

SOUTH AFRICA / JUDGMENT

S v Schwegmann (117/89) [1989] ZASCA 116 (26 September 1989) [1989] ZASCA 116

COURT

Supreme Court of Appeal

BEFORE

Hefer, Vivier, Nicholas

CASE / FILE NUMBER

117/89

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CEDRIC SCHWEGMANN Appellant and THE STATE Respondent

Coram: HEFER, VIVIER J J A et NICHOLAS A J A

Heard: 15 September 1989 Delivered: 26 September 1989

JUDGMENT NICHOLAS A J A

/This

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This is an appeal against sentence. The appellant was charged as accused No. 1 in the Regional Court sitting at Boksburg on four counts, including counts 1 and 2 (fraud) and count 4 (forgery and uttering). His co-accused was Jeffrey Walter Smith. The appellant (he will be referred to as "the accused") was found guilty on counts 1 and 2, and on count 4, of uttering a forged document. He was sentenced to 3 years' and 2 years' imprisonment on counts 1 and 2 respectively, and to 9 months' imprisonment on count 4 which was to run concurrently with the sentence of 2 years on count 2. The accused noted an appeal to the Transvaal Provincial Division, but the appeal against the convictions was abandoned. The appeal against sentence was dismissed but leave was granted to appeal to this court.

The magistrate accepted as true the evidence

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of the State witnesses, and this finding has not been challenged. The facts as they emerge from the evidence for the State may be summarized as follows. On 16 April 1982 an unidentified messenger produced to the enquiries clerk at the Boksburg branch of the Standard Bank a written request for the issue of a cheque book to Joshua Doore (Pty) Ltd, a customer of the branch. The signatures on the request were checked, and a cheque book containing cheques numbered 6001-6200 was issued to the messenger. At about 12 noon on 26 April 1982 the accused presented to Mrs. Danckwerts, a sub-accountant at the branch, an instruction, which purported to have been made by Joshua Doore (Pty) Ltd, to effect a telegraphic transfer of R60 000 to Mr P J Langley at the Sunnyside, Pretoria branch of the Standard Bank. It was accompanied

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by cheque No. 6025 (Ex "D") apparently drawn by Joshua Doore (Pty) Ltd. Mrs. Danckwerts said that the accused "was in a tremendous hurry. He came in, he had a black brief case, opened it, gave me these documents and immediately walked out again." She assumed that he was connected with Joshua Doore (Pty) Ltd. The transfer was duly effected in accordance with the request. The scene shifts to the Sunnyside, Pretoria branch of the Standard Bank. At about 1.30 pm on 26 April 1982 a man introduced himself as Mr. P. J. Langley to Mrs. Jooste, a clerk employed at the branch. He enquired about R60 000 which was being transferred to him from Boksburg. He produced his identity book as identification. Mrs. Jooste made out an internal cheque for the amount of R60 000 and took Langley, together with the cheque and the identity book, to the accountant, Ronald Wardhaugh, for

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the latter to verify Mr. Langley's identity. Wardhaugh endorsed the cheque and Mr. Langley went to the teller to get it cashed. The teller did not have sufficient money in her till to pay the cheque. It was brought back to Wardhaugh, who made arrangements to get funds from other banks. He explained the situation to Mr. Langley, who was "very understanding", and agreed to return to the bank in half an hour's time. Wardhaugh asked him if they could not deal with the situation in another way, e.g. by issuing a bank cheque to the parties he intended paying so that he would not have to carry this large amount of money on him. Mr. Langley answered him that there was no problem - in regard to security arrangements, he had guards and a vehicle outside; and the cut-throat business he was in required ready cash. Mr. Langley returned to the bank after about 30 minutes. He again identified himself and the internal

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cheque for R60 000 was cashed. Wardhaugh said that Mr. Langley was the accused. Mrs. Annetta Scheepers was in April 1982 the bookkeeper at the Boksburg branch of Joshua Doore. As such she had control of the cheque book used in the business. When a new cheque book was required, it was her duty to request and receive it. She, a Mr. Steenkamp, a Mrs. Ginsberg and a Mr. Wessels had authority to sign cheques on behalf of Joshua Doore. She had never received a cheque book containing cheques numbered 6001 to 6200. The cheque Ex "D" was not drawn by Joshua Doore, although the signatures resembled those of Ginsberg and Wessels. She had never requested a

telegraphic transfer of R60 000 to the Sunnyside branch of the Standard Bank. The debit to Joshua Doore's account of the sum of R60 000 had been reversed. These facts gave rise to count 1.

