REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 452/02
Reportable

In the matter between:

DAVID ASHLEY PRICE **FIRST APPELLANT**
CHRISTIAAN MAURITZ LABUSCHAGNE **SECOND APPELLANT**

and

THE STATE Respondent

CORAM: HOWIE P, FARLAM et BRAND JJA

HEARD: 20 MAY 2003

DELIVERED: 5 September 2003

SUMMARY: Prescribed minimum sentence – proceeds of stolen cheques laundered through attorneys' trust accounts – whether substantial and compelling circumstances prevent justifying imposition of lesser sentences than those prescribed.

JUDGMENT

FARLAM JA

INTRODUCTION

[1] The two appellants in this matter together with one Gerrit Nel (to whom I shall hereinafter refer as 'Nel' were indicted in the South Eastern Cape Division of the High Court on two counts of fraud. When the trial began Nel was absent and the trial continued without him. The first appellant was convicted on both counts and the second appellant was acquitted on the first count and convicted on the second. Thereafter, on the 11th October 2000 the first appellant was sentenced to fifteen years imprisonment on each of the two counts and it was ordered that the sentences be served concurrently. In addition he was ordered in terms of section 300 of the Criminal Procedure Act 51 of 1977 in respect of count 1 to pay R326 140-10 as compensation to the Standard Bank of South Africa Ltd. The second appellant was sentenced to fifteen years imprisonment on count 2.

[2] In respect of both appellants the sentences imposed were the minimum sentences prescribed in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997, read with Part II of the second schedule to that Act, in view of the fact that the trial judge held that he was not satisfied that there were 'substantial or compelling circumstances', as contemplated by sub-section (3)(a) of the section, which would have justified the imposition of a lesser sentence than the sentence prescribed in sub-section (2)(a)(i).

[3] At the time of the trial this Court had not yet delivered its judgment in *S v Malgas*, 2001(2) SA 1222(SCA), in which section 51 of Act 105 of 1997 (to which I shall hereinafter refer as 'the Act') was fully considered. Prior to the *Malgas* case a number of decisions had been delivered by various judges of the High Court and widely diverging views on the correct interpretation of the section had been expressed. In the result the view which commended itself to the trial judge was in broad outline the same as that upheld by this Court in the *Malgas* decision except for the fact that the trial judge was of the view that the fact that the first appellant had no previous convictions could not be taken into account when the question of substantial and compelling circumstances was considered. Counsel were agreed that the trial court's failure to take the first appellant's clean record into account when considering whether substantial and compelling circumstances were present constituted a misdirection with the result that this Court is at large in considering whether the minimum sentence prescribed by the Act should have been imposed on the first appellant.

FACTS

[4] The counts on which the appellants were indicted related to two cheques drawn by Mercantile Registrars Limited which were stolen and subsequently deposited into the trust accounts of two Port Elizabeth attorneys.

[5] The first cheque, which was drawn on the 9th November 1998 in favour of the trustees of the EM Gorton Trust in an amount of R325 000, was issued pursuant to the provisions of a scheme of arrangement under section 311 of the Companies Act 61 of 1973, whereby certain shareholders (among them the trustees of the EM Gorton Trust) sold their shares in Alpha Limited. At some stage between the 9th and 20th November 1998 this cheque was stolen. It was deposited on the 2nd December 1998 at the Braamfontein branch of the Standard Bank of South Africa Ltd for the credit of first appellant's trust account at the North End branch of the Standard Bank.

[6] On the 3rd December 1998 Nel faxed a copy of the cheque and the deposit slip recording the deposit to the first appellant's trust account to him. On the 12th December 1998 the first appellant drew a cheque on his trust account in an amount of R323 632 in favour of Tjeriktik

Eiendomsbeleggings Bpk and handed it to Nel. The amount for which the cheque was drawn represented the amount of R325 000 less a fee of R1 200-00 and 14% VAT. The first appellant's trust cheque for R323 632 was in turn deposited by Nel into a bank account in the name of the payee from which various amounts were withdrawn until a balance of R8 964-01 remained.

