Bib 151/95

Case No 715/94
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

JOHN HOWARD NOVIS APPELLANT

and

THE STATE RESPONDENT

CORAM: E M GROSSKOPF, F H GROSSKOPF JJA et SCOTT AJA

HEARD: 20 NOVEMBER 1995

DELIVERED: 29 NOVEMBER 1995

---

J U D G M E N T

SCOTT AJA/ ...

SCOTT AJA:

The appellant was convicted in the Regional Court on two counts of theft and one count of fraud. The counts of theft related to two cheques which had been drawn by a cigarette distributing company in favour of its supplier, Trans Atlantic Tobacco Corporation (Pty) Ltd of Industria, Johannesburg. One, which was for R265 208,77, was posted at Welkom; the other for R239 253,95 was posted at Klerksdorp. Both were intercepted and stolen between 13 and 20 November 1990. The count of fraud related to various misrepresentations made in an attempt to realise the cheques at their face value. The three counts were taken together for the purpose of sentence and the appellant was sentenced to five years imprisonment.

An appeal to the Witwatersrand Local Division was noted against both the conviction and sentence. On 18 April 1994 it was struck

from the roll for want of appearance on behalf of the appellant. An application for condonation and the reinstatement of the appeal was heard on 16 September 1994. After hearing full argument the Court a quo (per Schutz J with whom Stegmann J concurred) dismissed the application on the ground that the appeal had no prospects of success. The Court also found it unnecessary to consider the admissibility of two affidavits which the appellant sought to have admitted in evidence with regard to sentence as they did not add anything of significance to the evidence previously placed before the regional magistrate. Acting in terms of the powers conferred under s 304 (4) of the Criminal Procedure Act 51 of 1977 the Court a quo did, however, direct that the warrant of committal was to be amended so as to provide that upon the appellant's admission to prison the commanding officer was to arrange for the appellant to spend his first night in the prison hospital and to be seen by a psychiatrist on the following day

in order for him to make such arrangements as may be necessary to deal with the appellant's claustrophobia and related conditions.

The appeal to this Court is against both the refusal of the Court a quo to reinstate the appeal against the conviction and sentence and the refusal of the application to receive the affidavits of Dr Stahmer and Dr Vorster in relation to sentence. The appellant has also petitioned this Court in terms of s 22 of the Supreme Court Act 59 of 1959 to have the affidavits of a Dr Grové which were used in support of an application for bail to be received in evidence.

Turning to the conviction, much of the evidence adduced by the State was either common cause or not in dispute. Indeed, it was not in dispute that the crimes of theft and fraud had been committed. What was in issue was whether the appellant was a party thereto. The facts regarding the fraud are somewhat complicated. It is convenient, I think, to begin by

relating the events as they appeared to the persons to whom the representations were made.

On 20 November 1990 at about 10 am a Mrs Oosthuizen of the firm of stockbrokers, Frankel Kruger and Vinderine, received a telephone call from a person who said he was Mr Taper. (It transpired that this was a fictitious name and that the actual caller was a certain Mr Awerbach; but for the moment I shall refer to him as Taper.) He informed Mrs Oosthuizen that he had two cheques for an amount totalling some R504 400 which he wished to deposit for investment in the money market. As the market closed at 11.30 am she gave him the bank account number of Frankel Kruger and Vinderine and instructed him to deposit the cheques and telefax the deposit slips to her. A teller at the Fox Street branch of Nedbank, Mrs Cassim, testified that on the same day at about 11.40 am a person whom she described as a black man presented two cheques for

deposit into the account of Frankel Kruger and Vinderine together with two original depost slips and two copies. The cheques were those to which reference has previously been made. They were handed in at the trial as Exhibits E and F respectively. The deposit slips were handed in as Exhibits G, H, I and J. The signature of the depositor appeared to be that of "D Taper" and the slips were endorsed "Special Clearance". Mrs Cassim testified that she handed the copies, Exhibits H and J, to the black person who appeared to be a messenger and asked him for a contact telephone number so that she could advise when the cheques had been cleared. He was, however, unable to provide a number and said that he had been sent by "Michael". Shortly thereafter a person who said he was Taper telephoned the bank and suggested that as he was staying at the Carlton Hotel it would be more convenient to advise Mrs Oosthuizen of Frankel, Kruger and Vinderine when the cheques had been cleared. On the same

morning the deposit slips, Exhibits H and J, were telefaxed to Mrs Oosthuizen under cover of a facsimile message bearing the Carlton Hotel emblem and stating the sender to be "David Ryan Taper". (The original facsimile message which was later found in the appellant's motor car was handed in as Exhibit L.)

