

SOUTH AFRICA / JUDGMENT

Wannenburg v S (A483/04) [2005]

ZAWCHC

37; 2007 (1) SACR 27 (C) (20 May 2005)

[2005] ZAWCHC 37

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek, Davis

CASE / FILE NUMBER

A483/04

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(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A483/2004

DATE 20-5-2005

In the matter of

SELWYN DESMOND WANNENBURG Appellant

versus

THE STATE Respondent

J U D G M E N T

BOZALEK, J: The appellant was convicted on 25 October 2002 in the Regional Court, Wynberg, on 52 counts of being an accomplice to fraud and was sentenced on 12 December 2002 to correctional supervision for a period of three years in terms of section 276(1)(h) of Act 51 of 1977, together with a further three years' imprisonment suspended for four years under certain conditions. The appellant now appeals against conviction only.

Before us is an application by appellant seeking condonation of the late filing of his notice of appeal, amended notice of appeal and heads of argument. A full explanation is tendered for the aforementioned delays which, in any event, are not of undue length. The explanation relates in no small part to the appellant taking some time to collect the funds necessary to prosecute the appeal. The State does not oppose the application for condonation and regard being had to the

above factors and to the appellant's prospects of success in the appeal, I consider that condonation should be granted. (See *Melane v Santam Insurance Company Ltd* 1962(4) SA 531 (A)).

The appellant initially faced 116 counts of fraud. They arose out of a fraudulent scheme which obtained in the Wynberg Magistrate's Court during 1997 involving criminal summonses issued, mainly, if not exclusively, against taxi drivers for traffic offences. These summonses, issued at the instance of the City of Cape Town, incorporated admission of guilt fines. A practice developed whereby an official or officials working in the Wynberg Magistrate's Court procured either the withdrawal of these charges or substantial and disproportionate reductions in the admission of guilt fines. It would appear that these decisions, by whomsoever they were taken, were not made in the exercise of any proper discretion, but were corrupt and/or fraudulent acts committed pursuant to a money-making scheme. The scheme involved the recipients of the summonses paying half of the admission of guilt fines to an agent who in turn procured the reductions in the fines, or the withdrawal of the charges, paid the resulting reduced fines and pocketed the difference. The appellant worked as a security guard in the Wynberg Court although his formal duties were completely unrelated to traffic summonses or admission of guilt fines. Nonetheless, he found himself at the centre of the scheme which I have just described. Insofar as it is material the charge sheet alleged that: "Genoemde beskuldigde wederregtelik, valslik en met die bedoeling om te bedrieg voorgegee het aan die... persone genoem...dat hy gemagtig was om, kontantgeld vir betaling van verkeersskuld erkenningsboete te aanvaar, en/of, verkeersskuld erkenningsboetes te verminder, en/of aanklagte op verkeersskuld erkenningsboetes, terug te trek, en het toe en daar deur middel van vermelde valse voorwendsel die genoemde...persone...beweeg tot die verlies en nadeel van die Stadsraad om verkeersskuld, erkenningsboetes op kennisgewings vermeld...te aanvaar as verminderd...en/of te aanvaar dat verkeersskuld erkennings aanklagte...teruggetrek is... Nademaal in waarheid en in werklikheid die beskuldigde toe hy voorgegee het soos voormeld wel geweet het dat hy nie gemagtig was om verkeersskuld erkenningsboetes te aanvaar en/of te verminder en/of aanklagte terug te trek en so het die beskuldigde bedrog gepleeg." There is also an annexure to the charge sheet, the purpose of which is somewhat unclear. It does no more than sketch the background to the charges. It states, inter alia, that the appellant was not authorised to accept traffic summonses for any purposes and that reductions in admissions of guilt fines in respect of such summonses and/or the withdrawal of these charges was to be dealt with by the senior public prosecutor

and/or his or her delegees. The appellant pleaded not guilty to the charges and was legally represented throughout the trial. He testified in his own defence and called several witnesses. The State called two major witnesses whose evidence appeared to implicate the appellant in the scheme. The first was a Mr Adriaanse who for some years prior to the events in question had served as an assessor in criminal cases in the Wynberg Magistrate's Court and was well-known to staff working there. At the commencement of his evidence he was warned in terms of section 204 of Act 51 of 1977. In brief, his evidence was that he had over the years personally or through the agency of a staff member of the court, presented traffic summonses to prosecutors and had thereby obtained substantial reductions in the admission of guilt fines provided for therein. In

