

59/95

Case No 428/94.
/MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between

LEON D BLAIR

APPELLANT

and

THE STATE

RESPONDENT

CORAM: VIVIER, EKSTEEN et SCHUTZ JJA.

HEARD: 8 MAY 1995.

DELIVERED: 25 MAY 1995.

J U D G M E N T

VIVIER JA/

VIVIER JA:

The appellant was convicted in the Johannesburg regional court after pleading guilty to fifteen counts of theft from his employer involving nearly R180 000,00. He was sentenced to seven years' imprisonment, the counts being taken together for purposes of sentence. His appeal against the sentence to the Witwatersrand Local Division was dismissed but leave was granted to appeal to this Court against the sentence only.

The offences were committed over a period of seven months from September 1991 to March 1992 while the appellant was employed as a bookkeeper by a company called Rubber Stamp and Engraving (Pty) Ltd ("the company"). The appellant had been employed there for about six years and had, according to the evidence of the company's managing director, Mr Philip Kuhn, established an excellent work record. Mr Kuhn said that the

appellant was hard-working and conscientious and had been given responsibilities in addition to those of bookkeeper such as doing duty as staff manager, seeing to certain aspects of production and dealing with customers. He had even been offered a share in the business but had declined the offer. The appellant received a salary of R9 000,00 per month and had the use of a Mercedes Benz company car.

The appellant stole his employer's money by depositing clients' cheques into his own personal bank account. His explanation for his criminal conduct was that he had used the money to finance his own business of selling fax paper which he had started during the early part of 1991. This business was initially conducted from his home and he at first intended financing it out of his salary. It soon became impractical to run the business from his home and he was forced to acquire business premises for

this purpose. He also had to purchase machinery, office equipment and trading stock and fund trade debtors for which his salary was insufficient and for which he used the money stolen from the company. The business expanded so that by the time the thefts were discovered in February 1992 the turnover had increased to about R50 000,00 per month and the work force employed by him to eight people. After the thefts came to light the company liquidated the appellant's business and the trial Court accepted that the company did not suffered any great loss and "basically broke even".

The appellant was thirty-nine years old when the offences were committed. He is divorced with three daughters: a daughter presently eighteen and twins presently sixteen years old. He grew up in an environment described by Mr Carr, the clinical psychologist who testified on his behalf at the trial, as one of

deprivation, abuse and social and emotional disability. As a child he was physically tortured by his father and placed in an orphanage at the age of three years where he remained until he was eleven years old. He stayed with his father and step-mother for a few years thereafter and never saw his father again after he left him at the age of fifteen years. He did not see his own mother from the time he left home for the orphanage until just prior to his wedding in 1974. He then traced his mother and when he found her she opened the door, looked at him and closed the door in his face. The appellant passed matric and studied part-time for a B.Comm degree but did not complete the course.

Mr Carr's evidence was to the effect that he had been treating the appellant ever since 13 May 1992 and that at the time of giving his evidence (on 10 June 1993) he had spent about fifty to sixty hours in weekly consultations with the appellant. He

described the appellant as a person of above-average intelligence who felt overwhelming grief and remorse for his crime and who was motivated to work hard to rehabilitate himself. He said that the appellant was a decent, caring person with a lot of emotional and intellectual potential which has never been realised because of the psychological damage caused by the abuse he suffered in his formative years. Mr Carr said that the therapy had reached an advanced but critical stage where the appellant was very vulnerable. His defences had been dismantled in order to help him face his true self, and if he were to go to prison without the support of the therapeutic relationship with the witness, he would fall back into his "ongoing saga of self-destructiveness". The stigma attached to a prison sentence would further damage the appellant's personality, self-image and confidence. Mr Carr strongly recommended that a sentence of correctional supervision be

imposed. This was also the recommendation of Lieutenant Serfontein of the Department of Correctional Services.

The appellant is presently employed by a firm called Richardson Electronics where he is responsible for sales and administration. His salary is R2 000,00 per month. The trial Court accepted in favour of the appellant that he has shown deep remorse for what he has done and that once the thefts were discovered he fully co-operated in the investigation of the thefts.

