THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 318/09

Louis Johann Olivier
Appellant

and

The State
Respondent

Neutral citation: *Olivier v The State (318/09)* [2010] ZASCA 48 (31 March 2010)

Coram: Nugent JA, Griesel et Majiedt AJJA

Heard: 10 March 2010
Delivered: 31 March 2010

Summary: Sentence – evidentiary weight of *ex parte* from the Bar – six counts of fraud – sentence of seven year's imprisonment, of which three years conditionally suspended, confirmed.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Jones and Alkema JJ sitting as court of appeal).

The appeal is dismissed.

JUDGMENT

MAJIEDT AJA (Nugent JA and Griesel AJA concurring)

[1] It has become common practice during the sentencing stage of a criminal trial for an accused's legal representative to make *ex parte* from the Bar on his or her client's behalf. These unattested statements often contain material averments which impact directly on sentence considerations.[1] The primary issue for determination in this appeal is what evidentiary weight, if any, the *ex parte* contained in the submissions made by appellant's counsel on sentence at his trial carried.

[2] The appellant, Mr Louis Johann Olivier, was convicted on his plea of guilty of six counts of fraud by the regional court at East London. The six counts were taken together for sentence purposes and a sentence of seven years' imprisonment, of which three years were suspended for a period of four years on condition that the appellant is not convicted of fraud or theft committed during the period of suspension, was imposed.

An appeal to the Eastern Cape High Court at Grahamstown (Jones and Alkema JJ) against sentence was unsuccessful. The present appeal against sentence is with the leave of the court below.

[1] In my experience, prosecutors would only in rare instances convey to the court whether these *ex parte* submissions are disputed or not, which further complicates the matter.

[3] In a comprehensive written plea explanation the appellant admitted having perpetrated fraud in six instances in respect of monies entrusted to him by his clients for secure investment as their financial adviser.[2] The frauds were committed over a period of approximately one year from 18 February 2002 until 5 February 2003. The total sum lost through the appellant's fraudulent conduct amounts to R807 000. The appellant explained that he, contrary to the express instructions of his clients (the complainants) that he should invest their money with either Sanlam or Old Mutual, handed the money to one Shane Richter who deposited same into the account of Mini Stores (owned by Richter) at FNB Kingwilliamstown. Richter was one of the appellant's clients. The complainants' cheques were cashed through a special arrangement that Richter had with a specific teller at FNB. Richter did not pay over the full proceeds of the amounts thus deposited, thereby causing loss to the complainants.

[4] During the sentencing stage, the appellant's counsel did not lead any oral evidence and contented himself with an *ex parte* on sentence from the Bar. Given the importance of this aspect it is necessary to quote in full counsel's opening remarks:

'Your Worship, in respect of sentence, I am not calling any evidence, I will address the court on sentence. ***However if there's anything that I'm saying that my learned colleague is not in agreement with, if she can just indicate and then we will consider whether it's necessary to call evidence to disprove [prove] our allegations***'[3] (emphasis added).

The prosecutor did not take up this invitation to dispute any of the *ex parte* averments at that

[2] In his plea explanation the appellant described himself as a financial planner doing business as such as sole member of Louis Olivier Financial Services CC, trading as 'the Brokerage' in East London.

[3] Both addresses by defence counsel and the prosecutor on sentence were transcribed and form part of the record before us.

time, but instead challenged same in the course of her address on sentence.

[5] In his judgment on sentence the regional magistrate expressed the view that he would have expected the appellant to testify under oath to explain, inter alia, the appellant's relationship with Richter, upon whom the appellant sought to shift considerable blame for the fraud. I shall revert to Richter's alleged role later in the judgment; suffice to record at this juncture that the regional magistrate correctly observed that much of the blame for the commission of the offences was shifted onto Richter by the appellant in the written 'address on sentence.'[4]The regional magistrate was further of the view that many important questions relating to the commission of the offences remained unanswered in the absence of oral testimony by the appellant.

[6] Writing for the high court, Alkema J firmly dispelled the supposition on which appellant's counsel premised his submissions, namely that the facts set forth in the written address on sentence repeated by counsel in his address should have been accepted as a matter of fact by the trial court. The learned Judge drew a distinction between formal and informal admissions and categorized under the latter an agreement between the State and the defence on issues such as the accused's personal circumstances, his background and history, for sentence purposes. The learned Judge stated that he knew of no practice whereby counsel may simply place *ex parte* before a sentencing court, having invited the State to object to any such facts and, absent any

[4] A curious feature of the case is that the appellant's counsel handed in as exhibit B at the trial a written 'address on sentence' containing legal and factual submissions and incorporated therein a statement written by the appellant himself setting out in some detail his personal circumstances. It also contains a brief, rather incomplete description of the circumstances under which the offences had been committed.

objections, to obligate the sentencing court to accept these *ex parte* as proven facts. If indeed there is such a practice, said Alkema J, it cannot simply be elevated to a rule of law. It should be discouraged since it is open to abuse and it has no place in our jurisprudence.