[7] The first appellant opened a file in which he made false entries indicating that one of the trustees of the EM Gorton Trust deposited the stolen cheque into his trust account for the purposes of a property transaction which did not materialise and that he had thereafter, at the request of the trustee, paid the amount deposited, minus his fee amd VAT, by means of the cheque drawn in favour of Tjeriktik Eiendoms Bpk. The first appellant was to have received an amount of R100 000 for his participation in the obtaining of the proceeds of the cheque but eventually he received nothing apart from the fee of R1 200.

[8] The first appellant knew that the cheque was stolen, that it had been deposited into his trust account and subsequently cleared for payment to his account by someone in the bank who was involved in the conspiracy. When the paid stolen cheque was returned to the drawer it was intercepted by someone who was also involved in the conspiracy and destroyed.

[9] As a result of the actions of the first appellant and his accomplices the Standard Bank suffered financial loss in the amount of R326 140-10.

[10] The second stolen cheque was drawn by Mercantile Registrars Ltd on the 23rd December 1998 on behalf of Samancor Ltd in an amount of R1 620 000-00 in favour of the trustees of the C Cardases Testamentary Trust. It was drawn following the delisting of Samancor Ltd and the amount for which it was drawn represented the value of Samancor shares owned by the trust. The cheque was stolen between the 23rd December 1998 and the 22nd January 1999 and it was deposited on the 29th January 1999 at the Braamfontein branch of the Standard Bank to the credit of the trust account of one Stephen Wille Martin, a young attorney practising for his own account as Martin's Attorneys at Port Elizabeth. Martin's name had been provided by the first appellant to his co-conspirators in Gauteng after he had persuaded Martin to help him to realise the proceeds of the cheque and had offered him R25 000-00 remuneration for his assistance. In terms of his arrangement with the first appellant Martin had to deposit the money into an interest bearing account for the credit of the second appellant.

[11] The first appellant originally told Martin that the second appellant, who he said was a client of his, wanted to hide the proceeds of the cheque from his wife, from whom he was in the process of being divorced. The

proposal was that Martin would receive the proceeds of the cheque into his trust account as if it was a business transaction and would later repay the money on the basis that the transaction had fallen through. Martin was to draw an uncrossed trust cheque in favour of the second appellant who would then take the cheque to the bank and have the proceeds of the cheque paid out to him in cash.

[12] This proposal was not implemented because Martin had second thoughts and told the first appellant that he was unwilling to issue an uncrossed cheque in favour of the alleged client. Without telling the first appellant, he reported the matter to the police.

[13] The first appellant secured the co-operation of a client of his, one Eric Julian Smith, who was the owner of a cash loan business and operated a trust account with a cheque account in the name of Good Hope Financial Services Trust. The first appellant obtained Smith's co-operation by asking him if he would be willing to assist a client to hide an amount of R1 620 000-00, which, he said, had been obtained from the sale of shares, from his wife who had instituted a divorce action against him. In return for the promise of remuneration of R25 000-00 Smith agreed to pay the amount concerned (in respect of which an attorney's trust account cheque was to be drawn in favour of his business) into his account and then issue a cash cheque for the amount paid in, less his remuneration.

[14] The first appellant, together with the second appellant and Nel, both of whom had travelled specially to Port Elizabeth for the purposes of the transaction, then arranged for Martin to receive a fax instructing him to issue a cheque in favour of Good Hope Financial Services Trust for the amount deposited into Martin's trust account and the interest earned thereon. Martin, however, kept the police informed of what was happening and after the first appellant had gone to Martin's office to fetch the cheque, he, the second appellant and Nel were arrested.

[15] According to what the first appellant had told Martin he was to receive 10% of the amount concerned for his involvement in the realisation of the stolen cheque.

[16] The trial court found that the second appellant was what was described as a 'stooge' or foot soldier. He had learned some months beforehand of the scheme to realise the proceeds of a stolen cheque in which he and Nel were to be involved. He knew that the Samancor cheque had been stolen and deposited in a bank account and that he was to be responsible for withdrawing the amount so deposited. He allowed a copy of his identity document to be faxed to Martin so as to set up the realisation transaction and was well aware that the stolen money would eventually pass through his hands into those of his fellow conspirators and that he himself would derive a financial benefit, *viz* an amount of R50

000-00, for his participation. Although, as the trial court found, he played a smaller role than those who planned the scheme his role was a necessary element in its successful execution.

[17] The relevant personal circumstances of the first appellant may be summarised as follows:

(a) he was at the time a 49 year old married man, with two children from his first marriage, who were no longer dependant upon him, and three children from his second marriage who were dependent on him and who were still in primary school.

