THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 444/09

Mavis Pemella Steyn Appellant

and

The State Respondent

Neutral citation: **Steyn v The State (444/09) [2010] ZASCA 49 (31 March 2010)**

Coram: Nugent JA, Griesel et Majiedt AJJA

Heard: 10 March 2010

Delivered: March 2010

Summary: Appeal against refusal of a petition for leave to appeal against sentence – procedural irregularity and shortcomings in respect of the provisions contained in s 309B(5)(c)(ii) and s 309B(6) of the Criminal Proceudre Act, 51 of 1977 – no reasonable prospects of success in an envisaged appeal against sentence.

ORDER

On appeal from: Free State High Court, Bloemfontein (Kruger and Van Zyl JJ sitting as court of appeal).

The application for leave to appeal against the refusal of the appellant's petition in the court below is dismissed.

JUDGMENT

MAJIEDT AJA (Nugent JA and Griesel AJA)

[1] The appellant, Ms Mavis Pemella Steyn, was convicted on her plea of guilty in the regional court on charges of forgery, uttering and fraud. Counts one and two (forgery and uttering) were taken together for sentencing purposes and she was sentenced to two years' imprisonment, conditionally suspended for five years. On count three (fraud) the appellant was sentenced to five years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act, 51 of 1977 (the Act). This appeal is against the sentence imposed.

[2] After leave to appeal had been refused by the trial court, the high court (Van Zyl J and Voges AJ) granted leave to the appellant to lead the further evidence of a social worker on sentence (this application to lead further evidence was filed together with a petition for leave to appeal). The matter was remitted to the trial court in terms of s 309C(7)(d) of the Act to receive the further

evidence.

[3] The evidence of the social worker, Dr C C Wessels, was heard by the trial court in terms of s 309B(5)(c)(i) of the Act. No recordal of the trial court's findings and views relating to that evidence was made, as is required in s 309B(5)(c)(ii) (the further evidence recordal).[1]

[4] The petition and the further evidence of Dr Wessels served before Kruger and Van Zyl JJ (Voges AJ was unavailable at that time). Leave to appeal was refused by the learned judges.

[5] An application for leave to appeal the refusal of the petition was thereafter filed by the appellant. On the day before the hearing thereof, the further evidence recordal was filed at the registrar of the high court. At the hearing the prosecutor submitted that the interests of justice required that the sentence be set aside and remitted to the trial court for reconsideration. Kruger J (van Zyl J concurring) considered the high court to be *functus officio* granted leave to appeal to this court.

[6] It is plain from the aforegoing exposition that the high court had considered the petition and dr Wessels' further evidence without the further evidence recordal before it. This is an

[1] S 309B(5)(c)(ii) reads as follows:
'(c) The court granting an application for further evidence must –
(i) . . . .
(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.'

irregularity, since s 309B(6) provides that any further evidence received under s 309B(5) shall for purposes of an appeal be deemed to be evidence taken or admitted at the trial. The further evidence would in my view also in terms of this deeming provision have to be regarded as part of the evidence in a subsequent petition for leave to appeal. Section 316(5)(c)(ii) and (6) contain similarly worded provisions in respect of the further evidence recordal in proceedings in the high court as court of first instance. Section 309B(5)(c)(ii) is couched in peremptory terms. The further evidence recordal contemplated in this section can conceivably play an important role in the determination of an appeal (or petition for leave to appeal), as it contains the trial court's views on the quality of the further evidence before it (having seen the witness/es itself).[2]The aforementioned irregularity is not fatal for reasons that will become apparent.

[7] The further evidence recordal in the present matter is rather cryptic and does not in my view comply with the prescripts of s 309B(5)(c)(ii). It reads as follows:

'Daar was gehandel in terme van Artikel 309B(5)(c) Wet 51/77. Vir sover dit subartikel (ii) van bogenoemde artikel betref blyk dit uit die aanklaer se kruisondervraging presies wat die getuie se bevoegdheid behels vir sover dit gegaan het rondom haar verslag. Rondom haar geloofwaardigheid het ek niks by te voeg nie. Uit haar getuienis en kruisondervraging blyk dit dat sy nie oor dieselfde ondervinding beskik as Mevrou Viljoen nie. Ek het niks by te voeg nie'.

No finding was made by the trial court on the cogency and sufficiency of the further evidence, as is required by the said provision.

[8] Despite the procedural irregularity and shortcomings set out above, this matter can and ought to be disposed of by this court. We have before us an appeal against the refusal of the high court

[2] See: Du Toit et al, *Commentary on the Criminal Procedure Act* at 31-16.

to grant leave to appeal against sentence. We must therefore consider whether there is a reasonable prospect of success in the envisaged appeal against sentence. The issue is accordingly whether leave to appeal should have been granted by the high court and not the appeal itself.[3] The procedural shortcomings relate, inter alia, to the lack of the trial court's recordal of its views and findings on the cogency and sufficiency of the further evidence of an expert witness on sentence, the social worker, Dr Wessels. This further evidence is before us and we are in no worse a position to consider the cogency and sufficiency of that evidence ourselves, than we would have been if the further evidence recordal had been properly made. Credibility and demeanour findings are of less importance in the case of expert evidence on sentence than in the case of, say, eyewitness evidence on the merits. Moreover, demeanour has a lesser role to play in assessing the cogency of evidence than the content of the evidence itself.[4] In the present case there is nothing to suggest that Dr Wessels was anything but honest.