[7] In this court, appellant's counsel submitted that the approach adopted by Alkema J conflicts with other decisions (to which I shall allude later) and that the facts presented *ex parte* trial should have been accepted by the trial court as proved facts. Relying on this court's decisions in *S v Cele*[5] *S v Heslop*[6], counsel submitted that, in the context of the appellant's fair trial right[7], the regional magistrate was obliged to convey in advance which of the *ex parte* were not accepted, before drawing an adverse inference against the appellant in the absence of any testimony from him. The disputed factual averments advanced by appellant's counsel at the trial include, inter alia, the allegation that the complainants had all been compensated by the appellant, that the appellant did not personally benefit from the various instances of fraud and of course Richter's role in the whole affair. These are matters which may have a material bearing on sentence. A discussion of the evidentiary weight, if any, to be attached to factual averments contained in *ex parte* on sentence, is accordingly necessary.

[8] It is trite that during the sentencing phase, formalism takes a back seat and a more inquisitorial approach, aimed at collating all

[5] 1990 (1) SACR 251 (A); [1991] ZASCA 31.
[6] 2007 (1) SACR 461 (SCA); [2006] ZASCA 20.
[7] As provided for in s 35(3) of the Constitution, Act 108 of 1996.

relevant information, is adopted.[8]The object of the exercise is to place before the court as much information as possible regarding the perpetrator, the circumstances of the commission of the offence and the victims' circumstances, including the impact which the commission of the offence had on the victim. The prosecutor, defence counsel and the presiding officer all have a duty to complete the picture as far as possible at sentencing stage. Material factual averments made during this phase of the trial ought, as a general proposition, to be proved on oath.[9]

[9] Pedantic formalism in respect of minor, uncontentious issues such as an accused's personal circumstances is unnecessary and such matters can readily be disposed of in oral argument. Quite often these concern matters within an accused's personal knowledge and which are often incontrovertible by the State. But different considerations apply as far as the nature and circumstances of the crime is concerned. The prosecutor would be fully conversant with these aspects from the docket contents. Any *ex parte* erments from the defence at variance with the state's information ought to be unequivocally disputed. An accused and his or her legal representative should be alerted timeously about disputed facts, so that an accused can be afforded an opportunity to adduce oral evidence on such facts.

[10] Prosecutors are duty bound to assist the sentencing court by

[8] *S v Siebert* 1998 (1) SACR 554 (A) [1996] ZASCA 135 at 558g-d; *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) [2002] ZASCA 138 at 205d-i; Du Toit: S*traf in Suid-Afrika* at 161; *T*erblanche & Roberts: '*Sentencing in South Africa: lacking a principle, but delivering justice?'* 2005 SACJ 187 at 195.

[9] *S v Rooi; S v van Neel* 1980 (1) SA 363(C). This is also the position in comparable foreign jurisdictions; cf *R v Gardiner* [1982] 368 S.C.R 2; *R v Newton* (1982) 4 Cr. App. R(S) 388; *R v Donges & Sutton* [2007] SADC 88.

placing all known aggravating and mitigating circumstances before the court, particularly so in the case of an unrepresented accused.[10]The following prosecutorial guidelines are apposite:[11]

'It is the duty of the prosecutor to ensure that sufficient facts are placed before the court for it to impose an appropriate sentence. In this regard prosecutors must ensure that the court is informed of the existence of aggravating and (particularly where the accused is undefended) mitigating factors'.

[11] The sentencing phase in a criminal trial is of no less importance than the preceding determination of the guilt or otherwise of the accused. All too often prosecutors adopt a lackadaisical approach to sentence, permitting *ex parte* to be made willy nilly in the defence's submissions from the Bar, notwithstanding that it is at variance with the information in the docket. This is particularly so in the case of the circumstances of the offence of which the accused had been convicted. Quite often this is attributable to slothfulness on the part of prosecutors. It is a practice which must be deprecated, since it does not serve the interests of the justice system.

