CASE NO: 383/92
NvH

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

ANGELO CAPO Appellant

and

THE STATE Respondent

CORAM: SMALBERGER, VIVIER, et HOWIE, JJA

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CORAM: SMALBERGER, VIVIER, et HOWIE, JJA HEARD: 22 MAY 1995 DELIVERED: 30 MAY 1995

J U D G M E N T

SMALBERGER, JA:-

The appellant and a co-accused, one Hempel, were convicted of two counts of fraud in the Johannesburg Regional Court. They were sentenced to eight and four years imprisonment respectively.

Half of the appellant's sentence was conditionally suspended, one of the conditions being that he compensate Volkskas Bank in the amount of R25 000-00 plus interest. The whole of Hempel's sentence was suspended. The appellant's appeal to the Witwatersrand Local Division against his conviction and sentence was unsuccessful save for the fact that the condition relating to payment of compensation was deleted. The appellant now appeals to this Court, with the necessary leave, against his conviction and sentence.

The two counts of fraud related to a scheme which involved, inter alia, the establishment of a close corporation, Towerline Construction CC ("Towerline"); the opening of a bank account in its name; the unauthorised acquisition of cheques made out to other corporations or businesses; the depositing of such cheques into Towerline's bank account; and the withdrawal of monies from such account once it had been credited with the value of the cheques.

The main issue on appeal is whether it was established at the trial that the appellant was involved in the planning and execution of this fraudulent scheme.

The following facts are either common cause or not in dispute for the purposes of the present appeal. During the early 1980's the appellant owned and operated a construction company, Minardi Civil Contractor (Pty) Ltd ("Minardi"). Towards the end of 1984 Minardi found itself in financial difficulties and it was liquidated in 1985. Sometime thereafter the appellant, who is Italian by birth, went to Italy where he stayed until his return to South Africa in July 1987. After his return he was in contact with Hempel, with whom he was well acquainted. They had previously worked together for a company, Bramley Earthworks, and subsequently Hempel had been employed by Minardi.

On 24 June 1987 (prior to the appellant's return to South Africa) Hempel opened a savings account in his name with a branch

of the Trust Bank in Pretoria. Towerline was formed and registered by Hempel (as its sole member) on 12 August 1987. There is no direct evidence (apart from that of Hempel) linking the appellant with its formation and registration. On 14 August 1987 the appellant and Hempel went to Volkskas Bank in Johannesburg to open a current account in the name of Towerline. They were attended to initially by a Mrs Roos, who obtained the required details from them, before being introduced to the branch manager, a certain Ferreira. On 3 September 1987 Hempel opened a current account in his name with the First National Bank in Hillbrow. And on 9 September he opened a savings account with a branch of the Trust Bank in Johannesburg.

On 29 September 1987, at the head office of the Electricity Supply Commission ("ESCOM") in Johannesburg, in keeping with an established practice, month-end cheques were distributed to subcontractors of ESCOM who called or sent for them. Control at the

time was incredibly lax, and pre-prepared crossed cheques and advice notices which had been placed in envelopes, were simply handed over to anyone claiming to be there on behalf of a sub-contractor without proof of identity or acknowledgement of receipt, a system which clearly lent itself to abuse. In the early afternoon a man (whom the State claims was the appellant) arrived and asked for the cheque due to Sieva (Pty) Limited ("Sieva"). After a short delay, while a search was conducted for it, an envelope containing a cheque for R17 395 862-97 in favour of Sieva was handed over to him. A while later another man came to claim the money due to Powerlines (Pty) Limited ("Powerlines"). He was given an envelope containing three cheques for R219 745-66, R654 794-39 and R4 127 910-68 respectively made out to Powerlines or "Powerlines Consortium". It was only when the authorised representatives of Sieva and Powerlines arrived later that same day to collect their cheques that it was discovered that they had been

handed over to unauthorised persons. Immediate steps were taken to stop payment of the cheques.

