

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the appeal of:

LORRAINE ANN VERCUEIL appellant

versus

THE STATE respondent

Coram: JANSEN, JA, GALGUT et CILLIE, AJJA.

Date of Hearing: 12 September 1985

Date of Judgment: 25 September 1985

J U D G M E N T

GALGUT AJA:

The appellant pleaded guilty to and was convicted,
by a Magistrate in the Springs Magistrate's Court, on 525

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counts of fraud said to have been committed during the period from 1 May 1981 to December 1982. She was sentenced to four days imprisonment on each count. This amounts to a period of 5 years and nine months. Her appeal to the Transvaal Provincial Division against the sentence only was dismissed. With the leave of that Court she appeals to this Court against the sentence.

The complainant in the case is a Mr S W Vercueil who carries on business in Springs as an insurance broker. It is necessary to set out the accused's relationship to the complainant and also some factual background. The accused is 43. She married Pierre Vercueil, the son of the complainant, in 1959. Three children were born of the marriage. The eldest, a daughter, is married. A son, aged 21, was at all relevant times at university in Durban. The third child, a daughter aged 16, is a student at high school. Accused's marriage was far from happy.

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For fourteen years prior to December 1982 her husband was drinking heavily and her evidence indicates that he was an alcoholic. There were times when his behaviour, which included assaults, forced the accused and the children to leave home for as long as a week. The husband had had many jobs and in 1981 and 1982 he was a professional tennis coach. His monthly contribution to the household maintenance and expenditure varied from R200 to R250. The accused had been working for her father-in-law for 22 years. It was only in later years that he increased her salary to R400 per month. It is clear from her evidence, which was not challenged, that the task of maintaining the household, paying all the liabilities and expenses and keeping the family together fell upon her shoulders. The relationship between her husband and his father was far from good and it seems that she did not wish that situation to worsen. The relationship between the accused and her parents-in-law was very good.

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The complainant paid little attention to his business. He would take two holidays of three months every year and for the remaining six months was seldom in office. The complainant, like his son, was a heavy drinker. The accused in later years managed the office. In addition to the work in the office she used to drive her parents-in-law in her car in the afternoons to do their shopping and other visits.

Details of the 525 charges are set out in annexure B to the charge sheet. The pages in this annexure are numbered from 5 to 45. I attach hereto a copy of page 5 which sets out the details appertaining to counts 1 to 18. This page is typical of the other 39 pages. The charge sheet alleges that the accused during the period 1-5-81 to 31-12-82 falsely and with intent to defraud gave out and pretended to S W Vercueil (the complainant) that she received the amounts set out in column 2

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of annexure B, from the persons named in column 1, on the dates set out in column 4, in terms of the receipt numbers in column 3; that by these false pretences she caused S W Vercueil to his loss and prejudice to believe that she had received the said amounts from the named persons on the dates stated in the numbered receipts; that in truth and in fact when she so gave out she well knew that she had received the amounts set out in column 7, from the persons named in column 6, on the dates given in column 5 in terms of the receipts numbered in column 3; that she, the accused, had appropriated the amounts in column 8; that she did by the above conduct commit the 525 acts of fraud. There was an alternative charge of theft which alleged that during the period 1-5-81 to 31-12-82 she stole from S W Vercueil the amounts set out in column 8 of annexure B.

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When the charge was put to the accused she, as already stated, pleaded guilty to the 525 fraud charges. In terms of sec. 112(2) of Act 51 of 1977 she handed in a written admission in terms of which she admitted the allegations in the fraud charges. The prosecutor accepted the plea of guilty to the fraud charges. No evidence was led (see sec. 112(3)) and the Magistrate, acting in terms of sec. 112(2), found the accused guilty on the 525 fraud charges.

The accused then gave evidence in mitigation of sentence. It is from her evidence that the above background facts emerged. In addition she gave details of the manner in which she had committed the frauds, of the financial position in which she had found herself, of her reasons for leaving the employ of her father-in-law and when she left her husband.

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In her evidence-in-chief she said she was (at the time of the trial) working for an insurance company and earning R850 per month; that her school-going daughter was living with the married daughter; that she, the accused, was living with her married sister as "I have not had the finance to find other accommodation"; that she did not know how long this state of affairs would continue "because I said once I could afford to, I will find a little flat for us". The following extracts from her evidence-in-chief are significant:

"Mrs Vercueil, you pleaded guilty to committing the crime of fraud in the amount of R48 000,00 and you have been found guilty by His Worship. Could you tell the Court why this ever happened?-- Because Pierre was not bringing in enough money and, I do not know, I just started and then it got worse and he was getting worse and worse, and just to keep the family going and the more I wanted to, didn't want to do it, the

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more I seemed to get involved in doing it.

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During that period how did you spend the money?-- Only on the necessities. Food and to pay the accounts and the debts and that because Pierre bought a new motor-car and every month he never seemed to have money to pay for it.