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The Stock Exchange branch, Johannesburg, of the Standard Bank was the scene of the events which gave rise to count 2. On 18 June 1982 Mrs. Maria Ferreira, whose duties included dealing with requests for cheque books, received from a messenger a note on a compliments slip (Ex "F") headed Totalisator Agency Board (Transvaal), which reads, "Please hand bearer cheque book as arranged". It bore two indecipherable signatures. Having obtained authorization from the accountant, she handed a cheque book containing cheques numbered 0081 - 0280 to the messenger. Three days later, on 21 June 1982, Mrs. Esmeralda Dos Santos was acting as No. 1 Teller at the branch. A cheque (Ex "G") dated 21 June 1982, was referred to her by Teller No. 3. Numbered 0243, it was for the sum of R47 833-60. This was payable to A J Maxwell or Bearer, and

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it purported to have been drawn by Totalisator Agency Board Tvl. On it were two indecipherable signatures, which appear to be similar to those on Ex "F". The cheque had been presented by a man whom Mrs. Dos Santos identified as the accused, and who produced an identity document, Ex "H". She referred Exs "G" and "H" to Trevor Smith, the accountant, after telling the accused to take a seat for a few minutes. The accused asked Mrs. Dos Santos why she was referring the cheque, and she replied that it was a bank rule. He then asked where the men's toilet was. That was the last she saw of him. He left Ex "H" behind him. It bore his photograph, and it was an obvious forgery: it had been typed and not computer-printed, and it did not bear any stamps, embossed or otherwise.

Johannes Van Coller, an accountant with

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the Totalisator Board, said that he controlled all payments made by the Board. Cheque Ex "G" was not issued by the Board. One of the signatures on it bore some resemblance to his own, but it was not his. The cheque book containing Ex "G" had not been ordered by the Board. On 21 July 1982, Det. Sgt. H Van Cittert, the investigating officer, caused a copy of the accused's photograph on Ex "H" to be exhibited on the television programme Police File. Shortly afterwards the accused was arrested and taken to Boksburg, where Van Cittert interviewed him. Ex "H" formed the subject-matter of count 4. The accused gave evidence in his own defence. He said that he was born in 1940 and spent most of his youth in Zimbabwe. He passed Std. VIII, and later obtained a qualification known as A M I E E at the Bulawayo Technical

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College. This, he said, was more or less equivalent to a B.Sc degree in electrical engineering. He was a qualified

electrical engineer. In 1976 he went into a business, which was called Bremcor Construction, on his own account. At first it was successful, but later he found himself under financial pressure. He began drinking heavily and was eventually consuming a bottle of whisky a day. This affected his capacity to administer the company. In mid - 1981 he got into financial difficulties. The creditors took control of the business. And in the second half of the year he was unemployed and he spent most of his time drinking in hotels. Up to April 1982 he did odd jobs only. In that month he received a telephone call from his co-accused, Smith, whom he had not previously met, and who told him that he had heard from a common acquaintance, one Blumberg, that the accused needed money. He said that he had a

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proposition to put to him. They met by arrangement at an hotel in Johannesburg. Smith asked if the accused would cash a cheque for him, saying that the transaction was legal and there was nothing wrong with it. He gave a reason why he could not cash the cheque himself, which the accused thought at the time to be a good reason, although he had forgotten what it was. At the time his mind was befuddled and his thought-processes were not normal. He agreed to cash the cheque. He described in detail how he was driven by Smith to the Standard Bank branch in Boksburg, and what happened there; and how he was driven to a branch of the Standard Bank in Pretoria and got payment of a large sum of money. Smith gave him R9000 of the money. As the transaction had been completed quite normally and "without hassle", he had no reason to doubt Smith.

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In June 1982 Smith visited him at his house and told him that he had received a jackpot dividend of over R47 000, but he had not placed the bet in his own name. He asked the accused to cash the cheque, and the accused agreed to do so. They met the following day and went to the Stock Exchange branch of the Standard Bank. The accused described what happened there and said that when Mrs. Dos Santos asked him to wait, he realised something was wrong, and left the bank. Outside he told Smith what had happened, and Smith told him to forget about it and took him home. Because nothing appeared to be illegal about the first cheque, he was prepared to embark on the second venture. He thought that Smith was entitled to the proceeds of both cheques.

When his cross-examination by the

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prosecutor began, the accused executed a volte-face. He said that most of his testimony this far was not his own recollection, but was a reconstruction from what he had been told by the investigating officer, Det. Sgt. H. van Cittert. He had only vague memories of the events - "I remember things like which an alcoholic at the time remembers." For example, in Sunnyside he was so drunk that he did not know what he was doing. And he gave similar evidence in regard to other events. Testimony in regard to the accused's dependence on alcohol was led from Mrs.

