THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

469/2002

In the matter between

WIMPIE BARNARD **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM : MARAIS, CAMERON JJA *et* MLAMBO AJA

HEARD : 21 MAY 2003

DELIVERED : 30 MAY 2003

Summary: Sentence in terms of s 276(1)(i) for theft of money from employer.

J U D G M E N T

MLAMBO AJA/…

MLAMBO AJA:

[1] This is an appeal against sentence. The appellant, a thirty four year old man, pleaded guilty to 30 counts of theft from the complainants, involving an amount of R30 069. Consequent upon his plea he was convicted and sentenced to five years' imprisonment. His appeal against sentence to the Transvaal Provincial Division (Kirk-Cohen and Webster JJ) was unsuccessful, but leave to appeal to this Court was granted.

[2] The appellant was employed as a clerk in the complainants' business.

He also performed bookkeeping functions and was placed in charge of a safe where cash was kept. He had custody of the key to that safe. His responsibilities are indicative of the trust placed in him by the complainants. He however succumbed to dishonesty and started stealing money. This went undetected for some fifteen months. As was bound to happen, the thefts were discovered. Upon being confronted with the thefts, he simply undertook to repay the money he had stolen. The complainants, however, in addition to laying charges against him, dismissed him from employment and withheld his final month's salary of R3 000.

[3] The appellant, for his part, reported certain alleged VAT irregularities by the complainants to the South African Revenue Services (SARS). He also joined the Mineworkers Union as a member and laid a complaint about the withholding of his final salary of R3 000. Acting on his report SARS officials instituted an investigation in the complainants' business. This investigation was not yet finalised when the trial took place but the complainants stated that minimal irregularities were discovered. The Mineworkers Union also referred the appellant's complaint to the Commission for Conciliation Mediation and Arbitration ('CCMA') which culminated in the complainants paying the appellant the amount of R3000.

[4] In mitigation of sentence, the appellant gave evidence primarily about his current employment situation and offered to pay back the amount he had stolen in an amount of R700 per month. A report in terms of s 276(1)(h) of the Criminal Procedure Act, Act no 51 of 1977 ('the Act') was also handed in. This report recommended correctional supervision as a sentencing option.

[5] The State tendered the evidence of the complainants in aggravation of sentence. The gist of this evidence was that the appellant's reports to the South African Revenue Services and the CCMA had engendered a sense of indignation in the complainants. It was also claimed that it was impossible

to determine the full extent of the thefts because of the measures the appellant took to conceal them.

[6] The trial Court based its decision on sentence on the following essential findings:

6.1 theft by an employee in circumstances where the employee is in a position of trust was to be viewed in a very serious light and direct imprisonment was the rule;

6.2 the appellant had shown scant remorse for his dishonesty, by blowing the whistle on complainants to SARS, as well as invoking his labour law remedies to claim the R3000,00 withheld by the complainants;

6.3 the appellant's offer to repay the stolen money was made for the first time during the trial which gave the impression that he was not as serious about repayment as he was about being sentenced lightly; and

6.4 correctional supervision in terms of s 276(1)(h) of the act was limited to a period of three years and as such it would not have the necessary deterrent effect.

[7] The Court *a quo* in turn agreed with the trial Court that the appellant had failed to show remorse for his dishonesty. The Court *a quo* reasoned that the fact that up to the time of the appeal the appellant had made no repayment of any of the stolen money suggested, in effect, that the appellant's offer of repayment was a ploy to avoid direct imprisonment. The Court *a quo* also found that the appellant's offer of repayment was essentially an offer to repay only the capital without any interest; that there was uncertainty whether the appellant would retain the employment he secured after his arrest; and that the appellant's evidence that he used part of the stolen money to help his father was not persuasive.

[8] The Court *a quo* further agreed with the trial Court's reasoning that correctional supervision as a sentencing option was not appropriate. The

Court *a quo* went on to conclude that there was no material disparity between the sentence imposed by the trial Court and the sentence that it would have imposed, and, in the absence of any misdirection by the trial Court, it could find no reason to interfere with the sentence of five years imposed by the trial Court.

[9] The issue is therefore whether the trial Court exercised its discretion properly and judicially in imposing a sentence of 5 years' direct imprisonment. It is trite that sentence is a matter best left to the discretion of the sentencing Court. A court sitting on appeal on sentence should always guard against eroding the trial Court's discretion in this regard, and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the Court did not exercise its discretion at all or exercised it improperly or unreasonably.

[10] In my view this test is satisfied in the present case for the following reasons. The trial Court misdirected itself in finding that the appellant's conduct after his arrest in blowing the whistle on his employer for alleged VAT irregularities and the institution of proceedings in the CCMA were not reconcilable with remorse. This finding clearly played a large part in the trial Court's imposition of the sentence of five years. This finding was in my view actuated by the trial Court paying insufficient regard to the appellant's motive for acting in that manner.

