REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case Number : 626 / 2007
No precedential significance

MARIA DE LOURDES ABRANTIS DE SOUSA **Appellant**

and

THE STATE **Respondent**

Neutral citation: ***De Sousa v The State***
(626 / 2007) [2008] ZASCA 93 (12 September 2008)

Coram : **BRAND, PONNAN and JJA and LEACH AJA**

Heard: **2 September 2008**
Delivered: **12 September 2008**

Summary: Fraud – sentence – approach to on appeal - striking disparity between sentence imposed and that which the appellate court would have imposed – sentence reduced from seven-and-a-half to four years' imprisonment.

ORDER

On appeal from: The Johannesburg High Court, (Horn J and Mlonzi AJ sitting as a court of appeal)

1 The appeal succeeds.
2 The sentence is set aside and there is substituted for it a sentence of four years' imprisonment.

JUDGMENT

PONNAN JA (BRAND JA and LEACH AJA concurring):

[1] The appellant was convicted, pursuant to her plea of guilty, by the Regional Court (Johannesburg) of 13 counts of fraud involving a total amount of R1 000 228,94. All counts having been taken as one for the purposes of sentence, the appellant was sentenced to a term of imprisonment for a period of 7½ years. An appeal to the Johannesburg High Court (per Horn J, Mlonzi AJ concurring) having proved unsuccessful the further appeal is with the leave of this court.

[2] The facts and circumstances relating to the conviction can be gleaned from the appellant's written plea explanation in terms of s 112 of the Criminal Code:

'2 In pleading guilty to the said charges I admit:
2.1 that I misrepresented to Maslex and or their employers that
2.1.1 goods were bought by Maslex from MDS Marketing and or M de Sousa and or MDS Marketing trading as M de Sousa on the dates as per column 1 of the schedule attached to the charge sheet for the amounts as per schedule 2 of the said schedule.
2.2 that by means of the said misrepresentations Maslex and or their employers were induced to their prejudice or potential prejudice to:
2.2.1 accept the said misrepresentations as being the truth and or
2.2.2 pay the amounts as per column 2 of the schedule to MDS Marketing and or M de Sousa or MDS Marketing trading as M de Sousa.
2.3 that when I made the said misrepresentations as aforesaid I knew that the goods were not bought by Maslex from MDS Marketing and or M de Sousa and or MDS Marketing trading as M de Sousa for the amounts as per column 2 of the schedule and that the amounts were not payable as aforesaid.

3 The circumstances under which I committed these crimes were as follows:
3.1 During 1999 I met my co-accused Mr Dos Santos, who at the time was an executive director of Maslex.
3.2 We engaged in a lover's relationship.
3.3 I was confronted by Mr Dos Santos and asked whether or not my bank account could be utilised in order to get cheques from Maslex cleared and thereafter the monies would be transferred to his personal account.
3.4 At the time I was sceptical of this arrangement but I was informed by Mr Dos Santos, that I had to explain that I in fact sell water should I ever be asked about the money that had been deposited into my account.
3.5 I was at all times aware of the fact that Mr Dos Santos neither myself nor MDS Marketing bought any goods from Maslex and that no monies were payable to myself, Mr Dos Santos or MDS Marketing.
3.6 I then agreed to utilise my bank account for the clearance and transfers of the monies as set out above.
3.7 I then actually paid the cheques on the dates as set out in column 2 of the schedule into my bank account after the said cheques were handed to me by Mr Dos Santos.
3.8 The cheques were cleared on the same day whereafter I transferred the monies into the bank account of Mr Dos Santos.
3.9 From the monies that I transferred to the account of Mr Dos Santos I received an amount of R90 000,00 for my participation in this scheme.
3.10 I utilised the said monies in order to pay my debt and debt incurred by Mr Dos Santos. These facts will be more clearly set out to the court during sentence procedures.
4 I further admit that when I acted as aforesaid I knew that no monies were due to myself or MDS Marketing that my actions were wrong and that I was not entitled to deposit the cheques or to transfer the money as aforesaid.'

