

SOUTH AFRICA / JUDGMENT

S v Petkar (322/87) [1988] ZASCA 74; [1988] 2 All SA 550 (A) (1 June 1988) [1988] ZASCA 74

COURT

Supreme Court of Appeal

BEFORE

Grosskopf, Smalberger, Steyn

CASE / FILE NUMBER

322/87

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322/87

N v H

MOHAMED JAMIL PETKAR and THE STATE

SMALBERGER, JA -

322/87 N v H

IK THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION) In the matter between:

MOHAMED JAMIL PETKAR Appellant

and

THE STATE Respondent

CORAM: GROSSKOPF, SMALBERGER,

et STEYN, JJA

HEARD: 24 MAY 1988

DELIVERED: 1 JUNE 1988

JUDGMENT

SMALBERGER, JA :-

This is an appeal against sentence. The appellant, a 37 year old Indian male, who pleaded

guilty / 2 guilty to the charge against him, was convicted in the Regional Court, sitting at Benoni, of purchasing unwrought gold in contravention of section 143(1) of the Mining Rights Act, 20 of 1967 (the Act). The gold in question weighed 1 387,9 grams, and its value was R27 456-37. The appellant admitted a previous conviction for a similar offence, as well as one for possession of unwrought gold (a contravention of section 143(3) of the Act). He was sentenced to four years imprisonment. In addition the R13 000-00 paid by the appellant for the gold was declared forfeited to the State. The appellant appealed against his sentence to the Transvaal Provincial Division. His appeal was dismissed. The present appeal is with leave

of this / 3 of this Court. In the course of the proceedings in terms of section 112(1)(b) of Act 51 of 1977, which followed on his plea of guilty, the appellant gave an account of the events leading to the commission of the offence. It was to the following effect. Over a period of time he had become well acquainted-- even friendly - with a certain Croukamp. The latter was apparently employed by the East Rand Administration Board as a law enforcement officer of sorts. They used to reciprocate favours. The appellant reposed trust in Croukamp, whom he regarded as "a man of the law". One morning Croukamp approached the appellant and asked him to cash a post-dated cheque for

R500-00/ 4 R500-00. The appellant told him that he did not have the money to do so. Croukamp then showed the appellant some dagga, and asked him if he knew anyone who dealt in dagga. The appellant stated that he did not. He was then asked by Croukamp if he was interested in purchasing gold. The appellant questioned what Croukamp was up to, but did not firmly reject his enquiry. He appears, however, to have been reluctant to become involved in any illicit gold dealing. Croukamp told him "(E)k is in baie probleme en so ek is seker jy sal my kan uithelp". The matter was left there. The following day, at lunch time, Croukamp came to the appellant's house. It is implicit in the appellant's narrative of the events that he did so

with / 5 with a view to persuading the appellant to purchase gold. The appellant remained reluctant. The fact that Croukamp was accompanied by another person appears to have heightened his anxiety about becoming involved in any illegal transaction. Croukamp reassured him, saying "Look, trust me, I will not get you into problems." Croukamp told the appellant to meet him at Modderbee later that afternoon. The appellant made various excuses to avoid such a meeting. Croukamp left saying he would telephone the appellant later. He did so on three separate occasions. On the first and second occasions the appellant offered reasons - or excuses - for not meeting him, indicative of his reluctance to do so. On the third occasion

Croukamp / 6 Croukamp said he was coming to the appellant, which he then did. When he arrived the appellant said to him "Chris, please tell me, what are you trying to do?". To this Croukamp replied "Look, I promise you, genuine, you can take my word for granted, you are in problems, I am in problems, we will be able to handle this whole thing together". The appellant, who had R3 000-00 available, then arranged to borrow a further R10 000-00 from his brother. He expressed misgivings about the whole matter to Croukamp, but was reassured by Croukamp that he could be trusted. The appellant was then shown the gold, after which he handed over the money in exchange for the gold. At that stage the police entered and arrested the appellant,

and / 7 and he realised that he had been the victim of a trap. In concluding his account of what had happened the appellant stated "I knew at the back of my mind, or in front of my mind, that (it) was absolutely illegal and wrong. But the man promised me, trust, he told me, trust me, I will not let you get into problems." The facts set out by the appellant in explanation of his plea were accepted by the State. They therefore formed the basis on which an appropriate sentence had to be determined. This Court's powers to interfere with a sentence on appeal are circumscribed. It may only do so if the sentence is vitiated by (1) irregularity, (2) misdirection, or (3) is one to which no reasonable court

could / 8 could have come, in other words, one where there is a striking disparity between the sentence imposed and that which this Court considers appropriate. The main thrust of the argument of Mr Engelbrecht, for the appellant, was that the appellant's sentence fell into the third category. He did, however, albeit somewhat tentatively, suggest that there had been certain misdirections, and perhaps even an irregularity. The latter, it was contended, consisted in the trial magistrate's failure to enquire into the circumstances surrounding the appellant's previous conviction for dealing in unwrought gold. I shall revert to this point later. The suggested misdirections related to the magistrate's alleged failure properly to have regard, when

assessing /

9 assessing an appropriate sentence, (1) to the fact that he was dealing with a trap case, and (2) to the order of

forfeiture which he made.

