



REPUBLIC OF SOUTH AFRICA

40/98

***THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Case No 300/97

In the matter between :

EILEEN ROSE BOTHA

Appellant

and

THE STATE

Respondent

Coram: Hefer, Smalberger JJA et Farlam AJA

Heard: 4 May 1998

Delivered: 26 May 1998

JUDGMENT

FARLAM AJA

FARLAMAJA

The appellant in this matter was convicted in the Magistrates' Court for the Regional Division of the Cape at Cape Town on twelve counts of theft, ten counts of forgery of cheques and four counts of fraud. She was sentenced on all the counts taken together for the purposes of sentence to five years imprisonment, of which two and a half years were suspended for five years on condition that she was not again convicted of any common law offence of which dishonesty is an element committed during the period of suspension.

Her appeal against this sentence having been dismissed by the Cape Provincial Division of the High Court, she appeals to this Court, with leave of the Court *a quo*.

When she was sentenced the appellant was 38 years old, a divorcee (having been married twice) and the mother of three children. She and her children were living with her elderly father who was giving her financial assistance because it was

not possible for her to support herself and her children (who were not being supported by their father) on her own earnings.

The crimes of which she was convicted were committed over a period of six months, from early in September 1993 to the middle of March 1994.

Nine of the theft charges involved moneys stolen by her, first from her then employer and thereafter from a casting agency with which she was associated.

The first four thefts were committed in September 1993 when she was working for a company known as Lighting Systems (Pty) Ltd. The total amount stolen on these four counts amounts to R4 814-04. From February to March 1994, on five separate occasions, she stole further amounts totalling R5 511-23, from the casting agency to which I have referred, Xposure Modelling and Casting Agencies CC.

There were also three other counts of theft relating to cheque forms which she stole from Xposure Modelling and Casting Agencies CC in respect of which she was convicted.

The ten forgery charges on which she was convicted related to cheques which she had drawn on the bank account of Xposure Modelling and Casting Agencies CC. Two of the forged cheques were used by her to commit one of the frauds of which she was convicted while the others were dishonoured by the bank on which they were drawn.

On three of the four fraud charges on which she was convicted she obtained sums of money totalling R25 000-00 from friends and associates on the strength of various fraudulent misrepresentations. On the fourth fraud charge she persuaded a friend of hers to resign her job and enter the employment of Xposure Modelling and Casting Agencies CC and to borrow monies and/or withdraw monies from other investments to obtain the sum of R20 000-00 to make an investment in a non-existent film. Fortunately for the complainant on that count, on the day she went to the office to pay over the investment the appellant's misdeeds had come out in the open and the sum to be invested was not paid over.

From evidence led at the hearing it appears that R7 000-00 of the money taken was paid into the business of Xposure Modelling and Casting Agencies CC and one of the other complainants (who had been defrauded of an amount of R5 000-00) was repaid sums totalling R1 250-00.

As a result of the appellant's fraudulent activities Xposure Modelling and Casting Agencies CC entered into a lease for larger premises on the strength of the extra business which the appellant said she would bring to it, which lease had to be cancelled, and its business, which it must be said was in any event not very strong before the appellant come onto the scene, was closed down.

The frauds committed by the appellant evidenced great ingenuity and were well planned and thought out.

At the hearing three witnesses were called by the appellant's attorney in mitigation of sentence.

The first such witness, Mrs K Meyer, is a probation officer. She testified

that the appellant told her that she committed the crimes out of financial desperation.

She recommended that the Court consider imposing a sentence of correctional supervision in terms of section 276(1) (h) of the Criminal Procedure Act, 51 of 1977. Attached to her report was a letter from the Cape Town branch of NICRO, which had been asked to assess the appellant to consider her suitability to do community service. The letter contains the following :

“Mrs Botha presented favourably during the interview in terms of her present lifestyle which is reasonably stable according to her. However, as far as her offence was concerned, she was not completely truthful about the amount of money involved, nor does she have any way of repaying the money.

It is the opinion of NICRO that the seriousness of the offence merits a more serious sentence than a community service order.”

No attempt was made at the trial to explain or contradict the statement that the appellant was not completely truthful about the amount of money involved.

The second witness called in mitigation of sentence was Captain Cheryl Samuels, a qualified social worker who is currently employed by the Department of

Correctional Services. In her report she expressed the view that the appellant was a suitable candidate for a correctional supervision order but she added that as far as the seriousness of the offence was concerned the Court should decide on a suitable sentence.