On the afternoon of 29 September Hempel deposited the Powerlines cheque for R219 745-66 into the Towerline account at Volkskas Bank. The teller accepted the cheque not noticing the difference between Powerlines and Towerline. On the same afternoon Hempel managed to deposit the Powerlines cheque for R654 794-39 into his current account with First National Bank. The Sieva cheque and the largest of the Powerlines cheques were not deposited and have never been traced. On 30 September 1987 Hempel separately deposited two cheques, for R45 000-00 and R48 000-00 respectively, drawn in his favour by Towerline, into his account with the Trust Bank and requested a special clearance for each deposit. On the same day he cashed a Towerline cheque for R25 000-00, made out to cash, at Volkskas Bank. The computer showed the Towerline account to be in credit; the fact that payment

had been stopped on the cheque deposited the previous day had presumably not yet filtered through the system. Hempel was arrested the following day when he attempted to cash a further cheque for R50 000-00 at Volkskas Bank. Ultimately the only loss suffered was the R25 000-00 paid out by Volkskas Bank.

On 6 October 1987 Hempel made a detailed statement to a commissioned police officer admitting his role in the fraudulent scheme. In it he identified a certain Wille as the prime mover and brains behind the scheme. The statement did not implicate the appellant in any way. (The admissibility of the statement was challenged at the trial. It was held to have been freely and voluntarily made by Hempel despite his claim and evidence to the contrary.) On 24 February 1988 Hempel made a further statement to a magistrate in Johannesburg. It proceeded along the same lines as his earlier statement but assigned to the appellant the role previously ascribed to Wille. No mention whatsoever was made of

Wille. Hempel basically stuck to this version when giving evidence at the trial. He claimed to have acted throughout on the instructions of the appellant, the architect of the fraudulent scheme. (Hempel was found by the trial magistrate to be a blantantly untruthful witness on whose evidence no reliance could be placed in the absence of corroboration.) The appellant, notwithstanding the evidence implicating him in the commission of the offences, failed to testify.

The appellant was identified by the State witness, Mrs Bagley ("Bagley"), as the person who collected the Sieva cheque from ESCOM on 29 September 1987. Her honesty as a witness was not challenged. Any claim that she might have been biased is totally without foundation. The crux of the appeal relates to the reliability of her identification. It was conceded by the appellant's counsel that if Bagley's evidence was correctly accepted by the trial magistrate the appeal had to fail, as the combined effect of the

appellant's admitted involvement in the opening of the Towerline bank account, his collection of the Sieva cheque and failure to testify would constitute proof beyond reasonable doubt of his participation in the fraudulent scheme. Conversely, if there exists a reasonable doubt concerning Bagley's identification of the appellant, the appeal must succeed. For without proof that appellant was the person who collected the Sieva cheque, the remaining evidence would be insufficient to justify a conviction, notwithstanding his failure to testify. Bagley's evidence therefore assumed critical importance and, not surprisingly, was subjected to rigorous scrutiny and vigorous attack on appeal before us.

Bagley was employed at the relevant time as a senior receptionist at ESCOM. The person normally responsible for the handing over of month-end cheques to those who called for them was a Mr Niek Venter ("Venter"). She assisted him on 29 September 1987 because he was very busy that day. She testified

that at approximately 13:45 the appellant arrived and requested the Sieva cheque. She stated that she had never seen him before. He spoke to her in English. She was initially unable to locate the cheque. She recalled that she had looked up at the appellant on several occasions while searching for the cheque and had asked him more than once to spell the name Sieva. She eventually asked Venter where the cheque was. He explained to her where to find it. She located the envelope containing the cheque and gave it to Venter, who in turn handed it over to the appellant. According to her evidence the whole episode took about two minutes. She claimed that the appellant was wearing a light grey suit. On 29 October 1987, exactly one month later, she pointed him out at what, on the evidence, was a properly constituted identification parade. She testified that she was able to identify the appellant by his grey hair, his face, his eyes, his height and his build. Bagley was also able to give a detailed description of the person who came and

collected the Powerlines cheques. She was adamant that the person concerned was not Hempel.

Bagley was subjected to a searching cross-examination. The trial magistrate (who delivered a comprehensive and well-reasoned judgment) found her to be an "excellent witness". He went on to say:

> "She has been shown to be exceedingly observant and has described each of the two recipients of the cheques in minute detail. She had seen the two persons in broad daylight from close proximity in circumstances demanding more than just a casual glimpse of them. In respect of the SIEVA recipient, she looked up at his face on a number of occasions and was able to remember the gist of their discussion.
>
> The court finds that she had sufficient opportunity of making a proper and reliable observation of the person who came to uplift the SIEVA envelope and cheque and that her evidence is reliable in this regard."

