IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
Case No 105 / 99

In the matter between

ALLAN AUBREY BOESAK **Appellant**

and

THE STATE **Respondent**

Court: **Van Heerden ACJ, Smalberger, Olivier JJA, Farlam and Mpati AJJA.**

Date of hearing: **22 and 23 March 2000**

Date of judgment: **12 May 2000**

Criminal law - theft and fraud - authenticity and admissibility of letter apparently written by appellant - inferences therefrom - when deviation from purpose for which trust money donated amounts to theft - sentence.

JUDGMENT

SMALBERGER, OLIVIER JJA AND FARLAM AJA

SMALBERGER, OLIVIER JJA AND FARLAM AJA

[1] This matter involves an application for leave to appeal and, if granted, the determination of the appeal itself.

[2] The applicant is a former minister of the Dutch Reformed Mission Church in Bellville. He was intimately involved in South African politics. He was elected as President of the World Alliance of Reformed Churches ("WARC") in 1982. In 1984 the Church Council of the applicant's congregation decided to establish a trust as an extended ministry of the Bellville South Mission Church. In October 1985 this came into being as "The Foundation for Peace and Justice" ("FPJ"). The applicant became a trustee and director of the FPJ. He also operated bank accounts under the name of the WARC although he was not accountable to the parent organisation for the funds in such accounts. These accounts, unless the context requires otherwise, will be referred to in the singular as the WARC account.

[3] The objective of the FPJ was in essence to ameliorate the effects of government policy at that time. Several prominent international religious and humanitarian organisations donated substantial amounts to South African organisations such as the FPJ to further this objective. Monies were also donated to the WARC account for this purpose. Many of these donor organisations were based in Scandinavian countries. Danchurch, to mention but one, a religious organisation in Denmark, provided financial assistance to persons in countries where, in its view, human rights were being breached. Other donors included the Church of Norway, the Olaf Palme Centre and the Swedish International Development Authority ("SIDA").

[4] The evidence indicates that the applicant was trusted by these organisations to deal with the donated money in accordance with their wishes and aims. There can be no dispute that the applicant was, in the legal sense, in the position of a trustee.

[5] The accounts of the FPJ were audited annually. However, this method of donor protection proved hopelessly ineffective. It appears that the auditors reposed too much trust in the administrators of this fund, including the applicant. The ordinary checks and balances that would have ensured that the donor money reached its intended recipients were sorely lacking. Large amounts of these donor funds found their way into the pockets of corrupt employees of the various trusts of which the applicant was a trustee.

[6] In 1988 the Children's Trust was set up for the benefit of child victims of apartheid at the instance of the American musician, Mr Paul Simon ("Simon"), who donated a large sum of money towards this objective. At the outset there were three trustees responsible for administering this trust, namely the applicant, Mrs Mary Burton and Archbishop Desmond Tutu.

[7] In 1990 the ties between the FPJ and the Mission Church were severed. Also in 1990 the applicant resigned as President of the WARC, the remaining

WARC account was closed, and another account, the Urban Discretionary Account ("UDA"), was opened. The applicant's lifestyle changed as well. He divorced his first wife, announced his intention to marry his present wife, paid off a number of her debts, and acquired a house, first in Vredehoek and later in the more affluent suburb of Constantia. The more relaxed political climate at that time is also relevant. As a result thereof a number of funders decided to support more specific developmental projects of the FPJ instead of giving general donations for its work. In 1994 the applicant was appointed Minister of Economic Affairs in the Western Cape Government and the activities of the FPJ practically ground to a halt.

[8] In 1998 the applicant appeared before the court *a quo* on thirty two charges of fraud and theft relating to the funds under his administration. The State contended that these donor funds, referred to above, were donated mainly by foreign donors to various organisations with which the applicant was associated. It was further alleged that the applicant, through a web of theft and fraud, had

misappropriated these funds. The gist of the applicant's defence in respect of the counts on which he was convicted was that he was entitled in his own right to the funds alleged to have been stolen or that he had used them for the purposes for which they had been donated.

[9] At the close of the State's case the applicant was discharged in respect of five of the thirty two charges. At the end of the case the trial court, Foxcroft J and assessors, found the applicant guilty of three counts of theft and one count of fraud. The applicant was sentenced to a period of two years imprisonment in respect of each count. However, the sentences in respect of the convictions on count 4 (fraud) and count 5 (theft) were to run concurrently, with the result that the applicant was to serve a total of six years imprisonment. On being refused leave to appeal by the trial judge, the applicant petitioned the Chief Justice for leave to appeal to this Court against his convictions only.

[10] The judges who considered the application for leave to appeal to this Court

referred the application to a full Court for consideration and hearing of argument, by virtue of the provisions of s 21 (3) (c) (ii) of the Supreme Court Act 59 of 1959. Because the success or otherwise of the application for leave to appeal depends, *inter alia*, on the prospects of eventual success of the appeal itself, the argument on the application would, to a large extent, have to address the merits of the appeal. For this reason the parties were requested to argue the appeal as though the application for leave had been granted.

[11] It is trite that different considerations come into play when considering an application for leave to appeal and adjudicating the appeal itself. In the former instance, the applicant must convince the court of appeal that he or she has a reasonable prospect of success on appeal. In the latter, the court of appeal has to decide whether the appellant's guilt has been established beyond reasonable doubt. Success in an application does not necessarily lead to success in the appeal.

[12] In the present case, and after full argument on behalf of the applicant and the respondent has been heard, it cannot be said that the applicant has not shown reasonable prospects of success in the appeal. The issues that were argued are involved and much can be said for the arguments advanced on behalf of the applicant. In the circumstances we consider it to be appropriate to grant leave to the applicant to proceed with the appeal against the convictions on all the contested counts. That opens the door to a full consideration of the merits of the appeal itself. The applicant will henceforth be referred to as "the appellant".

[13] It is apposite at this stage to state, once again, the ambit of the concept of reasonable doubt and of the approach of this Court in applying that concept. It was elucidated in *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182 b - f, by Eksteen JA as follows:

> "Die bewyslas wat in 'n strafsaak op die Staat rus is om die skuld van die aangeklaagde bo redelike twyfel te bewys - nie bo elke sweempie

van twyfel nie. In *Miller v Minister of Pensions* [1947] 2 All ER 372 op 373 H - stel Denning R (soos hy toe was) dit soos volg:

> 'It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt.'

Ons reg vereis insgelyks nie dat 'n hof slegs op absolute sekerheid sal handel nie, maar wel op geregverdigde en redelike oortuigings - niks meer en niks minder nie (*S v Reddy and Others* 1996 (2) SASV 1 (A) op 9 *d* - *e*). Voorts, wanneer 'n hof met omstandigheidsgetuienis werk, soos in die onderhawige geval, moet die hof nie elke brokkie getuienis afsonderlik betrag om te besluit hoeveel gewig daaraan geheg moet word nie. Dit is die kumulatiewe indruk wat al die brokkies tesame het wat oorweeg moet word om te besluit of die aangeklaagde se skuld bo redelike twyfel bewys is *(R v De Villiers* 1944 AD 493 op 508 - 9)."

[14] Counts 4 and 5 arise from Simon's donation to the Children's Trust, mentioned in **[6]**. The third conviction, on count 9, concerns the theft of money

donated by SIDA for a project called the "audio-visual project". The fourth conviction, on count 31, relates to funds which the appellant is alleged to have stolen from the FPJ. We deal with each conviction in turn.

Counts 4 and 5

[15] It is common cause that Simon donated a sum of money for the setting up of the Children's Trust of which the appellant was a trustee and effectively the controller. However, the actual amount donated to the Trust is in dispute.

[16] The following facts are not in issue. An amount of R682 161,21 was paid on behalf of Simon via a credit transfer from the Presbyterian Church in the USA into the WARC account. The relevant document evidencing receipt of payment indicated that it was a "religious or charitable transfer". That document was signed by Ms T Sacco ("Sacco") who worked for the appellant at the time. Only R423 000 of this money was later transferred from the WARC account to the Children's Trust. The balance of R259 161,21 remained in the WARC account.

[17] The court *a quo* found that the appellant had committed fraud by representing to the other trustees that only R423 000 was available to the Trust when in fact R682 261,21 was available. The appellant was accordingly convicted on count 4. Furthermore, the court held that the appellant stole the difference of R259 161,21. This led to his conviction on count 5.

[18] The appellant's defence to both charges, in the court *a quo* and in this Court, was that *he*, and not the Children's Trust, was entitled to receive the sum of R259 161,21. Mr Maritz, counsel for the appellant, put it to Mrs Dawn King ("King"), a State witness, that only R423 000 was intended for the Children's Trust. The balance, he suggested, comprised a donation to the appellant for his political work as well as a reimbursement to him for expenses incurred "in coming to Paul Simon's rescue". The crucial question, therefore, is : Did Simon donate only R423 000 to the Children's Trust, or the full amount of R682 161,21? Neither Simon nor the appellant testified. Mr Maritz contended that on the evidence before

the court the State had not discharged the burden of proving the guilt of the appellant on charges 4 and 5. We proceed to consider this issue.

[19] King was the main State witness who testified in relation to this charge. She is a forensic accountant with some years of practical experience. Her expertise was not challenged.

[20] KPMG, the firm of accountants for which King worked, was appointed by the Office for Serious Economic Offences ("OSEO") with the mandate to analyse the bank accounts, statements, books, agreements, correspondence and other documents and contents of files and reports of and relating to the FPJ, the Children's Trust, the officials, staff members and certain associates of the Trust and of the appellant. The object was to determine the manner in which grants and donations were received from the international and national donors, how these grants were applied and utilised, and whether this was in accordance with the agreements with the donors. Under her leadership numerous books, accounts and

items of correspondence were collected from the offices of the various above-named organisations, and she conducted formal interviews with the appellant, the auditors of FPJ and various witnesses. Subsequent to her report to OSEO, she also completed a further report for the SA Police Services in order to assist the Attorney-General with his investigation. Her reports, bolstered by numerous accounts, documents, letters, flow-charts etc., were put before the court *a quo* and she was extensively cross-examined by Mr Maritz. Her evidence was accepted *in toto* by the court *a quo*, who described her as an impressive witness.

[21] The following uncontested facts emerge from her evidence :

(a) Simon paid an amount of US $350 000 to the Presbyterian Church of the USA to be remitted to the account of the WARC in Cape Town.

(b) On 21 January 1988 the equivalent rand value of US $350 000 was R682 261,21. On that day this amount was paid into the WARC account. The relevant Treasury form completed by Sacco indicates that the money was received

for "charitable and religious purposes".