1997 the appellant had approached him and offered to be the conduit between himself and the prosecutor or prosecutors. Adriaanse would deliver piles of traffic summonses to the appellant, which the former had obtained from taxi drivers at taxi ranks, together with 50% of the admission of guilt fines appearing thereon. The appellant would obtain reductions in these fines or withdrawal of the charges and, after paying such reduced fines, would furnish the receipts to Adriaanse. The latter kept detailed lists of what summonses he handed over to the appellant, the amount of the initial admission of guilt fine and the amount of money he handed to the appellant. These lists formed an exhibit in the trial and reflected the 52 counts of which the appellant was eventually convicted. Adriaanse maintained that he performed this service for the taxi drivers purely out of the goodness of his heart. For his part, the appellant admitted receiving the 52 summonses and, on occasion, sums of money from Adriaanse. He would then approach one or more prosecutors and, even without making any submissions on the merits, obtain withdrawal of the charges or substantial reductions in the admission of guilt fines. He denied any knowledge of the arrangement to which Adriaanse testified, namely that 50% of the original admission of guilt fine would always be paid to him and would cover whatever fines were eventually imposed subsequent to the reductions and withdrawals. According to the appellant he only performed these services because Adriaanse continually pressed him to do so, and then only as a favour. He stated that the only reward he ever received from Adriaanse was trifling, in the form of a bread roll or small sums of money to cover his petrol expenses. These expenses arose because the appellant had to travel on occasion to Adriaanse's flat to collect summonses or to deliver receipts. Furthermore, on occasion he travelled to a nearby traffic department office and paid the reduced admission of guilt fines, this notwithstanding the fact that he could have paid them at an office in the very building in which he worked. Thus both Adriaanse and the appellant denied that their activities were in any way fraudulent or corrupt. The other State witness who implicated the appellant was a Mr Williams, a part-time police informer who had been friendly with the appellant. He claimed to have sat in the appellant's car after work one evening and watched him work through a pile of traffic summonses, stamping them with what was presumably a stolen prosecutor's stamp and, at the same time, reducing the admission of guilt fines by writing on the summonses and signing them. The appellant denied this evidence and the magistrate ultimately disregarded it, in my view, correctly so, as unreliable. In his judgment, after observing that the charge sheet was "clumsily worded", the magistrate found that the frauds as alleged in the charge sheet had not been proven against the appellant. He found, however, that both Adriaanse and the appellant were knowingly involved in a scheme whereby the withdrawal of charges and reductions in admission of guilt fines were fraudulently obtained and that this involved one or more prosecutors working in the Magistrate's Court. The magistrate found further that although the appellant could not be convicted of the frauds as charged, the evidence established that he was an accomplice to the frauds committed in 52 of the counts he faced. These particular counts were those relating to the summonses reflected in the list drawn up by Adriaanse of those which he handed to the appellant and which the appellant conceded he had received and had placed before un-named prosecutors resulting in the reduction of the admission of guilt fines or a withdrawal of the charges. In reaching his conclusion that the appellant was an accomplice to fraud, the magistrate found that the evidence

