

32/87

KATHE LYDIA SOPHIE SCHWARTZ

APPELLANT

and

THE STATE

RESPONDENT

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

KATHE LYDIA SOPHIE SCHWARTZ

APPELLANT

and

THE STATE

RESPONDENT

CORAM: BOTHA, NESTADT JJA et NICHOLAS AJA

DATE HEARD: 24 MARCH, 1987

DATE DELIVERED: 27 MARCH, 1987

J U D G M E N T

NESTADT, JA:

Appellant pleaded guilty to, and was

convicted/

convicted by a Johannesburg magistrate on, five counts of contravening sec 53(1) of the Labour Relations Act 28 of 1956 ("the Act"). A sentence of 1 000 hours periodical imprisonment was imposed (the five counts being taken together for this purpose). An appeal against sentence to the full bench of the Transvaal Provincial Division failed. This is a further appeal (with the leave of the court a quo) against sentence.

The offences consisted in the failure of, what I may call, appellant's company to comply with certain agreements which, in terms of sec 48 of the Act, had been declared to be binding on it as an employer

in/

in the furniture manufacturing industry in the Transvaal.

In breach thereof the company had, in respect of the months of October, November and December 1983 and January 1984, failed to pay to the industrial council concerned certain provident and holiday fund contributions, training fund levies, council expenses and trade union subscriptions in the total sum of R12 920,08. The company was a co-accused and was also found guilty. Appellant's convictions were based on the deeming provisions of sec 332(5) of the Criminal Procedure Act 51 of 1977. She was at all material times the sole director and shareholder of the company, whose affairs she managed. In sentencing appellant, the magistrate also ordered her (and the company), in terms of sec 54(1) of the Act, to pay to

the/

the industrial council the amount involved at the rate of R500,00 per month over a period of 26 months, commencing on 30 June 1984.

Appellant is a woman, who, at the time of her trial (in April 1984), was about to turn 74 years of age. She acquired control of the company in October 1982. It would seem that she struck a bad bargain. Certainly, from the beginning, it was in financial difficulty and apparently not profitable. Appellant, nevertheless, persevered in conducting the business. In doing so, however, she failed to ensure that the company complied with its obligations under the industrial agreements referred to. It was in breach thereof from October 1982. As a result it, together with appellant, was from time to

time/

time prosecuted and convicted on charges similar to the ones in issue in this appeal. The first was in respect of payments due from October 1982 to January 1983. Arrears of R13 393,15 were involved. Appellant's sentence was a fine (of R13 393,15) which was conditionally suspended for five years. The second conviction, on 21 July 1983, was in respect of an amount of R22 880,54 due for the period February 1983 to May 1983. Appellant was sentenced to a fine of R1 000 or one year imprisonment, conditionally suspended for five years. The third was on 29 September 1983. It related to the company being in default of payment of contributions due for June and July 1983 in the sum of RS 935,74.

A/

A fine of R500, or six months imprisonment on each of the five counts was imposed. On 24 February 1984 appellant was convicted for the fourth time, in respect of the company's failure to pay an amount of R7 650,02 due for August and September 1983. This time she was sentenced to six months imprisonment on each count, conditionally suspended for five years. On each occasion orders for the payment of the arrears were made against the company and appellant.

In sentencing appellant, the magistrate was not unmindful of her age. On the contrary, the prospect of imposing a prison sentence on her obviously gave him cause for concern. He, nevertheless, felt compelled to do so. He was, understandably, influenced

by/

by appellant's bad record. With justification he

observed:

"(Y)ou failed to pay any contributions before there are any court orders...

(I)t is really shocking to think that

a person is in the trade and really

does not take cognisance of the court

orders and of other payments which

should be paid ... It is obvious to

the Court that you decided that you

will do as you like. That you are

not prepared to listen to the Court

Orders. You are in arrears already

on the amounts you should have paid

back."

The last statement was correct. Only about R7 500,00

was paid in respect of contributions owing for the

period October 1982 to September 1983. This left,

as at the time of appellant's trial, an amount of

R42 359 in arrears. And to this had to be added

the/

the sum of R12 920,08 which had not been paid for the subsequent four month period, ie, until and including January 1984. There had, moreover, been the evidence, tendered by the State, of an officer of the industrial council, pointing out the prejudice caused to it and the company's employees by the failure to pay the contributions.

In the light of all these considerations and despite appellant's testimony, in mitigation of sentence, that she was in ill-health, I might not have been inclined to accede to the argument of Mr Solomon, on behalf of appellant, that the sentence was unduly severe. It seems to me, however, that counsel's second submission, viz, that the trial court misdirected itself, is sound and that, on this basis, there was an improper

exercise/

exercise by it of its discretion. Having reviewed appellant's course of conduct and previous convictions the magistrate said:

"(T)he Court feels that it is time that you should be taught a lesson ...(I)n the past the Court assisted you in every possible way. You received suspended sentences, and other sentences, and the last - even on the fourth occasion - you got six months imprisonment, everything was suspended to assist you. But you showed the Court that every assistance was just thrown back into the Court's faces, and the Court feels that you should be sentenced to imprisonment. But because of your age the Court feels that the Court will not impose the normal period of imprisonment. You are sentenced to 1 000 hours periodical imprisonment."