Later on the same day, ie 20 November 1990, Mrs Oosthuizen received a second telephone call from Taper who inquired whether the investment had been made. She advised him that the deposit had been too late for the investment to be made that day. Taper told her that he proposed investing the money only for two days whereafter he wished to use it to purchase Kruger rands.

Mrs Oosthuizen subequently received an anonymous telephone call to the effect that the cheques had been stolen. She telephoned the South African Police who requested her to "play along" with Taper. The

following day, ie 21 November 1990, Taper telephoned to say that he wished to withdraw the funds on 22 November. He requested Mrs Oosthuizen to make out the cheque in favour of Investec Bank and he said that he would send a colleague to collect it. She, in turn, indicated that whoever collected the cheque would have to produce a letter to the effect that he was authorised by Taper to receive it. In the meantime certain employees of Trans Atlantic Tobacco Corporation (Pty) Ltd had been apprised of what was happening and had undertaken to assist in laying a trap for Taper. The drawer of the cheques was also informed and payment of the cheques was stopped. Mr Nowitz of Investec Bank with whom Taper had arranged for the purchase of 450 Kruger rands, was likewise advised by the South African Police of what was afoot.

On 22 November 1990 members of the S A Police together with certain senior employees of Trans Atlantic Tobacco Corporation (Pty)

Ltd took up positions at the Carlton Hotel and at the offices of Frankel Kruger and Vinderine. Later in the morning or in the early afternoon a person came into the hotel to pay the account of Taper. It is common cause that this was Mr Keith Bain who after paying the account climbed into the appellant's motor car which the appellant was driving. The car was followed but the pursuers lost it in the traffic. At about 1.30 pm it pulled up outside the offices of Frankel Kruger and Vinderine and the two occupants climbed out. Shortly thereafter a messenger in the employ of another stockbroker entered the offices of Frankel Kruger and Vinderine. He presented an envelope (Exhibit A) addressed to Mrs Oosthuizen which contained a letter (Exhibit C) bearing a Carlton Hotel emblem and which read:

> "Please hand bearer cheque in the amount of R456 300 in favour of Investec Bank, for and on behalf of Mr David Taper as arranged telephonically."

The letter purported to be signed by David Taper. The messenger was handed an envelope (Exhibit D) which contained merely a complimentary slip and not a cheque. He was followed downstairs where he handed the envelope to the appellant. The latter was immediately arrested by Lt du Toit of the South African Police.

For some reason which was not explained the appellant was unable to produce the key of his car which was locked. He was taken home to fetch a spare key. The vehicle was then unlocked and searched by Lt du Toit in the presence of the appellant. Lt du Toit testified that he found Exhibits H and J (the deposit slips previously referred to) in a tog bag in the boot of the car. In the car itself he found a diary which contained both an envelope addressed to Mr Nowitz of Investec Bank (Exhibit K) and the original facsimile message (Exhibit L) under cover of which Taper had sent the deposit slips to Frankel Kruger and Vinderine on

20 November 1990. He said that he asked the appellant for an explanation. The appellant replied that the tog bag belonged to Keith Bain but declined to give any further explanation until he had consulted his attorney. Lt du Toit was emphatic that the diary in which Exhibits K and L were found was that of the appellant. He said that the appellant pressed for the return of the diary and eventually it was returned to him. After the close of the defence case Lt du Toit was recalled to clear up certain aspects relating to the search of the appellant's motor car on 22 November 1992. He testified that he had a recollection of there being another diary which belonged to Bain and which had been returned to him as it contained nothing of any relevance to the case.