(b) He had practised as an attorney since 1976, except for a period when he worked as an insurance broker and an investment adviser. As a result of the negative publicity which resulted from the court case his practice had at the time of the trial virtually come to an end.

(c) As a result of his conviction on the two counts of fraud in the present case his career in the legal profession had effectively terminated;

(d) he was financially ruined as a result of this matter;

(e) since his arrest he had experienced considerable strain and he was, as it was put by the trial judge, on sick leave;

(f) he had personally derived no financial advantage from his fraudulent conduct;

(g) he was, as has already been stated, a first offender: he had an impeccable record as an attorney and had never been guilty of

any conduct which could reflect adversely on the profession of which he was a member.

[18] As far as the circumstances relating to the crimes are concerned I have already pointed out that the Standard Bank sustained damages in an amount of R326 140-10 in respect of count one. No loss was in fact occasioned to anyone in respect of count 2.

[19] The relevant personal circumstances of the second appellant may be summarised as follows:

(a) he was 34 years old at the time when sentence was imposed;

(b) the highest standard he passed at school was Standard Eight;

(c) he was self supporting and did, *inter alia,* security work;

(d) he was divorced and had a young daughter who was two years old when sentence was passed;

(e) he supported his daughter and his mother with whom his daughter was staying;

(f) he had previous convictions for fraud (for which he was sentenced to a fine of R1 000 or six months plus eighteen months imprisonment suspended for three years) and theft (for which he was sentenced to a fine of R300 or three months imprisonment);

(g) he had been in custody as an awaiting trial prisoner for approximately nine months pending the conclusion of the trial.

[20] As appears from what I have said as regards the first appellant no

one suffered any financial loss in respect of the count on which the second appellant was convicted.

RELEVANT STATUTORY PROVISIONS

[21] As far as is material, section 51 of the Act reads as follows:

'…

(2) Notwithstanding any other law but subject to ss (3) …, … a High Court shall –

(a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of –

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than twenty years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

…

(3) (a) If any Court referred to in ss …(2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in [that subsection], it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

…

(4) Any sentence contemplated in this section shall be calculated from the date of sentence.'

Part II of Schedule 2, as far as is material, reads as follows:

'

Part II

…
Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft –

(a) involving amounts of more than R500 000

(b) involving amounts of more than R100 000, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy …'

SUMMARY IN *S V MALGAS*

[22] Marais JA summarised the views of this Court on the correct interpretation of s 51 in *S v Malgas*, *supra*, at 1235F - 1236E, as follows:

'A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal

circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be

imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.'

JUDGMENT OF TRIAL COURT

[23] In his judgment on sentence the learned trial judge, after setting out the personal circumstances of the first appellant and stating that the first appellant's counsel in the trial court had drawn attention to the fact that no one suffered any financial loss as far as the activities of the first appellant on count 2 were concerned and that he had received no personal gain from the crime committed, said:

'On the other hand, the crimes committed by accused No 1, an attorney of this court, were well planned, He was part of a syndicate. He knew exactly how the crimes were to be committed. He related to Attorney Martin that a person would steal a cheque and that the cheque would then be deposited into a trust account, ant the further steps thereafter to be taken. On one occasion accused No. 1 made his trust account available for the stolen cheque. He wrote out a cheque and handed it to a co-conspirator. He would have received, on his story to Martin, an amount of approximately R100 00 had he not been done in by his co-conspirators.
On the second occasion accused No. 1 involved a friend who happened to be a junior attorney. When Martin wanted to get out of the scheme, accused No. 1 at first tried to persuade him to continue with the criminal act. Telling him that if he withdraws he would be the weak link in the scheme. When accused No. 1 realised that there would be certain difficulties to retain the co-operation of Martin, he, still in the furtherance of the criminal objectives, involved another person, Mr Smith, and his trust account. All these factors are in my view aggravating facts against accused No. 1. His profession as an attorney required of him the utmost honesty. A breach thereof puts the crime committed in even a more serious light.
If I look at the aggravating circumstances, and to the facts mentioned by Mr De Jager that I should take into account in favour of the accused, I have no doubt at all that there are no substantial and compelling circumstances as required by the Act.'