These findings by the magistrate cannot lightly be ignored on appeal, bearing in mind that he had the advantage of seeing the

witness and hearing her testify.

It was known to the ESCOM officials later that same afternoon that the Sieva and Powerlines cheques had been collected by unauthorised persons. The probabilities are that Bagley would immediately have recalled the occasions and made a mental note of the appearance of the persons concerned, thereby standing her in good stead to point the appellant out as one of those persons at the subsequent identification parade.

Bagley's evidence is at variance with Venter's description of the person who collected the Sieva cheque as '"n langerige persoon, blas in kleur", a description which clearly does not fit the appellant. That is as far as Venter's evidence went. He stated categorically that he would not be able to identify the person concerned. Nor was he able to give a description of the person who collected the Powerlines cheques. It was of course Bagley, not Venter, who dealt with the recipient of the Sieva cheque. Venter did no

more than

hand over the cheque. His opportunity for observation was limited, which would detract from the reliability of any description given by him. The trial magistrate was very much alive to this difference between Venter's evidence and that of Bagley. He appears to have approached Venter's evidence with some measure of justifiable scepticism. He held that Venter was clearly not as observant as Bagley, and that she "outclassed" him as a reliable witness in all material respects. On a careful reading of their evidence I am unpersuaded that the magistrate erred in his assessment of the two witnesses, and that Venter's evidence in any way detracts from Bagley's identification of the appellant.

It is common cause that the appellant is not entirely fluent in English and speaks with an Italian accent. Yet Bagley described the person who collected the Sieva cheque as "Engelssprekend" and added (referring to the English language) "Hy het dit goed gepraat". It was argued that she was either not as observant as she

claimed, or that her evidence in this regard raised a doubt as to whether the person concerned was the appellant. One must, however, view her evidence in its proper context. All that was said by the person she identified as the appellant was "Good afternoon, I am here to collect a cheque for Sieva", and thereafter he spelt "Sieva" a few times. The following passage in her evidence under cross-examination puts the matter in perspective:

> "En as ek reg onthou het u 'n verdere opmerking ook gemaak, u het gesê hy het 'n goeie Engels gepraat? - Dit het vir my goed geklink ja.
> Soos 'n Engelssprekende persoon? — Wel die woorde wat hy gepraat het sou ek sê hy kan Engels praat ja en verstaan.
> Mevrou ek bedoel soos iemand wat Engels vanuit huis praat, 'n Engelssprekende persoon? — Wel dit kan ek nie sê uit die paar woorde wat ons gewissel het nie.
> Maar u is bereid om te sê dit was 'n goeie Engels op die paar woorde? — Ja."

Having regard to the limited conversation between them, the impressions formed by Bagley are not necessary inconsistent with the person who spoke to her being the appellant.

It was also argued that it was reasonably possible that Bagley had observed the appellant on a previous visit by him to ESCOM and sub-consciously transposed the two occasions. There is no merit in this argument. It is not in dispute that the appellant and Hempel went to ESCOM on 7 September 1987 and signed the visitors register. The purpose of their visit was apparently to see a certain Rheeder. In the normal course their visit would have taken them to the reception area where Bagley worked. Non constat that Bagley, who was not the only receptionist, would have been there at the time, or would necessarily have observed them. Bagley denied any recollection of seeing the appellant on that occasion, although she admitted that she may possibly have seen him. If she did, he clearly made no firm or lasting impression on her, and this incident could not have accounted for her subsequent identification of him. Apart from this, it was never suggested to Bagley under cross-examination, in order to gauge her reaction, that she may have

transposed the two occasions.