(c) The first meeting of, *inter alia*, the prospective trustees of the Children's Trust took place in Cape Town on 23 May 1988. Present at this meeting were the appellant, Mrs Mary Burton, Archbishop Desmond Tutu, attorney E Moosa and others. It was decided to establish the Children's Trust with the first-mentioned three persons as trustees. The minutes of the meeting, prepared at a later stage by Mrs Burton, and the *viva voce* evidence, are to the effect that the appellant told them that approximately R423 000 was available for the Trust.

(d) A Trust Deed was drawn and notarially executed by attorney Moosa on 2 June 1988. It does not mention the amount of the donation, but the preamble to the Trust Deed is arguably of some significance.

(e) On 29 August 1988 the amount of R423 000 was transferred from the WARC account to the Children's Trust after an account had been opened for it on 25 July 1988. The balance of R259 161,21 remained in the WARC account. The Children's Trust never received, or derived any income

or benefit from, the amount of R259 161,21.

[22] There are only two matters with regard to the convictions on counts 4 and 5 that merit serious attention. The first is the preamble to the Trust Deed, and the second a letter allegedly written by the appellant to the representative of Simon, dated 30 March 1988.

[23] The court *a quo* took as its point of departure the Trust Deed, in particular, the preamble to the Deed which reads as follows :

> "WHEREAS PAUL SIMON, a musician of Graceland,
> has undertaken a tour to raise funds for children who are victims of Apartheid.
> AND WHEREAS he has approached DR ALLAN AUBREY BOESAK to set up a Trust to administer the funds for the purposes of carrying out the objects hereinafter more fully set out.
> AND WHEREAS DR ALLAN AUBREY BOESAK together with MARIA MACDIARMID BURTON and BISHOP DESMOND MPILO TUTU have undertaken to initiate the Trust to realise the

hereinafter mentioned objects.

NOW THEREFORE . . . "

The objects of the Trust were "to protect, safeguard and advance the interests of children who are victims of Apartheid". On its reading of this document the court *a quo* came to the conclusion that the entire amount of money (R682 281,21) was intended to be donated to the Trust:

> "The clear impression created by that Deed is that all the money, or certainly the vast majority of the funds raised by Paul Simon and resulting from a tour, was for children and not for the [appellant's] own political purposes which might or might not have included the interests of children."

[24] Mr Maritz contended that the court's interpretation of the Deed and its preamble was erroneous. He also questioned the admissibility of the preamble, arguing that it amounts to what the appellant "might have said to someone not called as a witness". There is no substance in the latter contention. On a proper

conspectus of the relevant evidence there can be no doubt that the wording of the preamble can be traced back to the appellant and that he can be held accountable for it.

[25] While the wording of the preamble may lend some support to the court *a quo*'s construction thereof, it is not necessary to determine its precise meaning and effect. This is because, in our view, the second matter referred to ("the letter"), for reasons that follow, effectively disposes of the appeal in relation to counts 4 and 5.

[26] The letter appears in the record as follows :

"**The Foundation For Peace and Justice**
An Extended Ministry of the Bellville N.G. Sending Kerk

30 Maart 1988
Mr. Ian E Hoblyn
PEREGRINE, INC
Suite 500
1619 Broadway
NEW YORK, NEW YORK, 10019

Dear Mr. Hoblyn

Thank you very much for your letter. I apologize for writing only now, but I was under the impression that an acknowledgement of receipt to the Presbyterian Church would be enough since that would be communicated to whoever the cheque was received from .

It gives me great joy to report that we have indeed received the money, which was deposited in the account of the Children's Trust. The Trust consists of Archbishop Desmond Tutu, Mrs. Mary Burton of the Black Sash, one representative each of the Free the Children Alliance and the National Education Crisis Committee. The present crisis has of course caused deep concern and has hampered us in our work, but the Trust has been formed and we are determined to go for it, whatever action the S.A. Government may take.

Thank you once again and we will keep in touch on developments. Please give my warmest regards to Paul Simon.

Sincerely
[SIGNED]
DR ALLAN BOESAK

AAB/sv"

[27] The letter came into the possession of King in the course of her investigations and was placed before the court *a quo* as an exhibit. During

evidence in chief, King read it into the record and stated that it was addressed to Mr Ian E Hoblyn ("Hoblyn"), the personal assistant to Simon. She also confirmed that the letter is dated 30 March 1988. In fact it is dated in Afrikaans "30 Maart 1988" which is not surprising, seeing that the appellant is Afrikaans-speaking.

[28] The State, in this Court, relied heavily on this letter in order to establish the guilt of the appellant on counts 4 and 5. On the other hand, Mr Maritz raised three defences :

(i) the letter was not relied upon by the court *a quo* and cannot be relied upon now;

(ii) the authenticity of the letter has not been proved beyond reasonable doubt;

(iii) the interpretation of the letter does not assist the State.

[29] We shall deal with each of these in turn. The admissibility of the letter now under discussion was to some extent debated in the court *a quo*. In its judgment, the court *a quo* did not rely on this letter nor did it refer to it. There is a

handwritten note on the letter, probably made by Foxcroft J, which reads :

> "[D]efence says this letter has not been proved except handed in by Dawn King."

[30] This Court can only consider the judgment of the court *a quo* and not notes made by the judge on exhibits. Foxcroft J did not rule the letter inadmissible, and we are free to consider the issue on the evidence before us. The fact that the court *a quo* found it unnecessary to deal with the letter does not mean that the respondent is not permitted now to rely on it. The respondent is, without having lodged a cross-appeal, entitled to seek to convince a Court of Appeal to uphold the judgment on other or additional grounds in respect of which no definite order has been made against the respondent (see *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 278 A -D ; *Standard Bank of South Africa Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (A) at 749 H - 750 A; *Cirota and Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 188 A - B; *Sentrale Kunsmis*

Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk 1970 (3) SA 367 (A) at 395 F - H).

[31] The main defence of the appellant was that the authenticity of the letter of 30 March 1988 had not been proved beyond reasonable doubt. Mr Maritz did not put in issue that the letter was typed on the letterhead of the FPJ nor that it was sent to Simon's secretary. He limited his attack to the authenticity of the letter submitting that it had not been proved, beyond reasonable doubt, that the appellant had authorised, written or signed the letter.

[32] Let it be said immediately : there is no direct evidence that the signature on the letter is that of the appellant. No witness saw him signing the letter. But lack of proof that the appellant personally signed the letter is, of course, not the only relevant enquiry. The enquiry includes whether the appellant authorised the letter, or had given instructions for its typing and dispatch, or had knowledge of its contents, or had affirmed its contents by signing it. If any one of these factors

could be established beyond reasonable doubt, the State would have discharged the *onus.* The State's case rests on inference from circumstantial evidence. That evidence is set out in what follows.

[33] As mentioned, it is not in dispute that the letter was typed on the letterhead of the FPJ, of which the appellant was in *de facto* control, and that it was addressed to the private secretary of Simon. In respect of many other documents and cheques found by the investigation team headed by King, she testified that they bore "on the face of it", the signature of the appellant, whilst conceding, reasonably, that she is not a handwriting expert.

[34] Early in the examination-in-chief of King by Mr Gerber, counsel for the respondent, Mr Maritz objected to her evidence based on the numerous exhibits in the bundle of documents prepared by her, *e.g.* accounts, documents *etc.* He said the following:

"M'Lord, perhaps at this juncture I should just make our position

> clear, the witness has referred to some documents called'auditor's working papers' and no doubt she's going to refer to quite a number of other documents of a hearsay nature. We do not have any objection to this witness testifying about those documents but we do not want by our silence to be understood that we are admitting that such evidence will be admissible. No doubt the State will in due course produce witnesses to testify about this."

[35] The trial proceeded on this basis. Mr Gerber painstakingly proceeded to deal with each item and piece of evidence, until Foxcroft J indicated that a more practical approach should be followed and that King need only to confirm her report. Mr Maritz then intimated that "I would be quite happy if my learned friend would deal with it on the basis as suggested by your Lordship because we will certainly focus on those aspects in cross-examination that we dispute".

[36] Admittedly this remark by itself can be read to be limited *to amounts in dispute*, which was then the issue under discussion. However, Mr Maritz put the appellant's version on other aspects of the case, but never in respect of the

provenance or authenticity of the letter, on several occasions indicating that the appellant would testify.

[37] The trial proceeded on the basis that the alleged signature of the appellant on documents was "on the face of it" that of the appellant. Mr Maritz himself expressly dealt with the evidence on this basis, using the expression referred to above. Mr Maritz also, on occasions, unreservedly accepted that cheques on the face of which the appellant's signature appeared, were signed by the latter.

[38] A very significant exchange took place between Mr Maritz and King during her cross-examination, as appears from the record :

> "MR MARITZ : I want to deal with something else and in particular the Children's Trust. In your report, exhibit "C", to the Attorney-General you had a chapter dealing with the Children's Trust commencing at page 11, not so? ....
>
> KING : That's correct.
>
> MR MARITZ : And in this Children's Trust narrative of yours you state at the foot of page 13:

> ‘We are informed that these funds were intended for the Children’s Trust as agreed between Paul Simon and Boesak.’

. . . .

MR MARITZ: This is your narrative where it commences and it’s under the heading of ‘Children’s Trust’, which we find at page 11. And then you give your summary of events, page 11 and 12, and then you commence your narrative at the foot of page 13.

KING : That’s correct.

MR MARITZ : Now the last sentence, the last line at page 13 you make the statement :

> ‘We are informed that these funds ...’

- that’s the total sum of 682 000 -

> ‘ ... were intended for the Children’s Trust
>
> as agreed between Paul Simon and Boesak’

KING : That’s correct.

...

MR MARITZ: Now again that is a statement that you now base on some information that you have?

KING : That’s correct.

MR MARITZ : *Can you tell his Lordship what the source of that*

information is?

KING : *If you'd bear with me a moment? I'm trying to identify the letter written by Dr Boesak to* ... (intervention)

MR MARITZ : *That was, I think, next* [annexed] *to your WARC report where receipt was acknowledged of monies for the Children's Trust. Is that the letter you're referring to?*

KING : *Yes, that's correct.*

MR MARITZ : And is it only based on that?

KING : On that information."

(Our emphasis)

Mr Maritz then proceeded to deal with another aspect of the transaction.

[39] Finally, Mr Maritz put the following to King.

"MR MARITZ : See Dr Boesak will say Mrs King that that donation of R682 000, from that total figure his expenses for involving himself and coming to the rescue of Paul Simon had to be deducted, all his travel expenses and other expenses that he had in connection with that whole mission of his ...

KING : Yes ...

MR MARITZ : And the resulting portion that he kept or that was kept back in the WARC and not transferred to the Children's Trust

. . .

KING : Yes?

MR MARITZ : Reflected a portion that according to Paul Simon [was to be] kept by Dr Boesak personally for his own political work together with the expenses.

KING : That is unknown to me."

