IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISON, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

12 December 2023

CASE NUMBER: A231/2021

In the matter between:

NJABULO MHLANGA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

TSHOMBE AJ

INTRODUCTION:

[1] This is an appeal following the appellant's successful petition to the High court of South Africa, Gauteng Division in Pretoria for leave to appeal granted on 10 June 2021. On 17 April 2019 the appellant was convicted by the regional court held in Benoni on two counts of fraud.

[2] Up until 6 February 2018, the appellant was employed at Electrolux Kwikot as an accounting clerk and earning R11 000 per month. He had been in such employ for 5 years. The charges, conviction and subsequent sentence against him followed a confession he made to his employer on 6 February 2018. After a police investigation the appellant was charged with 2 counts of fraud. At the trial the appellant was represented, pleaded guilty to both counts and a plea in terms of Section 112(2) of the Criminal Procedure Act[1] ("the Act") was read into the record. The State accepted the plea of guilt and did not prove any previous convictions.

[3] The appellant was convicted on the two counts of fraud as explained and to the amounts set out below:

3.1 Fraud to the amount of R378 013.78, consisting in payments made to an account created by and for the benefit of the appellant in the name of a fictitious entity called Dynamic Motor Spares in favour of which the appellant rendered invoices to his employer for non-existent services provided and unidentified merchandise between 30 September 2016 and 15 November 2016; and

[1] Act 51 of 1977

3.2 Fraud to the amount of R19 176.60, consisting in the appellant representing unlawfully and falsely to Electrolux Kwikot that the petrol card issued in his name and in respect of his private vehicle, a Toyota Tazz 130 registration number YXF 566 was approved by the complainant for toll gates and refueling, thereby inducing Electrolux Kwikot by false pretenses to prejudice themselves by paying up to an amount of R19 176.60 for 66 transactions.

[4] On 17 April 2019 the appellant was sentenced as follows:

[4.1]. Count 1: 10 years of imprisonment;

[4.2]. Count 2: 10 years of imprisonment.

[4.3] The trial court ordered that 5 years of the sentence on count 2 be served concurrently with the sentence on count 1 and the effective sentence was accordingly 15 years imprisonment.

[5] Before sentencing, the defense had unsuccessfully requested a postponement in order to obtain a correctional supervision report; the learned Magistrate a quo refused to grant the appellant such an opportunity.

[6] The appellant lodged an application for leave to appeal in respect of sentence only on 29 September 2019 together with an application for condonation of the late lodging of the Notice to Appeal. The magistrate refused condonation and the appellant approached this court with a petition to be granted leave to appeal against sentence only. Leave to appeal was granted by this court on 10 June 2021.

SUMMARY OF GROUNDS AND ARGUMENTS OF PARTIES ON APPEAL AGAINST SENTENCE

[7] The grounds of appeal against sentence were formulated as follows in the Notice of appeal:

7.1 The sentence is disproportionate to the offence.

7.2 The trial court failed to take into account that the appellant confessed to the crime, pleaded guilty and requested mediation with the complainant;

7.3 The trial court failed to have regard to the remorsefulness of the appellant and the clear indication that the appellant was a candidate for rehabilitation.

7.4 The accused was a first-time offender and everything considered the sentence imposed on him was shockingly hard and disproportionate especially considering the fact that the crimes he was convicted of are both not subject to the Minimum Sentences Act[2]

7.5 The court over-emphasized the interests of society and showed no regard for other principles, in particular rehabilitation, which is factor that plays a role in the same principle: *'in the interests of society'*.

[2] The Criminal Law Amendment Act 105 of 1997

[8] Counsel for the appellant argued that the trial court erred in refusing the preparation of a correctional services report, as such a report would have assisted the court with regard to the accused's motivation for committing the crimes. Counsel argued further that the said report would have indicated the accused's level of remorse, the prospects of rehabilitation, the impact of imprisonment on the family and would thus have assisted the court to arrive at a just sentence.

[9] Counsel indicated the personal circumstances of the accused, that is, his young age, supporting one child as a single father, that he pleaded guilty after the police investigation, that he attempted mediation with his employer and wanted to pay back the money with his father's assistance. Counsel then argued/submitted that the said personal circumstances were not taken into account by the trial court.

[10] With reference to certain utterances by the trial magistrate[3] the appellant's counsel argued that the trial court did not consider the prospects of rehabilitation, that he confessed to the crime to his employer without having been caught and by so doing taking responsibility for his actions. The said utterances are also indicative of the trial court not exercising any degree of mercy.

[11] Appellant's counsel also argued that the two counts of fraud are not for the same amount of money, neither is there a minimum sentence prescribed in respect of the amounts involved. With reference to the above, Counsel

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[3] *"Now do not think for a moment that I have a sense of empathy for you."*

Record page 32 Lines 3-4

"Sir, if you had remorse it would not have taken you from 27 August 2018 until April 2019, about 8 months to ***plead guilty"*** Record page 34 Lines 15 – 17 - (Emphasis provided)

submitted that an effective sentence of 15 years imprisonment is shockingly disproportionate given the circumstances. Counsel further argued that the sentence imposed treated these two counts of fraud in the same manner as a crime committed in terms of Chapter 2 of the Prevention and Combating of Corrupt activities Act[4] involving fraud amounting to R500 000.00 or more.