[12] Turning from the general to the specific – in this matter strong reliance was placed on behalf of the appellant on the cases of *R v Shuba*[12], *S v Mabala*[13]and *S v Caleni*[14]. Reference was also made to *S v Sanei*[15]wherein Masipa J, with reference to *S v Siebert,* , the duty on a presiding officer to investigate all the relevant circumstances at sentencing stage. *Shuba, Mabala Caleni*

[10] *R v Motehen* 1949 (2) SA 547 (A) at 550.
[11]Contained in part 31 para 3 of the National Prosecuting Authority's Policy Document.
[12] 1958 (3) SA 844 (C) at 844H-845A.
[13] 1974 (2) SA 413(C) at 421H-422A.
[14] 1990 (1) SACR 178 (C) at 181f-g.
[15] 2002 (1) SACR 625 (W) at 627g-628a.

of no assistance to the appellant in the present matter. In all three cases, the State and/or the presiding officer accepted (at the very least tacitly) the *ex parte* from the Bar. The various dicta in these cases hold that, unless unattested factual averments are disputed or queried, a presiding officer must accept same. But the present case is materially different in this respect. During the course of her address on sentence, the prosecutor unequivocally took issue with some of these factual averments. So, for example, she placed on record oral communications from certain of the complainants and, in one instance, referred to the evidence of a complainant before court, that the appellant had not in fact compensated them for their losses (as was claimed on his behalf). She pertinently challenged the averment that the appellant had not acted for personal gain and she submitted that the appellant himself should shoulder the blame for the fraud and not Richter. The regional magistrate did not take these disputed factual averments into account in appellant's favour during his judgment on sentence.

[13] In *S v Jabavu*[16] trial court had relied on evidence taken at the preparatory examination (under the previous Criminal Procedure Act, 56 of 1955) where the accused had pleaded guilty and where no evidence on sentence had been led. On appeal a similar contention to the one in the present case was advanced, namely that, in the absence of any comment from the prosecutor on the appellant's counsel's submissions, the trial court was obliged to accept the facts emanating from the *ex parte* . In distinguishing the facts in that case from those in *R v Hartley*[17], Botha JA held[18]that no

[16] 1969 (2) SA 466 (A).
[17] 1966 (4) SA 219 (RA).
[18] At 472B-D.

such obligation existed since the facts adumbrated by counsel ex facie the appellant's confession had not been accepted by the State.

[14] Ultimately considerations of fairness will be the deciding factor in a determination of whether an accused person has been prejudiced by a refusal to elevate unattested factual averments contained in an *ex parte* on sentence to proved facts.[19] *Cele Heslop* not support the appellant's contentions, as they are distinguishable on the facts. In *Cele* trial judge had disregarded intoxication as an extenuating circumstance, even though the accused had made mention of his intoxicated state in his s 112(2) plea explanation. On appeal, this Court (per Nestadt JA) held that this constituted a misdirection – the trial judge should have conveyed to the defence that he was not prepared to take into consideration the accused's state of intoxication, so that the accused could be afforded an opportunity to establish that averment under oath.[20] In *Heslop,* trial judge had drawn an adverse inference against the accused on matters not canvassed in evidence. On appeal Cloete JA held that it is a requirement of an accused's fair trial right under s 35(3) of the Constitution that if a court intends drawing an adverse inference against an accused, the facts upon which this inference is based must be properly ventilated during the trial before the inference can be drawn.[21]

[15] Considerations of fairness will also determine whether an accused's right to a fair trial has been violated in terms of s 35(3)

[19] *Jabavu* at 472E-F.
[20] At 254h-j.
[21] Para 22.

of the Constitution. Counsel's submission in this regard is that the appellant did not have a fair trial, since adverse inferences had been drawn against him, without the facts in respect of those inferences having been ventilated at the trial (this did not form part of the grounds of appeal listed in the appellant's notice of appeal). This submission can be dismissed without more. Section 35(3)(i) of the Constitution entrenches an accused person's right to adduce and challenge evidence at his or her trial. No violation of this right has occurred in the present case, as I have demonstrated above.

[16] When it became evident during the prosecutor's address that some of the material factual averments advanced on the appellant's behalf were being challenged by the prosecutor, it was open to the appellant's counsel to make a re-assessment in consultation with his client. An opportunity for such re-assessment presented itself when the time came for counsel to reply to the prosecutor's address. By not adducing oral in the face of these challenges, counsel took a calculated risk that the court may not accept the unattested disputed material factual allegations. By electing to simply proceed with an oral address in reply, counsel consciously passed on the opportunity to adduce oral evidence. In these circumstances, there has not been any misdirection by the trial court, nor can the approach of the high court be faulted. It follows that there can also be no sustainable challenge on constitutional grounds, more particularly on s 35(3) of the Constitution.

[17] The sentence was accordingly properly considered by the trial court and the high court with the exclusion of the various

mitigating circumstances advanced *ex parte* challenged by the State. In the absence of a material misdirection by the trial court, I turn to a consideration whether the sentence imposed is excessive.