[40] Mr Maritz further suggested to King that the appellant's version was corroborated by the entries in the books of account of WARC where a part of the money was allocated to the Children's Trust and a part to the WARC. This is, of course, of no value and a *petitio principii*, amounting to self-corroboration. In fact, if the State's version is correct, the unlawful appropriation took place precisely by the division of the Simon donation as reflected in the WARC books of account.

[41] At all relevant times, Simon was willing to testify on behalf of the State. But

he repeatedly intimated that due to heavy professional commitments, he was unable to come to South Africa in order to testify. He was agreeable to testifying in New York. The State first applied for his testimony to be heard on closed-circuit television after having received a statement from Simon which read as follows :

> "I reside in the United States in New York City. Due to the demands of my professional and personal life I am unable to travel the long distance to South Africa to testify in this trial. I would very much like to provide such testimony. However I am happy to do so under oath and subject to cross-examination through the mechanism of live video or live telephonic deposition."

The appellant opposed this application and it was turned down by Foxcroft J. The State then applied for the appointment of a Commission in terms of s 171 (1) (a) of the Criminal Procedure Act 51 of 1977 after having received a message from Simon's attorneys, reading as follows :

> "Mr Simon would be agreeable to providing testimony in New York at a mutually agreeable date and time if you are able to arrange for the appropriate commission."

This application was likewise refused by Foxcroft J. In the result Simon did not testify at the trial.

[42] The question now is : on the evidence and the way in which the trial proceeded, has the State succeeded in proving, beyond reasonable doubt, that the letter under discussion emanated from the appellant? In our view the answer should be *yes*. We say this for the reasons that follow.

[43] In cross-examination of King, she refers to the letter under discussion as "the letter written by Dr Boesak to ..." and Mr Maritz himself then identifies the letter as the one now under discussion. He never challenged King by putting to her that the letter was not written by the appellant. What is more, his subsequent silence on the subject can reasonably be seen as an admission or acquiescence, having regard to the cross-examination quoted above.

[44] It was never put in issue that the letter was typed on a FPJ letterhead, emanated from the appellant's office and was sent to Hoblyn, Simon's private

secretary. Nor was the contents of the letter ever disputed. The letter itself clearly relates to the Simon donation. In fact it acknowledges receipt of the cheque via the Presbyterian Church and sends greetings to Simon. Who else would act in this way but the appellant, who negotiated the donation with Simon personally, according to his own counsel?

[45] It was never disputed that the appellant wrote or signed the letter. In respect of many other documents on which the appellant's signature purportedly appeared, it was either accepted "on the face of it" that it was that of the appellant, or it was conceded by Mr Maritz to be so. There was, therefore, at least *prima facie* evidence of the authenticity of the letter. Not only was it never put to King that the letter was not authentic, but Mr Maritz at no time in the court *a quo* disputed the letter's authenticity.

[46] It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt if a *prima facie* case has been established and the

accused fails to gainsay it, not necessarily by his own evidence, but by any cogent evidence. We use the expression "*prima facie* evidence" here in the sense in which it was used by this Court in *Ex parte The Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 where Stratford JA said at 478 :

> "'*Prima facie*' evidence in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his *onus*."

[47] Of course, a *prima facie* inference does not necessarily mean that if no rebuttal is forthcoming, the *onus* will have been satisfied. But one of the main and acknowledged instances where it can be said that a *prima facie* case becomes conclusive in the absence of rebuttal, is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation. In the present case the only person who could have come forward to deny the *prima facie* evidence that he had authorised, written or signed

the letter, is the appellant. His failure to do so can legitimately be taken into account.

[48] In our view, in the circumstances, it was not incumbent upon the State to have produced evidence that no one else authorised, wrote or signed the letter. We have already referred to the judgment of this Court in *S v Ntsele*, *supra*. The State is not required to plug every loophole, counter every speculative argument and parry every defence which can be conceived by imaginative counsel without a scrap of evidence to substantiate it. In the present case there is the physical evidence of the letter itself; there is at least "on the face of it" the signature of the appellant. There is no evidence to suggest that the letter was not authorised, written or signed by the appellant.

[49] Should the State have called a handwriting expert to prove the appellant's signature on the letter? In our view such a suggestion is untenable in the context of the present case. It must be remembered that in the course of the trial a number

of documents, bearing "on the face of it" the signature of the appellant, were handed in as exhibits. Although initially challenged as hearsay, the trial proceeded on the basis that the appellant's signature would be accepted "on the face of it". It was put to King that the appellant would testify in his own defence. The authenticity of the letter now under discussion was never explicitly or implicitly challenged, even though it was the subject of discussion in the course of cross-examination. In the absence of a clear denial of the authenticity of the letter it could not have been expected, in all fairness, from the State to produce the evidence of a handwriting expert.

[50] In the context of the dispute now under discussion, *i.e.* proof of the authenticity of the letter of 30 March 1988, but also in the wider context of the outcome of this appeal and the conduct of the defence in the trial court, it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating

his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush.

[51] In this respect, we are in full agreement with the comments made by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 36 J - 37 E.

> "[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* [(1893) 6 R 67 (HL)] and has been adopted and

consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. [See the speech of Lord Herschell in *Browne v Dunn*, above] . . .

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed... particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be challenged but also *how* it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."

[52] The rule stated by the Constitutional Court applies also to the challenging of all evidence adduced by the counter-party, whether on the basis of hearsay, inadmissibility or lack of proof of authenticity, accuracy, etc.

[53] Although the rule is, as was pointed out by the Constitutional Court (at 37 F - 38 B; paragraphs [64] to [65]), not an inflexible one and admits of exceptions,

none of the exceptions apply in the present case. The objection by Mr Maritz during the early stages of the examination-in-chief of King was certainly not sufficient, especially in the light of the manner in which the trial proceeded, as sketched above. The vague reference to hearsay evidence raised in the objection was, in the first place, never raised in the context of the letter under discussion, despite the evidence during cross-examination of King that it was written by the appellant. Counsel for the appellant, who surely must have been alive to the serious implications of the letter, should there and then have raised the matter of the lack of proof of the authenticity of the letter (and should in any event have put his client's case in respect of the letter - see the remarks of the Constitutional Court quoted above). Furthermore, the trial proceeded on the basis of the acceptance, in all other instances, that " on the face of it" the alleged signature of the appellant on documents was his. To now single out one document as not *prima facie* proved is, to say the least, untenable.

[54] In our view, therefore, the State has proved the admissibility and authenticity of the letter under discussion beyond reasonable doubt. In coming to this conclusion we have relied solely on the facts as they emerged during the trial, and the well-known rules of our common law relating to the establishment of *prima facie* proof, the absence of a rebuttal thereof and the burden of proof in a criminal case.

[55] It may be that the authenticity of the signature itself was not a matter to which King herself testified, nor in relation to which the trial judge made a finding. What remains is the fact that there is a document which purported to be part of correspondence between the appellant and the recipient which required an explanation from the appellant, more particularly because of his control of the FPJ and its stationery and the extraneous evidence that he was in communication with the recipient and the only person concerned with the recipient. It would be like a typed (but unsigned) note found in exactly the same circumstances: if the only

reasonable explanation on the face of it is that the appellant is the author, then its contents would be admissible against him. And if his explanation in relation to the document is that he was not the only person concerned with the recipient or that it is not authentic, or the like, then he must testify to it in his defence.

[56] There is, however, further and perhaps more conclusive proof of the authenticity of the letter. It is the following. In the record of the case before this Court, all the exhibits were retyped. We did not have the original or a photo-copy of the letter of 30 March 1988 before us. We subsequently called for the original or a photo-copy thereof, which was received by the Registrar. We have compared the signature on the letter with that of the appellant at the end of his affidavit supporting the application for leave to appeal. The signatures are identical, or at least apparently so. The comparison at least establishes a *prima facie* inference that the letter was written and signed by the appellant. In the absence of rebuttal, it becomes, under the circumstances of the case, conclusive proof.

[57] That the court itself is allowed to compare the handwriting of the appellant on the letter with other genuine specimens of his signature, is acknowledged in our law, as in several other legal systems. This was laid down by the full bench of the Orange Free State in *Rex v Kruger* 1941 OPD 33 at 38, after an exhaustive review of the comparable position in England. (See also s 228 of the Criminal Procedure Act 51 of 1977.)

[58] The rule seems to be correct in principle. Even in cases where expert witnesses testify, it is the judge who bears the responsibility of making a final judgment (*Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 370 E - H; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616 D - 617 C. See also Hoffmann and Zeffertt, *The South African Law of Evidence*, 4th ed., 104 - 106.) The position in our law is, in essential respects, similar to that obtaining in the United States (Wigmore, *On Evidence*, paras 2129 *et seq*); Australia (*Adami v The*

Queen (1959) 108 CLR 605 (High Court of Australia) at 616 - 7; Canada (*R v Abdi* (1997) 34 OR (3d) 499 (CA) and England (*R v Rickard* (1918) 13 Cr App R 140; Cross and Tapper on *Evidence*, 8th ed, p 761, and Phipson, *Evidence*, 14th ed paras 17 - 15 and 17 - 16.) The rule under discussion should be applied with caution. But, taken in conjunction with all the other factors indicative of the authenticity of the letter discussed above, this Court is entitled to conclude, *prima facie*, that it was written and signed by the appellant. In the absence of evidence to the contrary, and having regard to all the other *indicia* mentioned above, we are satisfied that the authenticity of the letter has been proved beyond reasonable doubt.

[59] It having been found that the letter has been proved beyond reasonable doubt to be authentic, it remains to be decided whether it supports the case of the State. Can one deduce or infer beyond reasonable doubt that the letter means (as contended by the State) that Simon had intended the full sum of R682 281,21 to

benefit the children of South Africa or only part of that sum (as contended for by the defence)?

[60] It was not argued by Mr Maritz that a proper interpretation of the letter favours the appellant. He apparently only objects to the authenticity of the letter, with which we have dealt above. In this Court he was specifically asked what his objection to the letter was, and he limited it to its authenticity, in fact to absence of proof of the signature on it. Be that as it may, it is necessary, in fairness to the appellant, to subject the letter to close scrutiny to arrive at the correct interpretation thereof. In this respect the letter must be placed in its proper factual context and background and a fair and objective interpretation should be given to it.

[61] The letter under discussion is obviously a reply to an enquiry by or on behalf of Simon as to the receipt by the appellant of the donation. That the appellant had failed to acknowledge to Simon receipt of the cheque which came to him *via* the Presbyterian Church is manifest. The letter thus contains a belated explanation for

what had been done with the donation.

[62] Mr Maritz, when he was requested to deal with the interpretation of the letter, submitted that one cannot interpret it without having had sight of Hoblyn's prior enquiry. This is not so, because one can readily infer the nature of the enquiry.