The first of these alleged misdirections is without substance. It is apparent from the magistrate's judgment on sentence that he was fully alive to the fact that he was dealing with the case of a trap. The question, of course, remains whether he gave due weight to the circumstances surrounding the commission of the offence, and their effect on the appellant's moral culpability, in arriving at the sentence he imposed. This is a matter to which I shall allude again later when considering whether the sentence was excessive to an extent that would entitle

interference therewith.

It is / 10 It is common cause that, in the circumstances of the present matter, the forfeiture by the appellant of R13 000-00 should have been taken into account by the magistrate as a relevant consideration in determining an appropriate sentence. The State had requested forfeiture of the money before sentence, and the magistrate was obviously alive to the fact that he intended making such an order when passing sentence. As a known consequence *ex lege* of the conviction it was therefore a matter which he should have taken into account when assessing sentence. It was contended that he failed to do so. I am not convinced that this is so. It is true that nowhere in his judgment on sentence does

the / 11 che magistrate specifically state that he took the amount the appellant was made to forfeit into account when assessing the period of imprisonment imposed. Non constat that he did not in fact take it into account. It is likely to have been to the forefront of his mind - indeed, the imposition of four years imprisonment and the forfeiture of the R13 000-00 were dealt with in consecutive sentences at the conclusion of the magistrate's judgment on sentence. Regrettably the somewhat inelegantly drafted notice of appeal did not suggest any possible misdirection on the magistrate's part in this regard. The magistrate was therefore never given an opportunity of dealing with this contention. In the circumstances I am unpersuaded that the magistrate misdirected himself by totally

sentence. Whether he gave due weight thereto is another

matter /

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matter. That falls to be considered when dealing with the severity of the sentence generally.

Nor is there substance in the contention that

the magistrate should have investigated the circumstances

surrounding the appellant's first conviction in order to

arrive at a just sentence. Reliance in this regard was

placed upon the following passage in the judgment in *S v van Niekerk* 1981(3) SA 239 (0) at 243 D - E

"Die enigste vraag wat opval is egter of die streeklanddros die feite wat aanleiding tot

die eerste misdaad gegee het, behoorlik in ag geneem en oorweeg het. In die misdaad-loopbaan van elke persoon is dit van die grootste belang hoe dit gekom het dat hy sy eerste misdaad gepleeg het. Vir doeleindes van 'n gepasre vonnis en sy rehabilitasie daarna is dit van wesenlike belang om dit te ondersoek en sorgvuldig op 'n beskuldigde se

verklaring /

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verklaring daaroor te let. Hy is die beste persoon om daaroor te praat."

The "eerste misdaad" to which reference was made, was one of two crimes with which the accused in that case was charged in a single indictment. It would therefore have been appropriate, when assessing sentence,

to have regard to the circumstances giving rise to the

commission of the first offence. But the remarks made

are of limited application - they were obviously never

intended to relate, as a general principle, to crimes. not

charged in the indictment of which an accused person had

previously been convicted. The present is a totally

different situation from that which pertained in van Kiekerk's

case / 14 case. The contention advanced in the present matter, that a presiding judicial officer should always make a full enquiry into the circumstances surrounding an accused person's previous convictions, or at least the first, or first relevant one, is untenable. In the normal course a judicial officer would not be expected to embark on such an enquiry. To require this would impose a substantial additional burden on the Courts without, in the vast majority of cases, any corresponding benefit to the accused. There may well be occasions on which it becomes relevant to enquire into the circumstances of a particular previous conviction. But a judicial officer is normally entitled to proceed on the premise that the sentence

reflected / 15 reflected in respect of a previous conviction on form SAP 69, or its equivalent, was an appropriate one for the offence committed, and to gauge the seriousness or otherwise of the offence committed from the sentence imposed, and any relevant details appearing from the said form. This brings me to the final, and main, consideration, viz. whether the sentence imposed was excessive in the sense of there being a striking disparity between such sentence and what this Court considers to be an appropriate sentence. As previously mentioned, the appellant is not a first offender. He was convicted in 1982 of a similar offence and sentenced to a fine of R1 000-00 or

