REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 208/01

In the matter between :

YVONNE K N MAKHUDU Appellant

and

THE STATE Respondent

Coram: **MARAIS, FARLAM *et* NUGENT JJA**

Heard: **22 MARCH 2002**
Delivered: **16 MAY 2002**

Appeal against sentence – magistrate's sentence partially reduced by provincial division of High Court – further appeal remains one against magistrate's judgment in particular circumstances of case – behaviour of accused in court not ordinarily to be taken into account in aggravation of sentence.

J U D G M E N T

MARAIS JA/

MARAIS JA: [1] This is an appeal against sentence. The appellant was convicted in the Regional Court at Pretoria upon five counts of fraud to which she had pleaded guilty. She was sentenced on each of the counts to a fine of R 5 000 or 100 days' imprisonment, and 100 days' imprisonment suspended for five years on condition that she is not convicted of fraud committed within the period of suspension. In addition she was sentenced in terms of s 276 (1)(h) of the Criminal Procedure Act 51 of 1977 to correctional supervision for 18 months. The elements of the correctional supervision included house arrest during specified hours for 12 of the 18 months and the rendering of community service without compensation for 16 hours per month for the period of 18 months. The community service was to consist of cleaning and gardening services to be rendered at Forest Farm, Sandton. Participation in a responsibility acceptance programme and a reality confrontation programme was also ordered. She was also forbidden to use alcohol or drugs during the period of 18 months.

[2] An appeal to the Transvaal Provincial Division (Claassen AJ *et* Sceales AJ) against the sentence succeeded only to the extent that house arrest for 12 months and the prohibition of the use of alcohol or drugs were set aside. Leave to appeal to this Court against the sentence as ameliorated was granted by the provincial division. The focus of the attack in this Court upon the sentence was the quantum of the fines (R 25 000 in all) and the community service or, more specifically, the nature of that service (cleaning and gardening).

[3] It would be as well to be clear as to whose sentence is actually under consideration on appeal. Where a magistrate's sentence is set aside in its

entirety and replaced with a sentence fundamentally different in kind, for example, a fine instead of direct imprisonment, no problem arises. It is obviously the provincial division's sentence. Where the provincial division has dismissed the appeal against sentence it does not become the provincial division's sentence and in any further appeal the court is concerned, not with whether in dismissing the appeal the provincial division exercised its sentencing powers correctly or reasonably, but with whether the magistrate did so.

[4] Problems may arise in situations falling between those two poles. This is such a situation. The fine and community service which are under attack on appeal are but two of a number of components of a sentence imposed by the magistrate. On appeal to the Court *a quo* those two components were left undisturbed. However, some other components of the sentence were eliminated. Nothing was substituted for them so that in the result the sentence remained fundamentally that of the magistrate minus those components of it which the Court *a quo* eliminated. It is implicit in what the Court *a quo* did that it found no fault with either the decision of the magistrate to impose the fine or his decision to impose community service of the kind which he did. Its decision to eliminate certain components of the sentence must have been based upon either what it considered to be their inappropriateness irrespective of what the other components or the cumulative impact of the sentence as a whole might

be, or, if not upon their inappropriateness *per se*, upon the need to ameliorate somehow the overall cumulative impact of a sentence considered to be sufficiently overly severe to warrant interference on appeal.

[5] It is not entirely clear upon which of these two bases the Court *a quo* acted. It did not find that the magistrate had misdirected himself in imposing sentence. It seems to have felt that those components of the sentence which it deleted were either inappropriate or rendered the sentence as a whole too severe to be allowed to stand. Claassen AJ said:

"However, we are of the opinion that there is a bit much of a sting in this case. The total amount of the counts involved is just almost over R2 000,00 – the five counts to which she pleaded guilty which, in a certain sense, is not all that much but, at the same time, one must remember that she is a high profile person. She had a very high profile type of job in the modern South Africa, being concerned with affirmative action programs, which means she has a responsibility to the community and to the people she is involved in. Further, she was in a position of trust, dealing with funds of a very big organisation where it is often easy to get away with murder, so to speak.

However, in the circumstances, we feel that there are certain stings in this sentence which are unnecessary, and which must be deleted, and which creates a certain sense of shock to the court.

Mr Kotzè initially said that he opposes the appeal but he has conceded that certain aspects thereof can be alleviated. I don't think it is necessary to go into any detail.

Having said all that we feel that the sentence should be adapted somewhat and in this regard I suggest we make the following order:

1. The sentence of R 5 000,00 or 100 days imprisonment on each count is confirmed.
2. The 100 days per count that was suspended is confirmed.

As far as the community correctional services sentence is concerned, the following order is made:

1. The 18 months correctional supervision is confirmed. However, the 12

months house arrest, including the exceptions thereto, are struck from the sentence.

2. The community service of 16 hours per month for the full duration of 18 months is confirmed.
3. The place of community service being at the cleaning services at Forest Farm is confirmed.
4. The accused must attend the rehabilitation programs in paragraph 1.3.
5. Paragraph 1.5 and 1.6 of the sentence are confirmed.
6. Paragraph 1.7 is struck from the sentence, dealing with the use of alcohol and drugs."

[6] Regrettably, the Court *a quo* allowed the appellant's behaviour at her trial to influence it in considering the appeal against the sentence. It said:

"The appellant in this case has proved herself to be a very arrogant person. That is clear from the record in the way she behaved and the whole process of the recusal application against the magistrate. It was ill-conceived and it was arrogant and I think this lady must just be put in her place to a certain extent."