[12] Appellant's counsel referred to several judgments where the accused were convicted of many counts of fraud and involving much higher amounts of fraud, some in excess of a R1,000,000 but whose sentences were far less than the effective sentence of the accused in this matter. Counsel submitted, once again with reference to case law that an effective sentence of 15 years imprisonment should be reserved for the more serious cases of fraud involving very high amounts and for special circumstances like stealing from the public purse. Counsel submitted further, that for this kind of fraud a sentence in terms of *Section 276(1)(i) of the Act* should be considered and imposed.

[13] Counsel for the respondent started off by accepting that the imposition of sentence falls within the discretion of the trial court, however, counsel nonetheless agreed that the sentence is heavy and interference on appeal is justified. In this regard, respondent's counsel goes further to state that interference is in any event warranted where the trial court materially misdirected itself in imposing a sentence that is disproportionate to the severity of the offence and the circumstances of the appellant.

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[4] Act 12 of 2004

[14] Having said the above respondent's counsel, and correctly in my view does not support appellant's counsel argument that the trial court erred in refusing to postpone the matter for a correctional supervision report. Respondent's counsel sets out the distinction between a pre-sentencing report and a correctional supervision report and indeed indicates that a correctional supervision report is required to indicate to the court whether the accused is suitably monitorable for a sentence of correctional supervision in terms of section 276(1)(h) of the Act. Where correctional supervision is unlikely to be considered as a sentencing option, a correctional supervision report has no relevance.

[15] While rejecting both a correctional supervision type sentence and a wholly suspended sentence and a fine as possible appropriate sentencing options, respondent's counsel is however constrained to accept that the effective term of 15 years is disproportionate. Respondent's counsel also indicated that the trial court *"erred by not considering the guilty plea in conjunction with the fact that the appellant of his own accord reported what he had done, as indicative of remorse and of a reasonable prospect of rehabilitation."*[5]

THE LAW

[16] Even though most of the applicable law has been dealt with in Counsel's arguments, there are certain aspects that the court needs to bring to the fore especially those that are applicable in this case but somehow did not get adequate airing during both the proceedings and the trial court judgment.

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[5] Case lines 052-18 paragraph 9

Definition of correctional supervision:

[17] Both the Act and the Correctional services Act[6] define correctional services as a form of sentencing. However, due to the formalistic nature and referencing to other statutes and regulations, it challenges a simple explanation even to the legally trained. The result is that a judicial definition has become more useful and in this regard Kriegler AJA (as he then was) *"...found that correctional supervision does not describe a specific sentence but rather is a collective term for a wide range of measures sharing one common feature: they are executed within the community.[7] These measures were found in section 84(1) of the 1959 Correctional Services Act, and included house arrest, monitoring, community services, employment and rehabilitative programmes..."*[8]

[18] Flowing from the sources referred to in the above case, the following definition has been developed:

> *"...a form of punishment an offender serves in the community, and during which the offender is not incarcerated in prison at any time, subject to such conditions as the court may prescribe, which will usually include house detention and community service as well as submission to various programmes aimed at the offender's training, rehabilitation and improvement."*[9]

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[6] Act 111 of 1998
[7] S v R 1993(1) SACR 209 (A) at 220h. Or applied outside a prison.
[8] At 221 b-c
[9] A guide to sentencing in South Africa – Third Edition Page 318

[19] Evidently, if in *casu* the court did not envisage a form of punishment excluding incarceration, a correctional supervision report would serve no purpose.

Disproportionality of the sentence to the offence:

[20] The proportionality requirement, which drew constitutional support for the minimum sentence legislation, reflects the importance of tailoring the sentence to the seriousness of the crime.

[21] From a constitutional perspective, the constitutional court in S v Dodo[10], endorsed proportionality as a requirement in the sentencing regime. The constitutional court explained that, *"proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhumane or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue."*[11] The court referred to section 12(1)(a) of the Constitution, which provides that a person *"not be deprived of freedom arbitrarily or without just cause"* and found that when a person commits a crime the crime provides the just cause to deprive the offender of freedom.

[22] The constitutional court judgment in Dodo and other judgments stress the requirement of proportionality even in the prescribed minimum sentences regime. The courts have thus come into agreement[12] that once a sentence is disproportionate to the crime, the criminal and legitimate interests of

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[10] 2001 (1) SACR 594 (CC)
[11] At paragraph 37
[12] See in addition S v Vilakazi 2009 (1) SACR 552 (SCA)

society, it is no longer appropriate. Accordingly, disproportionality to the seriousness of the crime risks making the sentence unconstitutional.

Remorse:

[23] On the question of remorse, the appellant confessed to the two crimes, asked his representative to request mediation with the employer, made an offer (never mind the prospects of making good on such offer) to repay the amount of money involved, pleaded guilty and took full responsibility for his actions. Of course, the courts need to be and must be encouraged to be careful with respect to the difference between remorse and regret. The courts have stated that *"...there is a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not, without more, translate into remorse. Remorse is a gnawing pain of conscience for the plight of another...Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look."*[13] Regard being had to the facts of this matter, set out above, it can be said without any doubt that the appellant has from the beginning shown that he was indeed remorseful.