The State called two further witnesses who initially had been charged together with the appellant. Both were warned in terms of s 204 of the Criminal Procedure Act. The first was Keith Bain. His evidence

was not disputed by the appellant. He said that on the day in question and while he was at a gymnasium in Yeoville he was telephoned by the appellant who arranged to collect him so that the two of them could place bets at the horse races. He explained that this was something they frequently did together. As arranged the appellant arrived in his car. He told Bain that before placing their bets there were a few things that he had to attend to. Bain had no objection. First, they drove to the Carlton Hotel where the appellant asked Bain to run in and pay the account of a Mr Taper while the appellant double-parked. Next, they drove to Hillbrow where according to the appellant he had to pick up a letter at a place which Bain described as some agency or other. This time the appellant went in while Bain waited. After returning the appellant explained that the final thing he had to do was go to the stock exchange. Bain testified that when they arrived there the appellant asked him to take up an envelope to Frankel

Kruger and Vinderine (Exhibit A). He said that the appellant explained that because he was engaged in litigation involving stockbrokers he was reluctant to go into the building where he would be seen. Bain, too, was reluctant to deliver the letter as he was clad only in a vest and track-suit trousers. He testified that eventually he took the letter and gave it to a man dressed in a suit standing outside the building (a messenger in the employ of another stockbroker) who undertook for a reward of R20 to deliver it to the stockbrokers in question. He, Bain, then went to place a bet by telephone using, he said, his "tele-bet account". When he returned about 10 minutes later there was no sign of the appellant. He waited for some while but eventually gave up and made his own way home. He subsequently learned that the appellant had been arrested. Mr Bain also confirmed that his diary had been in his tog bag which he had put in the boot of the car. He was unable to recall whether there was any other tog

bag in the car.

The other witness who was warned in terms of s 204 of the Criminal Procedure Act was Mr Michael Awerbach. He testified that he had worked at the stock exchange and he and the appellant were known to each other. He said that he was approached in November 1990 by the appellant who sought Awerbach's assistance in putting two cheques through the money market "system". The appellant would not tell him where he had obtained the cheques and offered him R100 000 for his help. The plan was that the cheques would be deposited in the account of a stockbroking firm and once they had been cleared the stockbroker would be requested to make out a cheque payable to a coin dealer so that in this way the face value of the cheques could be realised in gold coins. Mr Awerbach acknowledged that he was aware that the plan would involve a fraud. He said it was he who invented the name Taper and in the presence of the

appellant telephoned Mrs Oosthuizen. Thereafter, while the appellant booked the fictitious Mr Taper into the Carlton Hotel, he, Awerbach, obtained the services of a friend's employee to deposit the cheques at the Fox Street branch of Nedbank. He said that he subsequently handed the copies of the deposit slips (which he had completed) to the appellant as well as the facsimile message (Exhibit L) under cover of which the deposit slips had been telefaxed to Frankel Kruger and Vinderine as described by Mrs Oosthuizen. He acknowledged also that it was he who had telephoned Investec Bank to order 450 Kruger rand coins and had later telephoned Mrs Oosthuizen to instruct her to withdraw the investment and have the cheque made out in favour of Investec Bank. He testified, however, that after making the necessary arrangements with Mrs Oosthuizen he had left it to the appellant to actually collect the cheque and pay Investec. Some days later he went to collect his R100 000 share from the appellant only to

discover that he had been arrested and was on bail.

In answer to the case against him the appellant in his evidence did not dispute the evidence of Bain or that he was arrested while in possession of Exhibit D outside the offices of Frankel Kruger and Vinderine. He maintained, however, that he was no more than an innocent pawn in a fraudulent scheme perpetrated by Awerbach who had sought to use him in order to avoid exposing himself to the risk of being recognised. The appellant testified that shortly before his arrest Awerbach came to his flat while he was entertaining a Mr Sergio Herscovitch. Awerbach joined them for a short while and then called the appellant aside and asked him to do him a favour the following day as he would be out of town. What he wanted the appellant to do was: (i) pay the account of a Mr Taper at the Carlton Hotel, for which Awerbach would give him money; (ii) go to Hillbrow and collect a letter which would be ready and waiting at a

secretarial services agency, and (iii) collect a letter from certain stockbrokers at the stock exchange. Although the appellant did not say so expressly it was implicit in his evidence that he was required to deliver the letter he was to collect at the secretarial services agency to the stockbrokers and to deliver to Awerbach the letter he was to collect at the stockbrokers. The appellant testified that the moment mention was made of the stock exchange he immediately protested that he could not go there because of the litigation in which he was then engaged. He said he invited the appellant to ask Herscovitch to confirm this. Awerbach, however, offered him R5 000 for his assistance and he eventually agreed to assist.