[7] While the behaviour of an accused during the trial **may** be indicative of a lack of repentance or intended future defiance of the laws by which society lives and therefore be a relevant factor in considering sentence, neither the fact that an accused's defence is conducted in an objectionable manner nor the fact that the accused's demeanour in court is obnoxious, is a proper factor to be taken into account unless it is of a kind which satisfactorily establishes that the accused is the kind of person who would best be deterred from future criminal activity by being dealt with in a firmer manner than would have been appropriate if the

accused was not that kind of person.[1]

[8] A court should be slow to jump to conclusions regarding an accused's character and reaction to punishment when such conclusions are based solely upon the accused's demeanour and behaviour in court. The dangerous result of succumbing to the temptation to do so is well exemplified in *R v Noble*.[2]

[9] The appellant, notwithstanding her admitted fall from grace, appears to have a somewhat exaggerated view of her own importance and status and the degree of respect to which she is entitled in a criminal court. It goes without saying that courtesy is due by a court to all who appear before it whatever their station in life but when dealing with self-confessed offenders who have committed serious crimes of dishonesty some sense of proportion is not out of place.

[10] However, her behaviour in court did not entitle the Court *a quo* to use its sentencing power on appeal to "put (her) in her place". To that extent, that court misdirected itself to a material extent when considering the appeal against sentence. It is not possible to say whether it might have ameliorated the sentence even more if it had not so misdirected itself. This Court is obliged to consider the magistrate's judgment afresh for it is fundamentally that which is still under attack despite its amelioration by the Court *a quo*.

[11] The gravamen of the appellant's crimes was that she fraudulently exploited her managerial position in Telkom to claim and obtain payment of sums of money to which she was not entitled. In September/October 1996 she falsely represented that she had incurred travelling expenses in connection with an official trip from Pretoria to Crystal Springs Mountain Lodge and back and claimed a total amount of R693,00 to which she knew she was not entitled. In February, June and July 1996 she falsely represented on each of three occasions that a named employee of Telkom was entitled to be provided with a ticket enabling that person to fly from Johannesburg to Cape Town on official business. The tickets were provided at a cost of R611,00 per ticket. In fact the named employees were not intended to travel to Cape Town on official business and the tickets were intended by the appellant to be and were used by her fiancé's

[1] 1See for example *R v Tazwigwira*, 1949 (2) SA 656 (SR) at 658; *R v Dhlamini*, 1954 (2) PH, H131 (N); *R v Noble*, 1956 (1) PH H 75 (SR); *R v Motaung*, 1952 (3) SA 755 (O); *R v Piniyasi*, 1948 (2) PH,H 159 (SR); *R v Mongamie*, 1949 (1) PH,H57 (T); *R v Booi*, 1943 (2) PH,H175 (O); *R v Chazangepo*, 1943 (2) SR 129; 1943 (2) PH,H163 (SR); *R v Klein*, 1942 TPD 263; *R v Mtataung*, 1959 (1) SA 799 (T).

[2] 2 Supra, note 1.

niece for private purposes.

[12] The appellant was a senior manager of Telkom's Affirmative Action Project at the time. It was within her power to authorise the purchase of flight tickets for use by employees when travelling on Telkom business. At the time of her trial she was conducting her own practice as a consultant in industrial relations in which discipline she was the holder of a doctorate. She was in receipt of an income of approximately R20 000,00 per month. She had no previous convictions.

[13] While the magistrate's reference to the appellant as having been on "the gravy train" and his statement that others on that "train" needed to be deterred from behaving as the appellant had done, were uncalled for, I do not consider that they amount to a misdirection of sufficient materiality to justify me in regarding myself as being at large to impose sentence entirely afresh. It is quite clear that the magistrate was responding to the need to deal firmly with a well-paid white collar employee in a position of trust who abused her position by defrauding her employer. White collar crime had become notoriously prevalent and courts of high authority had lamented a tendency on the part of some courts to impose sentences which were rightly generally regarded as being too lenient.

[14] He was dealing with a person who could well afford to pay for the trip which she undertook and the flight tickets which she fraudulently authorized and who had resorted to that dishonest conduct on a number of different occasions. She thus had more than ample time for reflection about the criminality of what she proposed to do and cannot claim to have succumbed to temptation in a rare, uncharacteristic, and transient moment of moral weakness. The magistrate *mero motu* called for a report as to the appellant's suitability for correctional supervision and did not simply in knee-jerk like fashion impose direct imprisonment. The fine he imposed may cumulatively appear heavy (R25 000,00) when compared with the amount of money involved in the charges (R2 526,00) but coolly calculated and repeated fraud is not to be taken lightly and R25 000,00 is less than the appellant's after tax earnings for two months.

[15] The correctional supervision and community service cannot be said to be unwarranted in principle and what might have been regarded as inappropriate or uncalled for aspects of the conditions set have been eliminated. The further complaint about the nature of the community service to be rendered is not open to the appellant when, as was the case, her legal representative not only failed to question its appropriateness but actually asked clarificatory questions about it which indicated

acquiescence in the proposal. It is, in any event, not manifestly inappropriate.

[16] While it may be that the sentence in its totality is severer than some might have imposed, it is by no means unreasonable and I can find no justification for interfering any further with it than has already been done. The appeal is dismissed.

R M MARAIS
JUDGE OF APPEAL

FARLAM JA)
NUGENT JA) CONCUR