[63] First : The enquiry could only have been relevant and an aid to the interpretation of the letter under discussion if Hoblyn's letter had

(a) stated, whether expressly or by necessary implication, that the total amount of the donation had been intended for the children of South Africa, or

(b) stated that part of the amount had been intended for the children and part for the appellant.

It was not shown in what other respect Hoblyn's letter could have been relevant, and one cannot conceive of any other statement that would have been relevant.

[64] If Hoblyn's enquiry had mentioned situation (a), it would have been fatal to the appellant's case: one would then have expected a letter from the appellant

precisely corresponding to the one of 30 March 1988 - acknowledging receipt of the “cheque” or “the money” which had been paid into the Children’s Trust.

[65] If it had, on the other hand, mentioned situation (b), the appellant would surely not have written the letter now under scrutiny in its present form. One would have expected him to have explained that he had allocated a certain sum to the Children’s Trust and a certain sum to himself. He would have no doubt explained what he had done with the money he had allocated to himself. On his own version, as put to King, even the portion to which he was entitled was to be used for certain purposes. It would have been expected of him to say how he had used this money in view of the enquiry. Indeed, in the letter under discussion he gives an explanation of what he had done with the “money”, but makes no reference to a portion being for his own benefit. It is inconceivable that, had there been a partial donation or a reimbursement to himself, he would have explained what he had done with the portion intended for the Children’s Trust but remained

silent as to the balance; nor would he have remained silent in respect of the respective amounts he had allocated to the Children's Fund and to himself. The probabilities are, therefore, overwhelming that situation (a) was contemplated in the letter of enquiry, *i.e.* one donation to one donee of the full sum.

[66] These probabilities are also borne out by the common sense inference that had Hoblyn's letter of enquiry contained anything advancing the appellant's version, it would have been put before the court *a quo* by the defence. It is inconceivable that counsel would not have been alive to the implications of the letter.

[67] We proceed to consider the interpretation of the letter of 30 March 1988. On a fair reading of the letter, the following emerges :

(a) One cheque only was received from the Presbyterian Church;

(b) "We have received the money". . . The "we" cannot be interpreted as a royal "we" intended to refer to the appellant

personally, because in paragraph 1 and the last paragraph the writer clearly uses "I" (twice) and "my" when referring to himself. The word "we" can only refer to the FPJ. This interpretation is supported by the sentence referring to the present crisis which has "of course caused deep concern and has hampered us in our work ..."

(c) The FPJ account, we know, was not an account of the appellant personally but a trust account.

(d) "We have received the money, which was deposited in the account of the Children's Trust." This is the crucial sentence. The commonsense reading of it is that the *money* (one sum) which was received from the Presbyterian Church by cheque (one sum) was deposited in the account of the Children's Trust (one account). There is no way in which this letter, and in particular the sentence under discussion, can be read so as to even suggest that part of the donation was meant for the Children's Trust and part of it for the appellant personally. Especially where the portion claimed by the appellant is a very substantial sum, one would have expected the appellant, an intelligent and educated man, to thank the donor for the donation

both to the Children's Fund and to himself. Or if his case was, as was faintly suggested (but unsupported by evidence), that he would first calculate and establish his expenses and then transfer the balance of the donated sum to the Children's Trust, one would have expected him to assure the donor that he was still in the process of doing the allocation; or, if it had been completed, to have advised the donor of the amounts respectively allocated to the Children's Trust and to himself.

(e) The letter is, therefore, neither ambiguous nor vague nor capable of two reasonable interpretations. It simply is not a reasonable interpretation that the words of the letter were intended to refer to only a portion of the monies received from Simon via the Presbyterian Church. The letter unambiguously represents that all such monies had been deposited in the account of the Children's Trust.

[68] This conclusion is, of course, fatal to the appellant's version as put in cross-examination. We are satisfied that the State has proved beyond reasonable doubt that the amount of R682 281,21 was donated to the children of South Africa and

that the appellant unlawfully appropriated R259 161,21.

[69] It was never contended by Mr Maritz that if the misappropriation had been proved, the appellant should be exonerated because the necessary criminal intent was not proved. Nor could such an argument reasonably have been advanced. There is no evidence on record, or even a suggestion that the said amount was taken mistakenly or in the genuine belief that the appellant was entitled to it.

[70] It will be remembered that the appellant's letter acknowledges receipt of the money, " ...which was deposited in the account of the Children's Trust. The Trust consists of Archbishop Desmond Tutu, Mrs Mary Burton of the Black Sash, one representative each of the Free the Children Alliance and the National Education Crisis Committee." These statements were all blatantly untrue. At the time the letter was written, the Children's Trust had not been formed. The money (whatever the amount) had not been deposited into its account, because there was no account. No trustees had as yet been appointed. From these untruths a strong

inference may be drawn that the appellant sought deliberately to mislead the donor, supporting an inference of criminal intent in respect of counts 4 and 5.

[71] Finally, it was also argued by Mr Maritz that the convictions of the appellant on counts 4 and 5 amount to a duplication, because they depend on the same factual finding, *i.e.* that the full amount of R682 281, 21 was intended for the Children's Trust. The argument cannot be upheld. Quite different *intentions* are required for fraud and theft. It would have been correct to convict the appellant on one charge only, *i.e.* either fraud or theft, if only one criminal intent had been proved. *In casu*, both the intention to defraud and the intention to commit theft were proved.

[72] In the result, the appeal against the convictions on counts 4 and 5 must fail.

Count 9

[73] This count, together with count 8 (on which the appellant was acquitted), related to a grant of R762 521,88 by SIDA to the FPJ for an audio-visual project.

What the State set out to prove, in a nutshell, was that the appellant applied to SIDA for funds; that he did so on the pretext that the money was needed to produce video and audio cassettes for the purposes of voter education; that he had no intention of producing such cassettes; and that he well-knew that the funds he was attempting to procure would be used to set up a permanent studio for his wife for use as a radio station and a television studio. Count 8 was one of fraud arising from the alleged false representations intentionally made by the appellant; count 9 related to the alleged theft of the amount granted by SIDA pursuant thereto. The essence of count 9 was that the funds were not used for the purpose for which they were granted.

[74] The money in question was contributed in terms of an agreement entered into between SIDA and the FPJ on 21 September 1993 ("the agreement"). The agreement was described as being one in respect of an "audio-visual project on political education for participation in democracy". It provided, *inter alia*, that

"the contribution shall only be used for the agreed project". The term "agreed project" was not defined, but was to be in accordance with "the plan of action presented with the application". The agreement provided further that "[s]ignificant changes or problems which arise when putting the plans into effect shall be discussed with SIDA". Provision was also made for financial records being kept, and for reports to be made, as well as for the refund of unused contributions should the project be discontinued or SIDA withdraw its support.

[75] On 22 June 1993 the appellant had written to Ms Lena Johansson who was attached to the Swedish Embassy in Pretoria. The letter, which was destined to reach SIDA, followed upon an earlier discussion he had had with her. Accompanying the letter was a ten-page "proposal for an audio-visual project" with an estimated budget of R746 000. The project was said to be aimed at "educating our people for participating responsibly in building democracy in South Africa after the elections". It is specifically recorded in the letter:

> "You will notice that we have budgeted a substantial amount for capital outlay in terms of equipment etc. This is necessary because we do not wish to be dependent on the equipment of the SABC or on the availability of those of our friends who work for other television companies, but who will help us only as they can."

The budget also provided, *inter alia*, for the cost of renting premises, professional fees and related items. Thus from the outset substantial expenditure was anticipated.

[76] On 28 June 1993 the appellant addressed a letter to Mr Carl Tham of SIDA. Reference is made to the FPJ having begun to look for premises to house the proposed project and Mr Tham is asked: "Are you in a position to give us any indication at all as to when we might be able to seriously begin to work on our infrastructure?"

[77] On 17 August 1993 a further letter was written to Ms Johansson on behalf of the FPJ enquiring about the progress of the proposal regarding the audio-visual project. In the letter it is stated:

> "We are in a position to locate adequate premises and would very much appreciate your soonest response on this. Please note that the budget attached to the proposal excludes the premises costs of R350 000."

(It is common cause that this letter never reached SIDA; the appellant, however, had no means of knowing that SIDA was unaware of its contents.)

[78] On 26 August 1993 Mr Johan Brisman of SIDA ("Brisman") wrote to the appellant in connection with the proposed project requesting certain additional information. Mention was also made of the fact that "[t]he proposed budget only seems to cater for the production of videos". The appellant responded by letter dated 1 September 1993. He pointed out that the proposed project went "beyond voter education". He stressed the need for funding. He went on to point out that "since the proposal was first made there has naturally been a rise in prices of technical equipment and other items which is now not covered by the budget"; that professional fees "now look not as feasible as [they were] a year ago"; that the

estimated amount involved (R310 000) "is clearly far more than was originally estimated"; and that an audio-unit (not previously budgeted for) would cost an estimated R36 900,00. What emerges from the letter is that the successful implementation of the envisaged project was likely to cost substantially more than the original budget estimate.

[79] On 2 September 1993 SIDA decided to grant FPJ "a contribution of not more than 1 800 000 SEK [which translated into R762 521,88] for financing an audio-visual project [for] democracy education". The decision was based on a memorandum which had been prepared by Mr Lars-Olof Höök ("Höök"), which in turn was based on the original proposal and budget estimate submitted by the appellant under cover of his letter of 22 June 1993. No allowance was made for the further developments and increased estimates of expenditure reflected in the later correspondence. Because of time constraints no feasibility study was carried out by SIDA before making its decision, as would normally have been the case. It

must have been obvious at that stage to anyone who had thought about it that the money granted would not be enough to fund the envisaged project as contemplated in the contemporaneous correspondence. The money was deposited in the account of the FPJ on 16 October 1993.

[80] It is apparent from the agreement and the documentation referred to that what the parties ultimately had in mind was the production of a series of video and audio cassettes ("the cassettes" or simply "cassettes") devoted to a number of themes pertaining to democracy generally ("the project"). However, before this could be achieved it was necessary to establish an audio-visual unit. This in turn involved, broadly speaking, securing suitable rented premises, carrying out structural modifications, the acquisition of what was needed in the way of furnishings and technical equipment, and the employment of professional staff. Only then could the cassettes be produced and distributed and, ultimately, an audio-visual library established. The available funds would obviously have to be spent in the necessary

sequence and order of priority.

[81] In November or December 1993 (he was not sure of the month or the precise date) Höök (according to his evidence) visited Cape Town where he had a general discussion with the appellant concerning the progress of the project. The appellant expressed the hope that "most of the videos would be produced before the elections" (i e before the end of April 1994). Höök got the impression that "the Foundation realised that this was a more complex matter than they envisaged initially". According to Höök the appellant told him that the FPJ was negotiating the purchase of a building but that Swedish money was not involved in that. However, when challenged in cross-examination he conceded that he might have been mistaken in that regard. It is common cause that the FPJ never purchased any building for the project.