This was not a correct assessment of the position. What was overlooked was that the fourth conviction, though in respect of a failure to pay contributions for a period

(ie/

(ie August and September 1983) which was prior to the months in issue in her trial (ie October, November and December 1983 and January 1984), only took place there-

after (ie on 24 February 1984). Accordingly, when

appellant committed the offences for which she has now

been sentenced, the suspended sentences of six months

imprisonment, referred to by the magistrate, were not

in existence. In S v Jack 1982(4) S A 736(A), Trengove JA

said (at 742 F):

"Waar 'n hof by straftoemeting 'n beskuldigde se vorige veroordelings as 'n verswarende faktor teen hom in ag neem, behoort die hof, uit die aard van die saak, die gegewens, wat op die betrokke vorm S A P 69 voorkom, versigtig te ontleed..."

I am bound to say that this did not happen here. Whilst

the trial court, in sentencing appellant, was clearly

entitled/

entitled to take her fourth conviction into account

(R v Zonele & Others 1959(3) S A 319(A) at 330 D - 331 A),

it should not have done so in the way in which it did.

Indeed, Mr Roets, for the State, in his able yet commendably

fair argument, had understandable difficulty in contesting

this.

We are, in the circumstances, entitled to

impose sentence afresh. And it remains to do so. The

seriousness of the offences is not to be underestimated.

In terms of sec 82(1)(b) of the Act, they are punishable

by a fine not exceeding R1 000 or imprisonment for a

period not exceeding one year or such imprisonment

without the option of a fine or both such fine and such

imprisonment. I have already referred to the prejudice

to/

to the industrial council and the company's employees and, of course, to the repeated contraventions committed by appellant. The amount involved is large. I have, nevertheless, come to the conclusion that this is not a case where justice and, more particularly, the purposes of punishment, would be served by appellant having, unconditionally, to undergo imprisonment (whether periodical or otherwise). What weighs with me is the following:

- (i) It need hardly be emphasised that a sentence of periodical imprisonment is a "very real form of punishment" (per Fannin J in S v Bhadloo 1971(1) S A 53 (N) at 54 fin and quoted with approval in S v Erwee 1982(3) S A 1057(A) at 1065 B - D).

- (ii) To subject a person of appellant's age (she was

described/.....

described by her counsel as being in her twilight years) to it, would be a severe sentence requiring exceptional circumstances.

(iii) During the course of his judgment on sentence, the magistrate said:

"Now you might tell me that you are not a criminal, and I will agree with you, but on the other hand if you go to jail - you will get the same treatment as any other criminal".

I think that what he had in mind was the consideration that appellant's failure to pay did not involve any dishonesty. I agree with this. Nor was it to be inferred that she was deliberately flouting her obligations. Her conduct stemmed rather, so it seems to me, from her shortage of funds/.....

funds, and, perhaps one might add, an irresponsibility or folly brought on with her advancing years.

These are considerations which, in my judgment, reduced her moral blameworthiness and were, as such, mitigating.

(iv) She was, in any event, not insensible to her predicament.

In about November 1983 she attempted to sell

certain immovable property, the proceeds whereof she

intended to use to pay the amounts owing to the

industrial council. She also, over the period in

question, injected (unavailinglly) approximately

R50 000 of her own capital into the business (from

which she did not draw a salary).

(v) I must revert to appellant's previous convictions.

Her sentences prior to her defaulting in the payment

of/

of the contributions due for the period October

1982 to January 1983 were, leaving aside the

alternatives, two suspended and one outright fine.

I do not believe that they sufficiently brought

home to her the realisation that a repetition of

her failure to comply with her statutory obligations

might lead to her imprisonment, whether periodical

or otherwise. On the facts of this case, it seems

to me, that before this happened, fairness required

that appellant be made aware that she stood in

jeopardy of such a sentence being imposed. Only

then could it justifiably be said that she deserved

to be "taught a lesson" (by being gaoled).

(vi) Significantly, consequent upon the suspended

sentence/

sentences of six months imprisonment, imposed on

24 February 1984, the February, March and April 1984

contributions were paid, if not timeously, then soon after they fell due.

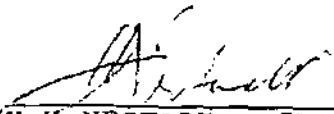
(vii) The impression one gains from her evidence (and confirmed by what has been stated in previous subparagraphs) is that appellant was truly remorseful for her conduct.

On an overall view of the relevant circumstances, I have come to the conclusion that, whilst the stage has been reached where imprisonment has to be considered as a punishment, the appropriate form it should take is a suspended period on the terms which are set out in the order which follows. It will, one hopes, achieve

the/

the trial court's obvious and praiseworthy desire to
avoid appellant actually being imprisoned.

The appeal succeeds. The sentence of the
magistrate is set aside. In its place there is substituted
the following sentence: The five counts are, for the
purposes of sentence, treated as one. In respect thereof
a sentence of six months imprisonment is imposed. It is
suspended for three years on condition that appellant
(or accused no 1) pay any unpaid balance of the amount
of R12 920,08 owing in terms of the order in instalments
of R500 per month commencing on or before 30 April 1987
and thereafter by the 30th of each succeeding month.


H-H NESTADT, JA

BOTHA, JA)
)
) CONCUR
)
NICHOLAS, AJA)