[11] The appellant testified in this regard that after the thefts were discovered, he was confronted by the complainants. He offered to repay the money he had stolen. The appellant testified that after his undertaking of repayment an arrangement was struck to the effect that the complainants would instruct their attorney to draw up an agreement which the appellant

would sign binding himself to the offer to pay. He testified that the complainants reneged on that arrangement by instead opting to have him arrested. On realising that the repayment arrangement was off the table, he then went to the SARS and to the CCMA. This version was not contradicted. These facts were misconstrued, to the prejudice of the appellant, in the trial Court's judgment on sentence.

[12] The trial Court found that a sentence of correctional imprisonment in terms of s 276(1)(h) was not appropriate in this case and that it would not have the necessary deterrent effect. This finding appears to have been influenced by the trial Court's view that direct imprisonment in this type of offence was the rule. In this regard the trial Court appears to have limited its sentencing options by positing a choice between direct imprisonment and correctional supervision. Hence the trial Court's statement that this type of sentence was limited to a period of three years which it did not consider would have the necessary deterrent effect. . This was clearly a misdirection in that the trial Court failed to consider other options provided in s 276 such as the sentence provided in s 276(1)(i) which caters for a period of direct imprisonment of up to five years, albeit imprisonment capable of subsequent conversion to a sentence of correctional supervision.

[13] In my view the Court *a quo* also misdirected itself in a number of other respects. It doubted the appellant's evidence that he used part of the stolen money to assist his father. It is however clear that the State did not contest the appellant's version that he assisted his father. The complainant as it happened had also assisted the appellant's father with motor vehicle parts but this did not stave off his subsequent sequestration. The Court *a quo* further found that the appellant's erstwhile employer was 'negative' towards a continuation of the appellant's employment. This is another misdirection. The appellant's evidence that the pending charges against him were known to

his employer and that they did not affect the continuation of his employment was clear and was not contradicted.

[14] The Court *a quo*'s finding that the applicant's offer to repay the money he had stolen did not encompass an offer to pay interest is clearly misdirected. Analysis of the appellant's offer to repay the stolen money in monthly instalments of R700,00 reveals that both capital and interest would have been fully paid off in a markedly shorter period than the twenty or so years suggested to the appellant by the State prosecutor during his cross-examination (which timeframe the trial Court and the Court *a quo* mistakenly seemed to endorse).

[15] The misdirections discussed in the preceding paragraphs are in my view material. They are material in that, taken individually and cumulatively, they provided the basis for the trial Court rejecting correctional supervision as a sentencing option. Under the circumstances this Court is at large to reconsider the question of sentence afresh. It remains for me to consider what sentence to impose. This Court has consistently held that theft of this nature is serious. What also makes it serious is that the appellant was in a position of trust and betrayed that trust. This Court in *S v Sadler* 2000 (1) SACR 331 (SCA) dispelled the notion that persons convicted of this type of offence were not criminals and were therefore entitled to be kept out of prison. In that case Marais JA, acknowledging the seriousness of this type of offence, stated that in appropriate cases direct imprisonment was not to be shied away from.

[16] A balance needs to be struck between the interests of society in having deterrent sentences imposed and the interests of the appellant in having his personal circumstances taken into account in amelioration of his sentence, as well as the purposes of judicial punishment *per se*. The recurrence of this type of offence needs to be curbed by the imposition of sentences which

address this upsurge. Deterrence is therefore crucial. Appropriately severe punishment should, therefore, be imposed to achieve this objective. The quest for severity in a sentence should however not override considerations of mercy and an understanding of human weaknes.

[17] In this case the amount of R30 069 stolen by the appellant may appear relatively small if one considers the amounts involved in other cases considered by this Court. However, if one considers that the business of the complainants was not a large one, then the amount stolen assumes graver proportions. It is also correct that when the appellant's conduct was discovered he offered to repay the money he had stolen. He was in fact prepared to sign a document signifying his willingness to pay. He also pleaded guilty and made an offer to repay the money in monthly instalments of R700,00 having secured alternative and sustainable employment. This tends to signify remorse.

[18] It is not in dispute, too, that the appellant used some of the money he stole to assist his father who was beset by financial woes. The appellant is also a first offender. It is also true that the commission of this type of offence is rampant, and a clear message needs to be sent out that this will not be countenanced.

[19] It is opportune at this stage to deal with the appellant's application for this Court to consider the fact, now sought to be placed before us, that after the dismissal of his appeal by the Court *a quo*, he effected full payment of the capital and interest to the complainants. Only in exceptional cases will a court, sitting on an appeal on sentence, consider a fact that came to light after proceedings in a court *a quo*. In *S v Marx* 1989 (1) SA 222 (A) at 226 B – C Smalberger JA said:

'Vonnis word bepaal na aanleiding van feite en omstandighede wat ten tyde van vonnisoplegging bekend is. Slegs in uitsonderlike gevalle kan feite wat

eers na vonnisoplegging bekend word op appèl in aanmerking geneem word.'