[82] Work appears to have commenced to bring the project to fruition, and SIDA funds were expended for this purpose. However, no cassettes were produced

before the election, as originally contemplated. With the passage of time the idea evolved of an extended, more ambitious and more lasting audio-visual project, to be run along commercial lines, which was said to be intended to play a more significant role in democracy education ("the extended project"). To this extent there was a change in policy without reference to SIDA.

[83] Brisman testified that in April 1994 he received a report from a Swedish journalist, who had investigated the project, that it "was being developed in a different way than agreed upon". What was conveyed to him was that a television studio was being built for the appellant's wife, who had previously worked as a radio and television producer. Brisman visited the project site in Cape Town on 27 April 1994. He had raised the question of a visit with the appellant the previous night at a dinner they attended. He received a positive response as appears from the following passage in his evidence under cross-examination:

> " At the time when you visited the premises in April, I think you

mentioned you had a meeting with Dr Boesak first of all and then you indicated you wanted to visit the premises. - - - That's correct.

And it was agreed that you would go the next day.- - - Yes.

Did he in fact sound pleased that you wanted to see the premises? - - - He did.

In fact it appeared as if he welcomed it? - - - Yes, he did."

On his visit he found that substantial building renovations were in progress. He was briefed "on aspects of how they were actually going to modify the particular building, and . . . also . . . on certain aspects of how they were actually going to run the project".

[84] Following on his visit Brisman wrote a letter to the appellant on 2 May 1994 which reflects his reaction to what he had observed and been told. After stating that "it was interesting to learn about the plans and to see the remodelling work going on at the 'studio-to-be'" he went on to add:

"The project is being developed in a different way than we anticipated when we took our decision to grant funds. In saying this I recognize the fact that the project was not outlined in any great detail in the

documentation we had access to at the time. This makes it important for us to keep a close contact with you during the implementation.

The briefing Elna [Mrs Boesak] gave me shows that you are developing a studio and an organization that can serve the community for a long period of time to come. If I understood things correctly, the studio would be operated on commercial terms, but be made available on concessional terms to a wide spectrum of NGOs. This approach has of course implications both on the time frame for implementing the project and also on the budget for investment as well as for operations.

We agreed that you would provide us with a progress report and with an outline of the plans for the development of the project, including time schedules and a revised budget with a financing plan. We would like to use such an outline plan as a basis for a discussion with you and your colleagues about the planned development. It would therefore be appreciated if the plan also included information on the planned organization of the implementation and on how the project is planned to be run. Information on the arrangement with the new trust, its structure and relationships, financial and others, with the foundation and with the NGO community would also be useful."

[85] In a letter written to Brisman on 9 May 1994, probably before receipt of the letter referred to in [84], the appellant remarked:

> "I was very happy to see your positive response to our revised plans for the Education for Democracy Project. We are very excited about it and are confident it can be a great success.
>
> We will very soon now provide you with a progress report, development plans, projections and a revised budget."

[86] Subsequently Steenkamp, on behalf of Eleutheria Productions ("Eleutheria") in apparent association with the FPJ, sent a detailed "progress report" to Brisman. (The letter is dated 20 April 1994, but it is clear from its context that it must have been written later, probably 20 May 1994.) The letter records:

> "We are extremely excited about this project and feel confident that we will achieve our set goals. This is the beginning of the process towards true democracy in South Africa and we are immensely glad that SIDA is already part of this."

[87] The progress report, together with financial details and statements, is a comprehensive one spanning some 28 pages. It traces the history of the original project forming the subject of the agreement; records that the production of a series of twelve video and twelve audio cassettes was to start as soon as funding from

SIDA was obtained; refers to certain difficulties in the immediate implementation of the project; deals with a "shift in project policy" after FPJ "was advised to seriously reconsider the nature of the audio-visual project and to take into account short and long term factors related to expenses and cost efficiency"; lists certain decisions that were made, one of which was that "it would be far more cost effective and strategic to invest the allocated funds in setting up an audio-visual unit"; mentions the establishment of Eleutheria and notes that "despite the fact that this was a complete shift in the project policy, they were still committed to realise the new vision as far as possible within the allocated funds received from SIDA"; outlines certain "logistical problems" which had been experienced; and provides details of the proposed short-term project implementation, the long-term project development and related matters.

[88] In June 1994 Steenkamp and Mrs Boesak went to Sweden to discuss the progress report and to seek additional funding. In a subsequent letter to Steenkamp

on 16 June 1994 Brisman states, *inter alia*:

> "I am pleased to learn you are proceeding with the production of the video cassettes as planned and that the production work will have started by now . . . . . SIDA expects you to complete the production as envisaged in your original project proposal . . . .
>
> The modifications you have made are probably well justified and could result in a much better project. I am not qualified to have an opinion on this. It is however not possible for us to take any stand on your request for additional funds until we have had the proposed 'new' project evaluated by an independent expert. Unfortunately this will take some time."

[89] In a letter to Brisman dated 30 June 1994, the appellant summarises SIDA's concerns as follows:

> "I understand the problem to be twofold. First, the money made available for the Education for Democracy Project was, in a sense, extraordinary. Second, that most of the initial budget was then diverted from the direct <u>production</u> of the audio-video material to setting up a permanent infrastructure for the project."

After alluding to the need for additional funds the letter proceeds:

> "I know we are presenting you with unique problems. But this project

is unique and we have never tackled something like this before. We are learning as we go along.

It is important to point out that not a cent of SIDA money has been wasted. It has all been invested in the project. Our contract gives SIDA hands on control and I would like to think, full participation in the project. I plead with you to take all the circumstances into account and respond positively to our request."

[90] Brisman responded by fax on 7 July 1994. He noted that:

"The main problem from our side is that you without consultations have changed the concept of the project, resulting in a more than doubling of the external financial support required. You expect this to be covered by SIDA."

He later went on to say:

"You have informed us about the new design of the project on various occasions both with myself and with Carl Tham and Lars Olof Höök, but only after already having irreversibly changed the approach. We were never made aware of the financial implications until the visit to SIDA by Me Boesak and Mr. Steenkamp on June 7. The progress report which reached us on May 31 contains a 'revised budget', that turned out to be a totally new budget over and above the initial allocation.

> It is under these new and very different circumstances, that we find it necessary to undertake an appraisal of the feasibility of the new project approach, before a decision on possible additional SIDA funding can be reached."

In a reply dated 19 July 1994 the appellant remarked:

> "I understand perfectly the point you are making. Mea culpa!! That point is well taken."

[91] We do not consider it necessary to deal with the further correspondence that followed. Suffice it to say that the relationship between the FPJ and SIDA soured; there was one particularly acrimonious (and somewhat uncalled for) letter written by the appellant; no further funding was forthcoming from SIDA; the project ground to a halt for lack of funds; no videos or audio cassettes (except perhaps for one) were ever produced; eventually the whole project folded and very little, if anything, was salvaged financially.

[92] On 28 October 1994 SIDA issued a press release concerning its relationship with the FPJ. In the release it is stated, *inter alia*:

> "SIDA has one project directly contracted with the Foundation, which relates to the production of 12 series of video-programmes on democracy for training purposes. The funds have however instead been invested in production facilities. SIDA has received an audited statement confirming that SIDA's funds have been used to procure equipment, renovate a building to house the studio and paying some staff."

The final paragraph records:

> "SIDA has not accused the Foundation of Dr Allan Boesak of using aid funds for private purposes. We do not have any proof that anything of that nature has occurred."

[93] We have dealt with the relevant documentation that passed between SIDA, on the one hand, and the appellant and the FPJ, on the other, at some length. This is because the documentation provides a contemporaneous, accurate and reliable record of the relevant events as they unfolded.

[94] Having regard to the aforegoing the trial court, in relation to count 8, the fraud count on which the appellant was acquitted, concluded as follows:

> "Given the history of events which I have recounted, it is difficult to

> see how it could be stated with any confidence that the Accused [appellant] never had the intention of producing any cassettes. There is no evidence to suggest that the Accused deliberately defrauded *SIDA* from the start and that the request for funding for video cassettes was a ruse, intended to obtain funds for another purpose. All the indications are that the Accused did originally intend to produce the video cassettes and may well have had good grounds for believing that the money could be better spent by creating a more permanent facility."

[95] To complete the picture, and in the interests of fairness, the allegations made by the State that SIDA's funds were used to set up a radio station and television studio for the appellant's wife were effectively refuted by Mrs Bardill, a trustee of Eleutheria, who was a State witness. She was involved in the project on a full-time basis. Her evidence makes it clear that the facility that was being created (although it appears to have been fairly elaborate and expensive) was one for the production of videos and audio cassettes and not a radio station or television studio as alleged. Her evidence in this regard was supported by the State witness, Mr Brown, who was responsible for the installation of the sound equipment.

[96] The trial court's finding on count 9 that the appellant was guilty of theft was posited on the conclusion that the appellant had breached the agreement by using the money donated by SIDA for a purpose not intended by it. In this regard the court reasoned as follows:

> "The Foundation was not free to use the money donated by *SIDA* to develop a studio if that studio did not produce the contracted product. Again, the Accused [appellant] was in a position of trust in regard to these funds. They had to be used according to the agreement with *SIDA* and could not be used without consent for some different purpose. The breach of the trust relationship amounts, in our view, to theft. When one is placed in charge of funds for a particular purpose with a duty to account for the proper use of those funds as desired by the donor, and the funds are not applied to that purpose, then a *prima facie* case of theft is established.
>
> *See* in this regard HONORÉ's '*South African Law of Trusts*, 4th Ed, pp.79-80, and the authorities cited therein, in particular **REX v RORKE, 1915 AD 145 at 157**, where INNES, CJ said:
>
> '*These were trust monies; they were neither deposited with nor received by the appellant under circumstances which constituted him the mere private debtor of the beneficiaries. He could only deal with them properly and legally by handling them in the manner and*

devoting them to the purposes prescribed by law. And if he deliberately appropriated them to his own use ..... the jury were fully justified in concluding that such appropriation was fraudulent, and that he had committed the crime of theft. To take any other view of the matter would be in a large measure to remove the safeguards which surround the control of trust funds, and to introduce a laxity into the rules regulating the disposal of such funds which would be far-reaching and disastrous in its consequences.'

In the absence of any explanation from the Accused as to why this happened, the guilt of the Accused on this count has been established beyond reasonable doubt."

[97] Theft, in substance, consists of the unlawful and intentional appropriation of the property of another (*S v Visagie* 1991(1) SA 177 (A) at 181I). The intent to steal (*animus furandi*) is present where a person (1) intentionally effects an appropriation (2) intending to deprive the owner permanently of his property or control over his property, (3)knowing that the property is capable of being stolen, and (4) knowing that he is acting unlawfully in taking it (Milton: *South African Criminal Law and Procedure*: Vol II (3rd Ed): p 616).