Herscovitch was called in support of the appellant's version. He confirmed the visit of Awerbach to the appellant's flat and that the appellant had asked him to tell Awerbach why he, the appellant, could not go to the stock exchange. He said that he had also overheard Awerbach

offering the appellant R5 000. He testified further that subsequently, ie early in 1992, Awerbach had telephoned him from overseas and requested him to collect a cheque made out to Investec Bank at the stock exchange in return for 50 gold coins worth approximately R50 000. This incident, I should add, was never put to Awerbach in cross-examination.

The regional magistrate found both the appellant and Herscovitch to be unimpressive witnesses and referred to certain improbabilities in their account of what they said had taken place at the appellant's flat. By contrast, he thought that Awerbach had given his evidence well, although the latter on his own admission was very much involved in the fraudulent scheme and his evidence accordingly had to be approached with caution. The magistrate referred in addition to various other shortcomings in the appellant's version but the principal justification for its rejection was the incriminating documents found in his motor car

immediately after his arrest.

The only basis upon which these documents could be explained, other than that the appellant was a party to the fraudulent scheme, was that they had been left there by Bain. In other words, what had to be contended on behalf of the appellant was that purely by coincidence the very person whom the appellant had fortuitously arranged to collect at the gymnasium and who would have had no idea where the appellant was going to take him before going to the races, was the person who had been working hand in glove with Awerbach on the previous two days and who at the time also fortuitously happened to have with him in his tog bag and in his diary the incriminating documents found by Lt du Toit. Not only would such a coincidence have been truly remarkable but, as I shall show, the possibility of it having occurred was inconsistent with other cogent evidence placed before the court. It was also at no stage put to Bain

in cross-examination that he was in any way involved in the fraudulent scheme or that the documents found in the car were his; but the contention that the appellant knew nothing of the documents necessarily implied that Bain was involved.

It is true that the deposit slips were found in a tog bag which at the time of the search the appellant said belonged to Bain. The appellant testified, however, that on the morning in question he had trained at his own gymnasium before going to collect Bain at the latter's gymnasium as arranged. It would seem likely therefore that there would have been two tog bags in the car. But the real difficulty with the appellant's version lay with the documents found in the diary.

Lieutenant du Toit testified that at the time of the search the appellant had offered no explanation regarding the diary. He testified that the appellant had repeatedly requested its return and that it had in fact been

returned to the appellant. In cross-examination it was put to Lt du Toit that the appellant was not sure whose diary it was. The appellant later testified, however, that he had subsequently sat down and thought about the matter and having done so was able to deny emphatically that the diary in which the documents were found was his. He denied also that the diary had been returned to him and said that at the time of the search he had told Lt du Toit that the diary was not his.

This evidence of the appellant was wholly unconvincing. If the incriminating documents had been found not in the appellant's diary but in Bain's diary as the appellant subsequently contended and if at the time of the search he had specifically told Du Toit that the diary was Bain's, it is inconceivable that he should subsequently have been unsure whose diary it was and be unable to instruct his counsel accordingly.

One of the documents found in the diary was Exhibit K which

was an envelope addressed to Mr Nowitz of Investec Bank. This is of particular significance as quite clearly it would have been intended for the cheque which the appellant was to have collected from Frankel Kruger and Vinderine. On the appellant's version it is difficult to see what it would have been doing in the possession of Bain as the appellant would have handed the envelope received from the stockbrokers to Awerbach. According to Awerbach, however, he had left the collection of the cheque and the payment of Investec to the appellant. On this version it makes sense that the appellant should be in possession of Exhibit K.

A further inconsistency in the appellant's version is the absence of any explanation as to how Exhibit C came to be signed. This was the letter which the appellant had collected at the secretarial services agency and which was delivered to Frankel Kruger and Vinderine. The probabilities are overwhelming, given the facts which are common cause,

that the agency had been employed to type the letter. Awerbach could not have signed it; yet it was signed "D Taper". The inference is inescapable that it was the appellant who did so.

