B E VAN NIEKERK APPELLANT

and

ATTORNEY-GENERAL OF TRANSVAAL &
ANOTHER FIRST RESPONDENT

and

THE REGIONAL MAGISTRATE OF KEMPTON
PARK, MR J J VAN EEDEN SECOND RESPONDENT

Judgment by:

H H NESTADT

CASE NO 528/89
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BREGGIE ELIZABETH VAN NIEKERK APPELLANT

and

ATTORNEY-GENERAL OF TRANSVAAL & ANOTHER FIRST RESPONDENT

and

THE REGIONAL MAGISTRATE OF KEMPTON PARK, MR J J VAN EEDEN SECOND RESPONDENT

CORAM: VAN HEERDEN, NESTADT et EKSTEEN JJA

DATE HEARD: 13 SEPTEMBER 1990

DATE DELIVERED: 27 SEPTEMBER 1990

J U D G M E N T

NESTADT, JA:

Appellant was convicted by a regional magistrate of the theft of R40 229,04 from her employer. She was

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sentenced to 4 years' imprisonment of which one year was conditionally suspended. Alleging that the proceedings had been irregular she sought to review them. This was done by way of an application to the Transvaal Provincial Division to set aside her conviction and sentence. The Attorney-General and the trial magistrate were cited as respondents. This appeal, brought with the leave of this Court, is against the refusal by the court a quo of such application.

A preliminary procedural matter arises. It relates to the form of certain of the affidavits filed on behalf of first respondent in opposition to the application. Contrary to AD Rule 5(7) some are not typed in double-space. Others, in breach of SC Rule 62(3) are not divided into concise numbered paragraphs. Perhaps the main criticism is that the attestation of many is defective in a number of respects. There is either no attestation clause at all; or the form of attestation is illegible; or the wording

thereof is irregular. The undesirability of papers being presented in this fashion need hardly be emphasised. The offending affidavits should not be received as evidence. In the view I take of the matter, however, and in the absence of any objection on behalf of appellant I am prepared to do so.

In effect, appellant alleges that she did not have a fair trial and that she was thereby prejudiced. She relies not so much on what took place in court but on the events leading up to her appearance there. There are in this regard a number of conflicts of fact between her version and that of first respondent. It is, however, unnecessary to canvass them. The matter can be decided on what is undisputed. I proceed to summarise what this is. Appellant, a 28 year-old married woman worked as a senior saleswoman or clerk for a co-operative society called Vetsak at its Isando offices. At about 4 pm on Thursday 15

October 1984 she was approached by certain senior employees in the organisation. One of them was a Mr van Vuuren, the administrative manager. He impliedly accused her of stealing over R40 000 from her employer. The following day, ie Friday 16 November 1984, she went to work as usual. Later that morning she was told that she was to be charged with theft. It would seem that this was shortly before 11 am. She was taken by warrant-officer Scheepers of the S A Police to the Kempton Park police station. There she was interviewed by another detective, viz warrant-officer Tiearney. Appellant told him that she would plead guilty. She remained at the police station. At about 2 pm Tiearney took her to the office of Mrs Otto, the senior regional court prosecutor at the Kempton Park magistrates court. Appellant confirmed to her that she would plead guilty. At about 2:30 pm she appeared in court. She was unrepresented. The charge was put to her. She pleaded

guilty. The magistrate questioned her in terms of sec 112(1)(b). She admitted all the elements of the crime. She was found guilty. The case was then postponed to 30 November 1984 when, still appearing in person, she was sentenced.

It is a principle of our criminal procedure that an accused ought to be brought to trial without undue delay. But he must not be tried on too short notice. He is entitled to a reasonable time within which not only to prepare for trial (including the obtaining of legal representation) but also to assess and weigh his position. It is a case of taking account of the proverb "allow time and moderate delay; haste administers all things badly". This means, in the words of ADDLESON J in S vs Yantolo 1977(2) SA 146(E) at 150 C, that:

> "(T)he procedure which is followed must leave no room for doubt as to whether ... an accused has had an opportunity to understand and appreciate the seriousness of a charge and its consequences".

The learned judge goes on (at 150 E) to hold that there must

be time "to arrive at a mature and unhurried decision on how to plead (and) to conduct his case". Where he is not afforded this opportunity his conviction and sentence are liable, depending on the circumstances, to be set aside (usually on review) on the ground that not having received a fair trial, the proceedings were irregular and that a failure of justice resulted. There are a number of reported judgments which illustrate this (see R vs Thane 1925 TPD 850; S vs Blooms 1966(4) SA 417(C); Khumbusa vs The State and Another 1977(1) SA 394(N); S vs Yantolo (supra); S vs Baloyi 1978(3) SA 290(T) and Siqodolo vs Attorney-General and Another 1985(2) SA 172(E); see too Lansdown and Campbell: South African Criminal Law and Procedure, vol 5, 462). Some of these authorities seem to indicate that the remedy is confined to cases where the charge is what has been termed a serious one involving a severe penalty such as a term of imprisonment. In an article entitled "The too

Speedy Trial - or the Right to be Prepared for Trial" published in SACC vol 9 (1985) 158, prof N Steytler criticises this limitation. Seeing the charge in the present matter was a serious one it is unnecessary to decide the point.