established that the appellant was an indispensable link in the fraudulent scheme and by his actions intentionally assisted Adriaanse in committing the various acts of fraud. In acquitting the appellant of the balance of the charges, the magistrate found that the misrepresentations upon which the State relied upon in each count had not been made by the appellant but by Adriaanse. This latter finding points to but one of the fundamental weakness in the State's case against the appellant. The charge sheet avers that it was the appellant who, with intent to defraud, falsely misrepresented to the persons cited in the various summonses that he was authorised to receive their monies, reduce admission of guilt fines or withdraw the charges in the summons. However, it was common cause that the appellant had never had any contact with any of the persons who had received traffic summonses, let alone made any misrepresentation to them. Such persons all handed their summonses to Adriaanse, who in turn passed them on to the appellant. Thus the magistrate was correct, not only in acquitting the appellant of the balance of the charges in respect of which there was no evidence at all even linking him to the withdrawal thereof or the reduction of the relevant admissions of guilt fines, but also in finding that the appellant could not be found guilty as a co-perpetrator of the frauds alleged in the 52 counts. The key issue is whether the magistrate's finding that the accused was an accomplice to the 52 counts of fraud is good in law. In *S v Williams* 1980(1) SA 61 (A) an accomplice's liability was described as accessory in nature: "'n Medepligtige se aanspreeklikheid is aksessories van aard, sodat daar geen sprake van 'n medepligtige kan wees, sonder dat dader of mededaders wat nie misdadig pleeg nie." [at page 63A] It follows then that a person cannot be an accomplice to his or her own crime and, furthermore, for accomplice liability to result, someone else must have committed the crime. (See further in this regard the discussion of the subject in *Principles of Criminal Law* (3rd ed.) Jonathan Burchell at page 604 and 614-616). Applying these principles to the present case, it is clear that the appellant could only be found guilty as an accomplice to the 52 counts of fraud in question if it were common cause or proved beyond reasonable doubt that some other party, presumably Adriaanse, had committed the frauds in question as perpetrator. According to Burchell, an accomplice's liability is not dependent on the principal offender being tried and convicted, a proposition with which one can readily agree since there are a number of circumstances which might render it impractical, undesirable or impossible for the State to obtain a conviction against the perpetrator or perpetrators of the fraud, for example where such person or persons give State evidence or are deceased. In convicting the appellant, the magistrate rejected Adriaanse's evidence that he had innocently and benevolently assisted traffic offenders to obtain reductions of admission of guilt fines or the withdrawal of charges. In general I have no difficulty at all with this factual finding but, even if both Adriaanse and the appellant were involved in a fraudulent scheme, this in itself does not necessarily render the appellant guilty of any of the fraud counts for two principal reasons. In the first place it is open to the gravest doubt whether the State proved that Adriaanse or anyone else had committed the frauds charged in the 52 counts. In particular, there was a dearth of evidence that Adriaanse had made the misrepresentations alleged in the charge sheet, or any misrepresentation for that matter. Of the half dozen or so witnesses called by the State who had received summonses in respect of which charges were withdrawn or admission of guilt fines reduced, only three, Messrs Faasen, Solomon and Schippers had direct contact with Adriaanse. To the extent that these witnesses testified of

any representation on the part of Adriaanse, it was simply that he could obtain reductions in the admission of guilt fines in respect of their summonses and certainly not that he was authorised to accept monies, to himself reduce admission of guilt fines or withdraw charges as alleged in the charge sheet. Accordingly, in my view, the State failed to make out any case that Adriaanse had made the misrepresentation alleged in respect of any of the 52 counts, an indispensable element of the offence of fraud. Even if the State had surmounted this obstacle there is, in my view, another fundamental reason why the convictions brought against the appellant cannot be sustained. The charge sheet alleges that the appellant himself misrepresented to the sundry recipients of the summonses that he had the authority to withdraw charges, reduce admission of guilt fines and receive monies for payments of such fines. There is no suggestion at all in the charge sheet that these alleged misrepresentations were or may have been committed by another person or persons, or by a person or persons unknown. Thus the appellant was not apprised in the charge sheet, even on an alternative basis, that the case he had to meet was that he had assisted another person or persons who had made these misrepresentations in committing the frauds. The case which he was called upon to meet was that he, the appellant, had made the misrepresentation with the necessary intent. In *Suid-Afrikaanse Strafproses* (6de uitgawe) Hiemstra, the authors disagree with the proposition in *De Wet & Swanepoel Strafreë* (4th ed.) at 199-200 that a charge sheet must distinguish between perpetrators and accomplices. The authors do concede, however, that a distinction should be made where an accomplice physically or juridically could not himself or herself have committed the crime charged. Hiemstra then goes on to state as follows: "In die praktyk gebeur dit egter betreklik dikwels dat die aanklaer met die feite wat bekend is (nie?) vooraf kan bepaal wie dader en wie medepligtige was nie. Bygevolg kan daar op praktiese gronde nie saamgestem word dat daar in die reël onderskei moet word nie." There is, however, much to be said for the approach advocated by De Wet & Swanepoel and in commending those "wat 'n sin vir die werklikheid het en medepligtiges as medepligtiges aankla." (at page 200). (See also *R v M & Another* 1950(4) SA 101 (TPD) where an unhappily worded indictment was criticised. In my view, where it is clear that the accused can only be held liable as an accomplice, the indictment should specify this and the basis of the accomplice's liability. Judging from the evidence in the present matter, on the charges as framed it is difficult to see how the State could ever have hoped to secure the appellant's conviction on any basis other than that of an accomplice. I accept that it may not always be practicable for the State to allege in a charge sheet that it seeks to hold the accused liable as an accomplice. However, the State clearly cannot charge an accused as the sole perpetrator of a fraud and, on failing to make out such a case, seek to hold the accused liable as an accomplice to the same or a similar fraud, but committed by another perpetrator, un-named in the indictment. The reason for this is simple: this is not the case which the accused is called upon to meet and unless apprised thereof such person cannot properly defend himself against such charges. Thus, in the present case, for example, had the appellant been made aware that, failing proof by the State that he had made the alleged misrepresentations in question, it would seek to prove that such misrepresentations were made by Adriaanse and that he had assisted the latter in the commission of the frauds, the defence raised by the appellant may well have been quite different. Certainly the cross-examination which his legal representative directed at Adriaanse would probably have been of a