In this Court counsel for the appellant was unable to provide any answer to the difficulties associated with the appellant's version referred to above. Instead he pointed to certain minor imperfections in the evidence of Awerbach and largely repeated the arguments advanced in the Court a quo. Nothing that was said by counsel persuades me that the regional magistrate was incorrect in rejecting the evidence of the appellant.

Counsel for the appellant also argued that the conviction should be set aside on the grounds of an irregularity. This contention was founded on the disappearance of Exhibit A during the course of the trial. It appears that this exhibit, which was the envelope containing the letter which the appellant had collected at Hillbrow, was removed by the prosecutor

apparently for further investigation. What further investigation was contemplated is unknown. The loss of an exhibit, depending upon its importance, can no doubt have far reaching consequences including the setting aside of the conviction (cf S v Marais 1966 (2) SA 514 (T) at 516 G - 517 B; S v Msane 1977 (4) SA 758 (N) at 758 H - 759 C; S v H 1981 (2) SA 586 (SWA) at 593 H - 594 H.) The question that arises in each case, however, is whether the consequence of the loss of the exhibit is such as to prejudice the accused so as to amount to a failure of justice (see s 309 (3) of the Criminal Procedure Act).

It was argued both in this Court and in the Court a quo that there may have been handwriting on the envelope which if proved to be that of Awerbach would have demonstrated that Awerbach's version that he had no part in the collection of the cheque from the stockbrokers was untrue. I must say that I have some difficulty in appreciating how on the

basis of the appellant's own version Awerbach's handwriting could have been on the envelope. It is true that it was a "Carlton Hotel" envelope. But it was never the appellant's case that it had been given to him by Awerbach. It was implicit in his evidence that he collected it from the agency in Hillbrow. Had Awerbach delivered it to the agency on some previous occasion it would hardly have been necessary to call back to collect it at some later stage as the letter (Exhibit C) and the address on the envelope would have taken no longer than a minute or two to type. But the real difficulty with the argument, I think, is that not only was the appellant's counsel given a copy of the envelope but it appears from the record that all the original exhibits were given to counsel to enable him during the course of an adjournment to take instructions from the appellant. Had there been any handwriting on Exhibit A the appellant, his counsel and attorney would have had every opportunity to observe it. The argument must accordingly

fail.

As far as the conviction is concerned, therefore, I can see no basis for interfering with the conclusion of the Court a quo that the appeal has no prospects of success.

I turn now to the question of sentence.

When sentence was imposed the appellant was a 34 year old bachelor who was employed as a financial manager by Reichlin Investments (Pty) Ltd at a basic monthly wage of R7 000. He had obtained employment with the company in January 1992 and Mr Reichlin who appeared to be an old family friend was one of the witnesses called in mitigation of sentence. The appellant was not a first offender. In 1982 he was convicted of theft of cash in an amount of R24 532 and sentenced to a fine of R5 000 plus 2 years imprisonment conditionally suspended for 5 years. Significantly, one of the conditions of suspension was that he

undergo psychiatric treatment. In 1988 he was fined R2000 for contravening a statutory provision relating to the sale of shares on the stock exchange. The latter conviction is not relevant.

The other witnesses called in mitigation were the appellant himself and a psychiatrist, Dr Stahmer, whom the appellant had consulted for the fist time about a week before. The appellant testified as to his claustrophobia and various other less serious phobias. He explained that because of his claustrophobia be usually slept with the door open and light on. He cannot travel in the back of a car and leaves the door open when he goes to the lavatory. As far as possible he avoids lifts and when travelling by air takes tranquilizers. His evidence in this regard was confirmed by Mr Reichlin and in particular by Dr Stahmer who gave detailed evidence regarding his consultation with the appellant and the conclusion to which he came as to the latter's condition. He described the

appellant as suffering from manic-depressive episodes which have their origin in an atypical bipolar emotional disturbance. He confirmed that the appellant also suffers from claustrophobia as well as various other phobias such as an unreasonable fear of needles, snakes and spiders. He testified that the facilities available in prison were inadequate and should the appellant be sent to prison he would not receive the benefit of the prolonged treatment and medication that he required. He expressed the view that in the event of the appellant being locked up in a cell for one or two days he may well commit suicide or become psychotic.