Did you during that period ever purchase any luxuries with that money?-- No.

Was that money sufficient to maintain your family?-- Yes.

Mrs Vercueil, at the moment you are earning R850 per month?-- Yes.

Is that income sufficient for you to maintain yourself and your two children who are still dependent upon you?-- No, it is not."

The following extracts from her evidence in cross-examination are self-explanatory:

"Mrs Vercueil, can you give the Court an idea of how it came about that you started taking money from this business? How did

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this first happen?-- I made out two receipts one day in a book that was not the current book that we were using and the next day when I found this out I was going to take... keep that money and pay it in at the end of the month when I got my salary because we were short, but I did not, and from then it went on.

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PROSECUTOR Was it by mistake that you used the wrong book?-- It was, yes.

How did this come about?-- It was one of the books that we had given to the branch office originally and all the books were the same and it was on the desk and I used it by mistake.

And you discovered this the following day?-- Yes.

If you used the book by mistake, what happened to the money?-- That is when I used that money.

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Did you experience financial difficulties?-- Yes, we were at the time. My husband was not working very much. You can say in a month

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he would... for at least one week he would not work at all.

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Mrs Vercueil, what eventually made you leave the business?-- I left because of the situation I was in and I realised that I could not go on like this and so I resigned and I left.

Why didn't you realise this earlier?-- As I said, it went on and on until eventually I could not take it any more.

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It never bothered you that you misused this position?-- It did.

Yes. You did not do anything about it. Why not?-- I do not know. He (the complainant) was not the type of person you could approach or speak to. He would say to me you must never go short; if you want anything you must know the money is there; just help yourself. But I did not want him to know what our financial position was.

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When you started taking money from the business, why didn't you tell Mr Vercueil about it?-- Because he is not the type of person...although he says that, he does not really mean it.

But why would he say it if he does not mean it?-- It is very difficult for you to understand but he is a person who will say one thing today and he will do something today and tomorrow he will throw it up at you in your face, everything, and he is a very difficult person."

The accused went on to say that when she left the business she also left her husband; that he then went to live with his parents. It is apparent that even at the stage of the trial he was not contributing towards the support of the children.

In reply to questions put to her by the Magistrate the accused gave details of her monthly expenditure during the period. The Magistrate then put it to her that, having

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regard to her income and that of her husband and taking into account that she had taken R48 000, it would appear that she had R1 500 per month over and above her monthly requirements. This the accused denied and stated: "I would only take what I needed. I did not take more". There is no need to set out the details of the accused's monthly expenditure. It is sufficient to say that having regard to the fact that her income and that of her husband did not exceed R650 per month, the amount which she took from the business could not have been as much as R20 000. She clearly did not keep a record of how much she had misappropriated. More as to this aspect later.

After the accused had given her evidence in mitigation, a Dr Van der Merwe, a clinical psychologist, was called. The only aspect of his evidence which need be mentioned is that he testified that the accused was under

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great tension during the latter period of her employment with complainant and that in his view she regretted what she had done.

After the complainant and the psychologist had given evidence the State called an accountant, Mr Erasmus. Why he was called is not clear to me. The accused had already been found guilty on the 525 charges. He testified that he had been called in by the complainant to investigate the extent of the shortages in the business. The variations in his evidence are strange. The first examination, so he said, showed that R7 000 had been misappropriated. This figure he put to the accused and she admitted that this amount was correct. The complainant, however, asked that a further investigation be carried out. This was done by Mr Erasmus's staff and they found a shortage of R35 000. Thereafter a further investigation was done. This, he said, revealed a shortfall of R48 322-22. These

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figures he checked and he thereafter put them to the accused.

She denied that she had taken these amounts. Mr Erasmus

then testified:

"That is as far as our audit is concerned,
but I have been asked by Mr S W Vercueil,
who is the father in law, to mention a
couple of matters as well."

Despite strenuous objection by accused's counsel the

Magistrate allowed him to give evidence on what he was

told by complainant. This evidence was clearly hearsay.

The Magistrate should not, as indeed was pointed out by

the Court a quo, have allowed this evidence. It was clearly

inadmissible.

I have to stress that the accused did not plead
to the alternative (theft) charge. The accountant did not
give evidence on the merits of the conviction. The evidence
which he gave did not purport to prove, nor did it deal with,
the allegations in respect of any of the fraud charges.

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Furthermore, as I read his evidence, even if it had been given before conviction, it would not have established that the accused stole the amounts which he alleged were not accounted for.

