clear that the young couple were not prepared to forfeit certain luxury items listed there. Appellant had admitted to Mr Crause

had to be taken into account. He was reluctant to advise the magistrate on his exercise of the discretion, which was his alone, as to the form appellant's sentence should take. Pressed by Mr Geldenhuys to do so, he expressed the view that imprisonment was indicated because of the seriousness of her offence. Fairly aggressive cross-examination did not cause him to change this view. He conceded the obvious: that the fact that she was trusted with blank signed cheques and that her work was unsupervised and unchecked, created temptation.

Mr Chester, the complainant's attorney, told the court that summons had been issued against appellant, who was defending the action every step of the way. Inquiry whether, in view of her plea of guilty and her conviction, she intended persisting in her defence, or filing a notice of withdrawal and consent to judgment, had elicited no response. Complainant had run up costs in the region of R3 000 already in attempting - unsuccessfully so far - to recover its money.

The magistrate's comments in passing sentence make it clear that

he was fully aware of appellant's personal circumstances and the harmful effect being separated from their mother would have on her children. He listed both mitigating and aggravating factors, and the advantages correctional supervision may have over direct imprisonment. He eventually concluded that correctional supervision would cater for the criminal but not the crime nor the interests of society: "it would most certainly not have sufficient general deterrence".

We were referred to a fair number of decisions following on S v R 1993 (1) SA 476 (A), in which sentences of correctional supervision were passed, or ordered to be at least considered, despite the label attached to each of the particular offences classifying it as prima facie serious: robbery with aggravating circumstances; rape; culpable homicide; fraud; and so on. In the first instance, it is not a proper approach to seek factual similarities between other cases and this as the ground for attacking the sentence imposed.

"In R v Wells 1949 (3) SA 83 (A) Centlivres JA said at 87-88 that:

'Decided cases are ... of value not for the facts but for the principles of law which they lay down. In this connection I cannot do better than quote the remarks of Lord Finlay in Thomson v Inland Revenue (1919 SC (HL) 10):

'No enquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together: the use of cases is for the propositions of law they contain, and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case."

Decided cases dealing with sentence may be of value also as providing guidelines for the trial court's exercise of discretion (see S v S 1977 (3) SA 830 (A)) and they sometimes provide useful guidance where they show a succession of punishments imposed for a particular type of crime. (See R v Karg 1961 (1) SA 231 (A) at 236G.) But it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence. '(E)ach case should be dealt with on its own facts, connected with the crime and the criminal ..." (See Karg's case ubi cit.)"

per Nicholas AJA in S v Eraser 1987 (2) 859 at 863 A-D. Secondly,

none of the cases to which we were referred supports the proposition that where particularly a non-violent offender will derive no benefit from being imprisoned, he may claim a non-custodial sentence as of right, any more than Kriegler J purported to do in S v R, supra. Mr Geldenhuys accused the trial court of ignoring the decision of S v Rees 1984 (1) SA 468 (T) despite his having drawn the passages on pages 469 and 470 to the magistrate's attention. In that matter a churchman of many years' standing, worthy by reason of good works over decades, who stole a large sum of money over a lengthy period from the church but benefitted comparatively little himself, was sentenced to a total of ten years' imprisonment, all suspended for 5 years, and a R30 000 fine repayable in instalments. This case gives no support to appellant's case, since the circumstances and characters concerned differ toto caelo. Moreover Goldstone J warned (at p 472 G):

> "I would not like this judgment ever to be used as a precedent in support of the proposition that persons who commit serious frauds should not be imprisoned, even if

> first offenders. I have gone to some length to demonstrate the unusual nature of the case and in particular the absence of a complainant."

In S v Lister 1993 (2) SACR 228 (A) this Court pointed out (at p 232 n-i) that

> "To focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence."

So too the warning sounded in S v Schutte 1995 (1) SACR 344

(C) at 350 c-e is both wise and timely:

> "... (C)ourts should be cautious not to debase the coinage of correctional supervision as a form of punishment. It is an innovative form of sentence, which if used in appropriate cases and if applied to those who are likely to respond positively to its regimen, can serve to protect society without the destructive impact incarceration can have on a convicted criminal's innocent family members.... However, if it is used indiscriminately it will soon forfeit its credibility. The courts could well become increasingly reluctant to invoke its provisions - even in circumstances where the sentence may well have best served the interests

of both society and the offender."

In the present matter the interests of the appellant and even more so of her family certainly call out for a sentence of correctional supervision. The magistrate considered that the interests of society, because of the seriousness of her offence, outweighed her own. In my view he cannot be faulted in that view. The appellant showed no sign of true remorse which of necessity involves a true appreciation of one's moral guilt. She has little, if any, of that but sought instead to justify her taking ways. She persistently and deliberately betrayed the trust placed in her and did so from greed, not need. A sentence does more than deal with a particular offender in respect of the offence of which he has been convicted: it constitutes a message to the society in which the offence occurred. In my view there are no grounds upon which the court a quo could fault the magistrate for his view that a sentence of correctional supervision would, in the circumstances of this case, send out the highly undesirable message that crime may well pay, after all. It follows that

similarly there is no call for this court to interfere with the magistrate's exercise of his discretion.

The appeal is dismissed.

L VAN DEN HEEVER JA

CONCUR:

VIVIER JA) VAN
COLLER AJA)