[98] The trial court's finding that SIDA's money was not used for the purpose for which it was donated, and that this amounted to theft, must be read in conjunction with its finding that there was no evidence to suggest that the appellant had intended to defraud SIDA from the outset, and its acceptance that he originally intended to produce cassettes as contemplated by the agreement. It is a necessary corollary of these findings that some portion of the funds donated by SIDA would have had to be spent on the project as initially envisaged. After all, the renting of premises, the establishment of a studio of sorts and the acquisition of equipment were all part of the project for which the funds were made available. The evidence does not reveal how much was spent before it was decided to embark upon the extended project. On the trial court's own approach, what had been spent on the project up to then was legitimately spent in terms of the agreement. In relation to the unquantified amount so spent the appellant's conduct could not have amounted to theft.

[99] Furthermore, the principle enunciated in *R v Rorke* and the other authorities alluded to in the trial court's judgment does not find application in the present matter. It applies where a person entrusted with money for purpose A uses such money for purpose B, or appropriates it for his own use. This presupposes that purpose A and purpose B are unrelated, or that there does not exist a sufficient nexus between them. The underlying ratio is that by using the money donated for purpose A for purpose B, the donor is being denied his say over the manner in which the money is to be dealt with. In effect he is deprived of his control over the money. Where purpose A and purpose B are related, the matter becomes one of degree. If the relationship is sufficiently close that it might reasonably be concluded that the donor would have had no objection to the money being used for purpose B, the required appropriation for there to have been theft would not have been established.

[100] SIDA's complaint boiled down to the fact that the appellant failed to use the

money it had contributed for the production of cassettes as undertaken in terms of the agreement between it and the FPJ. The agreement of course did not specifically provide for the production of cassettes. It spoke about the "agreed project" in terms of "the plan of action presented with the application". As previously pointed out, it envisaged a number of steps that had to be taken before cassettes could be produced. Admittedly this was what was ultimately sought to be achieved.

[101] The extended project also encompassed as one of its ultimate aims the production of cassettes but via a different route - one which envisaged the more creative use of better and more permanent facilities with a view to an enhanced end-product, albeit at greater cost. To this extent there was a close relationship between the extended project and the "agreed project" in terms of the agreement. There was therefore never any suggestion of SIDA's funds being used for an extraneous purpose.

[102] Although SIDA was not consulted at the time when the extended project was

first conceived, and the practical and financial implications of the resulting policy shift was not discussed with it, there are reasonable grounds for believing that they would not have objected to their funds being used for that purpose provided further funding from SIDA was not required. Brisman made it clear in evidence that had the FPJ been able to procure other funds which would have enabled them ultimately to produce the anticipated cassettes, SIDA would have been perfectly happy. Significantly, when Brisman became aware of the extended project in April 1994 he did not protest, express displeasure or accuse the FPJ of having breached the agreement. Nor did he threaten to terminate the agreement, or demand the return of any unspent funds, as he would have been entitled to do had there been a breach. His attitude was rather one of understanding and encouragement despite disappointment because no cassettes had been produced. The question of the agreement having been breached was only raised very much later by SIDA and at a time when the funds it had contributed had probably been exhausted. While

SIDA was understandably aggrieved by the fact that the substantial amount it had contributed did not produce the results it anticipated there was always the danger of this happening. It is not suggested that the money was appropriated for a purpose unrelated to that for which it was ear-marked. In fact it is common cause that the money was only spent on the project and the extended project. For these reasons, the appellant should not have been convicted of theft.

[103] Finally, and in any event, the State failed to prove that the appellant had the requisite intention to steal - in particular, it failed to establish beyond reasonable doubt that the appellant appreciated (on the assumption that he appropriated SIDA's funds for a purpose other than was intended) that he was acting wrongfully when doing so.

[104] The facts speak for themselves. It is apparent from a review of the evidence and documentation outlined above that the appellant and FPJ at all times acted openly and above-board in relation to the development of the audio-visual project;

that there was never any attempt deliberately to mislead SIDA; that inspection was welcomed and encouraged; that apart from the stage when the FPJ initially conceived the extended project, SIDA was kept abreast of what was happening; and that there were open and frank exchanges with regard to the unfolding events culminating in the appellant's confession of "*mea culpa*". From this it can reasonably be inferred that the appellant subjectively believed that he was entitled to act as he did. Even if his belief was erroneous, it appears to have been *bona fide*. On a conspectus of these considerations the inference that the appellant stole SIDA's money is not the only reasonable one, notwithstanding the appellant's failure to testify.

[105] In the result the appellant's appeal against his conviction on count 9 must succeed.

Count 31

[106] Count 31 was formulated as a single general count of theft in which, in so far

as relevant, it was alleged, *inter alia*, that during the period from 2 November 1988 to 2 August 1994 he stole amounts totalling R1 121 947,69 which was the property, or under the lawful control, of the donors to the FPJ and/or its Trustees.

[107] In the further particulars to the indictment this general count was broken down into separate transactions substantially in excess of 100. These transactions were listed in annexures H and I to the report of King. In reality therefore, as Mr Maritz correctly submitted, each of these transactions constituted a separate charge of theft. As they all formed part of count 31 we shall in what follows refer to them as sub-charges forming part of that count.

[108] The trial court acquitted the appellant on most of these sub-charges but in respect of six of the transactions listed in annexures H and I the court found the appellant guilty of theft and he was accordingly convicted on count 31 in respect of amounts totalling R332 722. Four of these transactions were listed on annexure H. Each constituted a payment by cheque drawn on the bank account of the FPJ

or a credit transfer or withdrawal for the benefit of the appellant or his wife. Details of these transactions are as follows:

DATE	PAYEE OR TRANSFER BENEFICIARY	AMOUNT
5-4-1990	Western Cape Development Fund	R50 158
30-7-1990	Western Cape Development Fund	R20 000
26-9-1990	Lavender Hill Urban Project	R120 000
31-10-1990	Allied Building Society, Johannesburg	R14 000

[109] In the judgment of the trial court the two payments totalling R70 158 credited to the Western Cape Development ("WCD") account which was controlled by the Rev Jan de Waal ("De Waal"), one of the trustees of the FPJ, were taken together. These two amounts together with other funds introduced by the appellant were used to pay part of the purchase price of the house bought by him in Vredehoek. The amount of R120 000 which was paid to the Lavender Hill Urban Project,

another account run by De Waal, was also used in part to pay a further portion of the purchase price of the Vredehoek house. The payment of R14 000 to the Allied Building Society is recorded in the cash book of the FPJ as having been made on 30 October 1990 on behalf of the appellant's wife, the amount in question having been withdrawn from the FPJ's call account, according to the bank statement, on the following day.

[110] The appellant was found guilty in respect of two transactions listed on annexure I, each of which constituted a payment from the Urban Discretionary Account ("UDA account") (which the State contended was an account belonging to the FPJ) for the benefit of the appellant. Details of these transactions are as follows:

DATE	PAYEE	AMOUNT
13-2-1991	Steinhobel Estate	R100 000,00
27-3-1991	Sonnenberg, Hoffmann and Galombik	R18 564,50

[111] In the judgment of the court *a quo* these two payments, which totalled R118 564,50, were taken together. They both relate to the purchase by the appellant of the house at Constantia. The amount of R100 000 was paid as the deposit on the purchase price to a firm of estate agents, while the amount of R18 564,50, being the transfer costs, was paid to the conveyancing attorneys handling the transaction.

[112] According to the evidence, two bank accounts in the name of the WARC were operated by the appellant until they were closed, one in March 1989 and the other in July 1990. When these accounts were closed the balances therein were paid into the account of the FPJ. The amounts paid over into the FPJ's account were R61 642 and R9 609 respectively.

[113] In addition, amounts totalling R430 000 were invested by the appellant in what were described as Futura Assured Lump Sum Investments ("the Futura investments"). The amounts so invested, which, it is common cause, were paid

from the WARC accounts, were R130 000, paid in terms of an application dated 14 March 1989, R200 000 paid in terms of an application dated 28 March 1989, and R100 000, paid in terms of an application dated 23 May 1989. The first investment was redeemed early by the appellant and the proceeds, *viz* R150 143,10, were paid over by the Southern Life Association Limited, with which the investment had been placed, by means of a cheque dated 19 July 1990, drawn in favour of the WARC and deposited into the FPJ's call account and then transferred therefrom into its current account. The second and third investments were redeemed in November 1990. The proceeds of the two together amounted to R264 488,29, of which R214 488,29 was paid into the UDA account in two amounts, *viz* R170 905,39, which was the opening deposit on the account, made on 14 November 1990, and R43 582,90 made on 23 November 1990. (The balance of R50 000 was stolen by Steenkamp and Mrs Fester ("Fester") who were respectively the FPJ's treasurer and the secretary to the appellant.)

[114] Mr Maritz contended that the amounts in the WARC accounts as well as the Futura investments which, as has been seen, had been made from funds drawn from the WARC accounts, belonged to the appellant and that he was free to use them as he wished. It was contended further that he was accordingly entitled to cause the amount of R50 158 to be paid from the FPJ's account in April 1990 for his benefit as the amount of R61 642, which had been paid from one of the closed WARC accounts into the FPJ's account in March 1989, was available to him as a credit in that account It was also contended that the appellant was entitled to further credits of R9 609 (being the balance of the second closed WARC account which was paid into the FPJ's account in July 1990) and R150 143,10 (being the amount of the first redeemed Futura investment paid into the FPJ's account also in July 1990) with the result that he was further entitled to cause the amount of R20 000 (which was paid to the WCD on 30 July 1990) and the amount of R120 000 (which was paid to the Lavender Hill Urban Project on 26 September

1990) to be paid out for his benefit from the FPJ's account. A similar argument was advanced as regards the amount of R14 000 paid for the benefit of the appellant's wife on 31 October 1990. (In addition certain further credits to which it was contended the appellant was entitled were referred to in argument by Mr Maritz. These contentions will be considered in due course.)

[115] Mr Maritz also contended that the moneys in the UDA account, into which had been deposited the proceeds of the second and third Futura investments (less R50 000 stolen by Steenkamp and Fester), were the property of the appellant to be used as he wished, with the result that he was entitled to cause the two amounts totalling R118 564,50 to be paid therefrom in respect of his house at Constantia.

[116] These contentions were rejected by the trial court, which held that the monies in the WARC accounts, the proceeds of the Futura investments and the monies in the UDA account were not the property of the appellant to be used for his personal benefit. The trial court based its finding that the funds in the WARC accounts did

not belong to the appellant and did not become available to him for his private use after the closure of the WARC accounts, and the transfer of the funds therein into the account of the FPJ, mainly on the evidence of Sacco, who had worked as the secretary and administrative assistant of the WARC in Cape Town from 1982 until February 1988 when she left. She had also worked for the FPJ from the time it was set up in 1985 until she left. The trial court found her to be "a satisfactory and reliable witness".

