113/85

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

KEITH STEINBERG ..... Appellant

AND

THE STATE ..... Respondent

Coram: RABIE C J, BOTHA J A et CILLIé, A J A

Heard: 13 September 1985

Delivered: 26 September 1985

J U D G M E N T

CILLIé, A J A :

This is an extraordinary case. The appellant was tried in the Regional Court, Johannesburg, on a charge which included 52 counts of fraud. It was alleged that he

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had committed the fraudulent acts while he was an accountant of the firm Mirriam Glick Trading (Pty) Ltd, which will be referred to herein as Glicks. At the trial his legal adviser, acting in terms of section 112 of the Criminal Procedure Act, 51 of 1977, handed in a statement and an affidavit by the appellant in which he had set out the facts which he admitted and on which he pleaded guilty. These facts disclosed an allegation that he had acted under the pressure of extortionists; he conceded that a defence of necessity was not available to him. The prosecution accepted his plea. No questions were put to him and he was found guilty as charged. After an address in mitigation, the appellant was sentenced to 8 years imprisonment of which 4 years were suspended for 5 years on condition that he was

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not convicted of fraud or theft or attempted fraud or theft committed during the period of suspension. The appellant appealed against his sentence only; the Supreme Court of the Transvaal Provincial Division dismissed his appeal but granted him leave to appeal to this Court.

It is not necessary to set out the well-known rules which this Court will follow when deciding whether it may and should intervene with a view to amend the sentence imposed by a lower court. In this case the facts and circumstances which are relevant to the crime and its commission, to the appellant and to the sentence imposed are the following.

The method employed by the appellant to defraud Glicks was to "duplicate" cheques. For a particular

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debt owed by his employer he would prepare two cheques, both showing the correct amount of the debt and the creditor to whom it was owed. At different times he would separately present the two cheques to the responsible director for his signature, intimating on each occasion that the debt was owing by Glicks. One cheque would then be sent to the creditor in payment of the debt; the other would be retained. On this second cheque the signature of the client would be forged and it would be cashed at the bank by the appellant or one of his accomplices. From 17 August 1981, to 25 January 1983, this procedure was followed on 52 occasions. Without their knowledge the accounts of 22 creditors of Glicks were involved, two no fewer than six times and seven once only. The amounts range from R861 in one case to

R14 130,84 in another. The total amount of which Glicks was defrauded, was R146 377,04. Glicks' clients suffered no loss.

It appears from the statement put before the magistrate that the appellant became acquainted with a certain Phillip Shaw towards the end of 1980. Shaw offered him a position in his furniture business. The appellant refused. In the middle of 1981 a commercial bank laid a charge of fraud against the appellant. It was alleged that he had forged a share certificate reflecting that he owned 20,000 Amaprop shares. This certificate was filed with the bank together with a deed of suretyship on which the appellant's name was forged. On these documents Shaw obtained an overdraft of R28 000 at the bank. The

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appellant was unaware of the existence of these documents. While the case was pending Shaw went to the appellant's father-in-law and threatened to arrange for false evidence to be given at the appellant's trial unless he, the father-in-law, paid Shaw's overdraft. The father-in-law refused and Shaw approached the appellant. He tried to persuade him to carry out the scheme of defrauding Glicks. When the appellant refused, he threatened to inform his employers of the case pending against their accountant. He apparently also stressed the fact that the appellant's acquittal or conviction depended on his evidence. On one occasion he fired two shots with a firearm into the ground next to the appellant's feet to show how serious he was about about his threats. The threats did not stop at physical harm to the

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appellant; Shaw also threatened to abduct, rape and even murder the appellant's wife. The appellant eventually succumbed and started the scheme. After the overdraft had been paid off Shaw did not release him from his clutches. He repeated the threats to the wife, followed her from her work and let it be known to the appellant and the wife that he was following her. He also threatened to harm the appellant's mother unless the duplicating of cheques was continued. A friend of Shaw by the name of Randall also wanted financial assistance. On one occasion at Randall's house, when the appellant appeared reluctant to proceed with the scheme, Randall threatened to kill him, took out a gun and fired five shots into the wall next to the appellant's head. The statement reads:

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"The bullet holes should still be visible. I was petrified as I believed I was dealing with a maniac."

He continued duplicating cheques.

Eventually the appellant and his mother consulted an attorney. As a result of his advice telephone conversations with Shaw and Randall were recorded. The police were also informed of the matter and a copy of the appellant's statement at his trial was handed to the police before he was charged. Finally it should be mentioned that the appellant was acquitted on the first charge laid against him in regard to the forged documents and Shaw's bank overdraft, and that Randall left the country and died abroad.

This is indeed a strange story. But it

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cannot be doubted or disregarded when sentence is considered. The appellant placed all the facts before the police and co-operated with the police officers who investigated, not only his fraudulent acts but also his allegations about extortions. He brought the police into contact with people who could verify his story, gave them recordings of telephone conversations he had had with the extortionists and pointed out the bullet marks on a wall of Randall's house. After an investigation by the police and a report to the prosecutor, the State accepted as correct, for the purpose of sentencing, the appellant's statements placed before the Court. In considering the sentence imposed by the magistrate and deciding on an appropriate sentence, if that should be necessary, this

Court .... / 10

Court must also accept that the appellant's statement is correct and true.