Laura Edmonds, a registered social worker employed by the South African National Council on Alcoholism and Drug Dependence (SANCA). She produced and confirmed a report prepared by herself dated 27 April 1984 and a supplementary report dated 11 October 1984.

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She said that the accused was born on 7 January 1940. He was admitted for treatment to the SANCA (Johannesburg) outpatient clinic on 27 September 1982. He was assessed as having a serious alcohol-dependency problem. She set out a detailed history of the accused. He stated that he began drinking at the age of 23 years, and began drinking excessively at the age of 40 years. Symptoms of his dependency on alcohol included: secret drinking; memory blackouts; guilt feelings about drinking; an inability to stop drinking; a loss of interest in things around him; and neglect of food. He suffered two seizures (thought to be related to alcohol withdrawal) on 1 October 1982, shortly after his admission to the clinic. He underwent out-patient treatment up until the dates of the reports. He suffered several relapses. Between 27 February and 3 March 1984, he underwent detoxification treatment.

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Mrs. Edmond's assessment was that the accused was a person as described in s. 29 of Act 41 of 1971 in that he has become dependent on a habit forming drug (viz. alcohol) to the detriment of his health and social functioning, as evidenced by the symptoms mentioned above. She did not make any specific recommendation to the court in regard to sentence, but did recommend that if the court decided upon a suspended sentence, it should be conditional inter alia on his submitting himself to treatment by SANCA. for a minimum period of two years. In the course of her oral evidence, Mrs. Edmonds made the following points. The alcohol-dependent person very frequently suffers from severe memory impairment, which is related to toxicity of certain cells in the brain. Information she obtained from the accused's wife and daughter indicated that he was already chronically dependent in April-

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June 1982 when the offences were committed. Memory blackout is a frequent symptom in the alcohol-dependent person. Alcohol may depress the patient's bodily functions and depress normal social inhibitions. Alcoholism affects the physical and psychological aspects of a person in a destructive or detrimental fashion. In the chronic phase of the illness, the alcoholic has a tremendous tolerance to alcohol. She doubted whether the accused did not know what he was doing in the Sunnyside branch or in the Stock Exchange branch of the bank. The condition was likely to have affected his inhibitions and his ability to appreciate the difference between right and wrong. Expert evidence was also given by Dr. Zalmon Wolf, a neurologist and psychiatrist. He saw the accused twice - on 30 January and 11 February 1985. He produced and confirmed a written report on the accused.

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He, too, took a detailed history. In his "DISCUSSION"

he said

"Mr Schwegmann presents the history of a compulsive drinker with steady deterioration. The failure of self-control, increasing inefficiency, loss of self-esteem, and blurred thinking has led to the failure in his business. It is probable that at the time of his committing the frauds with which he is charged that he lacked clarity of mind or circumspection in clearly appraising what he was doing to a degree as to reduce his biameworthiness." In his viva voce evidence, Dr. Wolf said that the history

of the accused was that of the chronic alcoholic. This condition reduces the ability of the patient to function in

terms of the circumstances, that is to say, he is less

circumspect. His condition was at an advanced stage: he was drinking large quantities daily and he was not acting

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responsibly. He was incurring debt, the domestic scene had deteriorated and he was not functioning. In answer to a question by the magistrate, Dr. Wolf agreed that the correctness of his assessment rested on the accuracy of the information he was given. In his judgment the magistrate said that the accused did not impress the court as an honest witness. He contradicted himself in a number of respects. His evidence that he was not aware of what he was doing was improbable: he was able to observe and remember small details; no person in his right mind would have sent a person as intoxicated as the accused described himself to be to negotiate the transactions involved in counts 1 and 2; in order for the swindles to succeed, the accused would have had to appear as presentable, coherent and convincing; and his abrupt departure from the scene when the cheque was referred to the

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accountant at the Stock Exchange branch indicated an understanding of what was going on and the action necessary to meet the situation. The magistrate's conclusion was that the accused's evidence about his state of intoxication was grossly exaggerated. He found him to be a totally unreliable and untruthful witness. The magistrate said that Mrs. Edmonds impressed the court as an honest witness and an expert in her field. Dr. Wolf, with nearly 30 years of experience, and also a credible witness, impressed the court equally, if not more so. However, the accuracy of their assessments of the accused depended, as Dr. Wolf had conceded, on whether the accused had told them the truth. The magistrate said that his finding on the accused's credibility affected to a certain extent the findings and assessments of Dr. Wolf and Mrs. Edmonds. While it was clear, on the whole of