[117] According to her evidence the monies that went into the WARC accounts during the period of which she had knowledge fell into three categories: (a) monies donated "for the struggle"; (b) monies for travel or travel reimbursement; and (c) monies representing the appellant's *honoraria*, being amounts paid to him in respect of sermons, lectures and addresses given abroad. With regard to the third category, i e, the appellant's *honoraria*, she stated that he did not pay in all the *honoraria* he received into the WARC account: sometimes he kept money received

as *honoraria* for himself, e g to buy himself a suit or to take his family on holiday, but according to her evidence most of the amounts received by him falling into this category were paid into the account. When asked for her comment if the appellant were to say that the money in the WARC account was his own money, she replied as follows:

> "Dit is nie waar nie, Edele. Dit kon nooit wees nie, want die geld was uitdruklik aan die stryd gegee wat Dr Boesak eintlik verteenwoordig. Dr Boesak het `n salaris. . ."

[118] Mr Maritz submitted that the trial court erred in relying on Sacco's evidence for its finding that the monies in the WARC accounts, when they were closed and the balances transferred to the account of the FPJ, did not belong to the appellant. He pointed out that her employment had terminated more than a year before the first of the WARC accounts was closed and that she was unable to state what the position was after she left in February 1988. He also drew attention to the fact that her involvement with and knowledge of the books could only really extend up to

the time when Fester started working for the FPJ and the WARC in 1986. It was further contended that her evidence relating to the monies received in the WARC account was extremely vague and reflected obvious confusion with the FPJ. In this regard reference was made to a number of passages in her evidence where there was confusion as to whether donations received were for the WARC or the FPJ. Mr Maritz also argued that the trial court's finding that she was a satisfactory and reliable witness was completely wrong. He submitted that a perusal of her evidence revealed numerous contradictions and demonstrated her unreliability and also what was described as "her unbridled animosity" towards the appellant.

[119] One aspect of her evidence which was strongly criticised was an answer she gave in reply to a question she was asked by Mr Gerber as to whether she knew if the appellant had ever used any of the FPJ's money for private trips during the time when she was there. The answer she gave was as follows:

"U Edele ek onthou net een geval wat dr Boesak sy gesin Disney

> World toe geneem het. Dit was uit die Foundation se rekening betaal."

The amount in question was, as she recalled it, about R45 000.

[120] The trial court dealt with the criticism directed at her evidence in this regard as follows:

> "Having regard to the fact that the Prosecutor made the same mistake as she did, it is not surprising that she repeated the word 'Foundation'. The fact of the matter is that the money was taken out of WARC funds for the purchase of those tickets. Mr *Maritz* suggested that this money was later reimbursed by the Coca Cola Foundation in the sum of R31 573,00. Even if that is so - there is no direct evidence to that effect and no witness from Coca Cola deposed to this - when the money was taken out of WARC funds, that constituted private use of money not intended for private purposes. If money is stolen and later replaced, theft has still taken place. One can well imagine the answer from foreign donor churches, for example, if asked whether in their opinion these donations were intended for private use by the Accused [appellant]."

[121] Mr Maritz submitted that the evidence she gave on this point was false and demonstrated conclusively to what extent she had a personal grievance against the

appellant and that she was an unreliable witness. On her evidence she had previously conveyed the same false story relating to the Disney World trip to a bishop in Botswana. The trial court's finding that her incorrect evidence on the point was due to an innocent mistake on the part of the prosecutor was clearly wrong and constituted, so it was submitted, a serious misdirection on the evidence. On this part of the case Mr Maritz argued further that the trial court seriously misdirected itself by failing to take into account or to give any consideration whatsoever to the evidence by other State witnesses, *viz* Steenkamp and Fester, that the monies in the WARC accounts were the appellant's own and could be used by him as he wished.

[122] In our view the trial court's finding that the appellant was not entitled to use the monies in the WARC account for his own personal purposes was correct. It is important to bear in mind that Sacco's evidence on the point did not stand alone. There were other items of evidence which corroborated her evidence on this point.

[123] Firstly, it was common cause that annual financial statements were prepared in respect of the WARC account and it was audited: something which was extremely unlikely to have happened if the money in the account was his own to do with as he pleased.

[124] Secondly, a letter was handed in which had been received from a college in California inviting the appellant to make a speech there and enquiring as to the appropriateness of the *honorarium* they wished to pay. On the letter was a note in the appellant's own handwriting which was in the following terms:

> "Tell him *honoraria* are used for our work - not for personal gain . . ."

[125] Thirdly, it is clear that the monies invested in the Futura investments (which, as has been said, were paid from the WARC accounts) were not the personal property of the appellant. It is true that the investments were made in his name but the beneficiary nominated in the application forms for the investments was the

WARC. Mrs Hester Maritz, a broker at First Bowring who processed the investment application, testified that if an investment of this kind was to be made by an organisation or a company it had to use, as she put it, the life of a natural person. She stated that she discussed the matter with the appellant and originally the name of a person called Kuys was to be used. On the day the investment was made he was not available and so the appellant's name was used instead. Later problems arose when IRP 5 forms were issued in the name of the appellant in respect of these investments. Mrs Maritz explained that when the application forms for the investments were filled in cession forms were signed, in which the appellant purported to cede all his rights to the investments to the WARC. It appeared that a member of the staff of the assurance company with which the investments had been made had mislaid the cession forms as a consequence of which IRP 5 forms were issued in the name of the appellant to the effect that he was liable to tax in respect of the investments. When this was brought to the

attention of the assurance company concerned it indicated that in order for what it called "the contractual record" to be corrected a letter signed by both the secretary of the WARC and the appellant to the effect that the WARC was the holder of the investment contracts, and that the appellant was "only the nominee", would be required. In due course a letter was sent to the assurance company signed by Steenkamp and the appellant which contained the following:

> "Please be advised that the World Alliance of Reformed Churches [is] the holder of the three Futura contracts [the numbers are then set out] and that dr A A Boesak is the nominee."

[126] Fourthly, it will be recalled that when the proceeds of the second and third Futura investments were paid out a portion of such proceeds constituted the opening deposit on the account of the UDA. This account was opened pursuant to what purported to be a resolution of a body described as the committee of the UDA, which was referred to in the resolution as "the said Association". The copy of the resolution forwarded to the bank when the account was opened was

accompanied by a "list of signing officers for a public body", with the appellant being listed as the chairman, Fester as the secretary and Steenkamp as the treasurer of the UDA. All of this would have been unnecessary, and indeed highly unusual, if the account so opened was a private account belonging to the appellant.

[127] Fifthly, the appellant made certain important admissions in an affidavit filed by him in a Rule 43 application brought against him by his wife *inter alia* for interim maintenance pending a divorce action she had instituted against him. In her founding affidavit in the application she said the following:

> "[The appellant] is able to obtain substantial funds from overseas sources for his political and social work in South Africa. He receives a substantial monthly income from the Foundation for Peace and Justice and he also receives donations and grants from overseas sources."

The appellant replied to this allegation as follows in his answering affidavit:

> "I deny that I am able to obtain substantial funds from overseas sources for my political and social work in South Africa. Any funds obtained from overseas are for the work of the Foundation for Peace

> and Justice mostly in the form of specific grants for particular social programmes and sometimes donations. Likewise, in most of the cases where a honorarium is received for any work that I do abroad, like lecturing, the same is for the account of the Foundation for Peace and Justice."

Later in his affidavit he said the following:

> "Soon after the marriage it became clear that Applicant [i e, his wife] unbeknown to me, was in grave financial difficulties. The position deteriorated to the extent where there were threats made that steps would be taken for Applicant's arrest for outstanding debts. The Messenger of the Court was at one stage attempting to locate Applicant. Although Applicant at first tried to deny that such debts were incurred by her, she eventually conceded liability when it appeared that such debts arose from the use of her credit cards. To avoid the embarrassment involved I was compelled to *raise* money from time to time to pay such debts, which eventually amounted to a substantial sum now repayable by Applicant." (The emphasis is ours.)

Steenkamp testified (and his evidence on this point was not challenged) that the appellant's wife's debts were paid from the UDA account. It is difficult to see how the appellant could have said that he had to "raise" money to pay his wife's

debts if such debts were paid from the funds in the UDA account which were his personal property to do with as he wished. It is true that at some stage after the account was opened the appellant began using it as a repository for private funds of his own or his wife's. Thus the proceeds of the sale of his Vredehoek house were paid into this account as well as occupational interest received by his wife pursuant to the sale of her house in Johannesburg. Some of the appellant's *honoraria* were also paid into this account but whether this was because the *honoraria* so deposited were to be used for the appellant's work or for his personal gain is not clear. Proper books of account were not kept of the UDA account and it was not audited but these two facts are equivocal, indicating either that the account was the appellant's private account or an account from which, to his knowledge, monies had been misappropriated.

[128] The five items of evidence we have listed corroborate Sacco's evidence that the monies in the WARC account were not the appellant's own to use for his

private purposes, at least until he became entitled to a credit in respect of his own monies which he deposited therein. Whilst Sacco may have displayed some animosity towards the appellant, and there was a measure of confusion in her evidence between the FPJ and the WARC, in view of the corroboration for her central statement that the WARC monies did not belong to the appellant to use for his personal purposes we are of the view that no good reason existed for not accepting her evidence on this point.

[129] As far as the Disney World statement is concerned, even on the assumption that the assertion put to her in cross-examination that the expenses of the Disney World trip were later reimbursed to the account (something in respect of which no evidence was led by the defence) is correct, the fact that she gave incorrect evidence on the point, either because of the way she was led or because she had earlier misinformed counsel for the State on the point, does not in our judgment justify a finding that she had a personal grievance against the appellant and was an

unreliable witness: it was equally consistent with her being genuinely mistaken in this regard.

[130] We do not think that the evidence by Steenkamp that the WARC and UDA monies, as well as the Futura investments, were the appellant's own takes the case any further. Apart from the fact that he was clearly a highly dishonest witness who stole large sums himself and lied on many points in the trial court, it seems clear that even if he believed that the monies in question belonged to the appellant such belief might well have been derived from what the appellant told him. As far as Fester is concerned her evidence on the point does not advance the case of the appellant. She stated that some amounts received by the appellant as *honoraria* were paid into the WARC account. She also said that the appellant never told her that the monies in the WARC account were his own but she conceded that he also never told her that they were *not* his own. It is common cause that some at least of the appellant's *honoraria* were paid into the WARC account. Fester's evidence on the point

clearly cannot afford support for the appellant's contention that the WARC monies were his own.