[3] It is common cause that Act 105 of 1997 – the so-called minimum sentencing legislation, finds application and that the matter falls within the purview of Part 2 of Schedule 2 of the Act. In terms of s 51(2)(*a*)(*i*), the legislature has ordained 15 years' imprisonment for a first offender found guilty of an offence of this kind, unless substantial and compelling circumstances in terms of s 51(3)(*a*) which would justify the imposition of a lesser sentence are found to exist . The trial court did indeed find such circumstances to be present. It thus departed from the statutorily prescribed minimum sentence.

[4] The approach of a sentencing tribunal to the imposition of the minimum sentences prescribed by the Act is to be found in the detailed judgment of Marais JA in *S v Malgas* 2001 (1) SACR 469 (SCA). The main principles appearing in that judgment which are of particular application to the present appeal are: first, the court has a duty to consider all the circumstances of the case, including the many factors traditionally taken

into account by courts when sentencing offenders; second, for circumstances to qualify as substantial and compelling, they do not have to be exceptional in the sense of seldom encountered or rare; third, although the prescribed sentences required a severe, standardised and consistent response from the courts unless there were, and could be seen to be, truly convincing reasons for a different response, the statutory framework nonetheless left the courts free to continue to exercise a substantial measure of judicial discretion in imposing sentence. (See also *S v Fatyi* 2001 (1) SACR 485 (SCA) para 5; *S v Abrahams* 2002 (1) SACR 116 (SCA) para 13.)

[5] The circumstances entitling a court of appeal to interfere in a sentence imposed by a trial court were recapitulated in *Malgas* (para 12), where Marais JA held:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. . . . However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

[6] It has not been suggested that the sentence was vitiated by any misdirection. The argument advanced on behalf of the appellant is that the degree of disparity between the sentence imposed and that which this court would have imposed is such that interference is competent and required. As Marais JA put it in *S v Sadler* 2000 (1) SACR 331 (SCA) para 8,

'The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate Court would have imposed a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So it is said that where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate Court would have imposed, interference is justified. In such situations the trial court's discretion is regarded (fictionally, some might cynically say) as having been unreasonably exercised.'

[7] It is so that the appellant has shown genuine remorse and contrition in: first, co-operating with the investigating officer from the time of her arrest; second, admitting her role in the commission of the offences; third, deposing to a witness statement and agreeing to testify against Mr Dos Santos; fourth, signing an acknowledgement of indebtedness in favour of Maslex in the sum R90 000 being the extent of her benefit from the fraudulent scheme and thereafter paying that debt in full; and, fifth, pleading guilty to the charges.

[8] It must also count in her favour that her first foray into crime occurred at the relatively advanced age of 32 years. And, when she did eventually venture into crime it was at the instance of her boyfriend with whom she evidently was besotted. As she explains in her evidence:

'Can you maybe explain to the court why you committed this crime? What was the reason therefore? --- I have never been proposed, and Rui proposed to me, and it was a husband that I was going to get, and the life that I was going to have with him, that knowing that he was a director of Maslex, I did not even see any problem with what he was asking me to do, and what I was doing at the time.

Did you actually trust him? --- He was, he is a well travelled man. He, in my experience, he used to speak, he used to have the ANC on a speed dial on his cell phone, and everything just came, everything happened that he promised everything happened, so there was no reason for me to doubt him at that time.'

[9] Mr Dos Santos obviously preyed on the appellant's vulnerabilities. He proposed to her, which she accepted and led her to believe that they would be getting married in the near future. Shortly after she had become complicit in his fraudulent scheme, however, he moved out of their shared apartment and became involved with another woman. But, while she initially succumbed to his charms and acted under his influence in becoming a party to the criminal venture, she persisted long after the relationship had ended. On the appellant's own version, their relationship lasted some four to five months. For the first two of those, Mr Dos Santos was unemployed. The fraudulent scheme commenced almost immediately after he had secured employment. All told the offences were perpetrated over a period in excess of nine months – sufficient time it seems for reflection and re-consideration, particularly when it was only for a third of that time that she was intimately involved with Mr Dos Santos and would have been susceptible to his influence.