[9] The appellant committed the offences whilst employed at a firm of insurance brokers. During December 2005 she falsified a valuation certificate in respect of a wristwatch and a ring by altering it to a certificate in respect of a ring only. She also effected a further alteration thereto by substituting her own name for that of the true owner. During January 2006 she lodged a claim for the loss of the ring with Mutual & Federal Insurance, but the claim was not met. The potential loss to the insurance company was R42 000.

[10] The appellant was 30 years old at the time of sentencing. She is married with two children of 2 and 5 years old respectively. She was employed and earned R2 500 per month. Her employers were prepared to re-employ her should she receive a short term of imprisonment. She had a previous conviction for fraud, also committed in the course of her employment

[3] See: *S v Matshona* [2008] 4 All SA 68 (SCA) para 5.

[4] *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) 101 at 979I-J; *Commercial Union Insurance Co of SA Ltd v Wallace NO* 2004 (1) SA 326 (SCA) at paras 40-42; *Medscheme Holdings (Pty)Ltd and another v Bhamjee* 2005 (5) SA 339 (SCA) at para 14.

with a previous employer. She received a suspended sentence of imprisonment on condition, inter alia, that she compensate the complainant by regular monthly payments. It is common cause that the appellant is in default with these payments.

[11] The appellant testified in mitigation of sentence. The State adduced the evidence of Ms Marinda Viljoen, a probation officer in the employ of the Department of Correctional Services. Her written report was also handed in. As stated above, the further evidence of Dr Wessels, a social worker, was presented later in the proceedings by the defence.

[12] The appellant's testimony concerned her childhood, employment history and her family circumstances. She also testified about her present and past conviction. The appellant grew up in very difficult circumstances in a home where an abusive father caused great disharmony in the family. Her father abused alcohol and, when intoxicated, routinely battered his spouse and young children. The unhappy marriage inevitably ended in divorce. The appellant was compelled to leave school at a young age while in standard 6 (grade 8 in today's nomenclature), to seek employment to augment the family's modest income. In her evidence the appellant sought to explain away the recurring problems she experienced in her employment career of being accused of theft or fraud by her various employers.

[13] The two pre-sentence reports compiled by Ms Viljoen and Dr Wessels differ markedly in their assessment of the appellant. Ms Viljoen's report and evidence portrayed the appellant as manipulative, dishonest, greedy, sly, immature and a troublemaker. This information was gleaned mostly from appellant's previous employers and from her husband's family. It bears mention that Ms Viljoen did not interview the appellant's own mother. Dr Wessels, on the other hand, sketched a far more positive image of the appellant, emphasizing her troubled upbringing and highlighting the appellant's concerted efforts to provide for her family. Dr Wessels made the startling observation that the appellant's husband's family had admitted to Dr Wessels that they had conveyed untruths concerning the appellant to Ms Viljoen. As confirmation of this, Dr Wessels indicated to the trial court that, at her request, the appellant's mother-in-law was present at court to

testify in corroboration of these allegations. As it turned out, the appellant's mother-in-law did not testify. Dr Wessels had also conducted an interview with the appellant's mother.

[14] It is not necessary to resolve the striking dichotomy between these two pre-sentence reports. It can be accepted that the appellant has had a troubled childhood, has struggled to make ends meet, is a caring and devoted spouse and mother and has by and large sought to obtain gainful employment to help make ends meet at home. But a consideration of the gravity of the offence, taking into account that the appellant had, as before, again abused a position of trust in her employment situation, counters her mostly mitigating personal circumstances. A further related countervailing factor is her previous conviction for a similar offence committed in similar circumstances. The benefit afforded her on the previous occasion through a suspended sentence has not had the desired deterrent effect. Instead she is in default of the conditions of suspension as regards her non-payment and repeat offending.

[15] The sentence imposed is in line with sentences imposed generally for similar offences.[5] There is nothing in the circumstances of this matter with regard to the appellant or the offence which persuade me that there is a reasonable prospect of the high court interfering on appeal with the sentence imposed. The conditional suspension of the term of imprisonment on counts 1 and 2 and the term of imprisonment from which the appellant may be placed under correctional supervision in the discretion of the Commissioner or a parole board on count 3, provides the

[5] *S v Michele & Another* 2010 (1) SACR 131 (SCA) [2009] ZASCA 116, para 10 and cases cited there.

appellant with another opportunity for rehabilitation mostly outside prison.

[16] There is no reasonable prospect of success in an appeal against sentence and the application for leave to appeal against the refusal of the appellant's petition in the court below is dismissed.

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S A MAJIEDT
ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant: R van Wyk

Instructed by:
Naudes Inc, Bloemfontein

For respondent: E Liebenberg

Instructed by:
Direkteur: Openbare Vervolgings, Bloemfontein