When asked if the appellant told her why she committed the offences she replied:

“Ek kon werklik nie agterkom wat die werklike rede daarvoor was nie ... Sy het nie spesifiek gesê hoekom die misdryf gepleeg is nie.”

When asked whether direct imprisonment would not be a better sentence than correctional supervision if the offences clearly appeared to be very serious, she said:

“Ek sal myself nie daarvoor kon uitlaat nie, al wat ek moes doen is om te kyk of haar persoonlike omstandighede geskik is ...”

The third witness called in mitigation was a clinical psychologist, Mrs C J Roux. She testified that the appellant had spent a period of nine months, from March 1994 when her misdeeds came to light, in intensive therapy with her. She

stated that the appellant's childhood was characterised by violence and severe physical abuse and that she repeated the childhood experience in adulthood and was emotionally and physically abused in both her marriages. Mrs Roux expressed the opinion that the appellant was at the time of her offences barely functioning. In this regard she said the following:

"The violent childhood and the violent marriage, combined with financial stress, culminated in a breakdown of all functions governing judgment and moral standards of behaviour. The slow disintegration of functions continued over a period of years, during which time Mrs Botha, increasingly plagued by financial worries and emotional stress, completely lost control over her life and actions."

She added, however, that despite the violence experienced in childhood and adulthood the appellant was an exemplary mother. She continued:

"She raised her three children on her own, with no emotional or financial support from their father. The children are well balanced and secure individuals who achieve well at school. They are able to form close and trusting relationships and are clearly the products of good mothering."

The following is her assessment of the appellant's current circumstances:

"In my opinion Mrs Botha experienced a breakdown in emotional and intellectual functioning at the time of her offences. Such a breakdown is almost inevitable given the circumstances of her life. However, the concerted and responsible effort made by her to re-structure her life, is not inevitable. It is unusual for a person with her emotional history to make such a strong and responsible effort to change her life, and shows a rare strength of character. Mrs Botha not only found work in which she proved herself to be a competent and reliable employee, she also made a very successful effort to support her children financially and emotionally. She, out of her own accord, entered therapy and worked very hard to process the damaging relationships of the past and the self destructive behaviour which resulted from that damage. She changed the circumstances of her life through hard and honest work, and should, in my opinion, be given credit for the strength of personality which went into that effort."

In her report she also set out the following considerations regarding the sentence which she suggested should be taken into account:

- "(1) Mrs Botha's three children have experienced a great amount of distress and emotional disruption to their lives. Over the last 18 months, Mrs Botha has gone to great trouble to re-structure her children's lives and to provide safety and security. A prison sentence will separate the children from their mother and will once again cause anguish and disruption to their lives. Their father has never taken responsibility for the children, and the grandfather is too old and sickly to support them. In my opinion a prison sentence could cause

lasting damage to all three children.

- (2) Mrs Botha's father has suffered three strokes over the last year. He is dependent on Mrs Botha for physical and emotional support.
- (3) Mrs Botha has gone to great lengths to change destructive behavioral patterns and to re-structure her life. A prison sentence would, in all probability, destroy everything which has so painstakingly been built up."

Her conclusions were stated as follows:

"Based on the concerted effort made by Mrs Botha to create a structured and disciplined life for her and her children, I would like to advise against a prison sentence. I strongly recommend correctional supervision."

When she testified she was asked if the appellant told her what she did with the money that she gained through the offences. Her reply was:

"I don't think we discussed that, I can't remember that. We might have discussed it but I can't remember now."

In her judgment on sentence the magistrate stated that she took into account all the appellant's personal circumstances. She also referred, as aggravating factors, to the facts that the complainants who testified at the hearing were persons

who regarded the appellant as a friend and that the appellant had abused the trust they put in her. The magistrate also referred to the fact that the complainants did not only suffer financially but also, so they had testified, emotionally.

The magistrate said that she took into account as another aggravating factor the prevalence of so-called white-collar crimes in the regional division of the Cape.

She pointed out that the appellant was not convicted of what she called "a one-off offence" and stated:

"As your attorney rightly pointed out, these offences were committed over a period of two years. You surely had ample opportunity to mend your ways, to come forward and come clean, however, this only happened after you were indeed confronted with the truth. In the meantime you, knowingly and deliberately, committed these crimes at the expense, not only of your employer but also at the expense of your personal friends and over this considerable period of time."

(As appears from what has been said earlier in this judgment, the appellant's attorney erred in saying that the offences were committed over a period of two years; the period over which they were committed was six months. The gravamen

of the point made by the magistrate is, however, correct. The appellant did have ample opportunity to desist from the course of dishonest conduct on which she had embarked.)