completely different nature. In a nutshell, it is impermissible, in my view, in circumstances such as these to charge an accused with crime A and upon failure to prove same, to convict him of being an accomplice to crime B. In terms of section 35(3) of our Constitution an accused is entitled to a fair trial and, in particular, to be informed of the charge with sufficient detail to answer it (section 35(3)(a)). In this connection I agree with Claasen, J in *S v Lavhengwa* 1996(2) SACR 453 (W) at 482f that the right to be informed of the charge as guaranteed in section 35(3)(a) of the Constitution encompasses the requirements that the accused must know the necessary particulars of the charge and that the charges must be clear and unambiguous. See also *S v Singo* 2002(2) SACR 160 (CC) at para 19. In my view, the appellant's conviction on the 52 counts of fraud is bad in law on a number of points, not least by reason of the infringement of his constitutional right to be fully apprised of the precise case upon which the State eventually sought to rely. There should, however, be no misunderstanding of these findings. Any upholding of the appellant's appeal in no way indicates that he was not involved in irregular or corrupt conduct. On the contrary, there is a substantial body of evidence suggesting that the appellant abused his position at the Wynberg Magistrate's Court and participated in a corrupt and fraudulent scheme for personal gain. The charges levelled against him, however, are wholly misconceived and unsupported by the State's evidence with the result that he is, in my view, entitled to his acquittal on all counts on which he was convicted. For these reasons I would allow the appeal and set aside the convictions on the 52 counts of fraud and the sentence imposed. BOZALEK, J DAVIS, J: I agree and it is so ordered. DAVIS, J

The appellant initially faced 116 counts of fraud. They arose out of a fraudulent scheme which obtained in the Wynberg Magistrate's Court during 1997 involving criminal summonses issued, mainly, if not exclusively, against taxi drivers for traffic offences. These summonses, issued at the instance of the City of Cape Town, incorporated admission of guilt fines. A practice developed whereby an official or officials working in the Wynberg Magistrate's Court procured either the withdrawal of these charges or substantial and disproportionate reductions in the admission of guilt fines. It would appear that these decisions, by whomsoever they were taken, were not made in the exercise of any proper discretion, but were corrupt and/or fraudulent acts committed pursuant to a money-making scheme. The scheme involved the recipients of the summonses paying half of the admission of guilt fines to an agent who in turn procured the reductions in the fines, or the withdrawal of the charges, paid the resulting reduced fines and pocketed the difference.