[131] We are satisfied that the appellant was not entitled to use the WARC funds as his own. Once they were paid into the FPJ's account they became its property. The appellant was not entitled to utilise them as a credit to justify payments from the FPJ's funds for his own private purposes. Monies taken for such purposes from the FPJ's account were on the facts of this case stolen from the trustees of the FPJ. The fact that the appellant was not entitled to the amounts that were utilised for the payment of the Vredehoek property is to some extent underscored by the fact that the payments were not made directly but were channelled through various accounts. There is thus no substance in the contention raised on behalf of the appellant that in respect of the monies paid out of the FPJ's account he was convicted on a basis and of offences in respect of which he was not charged.

[132] It follows from what has been said that we are of the view that the appellant

was correctly convicted of theft in respect of the amounts of R20 000 paid to the WCD on 30 July 1990, and R120 000 paid to the Lavender Hill Urban Project on 26 September 1990.

[133] With regard to the amount of R50 158 paid to the WCD on 5 April 1990, Mr Maritz did not seek to justify this payment only on the strength of a credit based on monies paid into the FPJ account from the WARC account. He also contended that the appellant was entitled to an amount of R50 158 (the exact amount of the payment made on his behalf on 5 April 1990 to the WCD, being what was described as "the change" from a donation of R130 158 made by the Swedish Government to the FPJ for what was called the "securitisation of the appellant's house and car"). Although the donation was made to the FPJ the money in question was paid to the Bellville South congregation of the Dutch Reformed Mission Church of which the appellant was at that stage a minister. According to the evidence of Steenkamp, only R80 000 of the amount received by the church

was paid over to the FPJ, the balance (the "change" of R50 158, as it was called) remaining in the church, which, he said, had spent the money, *inter alia*, on repairing its organ. He also stated that when De Waal asked him for this amount he told him that it had not been paid over by the church and that the church had since spent it, whereupon, he alleged, De Waal, who was the chairman of the trustees of the FPJ, told him to take the amount from the account of the FPJ. According to Steenkamp the matter was discussed with the appellant but it is not clear from his evidence whether the appellant was told anything more than that the so-called "change" was still with the church.

[134] In view of the fact that the amount of R50 158 had never been received by the FPJ there was clearly no justification for the payment of this amount from the FPJ's account. The question to be considered at this stage of the case is, however, whether the appellant knew that this amount was in fact taken from the account of the FPJ. The trial court convicted the appellant in respect of this

amount on two bases: firstly, because it was never denied during the cross-examination of Steenkamp that there was a discussion involving De Waal, Steenkamp and the appellant about this amount of R50 158 “wat wel by die kerk [was]” and, secondly, because the trial court did not accept “that when one buys a house and R50 000 of the purchase price comes from a source such as this, one does not know the origin of the funds”.

[135] In our view neither of these bases is sufficiently strong to justify the appellant’s conviction in respect of this amount. As far as the first basis is concerned, we have already stated that it is not clear on Steenkamp’s evidence that the appellant was told anything more than that the money was still with the church and would have to be obtained from it. As far as the second basis is concerned, it is not in our view self-evident that in a case such as this the appellant would necessarily have known that the amount in question had been taken from the FPJ’s account. The cheque was signed by Steenkamp and Fester and not by the

appellant himself. It was reasonably possible, as Mr Maritz submitted, that Steenkamp had stolen the R50 158 from the church, of which he was the treasurer at the time, and that in order to hide this fact from the appellant he took it from the FPJ when asked to get it from the church.

[136] Mr Gerber, in arguing in support of the court *a quo*'s finding that the appellant had stolen this amount, submitted that the appellant knew that he was not entitled to use any portion of the grant received from the International Solidarity Foundation of the Swedish Labour Movement (through which the Swedish Government channelled the money). This was because Mrs Margareta Gräpe-Lantz of the International Centre of the Swedish Labour Movement, who handled the matter on behalf of the Centre, testified that she told the appellant that the money could not be given to the appellant himself but only to an organization, either the FPJ or his congregation. Furthermore, he and De Waal had signed on 4 April 1990, the day before the FPJ cheque for R50 158 was signed, an income and

expenditure report for the period 1988 to 31 March 1990 dealing with what was called the "Trust Fund for Security Arrangements: Dr A A Boesak". In the report it was said that of the R130 158 received from Sweden, together with R2 626,11 interest received thereon, R89 963,04 had been spent on purchasing a vehicle with its security accessories for the appellant and maintaining it and effecting security improvements and purchasing security equipment for his home and paying bank charges, leaving a surplus of R42 821,07. This was to be used for providing vehicle services and maintenance, security services for his vehicle and maintenance/security alert control on the security systems at his offices and home over the following two years with the anticipated balance, after that period, of R16 821,07 to be kept for the purpose of covering depreciation or replacement costs of the vehicle. Mr Gerber accordingly submitted that the appellant knew that there was no "change" available to be paid out either from the church or the FPJ for the purposes of enabling him to purchase a house.

[137] As far as Mrs Gräpe-Lantz's evidence is concerned the difficulty the State has in this regard is that the donation of R130 158 was promised to the appellant in the presence of De Waal by the Swedish Prime Minister and Mrs Gräpe-Lantz was unable to say whether her qualification (that the money could not be paid to the appellant himself but to the FPJ or his congregation) was in accordance with the original terms of the grant as conveyed to the appellant by the Prime Minister. De Waal could have done so: he was on the list of witnesses the State intended to call but in the result was not called.

[138] As far as the "Income and Expenditure Report" was concerned, the State proved that the information contained therein was not correct. Only R80 000 of the monies received by the church from Sweden was paid over to the FPJ and the balance, R50 158, was not spent on the appellant's security, either in respect of his home or his motor-car. The appellant was not charged with fraud in respect of this document. He was not called upon to explain why he signed it and it cannot be

used, in our judgment, in support of the State's case in respect of the amount of R50 158 paid from the account of the FPJ.

[139] It follows from what we have said that the appellant was in our view wrongly convicted in respect of this amount.

[140] We turn now to deal with the amount of R14 000 paid on behalf of the appellant's wife to the Allied Building Society on 31 October 1990. Mr Maritz contended that the appellant was wrongly convicted on this sub-charge because he was entitled to certain credits on the FPJ's account when this payment was made, *viz* R6 839,75, transferred to the FPJ out of his personal banking account on 10 May 1990, and further amounts of R25 000 and R15 000 to which Steenkamp referred in his evidence. It is clear, as Mr Maritz conceded during oral argument, that the credits of R25 000 and R15 000 only arose long after October 1990 and could not be relied on to justify this payment. The credit of R6 839,75 stands on a different footing. It is common cause between the State and the appellant that

he was entitled to this credit. Strictly speaking it should be deducted from the amount of R20 000 paid to the WCD on 30 July 1990, to which reference has already been made, but it is convenient to deal with it here where it is relevant to this payment. In any event nothing turns on the point because, the appellant having been convicted on count 31 in respect of all six sub-charges, the credit has merely to be deducted from the total amount in respect of which he was convicted on this count. The State submitted that a further amount of R2 300 falls to be deducted from this credit in respect of a payment made from the FPJ account to Joshua Doore on 19 September 1990. But the Joshua Doore transaction was one of those listed on annexure H in respect of which the appellant was acquitted by the trial court. It follows that he was entitled to the full credit of R6 839,75 and that on this sub-charge he should have been convicted not of R14 000 but only of R7 160,25.

[141] In respect of the amounts of R100 000 and R18 564,50 which were paid from the UDA account, the State has the difficulty that it only charged the appellant

with theft from the donors to the FPJ or its trustees. King said that she could not say to whom the UDA account belonged and that the FPJ did not finance the UDA account at all (except for transfers to it by Steenkamp and Fester to conceal their thefts). There was in fact no evidence led to indicate that the funds in the UDA account belonged to or were controlled by the trustees of the FPJ. It follows that the appellant could not on the indictment in this case be convicted of thefts from this account.

[142] In the result we are of the view that the appellant should have been convicted on count 31 not of theft of amounts totalling R322 722, but only of theft of amounts totalling R147 160,25.

[143] No leave to appeal against sentence was ever sought by the appellant, either in the court below or on application to this Court, nor has any such leave been granted by this Court. By not seeking such leave the appellant accepted, at least tacitly, that in the event of his convictions, or any of them, being confirmed without

alteration in regard to the amounts involved, the sentence imposed in respect of each such confirmed conviction was appropriate and not open to attack on any recognised legal ground. Sentencing is pre-eminently a matter for the discretion of the trial judge. This Court does not have an overriding discretion to interfere with a properly imposed sentence i.e. one where no recognised legal ground for interfering with such sentence exists. This is the position which pertains in respect of counts 4 and 5 - no legal ground for interference with the sentences imposed has either been suggested or established. It should be added that before us Mr Maritz did not submit that in the event of a dismissal of the appeal against the convictions on these counts the sentences nevertheless should be reduced. It follows that the sentences on these counts must stand.

[144] The position with regard to count 31 is somewhat different. Notwithstanding the fact that the appeal on that count must fail, the amount found by us to have been stolen by the appellant is substantially less than that found by the court *a quo*.

The amount involved must inevitably have played a role in Foxcroft J's determination of an appropriate sentence on count 31. In the circumstances there exists a legal basis for interference with the sentence imposed on this count and we are at large to reconsider it. The lesser amount which we have found the appellant stole remains a significant one, and could justify the sentence being left unaltered. However, it seems fair and proper to make some allowance for the substantial reduction in the amount stolen. In our view this is best done by directing that a portion of the sentence on count 31 run concurrently with those on counts 4 and 5. After careful consideration, and having regard to all factors relevant to sentence on count 31, including the appellant's personal circumstances, we are of the view that it would be appropriate and just to order one year of the sentence on count 31 to run concurrently with those on counts 4 and 5.

[145] To sum up. The appeal in respect of counts 4 and 5 fails. The sentences of two years imprisonment on each of these counts, which sentences are to run

concurrently, stand. The appeal on count 9 succeeds; the conviction and sentence on that count are to be set aside. The appeal in regard to count 31 fails, but the appellant is held to have been guilty of the theft of amounts totalling R147 160,25 and not R322 722 as found by the trial court. The sentence of two years imprisonment on count 31 stands, but is ameliorated to the extent that one year imprisonment is to run concurrently with the sentences on counts 4 and 5. In the result the effective sentence is one of three years imprisonment.

[146] The following order is made:

1. The appeal against the convictions on counts 4, 5 and 31 is dismissed;

2. The appeal against the conviction on count 9 succeeds, and the conviction and sentence on that count are set aside;

3. One year of the sentence on count 31 is to run concurrently with the sentences on counts 4 and 5.

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SMALBERGER JA

_____
OLIVIER JA

_____
FARLAM AJA

VAN HEERDEN ACJ)concur
MPATI AJA)