[24] The portions of the trial court's judgment dealing with the second appellant were in Afrikaans. After setting out the personal circumstances of the second appellant and referring to the submission advanced by his counsel that he played a lesser role in the commission of the crime, was what was described as a 'stooge' and a foot soldier and had gained no advantage from the commission of the crime covered by count 2 of the indictment and that no financial harm was suffered by anyone as a result of the crime, the trial judge said:

‘Dit is inderdaad so dat beskuldigde nr. 2 die “stooge” of voetsoldaat was. Dit is egter heeltemal tereg deur mnr Roberts, namens die Staat, uitgewys dat in elke een van hierdie skemas daar inderdaad ’n voetsoldaat moet wees. Beskuldigde nr. 2 was bewus daarvan. Hy het op sy weergawe reeds maande voor die gebeure in die gevangenis van Nel verneem van die skema waarmee hulle betrokke sou raak. Hy het presies geweet watter rol hy sou speel in die skema. Hy het presies geweet dat ’n tjek gesteel is en in ’n bankrekening gedeponeer is en dat hy verantwoordelik sou wees vir die trekking daarvan . Hy het toegelaat dat sy identiteitsdokument gebruik word, wel wetend dat gesteelde geld uiteindelik via sy hande in dié van sy mede-samesweerders sou beland en dat hy self geldelike voordeel daaruit sou trek. Hy het inderdaad ’n kleiner rol gespeel as die beplanners, maar sy rol was ’n noodsaaklike element in die suksesvolle uitvoering van die skema. Alhoewel hy nie die finale brief met die instruksie aan Martin opgestel het nie, het hy geweet waarmee hy besig was en het gegaan na ’n plek waar hy so min as moontlik spore sou laat om die instruksie om die tjek te kry aan Martin deur te faks.
Slegs sy weergawe, wat aanvaar moet word, ten aansien van die vergoeding wat hy sou ontvang het, is voor my geplaas. Die feit dat dit relatief klein is en die feit dat hy ’n mindere rol gespeel het as byvoorbeeld beskuldigde nr. 1 en Nel, tesame met sy persoonlike omstandighede, kan egter, na my oordeel, ook nie dwingende omstandighede daarstel wat ’n mindere vonnis regverdig ingevolge die terme van die bepalings van die Wet nie.’

In the course of his judgment the trial judge said that had it not been for the Act he would ‘most probably’ not have imposed the prescribed minimum sentence on either of the appellants. In his judgment granting the appellants leave to appeal the trial judge said:

‘Ek kan op hierdie stadium meld dat ek met oorweging van vonnis behoorlik aandag aan die saak gegee het, en ek het uiteindelik tot die gevolgtrekking gekom dat indien ek nie verplig was deur die Wet om die statutêre minimum van 15 jaar gevangenisstraf op te lê nie, ek waarskynlik in die geval van die eerste applikant ’n vonnis in die omgewing van 10 jaar gevangenisstraf sou opgelê het en ten aansien van die tweede applicant, in die lig van sy vorige veroordelings, maar ook in die lig van die mindere rol wat hy gespeel het, ’n vonnis in die omgewing van agt jaar gevangenisstraf. Ek sou waarskynlik ten aansien van beide ’n gedeelte van die vonnis opgeskort het.’

SUBMISSIONS ON BEHALF OF FIRST APPELLANT

[25] Mr *Van Zyl,* who appeared on behalf of the first appellant laid great stress in his submissions on behalf of his client on the factors that the first appellant derived no financial benefit from the offences, that no-one suffered financial loss in respect of the fraud forming the subject matter of the second count and that the first appellant’s career has been destroyed and he is financially ruined as a result of the convictions.

[26] He also contended that the first appellant had played a much smaller role than Nel, whom he described as the main protagonist. He also drew attention to the fact that the first appellant was, as he put it, financially vulnerable at the time because he had had to repay an amount of R450 000 which he had borrowed to lend on to someone who had since died without repaying him the debt. He contended in this regard that it was probable that the first appellant had succumbed to the temptation to participate in the two offences as a result thereof.

[27] Mr *Van Zyl* then proceeded to refer to a number of decisions all decided before the Act came into operation, in which substantially lesser sentences were imposed on persons convicted of crimes broadly similar to those presently under consideration.