The appellant worked as a security guard in the Wynberg Court although his formal duties were completely unrelated to traffic summonses or admission of guilt fines. Nonetheless, he found himself at the centre of the scheme which I have just described. Insofar as it is material the charge sheet alleged that:

"Genoemde beskuldigde wederregtelik, valslik en met die bedoeling om te bedrieg voorgegee het aan die... persone genoem...dat hy gemagtig was om, kontantgeld vir betaling van verkeersskuld erkenningsboete te aanvaar, en/of, verkeersskuld erkenningsboetes te verminder, en/of aanklagte op verkeersskuld erkenningsboetes, terug te trek, en het toe en daar deur middel van vermeldde

valse voorwendsel die genoemde...persone...beweeg tot die verlies en nadeel van die Stadsraad om verkeersskuld, erkenningsboetes op kennisgewings vermeld...te aanvaar as verminderd...en/of te aanvaar dat verkeersskuld erkennings aanklagte...teruggetrek is... Nademaal in waarheid en in werklikheid die beskuldigde toe hy voorgegee het soos voormeld wel geweet het dat hy nie gemagtig was om verkeersskuld erkenningsboetes te aanvaar en/of te verminder en/of aanklagte terug te trek en so het die beskuldigde bedrog gepleeg."

There is also an annexure to the charge sheet, the purpose of which is somewhat unclear. It does no more than sketch the background to the charges. It states, inter alia, that the appellant was not authorised to accept traffic summonses for any purposes and that reductions in admissions of guilt fines in respect of such summonses and/or the withdrawal of these charges was to be dealt with by the senior public prosecutor

and/or his or her delegees.

The appellant pleaded not guilty to the charges and was legally represented throughout the trial. He testified in his own defence and called several witnesses. The State called two major witnesses whose evidence appeared to implicate the appellant in the scheme. The first was a Mr Adriaanse who for some years prior to the events in question had served as an assessor in criminal cases in the Wynberg Magistrate's Court and was well-known to staff working there. At the commencement of his evidence he was warned in terms of section 204 of Act 51 of 1977.

In brief, his evidence was that he had over the years personally or through the agency of a staff member of the court, presented traffic summonses to prosecutors and had thereby obtained substantial reductions in the admission of guilt fines provided for therein. In 1997 the appellant had approached him and offered to be the conduit between himself and the prosecutor or prosecutors. Adriaanse would deliver piles of traffic summonses to the appellant, which the former had obtained from taxi drivers at taxi ranks, together with 50% of the admission of guilt fines appearing thereon. The appellant would obtain reductions in these fines or withdrawal of the charges and, after paying such reduced fines, would furnish the receipts to Adriaanse. The latter kept detailed lists of what summonses he handed over to the appellant, the amount of the initial admission of guilt fine and the amount of money he handed to the appellant. These lists formed an exhibit in the trial and reflected the 52 counts of which the appellant was eventually convicted.

Adriaanse maintained that he performed this service for the taxi drivers purely out of the goodness of his heart. For his part, the appellant admitted receiving the 52 summonses and, on occasion, sums of money from Adriaanse. He would then approach one or more prosecutors and, even without making any submissions on the merits, obtain withdrawal of the charges or substantial reductions in the admission of guilt fines. He denied any knowledge of the arrangement to which Adriaanse testified, namely that 50% of the original admission of guilt fine would always be paid to him and would cover whatever fines were eventually imposed subsequent to the reductions and withdrawals.

According to the appellant he only performed these services because Adriaanse continually pressed him to do so, and then only as a favour. He stated that the only reward he ever received from Adriaanse was trifling, in the form of a bread roll or small sums of money to cover his petrol expenses. These expenses arose because the appellant had to travel on occasion to Adriaanse's flat to collect summonses or to deliver receipts. Furthermore, on occasion he travelled to a nearby traffic department office and paid the reduced admission of guilt fines, this notwithstanding the fact that he could have paid them at an office in the very building in which he worked. Thus both Adriaanse and the appellant denied that their activities were in any way fraudulent or corrupt.

The other State witness who implicated the appellant was a Mr Williams, a part-time police informer who had been friendly with the appellant. He claimed to have sat in the appellant's car after work one evening and watched him work through a pile of traffic summonses, stamping them with what was presumably a stolen prosecutor's stamp and, at the same time, reducing the admission of guilt fines by writing on the summonses and signing them. The appellant denied this evidence and the magistrate ultimately disregarded it, in my view, correctly so, as unreliable.

In his judgment, after observing that the charge sheet was "clumsily worded", the magistrate found that the frauds as alleged in the charge sheet had not been proven against the appellant. He found, however, that both Adriaanse and the appellant were knowingly involved in a scheme whereby the withdrawal of charges and reductions in admission of guilt fines were fraudulently obtained and that this involved one or more prosecutors working in the Magistrate's Court. The magistrate found further that although the appellant could not be convicted of the frauds as charged, the evidence established that he was an accomplice to the frauds committed in 52 of the counts he faced. These particular counts were those relating to the summonses reflected in the list drawn up by Adriaanse of those which he handed to the appellant and which the appellant conceded he had received and had placed before un-named prosecutors resulting in the reduction of the admission of guilt fines or a withdrawal of the charges.