[18] The State adduced the evidence of two witnesses on sentence, viz Ms Kutala Sikweza and Mr Madoda Jeke. Ms Sikweza is the daughter of the complainant in count 3, who lost R177 000 which was supposed to have been invested at Old Mutual. This amount was the proceeds of life policies of Ms Sikweza's late brother and his wife who died in a motor vehicle accident. The returns on the proposed investment at Old Mutual was intended to provide a monthly income to the deceased couple's three young children who were in the complainant's care. Mr Jeke, a 68 year old retired policeman, had received the sum of R330 000 as a globular pension payout after 36 years' service. This money he entrusted to the appellant for investment with Old Mutual so that Mr Jeke could obtain a monthly income for himself and his dependants.

[19] The tale narrated by these witnesses is a poignant rendition of severe hardship and suffering. Their plight appears to be representative of all the complainants' circumstances. The appellant defrauded poor people, many of whom were dependent on these monies to support themselves and/or needy dependants. In Mr Jeke's case, the reward for a lifetime's toil had been lost as a result of the fraud, leaving him penniless and resulting in Mr Jeke having to sell his cattle and to go around with begging bowl in hand in a quest to survive. The gravity of the offences is beyond question.

[20] Richter's alleged role in the fraud was described by the appellant in his plea explanation, amplified by the written address on sentence, as set out in para 3 above. After the default in paying over the complainants' money, Richter's business (it is not clear if this was conducted through a close corporation or a company),

was placed under liquidation on the application of FNB. Most of the complainants were subsequently compensated by FNB when the frauds and concomitant losses became known to the bank.

[21] It can be accepted that the appellant's personal circumstances are mitigating – he is a first offender with fixed employment and with a wife and adopted daughter who depend on him for their livelihood. One must accept in his favour that his plea of guilty is indicative of a measure of remorse. But, like the trial court and the high court I do not accept in the appellant's favour the disputed *ex parte* averments that the appellant repaid all the complainants, that Richter was mostly to blame for the commission of these offences and that the appellant did not act out of self-interest. These are matters which required proof by way of oral evidence so that it could be tested by cross-examination. Moreover, there is direct evidence controverting the averment that the appellant had compensated all the complainants. The complainants in counts 4 and 5 had not been reimbursed and the appellant's counsel was constrained to withdraw his earlier submission to this effect when he replied to the prosecutor's address at the trial. Richter's alleged blameworthiness raised more questions than answers. The averment that the appellant was not actuated by self-interest in committing the various instances of fraud, was pertinently contested by the prosecutor in her address. The evidence of Ms Sikweza furthermore directly contradicted the appellant's *ex parte* that he reported these matters to the police first. On Ms Sikweza's uncontested version a criminal charge was laid some 3 months before the appellant allegedly reported the matters.

[22] The trial court was left in the dark on Richter and the appellant's precise modus operandi. The trial court had no information whatsoever about the amounts received by the appellant and, as was alleged by the appellant, by Richter. No explanation was forthcoming why the appellant, who on his own version earned approximately half a million Rand annually as a financial adviser, had to misappropriate (at least some of) the monies entrusted to him. He would have earned handsome commission on the investments if they had been made by the appellant as instructed by the complainants.

[23] What is plain is that the appellant abused the trust that the six complainants placed in him. They were by and large poor, less educated simple folk who entrusted what to them must have been princely sums, to the appellant for secure investment for the betterment of their lives and that of their dependants. It bears mention that both complainants, Mrs Sikweza and Mr Jeke, had been referred by social workers to the appellant for financial advice.

[24] The approach of this court to sentencing in so-called 'white collar crimes is well-established.[22]Direct imprisonment is not uncommon, even for first offenders. The sentence imposed in the present matter does not induce a sense of shock at all. On the contrary, I share the view of Alkema J in the court below that the sentence borders on the lenient. The trial court balanced the

[22] See *S v Sadler* 2000 (1) SACR 331 (SCA); ([2000] 2 All SA 121); [2000] ZASCA 13 paras 11-13, *S v Barnard* 2004 (1) SACR 191 (SCA); [2003] ZASCA 63 para 15, *S v Michele* 2010 (1) SACR 131 (SCA); [2009] ZASCA 116 para 10.

aggravating and mitigating factors and gave recognition to the factors favourable to the appellant by suspending a portion of the sentence of imprisonment. It ameliorated the cumulative effect of the sentence by taking the six counts together for purposes of sentence.

[25] There are no grounds to interfere with the sentence. In the result, the appeal is dismissed.

……..

S A MAJIEDT

ACTING JUDGE OF APPEL

APPEARANCES:

FOR APPELLANT: S D Slabbert

Instructed by
J H Slabbert Attorneys, Durban North
Van Wyk & Preller Inc, Bloemfontein

FOR RESPONDENT: T van Zyl

Instructed by
The Director of Public Prosecutions, Grahamstown
The Director of Public Prosecutions, Bloemfontein