SUBMISSIONS ON BEHALF OF THE SECOND APPELLANT

[28] Mr *Pretorius,* the attorney who appeared on behalf of the second appellant before this Court, contended that, in the light of the personal circumstances of the second appellant, his substantially lesser role in the commission of the offence of which he was convicted, the fact that he was only to receive R50 000 for his part in the crime and in fact received nothing, and the fact that no financial loss was in the result suffered by anyone, the prescribed sentence was unjust with the result that an injustice would be done if the sentence imposed on the second appellant would have to be served.

DISCUSSION

[29] As far as the first appellant is concerned I shall consider the sentence imposed on each count separately, although I agree with the trial judge that nothing in section 51 of the Act prevented him from ordering that the sentences should run concurrently and that in the circumstances of this case it was appropriate so to order.

[30] I agree with the trial judge that had it not been for the Act a lesser sentence in the region of ten years imprisonment, part of which would be suspended, would have been appropriate. The cases to which Mr *Van Zyl* referred confirm that that is so. One cannot ignore, however, that, as Marais JA put it in *Malgas, supra,* at 1230 D-E, after the Act came into operation 'it was no longer to be "business as usual" when sentencing for the commission of the specified crimes' and that the Legislature has provided a new 'bench mark' against which the sentence to be imposed must be assessed.

[31] The first offence involved a significant amount of money, which the bank has lost. In the light of the fact that the first appellant is, as the Court was told, financially ruined it does not seem as if the compensation order made in its favour will do much to reduce that loss.

[32] The crime was carefully planned. Its execution involved the co-operation of a number of accomplices. In addition, the use of an attorney's trust account for what amounts to the laundering of the proceeds of crime is an important aggravating factor. Conduct of this kind by a practising attorney is reprehensible and cannot be tolerated.

[33] I do not think that the mitigating factors to which reference was made and the fact that the first appellant was a first offender are sufficiently powerful to constitute substantial and compelling circumstances so as to justify a departure from the bench mark laid down by the Legislature.

[34] Similar considerations apply in respect of the second fraud. It is true that in respect of that offence no loss was suffered. On the other hand the amount was substantially greater and there were the aggravating factors that the first appellant not only involved a much younger practitioner in the offence but also tried to persuade him to continue when he had second thoughts. Moreover he took great care to see to it that the fact that the paper trail relating to the transaction did not lead in any way to him so that if the police discovered that the proceeds of the stolen cheque had been paid into Martin's trust account the suspicion would have fallen on Martin and not on him.

[35] In all the circumstances I am not satisfied that there are substantial and compelling circumstances justifying the imposition of lesser sentences than those prescribed in the case of the first appellant and his appeal against the sentences imposed upon him must fail.

[36] I turn now to deal with the sentence imposed upon the second appellant. In my view the trial judge overemphasised the fact that his participation was a necessary element in the successful implementation of the scheme. The fact is that he was a relatively unimportant cog in the criminal engine which produced the offence in the present case. There is nothing to suggest that he was in any way involved in the planning of the

crime or the recruitment of the other accomplices. He did not benefit in any way and in fact spent nine months in custody before the trial concluded: it will be remembered in this regard that in terms of s 51(4) prescribed sentences run from the date of imposition. It is true that, as his list of previous convictions indicates, he is a pretty criminal. But that is no reason for him to receive the same sentence on count 2 as the first appellant, whose role and culpability were substantially greater.

[37] In my view the imposition of the prescribed sentence in the case of the second appellant would cause an injustice to be done and that a lesser sentence should be imposed. Regard being had to the benchmark provided by the legislature, the question to be considered is what sentence falling short of 15 years is appropriate.

[38] The crime was, as I have said when considering the first appellant's appeal, very serious even though no financial loss to anyone in fact resulted. In my view a sentence of ten years' imprisonment will be appropriate in the circumstances.

[39] The following order is made:

1. The appeal by the first appellant is dismissed.

2. The appeal by the second appellant succeeds: The sentence of 15 years' imprisonment imposed upon him is set aside and there is substituted for it a sentence of imprisonment for ten years. Insofar as it may be necessary to do so, the sentence so imposed is antedated to 11th September 2000 being the date upon which the sentence of 15 years' imprisonment was imposed.

……..

IG FARLAM

JUDGE OF APPEAL

CONCURRING:

HOWIE P

BRAND JA