Hempel testified that he collected the Powerlines cheques from ESCOM on 29 September 1987. However, he does not by any stretch of imagination fit the description of the recipient of those cheques. If he did fetch a cheque, it must have been the Sieva cheque. For, on a proper conspectus of the evidence, the recipient of the Sieva cheque could only have been the appellant or Hempel. One may ask why Hempel, against his own interests, would admit to collecting a cheque if he did not do so? The answer probably lies in the fact that Hempel is a totally unreliable and discredited witness whose motives cannot be fathomed. Significantly, Hempel never mentioned fetching a cheque at ESCOM in his original statement. It is true that Hempel was never present at an identification parade. But in court he and the appellant were seated next to each other when Bagley pointed out the appellant. She could hardly have mistaken the one for the other. It was never

pertinently put to Bagley under cross-examination that Hempel might have been the recipient of the Sieva cheque. She might have convincingly refuted any such suggestion. There is in my view no merit in any argument which suggests that Bagley may have confused the appellant with Hempel.

It was further argued that it was improbable, in all the circumstances, that the appellant would have exposed himself to the risk of identification by fetching the Sieva cheque. Minardi had previously done sub-contracting work for ESCOM. The appellant had probably in the past collected cheques from ESCOM on Minardi's behalf. He would have been known to certain of ESCOM's officials. He had visited ESCOM on 7 September 1987. Why then choose to fetch the cheque himself when he could have sent Hempel to do so? There may have been various reasons for his doing so. If he knew the situation from past experience he was probably better equipped to achieve his purpose without attracting

undue attention. He may have believed that his absence from the country for quite a long time reduced the likelihood of his being recognised. Or it may simply not have entered his mind at the time that he was in any real danger of being observed and caught. One cannot speculate for what reason he might have decided to fetch the cheque. The improbability of his doing so, however, is not sufficiently strong to otherwise detract from Bagley's positive identification of him.

It is true that in his original statement Hempel did not incriminate the appellant. It was argued that what he said immediately after his arrest was more likely to have reflected the truth than his later statement and evidence. Whether Hempel avoided any reference to the appellant originally because he feared him (as he claimed in evidence) or because he wished to protect him, it is perfectly clear that he deliberately refrained from making any mention of the appellant. In the statement he tells how he

was introduced to one Gordon, who professed to be an attorney, who accompanied him to Volkskas Bank on the occasion when the Towerline account was opened. It is common cause that the person who actually accompanied him was the appellant, but Hempel falsely withheld that fact. Hempel is a person on whose word little if any reliance can be placed. His initial failure to ascribe to the appellant the role he subsequently did does not justify any inference in the appellant's favour.

The appellant did not seek to gainsay Bagley's evidence. There was therefore less reason to doubt her reliability than might otherwise have been the case. The absence of any rebutting testimony from the appellant, whatever the reason for such absence, ipso facto tends to strengthen the direct evidence of identification given by Bagley (S v Mthetwa 1972(3) SA 766(A) at 769D-H). In all the circumstances I am unpersuaded that the magistrate erred in holding Bagley to be a reliable witness and accepting her evidence.

As previously mentioned, it was conceded that if Bagley's evidence was correctly accepted the appellant's appeal must necessarily fail. The opening of the Towerline bank account was a very important component of the whole scheme. The appellant was present on that occasion. I do not find it necessary to traverse the evidence of the witnesses Roos and Ferreira. Suffice it to say that it is quite apparent from Roos's evidence, which the magistrate accepted, that the appellant played a prominent role in the opening of the account. Coupled to this is the fact that the appellant collected the Sieva cheque as well as his failure to testify. The only reasonable inference to be drawn (leaving aside Hempel's evidence) is that the appellant was knowingly a party to the fraudulent scheme. He was accordingly correctly convicted.

The magistrate went further and held that Hempel's evidence that the appellant masterminded and planned the execution of the crimes was substantially the truth. Earlier in his judgment he had

said of Hempel:

> "It has to be stated without more ado that he was not a satisfactory witness by any stretch of imagination. He is a self-confessed liar, an accomplice in the matter and a person who suffers from an impairment of his memory. It is obvious that it would be extremely dangerous and fatal to rely on [his] uncorroborated evidence. If no corroboration or other safeguards can be found for the core of his version the court would have to hold that it can place no meaningful reliance on his evidence. The court will and can only rely on those portions of his evidence where it has been corroborated by other reliable evidence, circumstantial evidence or the probabilities in the matter."

He accordingly sought, and found, corroboration of Hempel's evidence in relation to this aspect in the evidence of Bagley, Roos and the defence witnesses Fletcher and Language.