In reaching his conclusion that the appellant was an accomplice to fraud, the magistrate found that the evidence established that the appellant was an indispensable link in the fraudulent scheme and by his actions intentionally assisted Adriaanse in committing the various acts of fraud. In acquitting the appellant of the balance of the charges, the magistrate found that the misrepresentations upon which the State relied upon in each count had not been made by the appellant but by Adriaanse.

This latter finding points to but one of the fundamental weakness in the State's case against the appellant. The charge sheet avers that it was the appellant who, with intent to defraud, falsely misrepresented to the persons cited in the various summonses that he was authorised to receive their monies, reduce admission of guilt fines or withdraw the charges in the summons. However, it was common cause that the appellant had never had any contact with any of the persons who had received traffic summonses, let alone made any misrepresentation to them. Such persons all handed their summonses to Adriaanse, who in turn passed them on to the appellant. Thus the magistrate was correct, not only in acquitting the appellant of the balance of the charges in

respect of which there was no evidence at all even linking him to the withdrawal thereof or the reduction of the relevant admissions of guilt fines, but also in finding that the appellant could not be found guilty as a co-perpetrator of the frauds alleged in the 52 counts.

The key issue is whether the magistrate's finding that the accused was an accomplice to the 52 counts of fraud is good in law. In *S v Williams* 1980(1) SA 61 (A) an accomplice's liability was described as accessory in nature:

"n Medepligtige se aanspreeklikheid is aksessories van aard, sodat daar geen sprake van 'n medepligtige kan wees, sonder dat dader of mededaders wat nie misdaad pleeg nie." [at page 63A]

It follows then that a person cannot be an accomplice to his or her own crime and, furthermore, for accomplice liability to result, someone else must have committed the crime. (See further in this regard the discussion of the subject in *Principles of Criminal Law* (3rd ed.) Jonathan Burchell at page 604 and 614-616). Applying these principles to the present case, it is clear that the appellant could only be found guilty as an accomplice to the 52 counts of fraud in question if it were common cause or proved beyond reasonable doubt that some other party, presumably Adriaanse, had committed the frauds in question as perpetrator. According to Burchell, an accomplice's liability is not dependent on the principal offender being tried and convicted, a proposition with which one can readily agree since there are a number of circumstances which might render it impractical, undesirable or impossible for the State to obtain a conviction against the perpetrator or perpetrators of the fraud, for example where such person or persons give State evidence or are deceased.

In convicting the appellant, the magistrate rejected Adriaanse's evidence that he had innocently and benevolently assisted traffic offenders to obtain reductions of admission of guilt fines or the withdrawal of charges. In general I have no difficulty at all with this factual finding but, even if both Adriaanse and the appellant were involved in a fraudulent scheme, this in itself does not necessarily render the appellant guilty of any of the fraud counts for two principal reasons. In the first place it is open to the gravest doubt whether the State proved that Adriaanse or anyone else had committed the frauds charged in the 52 counts. In particular, there was a dearth of evidence that Adriaanse had made the misrepresentations alleged in the charge sheet, or any misrepresentation for that matter. Of the half dozen or so witnesses called by the State who had received summonses in respect of which charges were withdrawn or admission of guilt fines reduced, only three, Messrs Faasen, Solomon and Schippers had direct contact with Adriaanse. To the extent that these witnesses testified of any representation on the part of Adriaanse, it was simply that he could obtain reductions in the admission of guilt fines in respect of their summonses and certainly not that he was authorised to accept monies, to himself reduce admission of guilt fines or withdraw charges as alleged in the charge sheet. Accordingly, in my view, the State failed to make out any case that Adriaanse had made the misrepresentation alleged in respect of any of the 52 counts, an indispensable element of the offence of fraud.