In response, Col Lorinda Berg, a clinical psychologist in the department of Correctional Services, gave evidence as to the facilities available in prison for a person such as the appellant. She readily conceded that although available, there was a shortage of psychiatrists; but pointed out that while psychiatrists were responsible for the pharmacotherapy, the

actual psychotherapy was administered by psychologists and that at a prison such as the Johannesburg prison there were two resident clinical psychologists who were able to administer such therapy. It was on the basis of her suggestion that the Court a quo made the order to which I referred earlier in this judgment.

In his judgment on sentence the regional magistrate correctly pointed out that the offences had been carefully planned, involved a large sum of money and fell into the category of so-called "white collar crimes" for which there was a need, he felt, for sentences to serve as a deterrent. He considered the personal circumstances of the appellant and in particular his claustrophobia and other personality disorders but nonetheless felt that he could not accede to counsel's request that a heavy fine be imposed and came to the conclusion that imprisonment was the only appropriate sentencing option in all the circumstances.

In this Court counsel for the appellant was unable to refer to any misdirection on the part of the magistrate. He submitted, however, that having regard to the appellant's claustrophobia and the effect that imprisonment would have on him a sentence of a heavy fine would have been more appropriate. The fact that the person to be sentenced suffers from claustrophobia and the possible consequences which imprisonment may have for him are undoubtedly important factors to be taken into consideration (cf S v S 1977 (3) SA 830 (A)). But non constat that a person with claustrophobia is rendered immune from imprisonment regardless of his crime and other relevant circumstances. As pointed out by the magistrate, the fraudulent scheme to which the appellant was a party was a carefully planned operation involving over half a million rands. But for the intervention of the police and the co-operation of the potential victims the appellant would have got away with his crimes. On a previous

occasion he received the benefit of a fine and suspended imprisonment. As I have indicated, one of the conditions of suspension was that the appellant undergo psychiatric treatment. But this did not deter him from trying his hand at serious crime again. I accept that the facilities in prison for treating a person such as the appellant are not of the best and that imprisonment by its very nature will create special problems for him. Nonetheless, the condition of the appellant will be brought to the attention of the prison authorities who no doubt will do their best to accommodate those problems. I can see no justification for interfering with the sentence of 5 years imprisonment imposed by the magistrate.

Counsel submitted further that the Court a quo erred in not admitting the affidavits of Dr Stahmer and Dr Vorster. There is no merit in this submission. While the Court has a wide discretion in terms of s 22 of the Supreme Court Act of 1959 to admit further evidence it will in the

interests of finality do so only in special circumstances. In S v De Jager 1965 (2) SA 612 (A) at 613 C - D Holmes JA formulated the test as follows:

"(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial."

The affidavit of Dr Stahmer contains little if anything which is relevant that was not dealt with in his oral evidence. Nor has any reason been advanced why if there is something additional it was not dealt with at the trial. As to the affidavit of Dr Vorster, counsel for the appellant informed the trial court that he had decided not to call her as a witness. In these circumstances her evidence cannot be admitted after sentence without

a satisfactory explanation, which has not been forthcoming. The contents of her affidavit were in any event put to Col Berg in cross-examination and generally accepted by her. Neither affidavits, therefore, pass the tests formulated in (a) and (c) above.

Finally there is the further application before this Court to have two affidavits deposed to by Dr Grové admitted in evidence on the question of sentence. To the extent that Dr Grové deals with subsequent developments in the condition of the appellant, such evidence is inadmissible in accordance with the principle that save perhaps in the most exceptional cases evidence of facts not in existence when judgment was given will not be considered on appeal. (See R v Verster 1952 (2) SA 231 (A); Goodrich v Botha and Others 1954 (2) SA 540 (A).) The present case is clearly not one which is exceptional. To the extent that Dr Grové deals with matters other than subsequent developments, the evidence sought

to be admitted does not pass the tests formulated in (a) and (c) in the De Jager case supra. The application must accordingly fail.

In the result the appeal is dismissed.

D G SCOTT

E M GROSSKOPF JA

- Concur

F H GROSSKOPF JA