[10] It is indeed so that the appellant utilised some of the money to assist her mother, who was, according to the appellant, in financial difficulty and her sister (whose husband was in rehabilitation) to pay school fees. She had as well to pay Mr Dos Santos' cell phone debt to the tune of R10 000. Much of the money however was spent in a wasteful way on lavish items and not for needy purposes. It was not needed to satisfy any of the necessities of life. On the other hand, to the appellant's credit, she has been in gainful employment since March 1993 as a production manageress at Ster Kinekor. Not only were her employers aware of the fact that criminal charges had been preferred against her, but they had loaned and advanced to her the sum of R50 000 which she utilised to pay bail, legal costs and the like. Her excellent work record and the trust that her employers continued to repose in her, particularly after they had learnt of her criminal transgression, must undoubtedly count in her favour.

[11] White collar crime has reached alarming proportions in this country. They are serious crimes, whose corrosive impact upon society is all too obvious. The appellant assisted her boyfriend, who occupied a position of the utmost trust in the complainant company, to implement a plan that he had devised to defraud it. It does not emerge whether all of the losses of the complainant have yet been made good. They are substantial. Furthermore, the misconduct was premeditated and persistent. She participated in the criminal venture not just to benefit herself but also to ingratiate herself with Mr Dos Santos.

[12] There are however facts that distinguish this case from many other similar cases. Although the complainant lost a very large sum of money, the appellant only benefited to the tune of R90 000. In respect of that sum, once discovered, she immediately undertook to repay the money, signed an acknowledgement of indebtedness and in fact has since repaid the amount in full. From the outset, she co-operated fully with the police. Thus, even before she came to be sentenced, she had furnished the investigating officer with a statement detailing her involvement as well as the involvement of Mr Dos Santos in the fraudulent scheme. The investigating officer who testified on her behalf during the trial was very well disposed towards her. As was the complainant. That she has shown genuine remorse for what she has done is abundantly clear.

[13] The appellant has obviously had to suffer in many ways. Her embarrassment is patent and she has had to live with a constant sense of guilt for subjecting those near and dear to her to the trauma that her fall from grace has caused. In compensating the complainant, the appellant divested herself of all of her ill-gotten gains. There is little likelihood that the appellant will repeat the offence or that she in future will constitute a risk to society. Moreover, she is obviously good human material and her prognosis for rehabilitation appears excellent. Because of the gravity of the offences, the request that she be kept out of jail cannot be acceded to. Plainly, a custodial sentence will be the only appropriate sentence. Although one cannot but feel deeply for her, sympathy cannot deter a court from imposing the kind of sentence dictated by justice and the interests of society.

[14] It remains for me to substitute what I consider to be an appropriate penalty for that imposed by the trial court. Taking all of the factors into consideration, in my view, an appropriate sentence is imprisonment for a term of four years. In arriving at that sentence I take account of the fact that she spent some two months in custody prior to being released on bail pending her appeal. Plainly the difference between that sentence and the 7½ years imposed by the trial court is sufficiently striking as to oblige interference.

[15] In the result:

(a) The appeal succeeds.

(b) The sentence is set aside and there is substituted for it a sentence of four years' imprisonment.

_____

V M PONNAN

JUDGE OF APPEAL

APPEARANCES:

COUNSEL FOR APPELLANT:	M VAN WYNGAARD
INSTRUCTED BY:	A S STEIJN BENONI
CORRESPONDENT:	ROSENDORFF REITZ BARRY BLOEMFONTEIN
COUNSEL FOR RESPONDENT:	S M MAAT (Ms)
INSTRUCTED BY:	NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS JOHANNESBURG
CORRESPONDENT:	NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS BLOEMFONTEIN