12 months/ 16 12 months imprisonment, plus a further 18 months imprisonment. The latter period of imprisonment was suspended for 5 years on certain conditions. The present offence was committed during the period of suspension. At the same time in 1983 he was convicted and sentenced to a fine of R500-00 or 5 months imprisonment for being in possession of unwrought gold. In terms of section 153(1)(a) of the Act the maximum sentence for a second contravention of section 143(1) of the Act is a fine not exceeding R5 000-00 or imprisonment not exceeding 10 years, or both such fine and imprisonment. The sentence imposed was therefore

It is true that Croukamp's initial proposal of an illicit gold transaction did not meet with an immediate

rebuff / 17 rebuff from the appellant. This suggests that it aroused the appellant's interest to some extent. However, the appellant was clearly reluctant to become involved in any illegal transaction. This reluctance on his part was gradually broken down by the persistence of Croukamp - a man the appellant regarded as a friend, and in whom he reposed great trust - in the sense that he did not believe that Croukamp would get him into trouble. In persisting with his attempts to persuade the appellant to purchase gold, and at the same time tempting him to do so, Croukamp was preying on a weakness in the appellant's make-up to which he was likely, in time, to succumb. In acting as he did Croukamp abused his friendship with the appellant,

and /

18 and the latter's trust in him. He in fact took unfair advantage of their relationship in involving the appellant in the commission of the offence.

Much has been said in the past about the use of traps and the many undesirable features of the system. I do not propose to review the authorities on the point, and what has been stated in them. It will suffice for the purposes of the present matter to refer to extracts from two authorities. In *R v Clever* 1967(4) SA 256 (R A D) at 257 H QUENET, JP stated:

"In the case of persons who have previously been convicted, trapping has the undesirable feature that it puts temptation in the way of those least able to resist. In any case, such persons might not have offended again but for the fact that a trap was used."

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and later he added (at 258 E)

"In cases where there is general recognition of the propriety of employing the system the greatest care should be taken to see that the trap is a fair one. Verbal persuasion should not be used".

In *S v von Pittius and Another* 1973(3) SA 814

(C) it appeared that one of the appellants had been importuned three times by the traps before he agreed to sell them wine illegally. With regard thereto CORBETT, J,

said the following (at 819 A - C):-

"The artificial propagation of crime by means of police traps has 'many distasteful features' (see *R v Clever*, 1967(4) SA 256 (R, AD) and the authorities cited therein) and its justification is based partly upon the belief on the part of the authorities that the accused has been engaged in criminal conduct of a similar

nature /

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nature in the past and is likely to continue to do so unless checked. The fact that an accused has to be importuned several times before agreeing to the criminal conduct proposed by the trap hardly indicates a general predisposition upon his part to commit this type of crime and this is, generally speaking, not an appropriate case for an artificially generated offence. Moreover, this kind of approach offends against the belief that the trap should be a fair one and that in general verbal persuasions should be avoided (see *R v Clever*, supra at p 258)."

I am in full agreement with the sentiments expressed in the above quoted passages. In the present instance the trap was not a fair one. Verbal persuasion - or at least something akin to it - was used. An apparent weakness was exploited. A friendship and situation of trust was abused. True, the appellant was not an entirely

unwilling / 21 unwilling participant in the offence. He believed that he would ultimately "get away with it" - a belief no doubt shared by most people who embark on criminal conduct of this kind. But the fact remains that the appellant did initially offer resistance, and this resistance was largely broken down by unfair methods. These considerations in my view substantially reduce the appellant's moral culpability. Had he been a first offender he would have been entitled to have been dealt with fairly leniently - a totally suspended sentence may not have been out of the question in the circumstances. When this situation is taken in conjunction with the appellant's previous convictions, the steep progression from the previous sentence to the /

22the present is in my view not justified. While, generally speaking, related second and subsequent convictions call for increased sentences on each occasion, such increases should be made with due regard to the circumstances of the case, and be kept within reasonable limits. In determining an appropriate sentence in the present matter due regard must also be had to the fact that the appellant has had to forfeit R13 000-00, and faces the prospect of the suspended portion of his previous sentence being put into operation. While a sentence of imprisonment cannot be avoided having regard to the nature of the appellant's offence, the value of the good involved and the fact that this is a second offence committed while the appellant had a suspended /

23 a suspended sentence hanging over his head, on an overall conspectus of the evidence, and with due regard to the considerations I have mentioned, an appropriate sentence in my view would have been one of 2 years imprisonment. The difference between this sentence and that imposed is sufficiently striking to justify interference with the latter.

The appeal succeeds. The sentence of 4 years imprisonment is reduced to one of 2 years imprisonment.

J W SMALBERGER JUDGE OF APPEAL

GROSSKOPF, JA) STEYN, JA)CONCUR

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