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the evidence, that the accused had a liquor-dependence problem, its degree was not entirely determinable because the accused had not been frank and honest. The magistrate's judgment on sentence was careful, balanced and comprehensive. He mentioned the following factors. In February 1977 the accused had been convicted on 10 counts of fraud. On 9 of them he was sentenced to two months' imprisonment on each count; and on the tenth count he received a sentence of ten months' imprisonment. He had also been convicted on two counts of theft, for which he was sentenced to one month's imprisonment on each count. All of these sentences were conditionally suspended. As a result of the appearance of his photograph on the television programme Police File he had

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lost the esteem of the community in which he lived and of his associates, and he was apparently expelled from his golf club. He had suffered prolonged anguish and anxiety because the trial was concluded nearly 3 years after his arrest in July 1982. (It appears from the record that the trial began on 21 November 1983 and judgment was given on 10 April 1985). He was "to some degree dependent on alcohol". At the time of the crimes he was financially embarrassed. These circumstances weakened any resistance he may have had when the check-cashing propositions were put to him. On the other hand, counts 1 and 2 were very serious, involving in count 1 a loss of R60 000 to the Standard Bank, and in count 2 a potential loss to the Totalisator Agency Board of over R47000. The crimes were

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premeditated and carefully planned. While the court accepted that he personally did not mastermind them, the accused was a necessary link in the venture, and upon him success or failure depended. The magistrate said that along with other possible punishments, he had considered the imposition of a suspended sentence, but did not think this to be appropriate. In regard to count 4, he took into account that this offence was part and parcel of the fraud which was the subject matter of count 2. The magistrate accordingly imposed the sentences set out at the beginning of this judgment. In the heads of argument filed on behalf of the accused, his then counsel submitted that the magistrate had not given due weight to the fact that the accused had

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a serious alcohol dependency problem which had resulted in permanent intellectual and moral deterioration and hence in reduced responsibility for his actions. In her eloquent address Mrs. Loubser, who appeared to argue the appeal, submitted that the magistrate had misdirected himself in an important respect. He had disposed too lightly of the evidence of Mrs. Edmonds and Dr. Wolf. He should have found that when the offences were committed the accused was a chronic alcoholic and had diminished responsibility. His personality was disorganised. He was not the man he appeared to be: although he may have appeared to be acting normally, he was a man functioning in an alcoholic haze. At the date of the trial he was being rehabilitated. To send a man of 49 years to prison for a long term would destroy him utterly. Mrs. Loubser did not

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suggest that he should go unpunished. What she did suggest was that the maximum period of periodical imprisonment should be substituted for the long terms imposed by the magistrate. It has repeatedly been emphasized in judgments of this court that sentence is pre-eminently a matter for the discretion of the judex, and that his sentence should be altered only if the discretion has not been judicially and properly exercised, that is, where the sentence is vitiated by irregularity or misdirection, or is disturbingly inappropriate. See for example, *S v Giannoulis* 1975(4) SA 867 (A) at 868 G-H. The judex has a wide discretion in deciding on the factors which should in his opinion influence him, and to what extent they should do so, in determining the punishment which is appropriate in the circumstances. And this court will not readily differ from him in his assessment either of the factors to be regarded

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or the value to be attached to them. Of *S v Fazzie and*

Others 1964(4) SA 673 (A) at 684. If, of course,

"... the dictates of justice are such as clearly to make it appear to this Court that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh. (ibid B-C.)

In my opinion, no fault is to be found with the approach of the magistrate to the evidence of Mrs. Edmonds and Dr. Wolf. The trier of fact is not obliged

to accept the opinions of expert witnesses - in general, they

serve only as a guide. He must exercise his own judgment,

particularly in a case such as the present where he has a

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knowledge of the facts of the case as revealed by the evidence, and of the conduct of the accused, far greater than that possessed by the experts who know only what the accused has told them. The lot of the chronic alcoholic excites compassion, but the sentence as determined by the judex is the resultant of a number of factors, and compassion cannot be allowed to have a disproportionate influence. For offences involving abuse of alcohol (e.g. driving under the influence of liquor) the courts have often been encouraged to make use of periodical imprisonment. (see *S v Erwee* 1982(3) SA 1057 (A) at 1064 H), but that would not be appropriate in my opinion for the serious crimes of which the accused was here convicted. In my view the magistrate gave due and proper consideration to all the material relevant to sentence

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which was before him. No irregularity or misdirection has been shown, and there is not that striking disparity with any sentence this court might have imposed which would justify interference.

The appeal is dismissed.

H C NICHOLAS A J A

HEFER J A concur. VIVIER J A

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