76/93

CASE NO. 5/92
J VD M

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

YUSUF SINDHI — APPELLANT

and

THE STATE — RESPONDENT

CORAM: SMALBERGER, JA et KRIEGLER, HARMS, AJJA

DATE HEARD: 26 MAY 1993

DATE DELIVERED: 28 MAY 1993

J U D G M E N T

HARMS, AJA:

This is an appeal against sentence. The appellant was convicted in the regional court at Dundee

on four counts of fraud and a sentence of one year's imprisonment was imposed in respect of each count. An appeal to the Natal Provincial Division against sentence was successful to the extent that half of the sentences was suspended for a period of five years on suitable conditions. That court granted leave for this further appeal.

The appellant was during the period March 1987 to February 1989 in the employ of a motor dealer as a salesman. During this period, and on four occasions, he falsely represented to customers of his employer that he was entitled to accept moneys due to the employer on the latter's behalf. Acting on this representation, the customers paid to him the following amounts in cash: R223,46 on 28 May 1988, R2000 on 3 January 1989, R550 on 8 February 1989 and R2500 on 25 February 1989. He left his employment some days later but returned during July at the request of the employer and was at the date of

the trial on 15 March 1990 still so employed.

At the trial the appellant pleaded guilty and tendered a statement in terms of sec 112(2) of the Criminal Procedure Act 51 of 1977 in which he admitted all the elements of the crimes. He was correctly convicted thereon. In mitigation an administrative manageress of his employer, Mrs Badenhorst, testified. She said that the appellant was a good salesman who "brings in sales" and that is why, in spite of the frauds, he was re-employed. He had also made good the first two amounts, had repaid R1400 of the third and was making undisclosed repayments of the last.

The appellant did not testify in mitigation but his attorney provided some relevant information from the bar. The appellant was 36 years of age, married according to Islamic rites and had two minor children. His average income was R1200. (This elicited the response from the magistrate: "And that for a good

salesman?"). His wife was also in receipt of a salary and she owned all "their" assets. The reason given for the crimes was that his erstwhile creditors had pressed him for payment. The court was also informed that the appellant was not in a position to pay a fine immediately but would pay off a deferred fine.

The appellant admitted a previous conviction dated 28 January 1985 for the theft of a cheque of R300. A suspended sentence of four months' imprisonment was imposed. The period of suspension had not lapsed when the present crimes were committed.

In his judgment on sentence the learned magistrate dealt with all the facts relevant to it. He held that the crimes were grave and were committed over a period of time (some nine months) and during a period of suspension. He rejected a fine as a suitable sentencing option because if it were to be imposed, it had to be substantial and past experience had shown that

if subjected to financial pressure, the appellant committed frauds. He was also not overly impressed by the employer's trust in the appellant and regarded it as misplaced. (I may add that it is unlikely that the employer was prejudiced by the frauds; it was the customers who were.)

On appeal, Levinsohn J (Galgut J concurring) held that the learned magistrate had correctly taken a serious view of the appellant's conduct because, first, it was one of gross dishonesty affecting members of the public; second, because of the suspended sentence and third, because the crimes were committed over a period of time. The court a quo further held that in spite of the plea of guilty and the employer's attitude towards the appellant, the case was a proper one for imprisonment especially in the light of the previous conviction. It concluded by stating that the cumulative effect of the sentence created the impression

that the learned magistrate had under-emphasized the mitigating circumstances. As a court of first instance, Levinsohn J said, he would have been disposed to suspend at least half of the sentence imposed on each count. There was therefore a sufficient disparity between such sentence and that imposed in the regional court. Hence the partial success on appeal.

It is against this background that the present appeal has to be considered. It is based on the submission that although there were no misdirections a sentence of imprisonment is, under the circumstances, shockingly inappropriate. Counsel pointed out that the appellant could still not afford a fine and that the only proper sentence would be a totally suspended one. In response to a question put during argument it was faintly argued that correctional supervision might provide a suitable alternative.

It was submitted that undue weight should

not be attached to the previous conviction and suspended sentence, because, according to counsel, it had some deterrent effect since it deterred the appellant from committing crimes for more than three years. This argument smacks of cynicism. The previous conviction was of particular relevance to the sentence option because it dealt with the same type of offence and because its period of suspension had not lapsed. It shows that a suspended sentence has no deterrent effect on the appellant and there is no reason to believe that another suspended sentence will.

It was further submitted that having regard to the appellant's family life, his stable employment and the attitude of his employer society will not be benefitted by a sentence of imprisonment. That raises the interesting, but in this case irrelevant, question whether any sentence of imprisonment in respect of a non-violent crime is to the benefit of society. The

appellant's personal circumstances are not of such a compelling nature as to justify an exceptionally lenient approach. He defrauded members of the public and not his employer. He was able to use his position with his employer to do so. The fact that his employer is prepared to keep him as a salesman, does not mean that the public is thereby protected. His excuse for the crimes is not impressive. The pressure of creditors could not have been so coercive as to justify, in isolation, the taking of R223,46 in May 1988. It will be recalled that the other frauds were all committed during the following February.

To sum up, if regard is had to the conspectus of evidence, I am of the view that the sentence imposed by the court a quo was a proper and balanced sentence.

The appeal is dismissed.

L T C HARMS
ACTING JUDGE OF APPEAL

SMALBERGER, JA)
) CONCUR
KRIEGLER, AJA)