An examination of the individual charges in annexure B (page 5 thereof is annexed hereto) to the charge sheet, reveals some strange features. I need only refer to counts 2, 3 4 and 6. In count 6 it is alleged that the accused gave out that she had received R31,14 (column 2) from one Annandale (column 1) on 21-1-82 (column 4), whereas she had in fact received R10,00 (column 7) from one Collins (column 6) on 3-3-82 (column 5) and that pursuant to her misrepresentation she had appropriated the amount of R21-14. How she could have taken R21-14 when she only received R10 is not explained. The anomaly is even less explicable when one has regard to the fact that on the wording of the indictment the pretence was made in January in respect of moneys received in March. A study of counts 4, 3 and 2 reveals similar anomalies. In fact a study of the counts set out

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in pages 6 to 45 of the annexure B shows that similar anomalies appear in approximately half the counts. At the outset of the appeal in this Court the attention of both counsel was drawn to what is set out above. Counsel for the State asked for an adjournment to consider the position. After the adjournment he advised this Court that the anomalies could not be explained. One of the difficulties which he and, I may say, this Court had, was that it was obvious that the amounts set out in column 8 were incorrect. It followed that the accused had not misappropriated all the amounts set out in that column 8. Furthermore, it was not possible to establish exactly what amount had been misappropriated. It also seemed clear that the extent of the misappropriation would not, having regard to the allegations in the charge sheet, be able to be ascertained with any degree of exactitude.

The appeal in this Court as in the Court a quo, was in respect of sentence only. In view of what has been

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said above counsel were agreed, and in our view correctly so, that no good purpose could be served by postponing the appeal or remitting it to the Court a quo or to the trial Court. After some debate counsel were agreed that, as far as could be ascertained, the amount which had been misappropriated was approximately R20 000. This Court was of the view that that figure was correct. The appeal proceeded on that basis.

At the end of the trial the Magistrate delivered an ex tempore judgment. On receipt of the grounds of appeal he furnished written reasons for his judgment. In these he said:

"Because of the aggravating facts, namely the amount, the manner in which the fraud was committed, the long period of over eighteen months, the indiscriminate manner in which accused took the money; that she was in a position of trust; that she was in no financial trouble; because of all these facts the Court considered a suspended sentence as inappropriate, unjust and that it would be a grave miscarriage of justice having regard to all the facts."

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Counsel for the appellant submitted that the Magistrate had erred in that he had not had sufficient regard to the accused's personal circumstances; in that the evidence did not show that the accused had taken the money indiscriminately and also in finding that she was in "no financial trouble". He urged that a suspended sentence should have been imposed by the Magistrate. He further submitted that having regard to the fact that the amount involved was R20 000 and not R48 177,90, this Court was at large to impose a proper sentence; that the total period of imprisonment should be reduced and totally suspended.

Counsel for the State, stated that as the amount involved was R20 000 and not R48 000, this Court was at large in regard to the sentence to be imposed and he accepted that the total period of imprisonment would be reduced. He, however, submitted that the accused had been in a position of trust; that even though the first

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frauds had not been planned, the other frauds were planned and carried out over a period of twenty months; that in these circumstances the interests of society demanded that whatever the period of imprisonment this Court decided would be appropriate, it should not be totally suspended.

As appears from the Magistrate's reasons, two of the factors which weighed with him when considering whether or not to impose a suspended sentence were firstly that the total of the amounts taken was large and secondly that this total exceeded the accused's financial needs. These two factors no longer apply.

As far as mitigating circumstances are concerned there is no need to look for them; they present themselves. The evidence given by the accused in mitigation leaves one in no doubt that she was the person who looked after the household and kept the family together; that she paid / her.....

her husband's bottle store account and also the amounts owing to Barclays Bank in respect of purchases which he made on the strength of his credit card from that bank; that the money she took was for household expenses and for the maintenance of her children, her husband and herself; that her husband, far from being a help was an added responsibility and a liability; that the money she took was not spent on luxuries; that when she left the complainant's firm she was in such straitened circumstances that she was not able to take even a small flat for herself and her younger daughter. There is also no doubt that the accused regretted what she had done and has shown true remorse. This appears not only from the evidence of the psychologist but also from the fact that she gave up her job and from her reasons for so doing.

There is no need to repeat what has so frequently

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been said by our courts about the facts which have to be borne in mind when assessing the punishment appropriate in any particular case. I bear in mind that the frauds were perpetrated over a period of twenty months but bearing in mind that she has no previous conviction and because of the mitigating factors present in this case, I am of the view that the interests of society do not demand that the accused should be denied the benefit of a suspended sentence. I am further of the view that this is a case in which all the counts should be taken as one for purposes of sentence and that a proper sentence is one of 4 years imprisonment suspended on appropriate conditions. In the result the appeal succeeds. The order made is:

1. The appeal succeeds.
2. The order of the Transvaal Provincial

Division is set aside and there is substituted therefor an order which reads:

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"(a) The appeal succeeds.

(b) The order of the Magistrate, in regard to sentence, is set aside and there is substituted an order which reads:

All counts are taken as one for purposes of sentence and the accused is sentenced to four years imprisonment suspended for 3 years on condition that she does not during that period commit any offence of which dishonesty is an element."

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JANSEN, JA)
CILLIÉ, AJA)

CONCUR.