In my view it would be extremely dangerous to place reliance on any aspect of Hempel's evidence. Hempel is clearly not as naive and unworldly as he would have one believe. He has held relatively responsible positions in the construction industry and there

was even a time, according to the evidence, when the appellant worked under him. Roos's evidence showed that the appellant played a prominent role in the opening of the Towerline account; Bagley's that he fetched the Sieva cheque. Those acts establish that he was a party to the fraudulent scheme; they do not necessarily point to his masterminding it. Nor does the evidence of Language and Fletcher do so, neither of whom positively link the appellant to the scheme. Many of the aspects of the scheme were carried out by Hempel alone without the apparent presence or assistance of appellant - the registration of Towerline, the opening of a number of bank accounts, the depositing of cheques and the withdrawal or attempted withdrawal of monies. We only have Hempel's word for it that he did so at the behest of the appellant. He did not claim, on his arrest, to have been acting on anyone else's instructions. The appellant was not found in possession of any incriminating evidence relating to the scheme from which an inference could be drawn as

to the role he played. There was probably at least one other person involved in the scheme. The precise extent of his role remains obscure. It may well be that the appellant, by dint of past experience and greater intellectual capacity, was better equipped to devise and carry out a scheme of this nature than Hempel. But even though the probabilities may suggest that the appellant was the mastermind, it cannot be held beyond all reasonable doubt that he was. By the same token it cannot be found, as the magistrate did, that the appellant manipulated and abused Hempel to the extent that the latter merely acted as a pawn on his behalf. The appellant and Hempel should therefore have been treated as equal perpetrators in the commission of the crimes.

This brings me to the question of sentence. Hempel was given a totally suspended sentence; the appellant was sentenced to an effective four years imprisonment. The primary reason for this disparity was the rinding, which I have held was not justified, that

the appellant had masterminded the scheme, had abused Hempel to achieve his own ends and was responsible for Hempel landing in prison and being left with a criminal record. The magistrate found that Hempel had not gained financially from the nefarious scheme; there is no evidence to show that the appellant did. The R25 000-00 lost by Volkskas Bank was drawn by Hempel, and what became of it we do not know. Appellant, like Hempel, is a first offender. The offences were serious and the potential loss great. The crimes were well planned and executed. Yet in reality there was little chance of the scheme ever achieving complete success.

It may well be that the mitigating factors which operated in Hempel's favour were greater than those favouring the appellant. But they were not such as would justify a significant difference in their sentences. Our courts strive as far as possible, to achieve parity of sentence in instances of equal or near equal participation in the same crime. In this respect it was said in S v Marx

1989(1) SA 222(A) at225B-C that:

> "As 'n algemene beginsel poog ons howe om sever doenlik gelyke deelname aan 'n misdaad eenvormig te straf, tensy die betrokke misdadigers se uiteenlopende persoonlike omstandighede ongelyke vonnisse regverdig. Dit is belangrik dat by vonnisoplegging geregtigheid nie alleenlik moet geskied nie, maar duidelik moet blyk te geskied, nit die oogpunt van sowel 'n beskuldigde as die publiek. Ongelyke strawwe op gelyke misdadigers ten opsigte van dieselfde misdryf druis teen die algemene gevoel van geregtigheid in (Du Toit Straf in Suid-Afrika op 118)."

We arc called upon, in view of the magistrate's misdirection, to consider the question of sentence afresh. Hempel's sentence may have been too lenient, and the appellant may be deserving of a higher sentence. But it would in my view be inequitable, given the circumstances of this matter, to require the appellant to serve a prison sentence when Hempel's sentence was fully suspended. The appellant is now in his mid-fifties. He has started a new and seemingly stable life for himself and his family in Port Elizabeth. Hopefuly he has learnt from his experience. The sentence that will

hang over his head should aid his rehabilitation.

The appellant's appeal against his convictions is dismissed.

The appeal against sentence succeeds. The appellant's sentence is altered to read:

"Five years imprisonment wholly suspended for five years on condition that the accused is not convicted of fraud or theft, or any offence of which theft is an element, committed during the period of suspension."

J W SMALBERGER
JUDGE OF APPEAL

VIVIER, JA) concur
HOWIE, JA)