In view of the recommendations by Mr Carr and Lieutenant Serfontein the trial magistrate gave full and careful consideration to imposing a sentence of correctional supervision. He came to the conclusion that, in the circumstances of this case and having regard to the main purposes of punishment, a sentence of correctional supervision was not an adequate punishment and that an unsuspended sentence of seven years' imprisonment was justified in

this case. He did not, as the Court *a quo* seemed to think, hold that he was precluded from sentencing the appellant to correctional supervision because the crime and the circumstances of the appellant warranted a sentence of seven years' imprisonment and the precise interpretation of sec 276 A (1) and (2) of the Criminal Procedure Act 51 of 1977 played no role in the imposition of sentence (cf **S v Blank** 1995 (1) SACR 62 (A) at 78 e-g).

One of the main factors which persuaded the magistrate that a sentence of correctional supervision would be inadequate was that the appellant had previously during March 1984 been convicted on twenty-five counts of fraud involving his then employer's cheques to the value of some R842 000,00 for which he was sentenced to seven years' imprisonment. After serving only two years and five months of this sentence he was released on parole on 16 August 1986. Two months later he commenced working for the company.

The appellant admitted at the trial that he stole his previous employer's money over a period of eighteen months in order to start three businesses of his own. These businesses were liquidated when the fraud was discovered. The present offences were committed using basically the same *modus operandi* and with the same intention as the previous offences. Other factors which weighed with the magistrate were the large amount of money stolen; that the appellant stole from his employer; that the money was stolen on a number of occasions over a period of seven months; that he was in a position of trust; and that he was earning a good salary and was not personally in need of money. These are all valid considerations in the determination of a proper sentence and the magistrate was clearly entitled to have regard to them.

Counsel for the appellant submitted in this Court that the magistrate misdirected himself in finding a conflict between the

reasons advanced by the appellant for his conduct and those given by Mr Carr, and that in so doing the magistrate attached insufficient weight to the appellant's psychological make-up and his motivation for committing the offences. Mr Carr identified the following subconscious motives for the commission of the offences: revenge against his employer; acting in accordance with other people's perceptions of him as bad and worthless; to be caught for the crime in order to gain recognition as a failure; the perception that Mr Philip Kuhn was a criminal himself; and anger at all authority figures in his life. Although these motives may explain the appellant's conduct they do not, in my view, either alone or collectively, serve to reduce the appellant's blameworthiness in the circumstances of this case. The appellant, on the other hand, said that the only reason why he took the money was that he wanted a business of his own as he felt that he would not be acceptable to

other people unless he had his own business. He always intended repaying the money. The desire to acquire his own business can certainly not be regarded as a mitigating factor. In my view the magistrate was fully aware of the fact that the motives advanced by Mr Carr were subconscious ones and I am satisfied that they were properly considered by him.

Counsel for the appellant further submitted that the magistrate misdirected himself by overemphasising the elements of deterrence and retribution, and that he ignored the shift in emphasis to the rehabilitation and reformation of offenders which has been brought about with the advent of correctional supervision (*S v E* 1992 (2) SACR 625 (A) at 632 c-d; *S v R* 1993 (1) SA 476 (A) at 487 F; *S v Blank, supra*, at 78 c - 79 b). It is clear from the magistrate's judgment on sentence that he carefully considered the advantages of correctional supervision over imprisonment. He also

considered the deterrent effect of a sentence of correctional supervision but concluded, in this regard, that it would not be the same as that of a sentence of imprisonment. I cannot find any indication in the magistrate's careful reasoning that the aspect of rehabilitation was not fully considered.

It was finally submitted that the magistrate misdirected himself when he said in his judgment on sentence that, in view of the appellant's previous conviction, "it would be completely wrong" not to impose a sentence of imprisonment. This passage must be read in its context. The reference is not merely to the appellant's previous conviction but to the conclusion which the magistrate had reached in all the circumstances of the case, viz that correctional supervision was not an adequate sentence and that a sentence of imprisonment was called for.

For the reasons I have given it has not been shown that the

magistrate misdirected himself or that he in any other way wrongly exercised his discretion in sentencing the appellant.

The appeal is dismissed.

W. VIVIER JA.

EKSTEEN JA)
SCHUTZ JA) Concurred.