Even if the State had surmounted this obstacle there is, in my view, another fundamental reason why the convictions brought against the appellant cannot be sustained. The charge sheet alleges that the appellant himself misrepresented to the sundry recipients of the summonses that he had the authority to withdraw charges, reduce admission of guilt fines and receive monies for payments of such fines. There is no suggestion at all in the charge sheet that these alleged misrepresentations were or may have been committed by another person or persons, or by a person or persons unknown. Thus the appellant was not apprised in the charge sheet, even on an alternative basis, that the case he had to meet was that he had assisted another person or persons who had made these misrepresentations in committing the frauds. The case which he was called upon to meet was that he, the appellant, had made the misrepresentation with the necessary intent.

In Suid-Afrikaanse Strafproses (6de uitgawe) Hiemstra, the authors disagree with the proposition in De Wet & Swanepoel Strafred (4th ed.) at 199-200 that a charge sheet must distinguish between perpetrators and accomplices. The authors do concede, however, that a distinction should be made where an accomplice physically or juridically could not himself or herself have committed the crime charged. Hiemstra then goes on to state as follows:

"In die praktyk gebeur dit egter betreklik dikwels dat die aanklaer met die feite wat bekend is (nie?) vooraf kan bepaal wie dader en wie medepligtige was nie. Bygevolg kan daar op praktiese gronde nie saamgestem word dat daar in die reël onderskei moet word nie."

There is, however, much to be said for the approach advocated by De Wet & Swanepoel and in commending those "wat 'n sin vir die werklikheid het en medepligtiges as medepligtiges aankla." (at page 200). (See also *R v M & Another* 1950(4) SA 101 (TPD) where an unhappily worded indictment was criticised.

In my view, where it is clear that the accused can only be held liable as an accomplice, the indictment should specify this and the basis of the accomplice's liability. Judging from the evidence in the present matter, on the charges as framed it is difficult to see how the State could ever have hoped to secure the appellant's conviction on any basis other than that of an accomplice.

I accept that it may not always be practicable for the State to allege in a charge sheet that it seeks to hold the accused liable as an accomplice. However, the State clearly cannot charge an accused as the sole perpetrator of a fraud and, on failing to make out such a case, seek to hold the accused liable as an accomplice to the same or a similar fraud, but committed by another perpetrator, unnamed in the indictment.

The reason for this is simple: this is not the case which the accused is called upon to meet and unless apprised thereof such person cannot properly defend himself against such charges. Thus, in the present case, for example, had the appellant been made aware that, failing proof by the State that he had made the alleged misrepresentations in question, it would seek to prove that such misrepresentations were made by Adriaanse and that he had assisted the latter in the commission of the frauds, the defence raised by the appellant may well have been quite different.

Certainly the cross-examination which his legal representative directed at Adriaanse would probably have been of a completely different nature.

In a nutshell, it is impermissible, in my view, in circumstances such as these to charge an accused with crime A and upon failure to prove same, to convict him of being an accomplice to crime B. In terms of section 35(3) of our Constitution an accused is entitled to a fair trial and, in particular, to be informed of the charge with sufficient detail to answer it (section 35(3)(a)). In this connection I agree with Claasen, J in *S v Lavhengwa* 1996(2) SACR 453 (W) at 482f that the right to be informed of the charge as guaranteed in section 35(3)(a) of the Constitution encompasses the requirements that the accused must know the necessary particulars of the charge and that the charges must be clear and unambiguous. See also *S v Singo* 2002(2) SACR 160 (CC) at para 19.

In my view, the appellant's conviction on the 52 counts of fraud is bad in law on a number of points, not least by reason of the infringement of his constitutional right to be fully apprised of the precise case upon which the State eventually sought to rely.

There should, however, be no misunderstanding of these findings. Any upholding of the appellant's appeal in no way indicates that he was not involved in irregular or corrupt conduct. On the contrary, there is a substantial body of evidence suggesting that the appellant abused his position at the Wynberg Magistrate's Court and participated in a corrupt and fraudulent scheme for personal gain. The charges levelled against him, however, are wholly misconceived and unsupported by the State's evidence with the result that he is, in my view, entitled to his acquittal on all counts on which he was convicted.

For these reasons I would allow the appeal and set aside the convictions on the 52 counts of fraud and the sentence imposed.

BOZALEK, J

DAVIS, J: I agree and it is so ordered.

DAVIS, J

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