Dealing with the contention that the appellant should be sentenced to correctional supervision, the magistrate said:

"It is so that you are a suitable candidate for correctional supervision. It is, however, this Court's personal experience that correctional supervision in whichever form - that is in terms of subsection (h) or (i) - mostly just provides a half-hearted antidote for crimes or criminals like this. It cannot prevent you from defrauding people, it cannot prevent you from stealing again, and deterrence is certainly a factor that the Court must also take into account."

The magistrate dealt as follows with a submission that the appellant had shown remorse for what she had done:

"It was stated on your behalf that you are remorseful for what you have done and the Court can understand that any person would certainly be sorry for what they have done afterwards if it affects them in a negative way which happened to you, emotionally as well as, I assume, financially.

But before the Court can regard remorse as a mitigating factor, the Court

must be satisfied that it was genuine, or that it is remorse that is genuine. The following was said in the case of *Seegers* 1970(2) SA 506(A) at 511 (G) to (H) -

‘Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.’

The Court cannot, to date, say that you have placed all your cards on the table. The fact that you pleaded guilty can certainly be seen as indicative of remorse, but to date the Court has absolutely no indication from you as to what really motivated you and exactly what happened and what all the monies were used for. You chose not to take the court into your confidence with regards to that. Obviously that is then something that places a question mark behind your expression of remorse.”

The magistrate then proceeded to consider the evidence of the clinical psychologist, Mrs Roux, that direct imprisonment was not a viable option in this case. In this regard she quoted what Nienaber JA had to say about a similar submission which was advanced in the case of *S v Lister*, 1993(2) SACR 228 (A).

The passage quoted, which appears at 232 g-h, reads as follows:

“Prison, one knows, is not a congenial place and the conditions may well be less than ideal for psychotherapy. But then, a prison is primarily an institution of punishment, not cure. As the Court *a quo* was at pains to point out, the approach of a sentencing officer is not the same as that of a psychiatrist. The sentencing officer takes account of all the recognised aims of sentencing including retribution; the psychiatrist is concerned with diagnosis and rehabilitation. 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.”

The magistrate expressed the view that direct imprisonment is the most appropriate option in the circumstances of this case and that a sentence in terms of correctional supervision “would, in view of the seriousness of the offence, the demands of society and the need for deterrence, be an inadequate response to the crimes that you have committed”.

Mr Grobbelaar, who appeared on behalf of the appellant, contended that the magistrate misdirected herself when she rejected correctional supervision as a

sentencing option in this case on the ground that it had been her personal experience that correctional supervision "mostly just provides a half-hearted antidote for crimes or criminals like this".

In this regard Mr **Grobbelaar** referred to the decision of this Court in *S v R*, 1993(1) SA 476(A) and an unreported decision of **Conradie J** in *S v Harding*, CPD 23 September 1992, in both of which the advantages of correctional supervision orders were stressed. Mr **Grobbelaar** submitted that the magistrate's approach, as revealed in the passage from her judgment cited above, was, as he put it, directly in conflict with the approach of this Court in respect of the advantages of correctional supervision.

In my view the magistrate in the passage relied on by Mr **Grobbelaar** did not misdirect herself. Her comments were made in the context of crimes committed by an accused in the workplace, with the result that a correctional supervision order, which is designed to allow a person sentenced thereto to carry on working, cannot

in itself prevent such person from committing further offences in the workplace.

Mr Grobbelaar also argued that the magistrate misdirected herself by not maintaining a proper balance between the personal circumstances of the appellant, on the one hand, and the seriousness of the crime, on the other, with the result, so he submitted, that the sentence imposed was a shockingly heavy one.

It is clear, and indeed Mr Grobbelaar did not dispute this, that the offences committed by the appellant were serious. Various aggravating factors were present, as the magistrate correctly found.

In my view the question to be considered in this case is whether the trial court could reasonably have imposed the sentence which was imposed: see *S v Pieters*, 1987(3) SA 717(A) at 734 E and the discussion of that judgment in Hiemstra, Suid-Afrikaanse Strafproses, 5e uitgawe, by J Kriegler, at 803-4.

Applying that test I am unable to say that the sentence which the magistrate imposed was an unreasonable one nor that she misdirected herself in any way.

One has considerable sympathy for the appellant and the situation in which she finds herself. On the other hand there is considerable force in the factors listed by the magistrate in her judgment which induced her to impose the sentence she did.

In the circumstances the appeal is dismissed.

IG FARLAM
Acting Judge of Appeal.

Hefer JA)
Smalberger JA)

Concur.