[24] For purposes of sentencing three basic elements, which have come to be known as the triad of Zinn, were espoused in the case of S v Zinn[14], and remain relevant, albeit with some clarification with regard to the third component set out in the case. The first element, that is *'the crime'* is considered the most important and influential element on the nature and

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[13] Per Ponnan JA in Matyityi page 47 Paragraph 13 a - b
[14] S v Zinn 1969(2) SA 537 (A)

extent of the sentence. The proportionality requirement, which drew constitutional support for the minimum sentence legislation, reflects the importance of tailoring the sentence to the seriousness of the crime.

[25] The second element to be considered in terms of the triad of Zinn is *'the offender'*, and because of the nature of the analytic factors involved in considering the offender, this element has been referred to as the *'individualization'* of the offender. Although this kind of investigation is often not done, it is nonetheless an important aspect as it enables the sentencing officer to get to know the offender, his/her character and motives. The necessary information in this regard includes age, marital status, the presence of dependents, level of education, employment and health. Owing to the shortcomings of this process and the lack of exposure time between the presiding/sentencing officer and the offender, this aspect of the elements needs a system of rigorous pre-sentence reporting which would assist the presiding officer to have a better understanding of the offender, personal circumstances, character, motives and why the crime was committed.

[26] For the above reasons it appears to me that the provisions of section 274(1) of the Act would have been a useful pre-sentencing process in this case. The subsection provides that the court may *"before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed"*. The evidence referred to in the subsection may be presented to the court either orally or via written reports prepared by various experts or officers whose evidence may be of assistance to the court to understand the offender better and to even gather the reasons why the crime was committed (mitigation), the offender's view of the crime – all for purposes of the exercise of the sentencing discretion. This section

becomes particularly useful in instances where the trial court must sentence following a plea of guilty.

[27] The third leg of the triad of Zinn is '*the interests of society*'. In the face of some difficulty in expressing what is actually meant by this phrase, it has been suggested that this leg be interpreted to mean *'serving the interests of society'*. It has been cautioned that this leg must not be interpreted to mean the *satisfaction of public opinion*,[15] instead its value must be in the deterrent and retribution effects of a sentence, the protection of the society and the reformation or rehabilitation of the offender.

CONCLUSION

[28] Indeed, counsel for the respondent is correct that considering the seriousness of the offences that the appellant was convicted of, direct imprisonment in terms of section 276(1)(b) of the Act could not be avoided. However, the trial court is called upon to weigh all the traditional sentencing considerations. The principle espoused is that in order for the court to be able to assess the proportionality of a particular sentence in a particular case, the court must determine what a proportionate sentence would be, taking into account all the circumstances traditionally relevant to sentencing cumulatively.

[29] The sentencing discretion is indeed properly seated with the trial court especially in the light of all the information that the trial court becomes exposed to during the trial, and via all the other mechanisms that enable the trial court to get information as discussed above. In *casu* the trial court

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[15] S v Mhlakaza 1997(1) SACR 515 (SCA)

did not have this opportunity, given the plea of guilty. On the other hand, the principle remains to remind courts of appeal that they should not simply replace the imposed sentence with their own. This was fortified in S v Pieters[16], where the court clarified that the determination of a term of imprisonment does not occur in accordance with any exact generally accepted yardstick and there will be areas where opinions on an appropriate term of imprisonment may differ with good reason. However, to fortify the basic principle, the courts have developed some refinements which explain circumstances where an imposed sentence can be interfered with and of these a misdirection of any kind by the trial court is a proper basis.

[30] For the reasons set out above, I find that the trial court was misdirected as to the principles and the law applicable in sentencing. The sentence imposed on the appellant is shockingly disproportionate, and this Appeal Court is at liberty to interfere with the sentence. In the circumstances the appeal on sentence should be upheld. Regard being had to all the relevant factors present in this case, including the age of the appellant at the time of the commission of the offences herein, the aggravating and mitigating circumstances, the following order is made:

[31] The appeal against sentence is upheld and the sentences of the court *a quo* are set aside and substituted with the following order:

31.1 In respect of count 1, the fraud to the amounting to R378 013.78 the appellant is sentenced to 5 year's imprisonment;

[16] 1987(3) SA 717(A)

31.2 In respect of count 2, the fraud to the amounting to R19 176.60 the appellant is sentenced to 3 year's imprisonment;

31.3 It is ordered that the sentence in count 2 runs concurrently with the sentence in count 1, making the effective sentence 5 years.

[32] In terms of section 280 (2) of the Criminal Procedure Act 51 of 1977, as amended, the substituted sentence is ante-dated to 17th April 2019, being the date on which the appellant was sentenced.

[redacted]

N TSHOMBE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

I AGREE [redacted]

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

For the Appellant	: Adv: A Coetzee
Instructed by	: National Prosecution Authority
For the Defendants	: Adv: L A Van Wyk
Instructed by	: Legal Aid South Africa