It will be apparent from what has been stated that only some three and a half hours elapsed from the time that appellant first learned of the charge against her until she appeared in court. Prima facie this afforded her little opportunity to consider her position. It was one that required thought. As I have said, the crime was a serious one. According to Scheepers "die saak (het) vir my ingewikkeld voorgekom ... en ek (het) onder die indruk gekom ... dat daar heelwat ondersoek moes gedoen word". Appellant herself was in a state of uncertainty as to what to do. She says in her founding affidavit:

> "(E)k (het) nie geweet ... wat om te doen nie. Ek was nog nooit voorheen in a polisiestasie nie en

ek het myself nog nooit in so 'n posisie bevind nie."

The affidavit of the prosecutor supports this. Mrs Otto admits that having asked appellant whether she wanted an attorney (an allegation denied by appellant) appellant said that "ek (ie the prosecutor) ken die reg en ek moet vir haar sê wat om te doen". Mrs Otto's reaction to this was to explain to appellant that "as die weergawe wat sy aan my gegee het die ware feite is, sy aan die landdros die omstandighede waaronder sy die misdryf gepleeg het moet uiteensit." Clearly, then, she did not warn appellant that the offence was a serious one.

Appellant was prejudiced by the matter, in these circumstances, being hastily proceeded with. It is true that she herself wanted it disposed of quickly and indeed that day. She admits as much. She thought her husband would thereby not find out about her prosecution. She was prepared to plead guilty because, so it is conceded in her

affidavit, she had committed theft (though not of R40 229,04, but of about R5 000). She alleges it was only in court that she heard for the first time that the charge related to the former amount; and by this time she had already committed herself to a plea of guilty. The veracity of this allegation is to be doubted. At the same time, however, it is obvious that she was genuinely under the impression that only a suspended sentence would be imposed. It was this belief that caused her to adopt the course she did. Naturally, this per se would not entitle her to relief. But her decision to proceed with the trial was not, as it should have been, the product of a mature assessment of her predicament. Thus she says:

> "Ek is verder in groot haas deur die hof 'gestoomroller', sonder dat ek die geleentheid gehad het om behoorlik te besef wat aangaan. Indien ek voor die tyd, tyd gehad het om na die klagstaat te kyk en die erns van die saak te besef, sou ek nie skuldig gepleit het aan die diefstal van R40 229,04 nie, en sou ek 'n prokureur gekry het om my te verdedig sodat ek my saak

> behoorlik voor die hof kon plaas en ek sou verder vir my man gesê het wat my posisie by die werk was."

She would, therefore, had she been afforded more time instead of being caught unawares, not have allowed the trial to proceed in the manner it did. And had the steps she refers to been taken, it cannot be gainsaid that her sentence may have been a more lenient one. It was, however, argued on behalf of first respondent that appellant had an adequate opportunity for reflection seeing that she was only sentenced some two weeks after being convicted and that this cured any prejudice she might have suffered. I am unable to agree. She had already been convicted (on the basis of a theft of R40 229,04). So the die was cast. And she continued to labour under the impression that she would not go to jail.

It must have been apparent to the magistrate that appellant had only been arrested on the day of the trial.

The charge sheet contains this information. He ought then to have realised that she had probably for the first time learned of the charge against her on that day. It may be that in these circumstances the magistrate was under a duty to explain to appellant the possible consequences of a conviction and to determine whether she did not require a greater opportunity to consider her position; that his failure to do so constituted an irregularity; and that on this basis too the application ought to have succeeded. Steytler, op cit, at 162-3 considers that a general duty of the kind referred to exists. It is, however, unnecessary to express a view on the matter. Nor do I propose to deal with appellant's further complaint that the failure of the trial court to inform her of her right to legal representation resulted in an unfair trial (as to which see S vs Mabaso and Another 1990(3) SA 185(A)) or with first respondent's argument that this was not so because she knew

of her rights in this regard. This is because, for the reasons given, I am satisfied that there was an irregularity which resulted in a failure of justice. The court a quo should accordingly have granted the application.

The appeal succeeds. The dismissal of the review proceedings by the Transvaal Provincial Division is set aside. So too is appellant's conviction and sentence.

NESTADT, JA

VAN HEERDEN, JA)
) CONCUR
EKSTEEN, JA)