The payment this Court is requested to consider was effected by the appellant. The timing of the payment was therefore determined by him. We have no explanation why the payment occurred only after the unsuccessful appeal to the Court *a quo* and why it was not made at any other time. The repayment was no doubt of advantage to the complainant. Had there been no misdirections by the Court *a quo* and had this Court not been at large to consider the question of sentence afresh, taking into account the repayment would not have been justified. It would encourage others to manipulate their dealings in an effort to influence the outcome of appeals.

[20] That must in my view be the general rule. However, in view of the fact that a number of material misdirections have been found, this Court is at large to impose an appropriate sentence. In this sense the appellant's position before this Court is similar to a convicted accused awaiting sentence. In *S v Mpendokana* 1987 (3) SA 20 (C) the Court considered an appeal from a magistrate in which the appellant had been sentenced to two years' imprisonment. In that appeal the Court was of the opinion that the sentence imposed was not appropriate and reserved judgment. Before the Court could pronounce its sentence the legislation applicable to those offences was amended to make provision for a fine. The Court imposed a sentence based on the new legislation. Marais J (as he then was) stated at 23 E – G:

'Na my mening is 'n Hof van appèl nie genoop om 'n minder paslike vonnis op te lê slegs omdat dit nie bestaan het ten tye van die aanvanklike vonnisoplegging nie. As hierdie Hof die saak na die landdros sou terugverwys het vir vonnisoplegging opnuut, sou die landdros geregtig gewees het om van die nuwe vonnis gebruik te maak. Myns insiens sou dit absurd wees om te bevind dat 'n Hof van appèl nie self van die nuwe

strafmaatreël gebruik kan maak nie en dat die enigste wyse waarvolgens so ‘n resultaat bereik sou kon word, sou wees om die saak na die hof *a quo* terug te verwys vir vonnisoplegging opnuut.’

[21] This approach was approved by this Court in *Prokureur-Generaal, Noord-Kaap v Hart* 1990 (1) SA 49 (AD) at 57 A – B.[1] Even though that case and *S v Mpendokana* (*supra*) and the cases[2] discussed therein dealt with supervening legislation, the approach is in principle applicable also to other situations. Given that we are ourselves imposing sentence as if none had been previously imposed I can see no impediment to considering the fact that the appellant has now fully repaid the complainants the money he stole from them. It seems obvious that since his trial and the hearing of his appeal in the Court *a quo* the appellant has been able to raise the money needed to reimburse the complainant whereas he was not able to do so at any earlier date.

[22] All the circumstances of this case persuade me that this is a suitable case for the imposition of a sentence of imprisonment which is capable of conversion to correctional supervision in terms of s 276(1)(i) of Act 51 of 1977. Such a sentence is appropriate in this case as it strikes a balance between the public interest in the retributive and deterrent elements of sentence and the personal interests of the appellant.

[23] In the circumstances the appeal succeeds and the sentence imposed by the Court *a quo* is set aside. The following order is substituted:

> ‘The appeal succeeds. The sentence of the trial Court is set aside. In its place there is substituted the following sentence:

The accused is sentenced to five years’ imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act read together with s 276A(2)(b).’

1 ‘Ek volstaan deur te sê dat bostaande redenasie na my beskeie mening suiwer is, en ten volle versoenbaar met die grondbeginsels van ons reëls van wetsuitleg betreffende straftemperende wysigingswette.’ Per Hoexter JA

2 *S v Crawford and Another* 1979(2) SA 48 (AD); *S v Loate* 1983(3) SA 400 (T); *S v Mpetha* 1985(3) SA 702 AD and *S v Innes* 1979(1) SA 783 (C)

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D MLAMBO
ACTING JUDGE OF APPEAL

CONCUR:
MARAIS JA
CAMERON JA

MARAIS JA:

[1] With some reluctance I concur in the judgment of Mlambo AJA. I am less inclined to accept that the appellant was and is genuinely remorseful. He is not of course being sentenced for seeking to cause his employer embarrassment and discomfiture by reporting alleged tax irregularities to SARS. Nor is he being sentenced for his insistence upon being paid his salary of R3 000,00 despite the fact that he had stolen from and therefore owed his employer over R30 000,00. But I find it very difficult to reconcile that behaviour, even if it was retaliatory, with a sense of genuine remorse for his misdeeds and to accept that he is entitled to be given the benefit of such a finding. The plea of guilty in the face of an open and shut case against him is, in my opinion, a neutral fact. That said, I agree with respect that there were other material misdirections by the trial court and that we are therefore at large in relation to sentence. I agree too that we may properly take the repayment of the money stolen into account. I myself would have been inclined to impose a sentence more severe than that which Mlambo AJA has imposed and which would have approximated more closely to the sentence which the trial court imposed, but I do not feel sufficiently strongly about the matter to warrant a positive dissent.

R M

MARAIS

JUDGE OF APPEAL