It will be convenient to deal now with a few misconceptions or possible errors in the magistrate's reasons for his judgment and in the judgment of the Court a quo. Firstly, the Court a quo criticizes the appellant for not going to the police at an earlier stage and the judgment reads:

> "Moreover, he chose not to go into the witness box to face cross-examination on any of these questions or generally on the question as to the degree of resistance that he had tried to put up to those who were exerting pressure on him."

It would appear that sight was lost of the fact that section 112 of the Criminal Procedure Act, 51 of 1977, provides for the questioning of an accused who hands into court a

statement .... / 11

statement of the facts on which he pleads guilty. The last part of sub-section 112(2) reads as follows:

> "Provided that the Court may in its discretion put any question to the accused in order to clarify any matter raised in the statement."

It should therefore not be considered as a factor against him that he had chosen to make use of his rights in terms of the section.

Secondly, the appellant was criticized, and in my view correctly criticized, for not telling the police of the threats when they were initially made. The effect of this criticism is greatly minimized by the fact that the appellant could not, partly as a result of his dilatoriness, plead necessity as a defence. It should also not be forgotten that the vehement threats had a

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serious effect on the appellant, particularly when his complicity and guilt became greater as the fraudulent scheme progressed; eventually the appellant made a full disclosure to the police before he was charged. Of this last aspect the magistrate incorrectly said:

> "It was not as a result of anything that the accused did that the crimes were discovered."

Thirdly, in the statement which was handed in the appellant admitted that he had taken R7 430 of the total amount obtained from Glicks. The magistrate deals with this fact as follows in his reasons for sentence:

> "Although accused was extorted, he used a substantial amount of the money for his own purposes. He was not extorted to do this. This fact clearly shows that he did not need much persuasion to defraud his employer."

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The magistrate apparently lost sight of the fact that the appellant said in his statement that he had taken a certain amount of the money obtained from Glicks to pay his attorney for his first trial. That trial was caused by Shaw's machinations and was one of the first levers to be used by Shaw in his extortions. It was common cause that the R7 430 received by the appellant was paid to his attorney in connection with that trial. This fact also lessens the force of the magistrate's finding that the appellant did not need a great deal of persuasion to commit the fraudulent acts.

These errors should not, in my opinion, be elevated to the level of misdirections which would justify this Court's intervention and substitution of another

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sentence. They should, on the other hand, not be forgotten; they must be given their proper weight and importance as part of the totality of facts and circumstances to be considered in order to arrive at an appropriate sentence. I am satisfied that some of these facts, and particularly the extent of the extortion and the appellant's reaction, were not given their full value in the magistrate's considerations. As a result the sentence is an unreasonable one, so unreasonable that, on the application of the rules which apply, it must be set aside and an appropriate sentence must be substituted.

In deciding what is an appropriate sentence the Court must consider the crime and the circumstances in which it was committed, the appellant's circumstances

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and the interests of society. In dealing with this crime it must be borne in mind that the appellant was extorted and he should not be punished for blame resting on the extortionists. It does, however, remain a serious crime. As far as the appellant is concerned he is a young married man with a wife and one child. He received no benefit from his fraudulent actions save for what has been said about the R7 430. He is now employed and earns R2 000 per month; his wife earns R1 000 per month. Glicks issued summons against the appellant and the Court was informed that the matter was settled. As a result of this settlement the appellant has to pay Glicks a sum of R500 per month out of his income for its loss. It is also unlikely that the appellant will commit a similar crime in the future. As far as society is concerned its main interest is that crime should be properly punished.

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In this case it has no great interest in a sentence which would deter others because the particular crime was extra-ordinary and unlikely to be repeated.

The magistrate considered whether he should suspend the whole sentence. In his judgment he said:

> "The Court is not prepared to suspend the whole of the sentence because the accused succumbed far too easily and, furthermore, used R7 430,00 for his own purposes. Now the defraudment of the R7 430,00 had nothing to do with any threats of extortion."

I have dealt with the points raised by the magistrate; they are in my view not good reasons for not suspending the complete sentence. On a consideration of all the relevant facts as indicated before, I am satisfied that it would be appropriate to reduce the sentence of eight years as imposed by the magistrate to five years to suspend the whole sentence.

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In coming to this conclusion I also took into account that, on the information given to the Court, a totally suspended sentence would have no effect on the appellant's present employment.

The appeal succeeds and the following order is made:

1. The sentence imposed by the magistrate is set aside.
2. The following sentence will be substituted -
   a The accused is sentenced to imprisonment for five years.
   b The complete sentence is suspended for five years on condition that the accused is not found guilty of fraud or theft, or an attempt to commit fraud or theft, committed within the period of suspension.

P M CILLIé, A J A

RABIE, C J)
BOTHA, J A) concur