THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No:
613/09

In the matter between:

ELLOUISE BRITZ Appellant

and

THE STATE
Respondent

Neutral citation: *Britz v S* (613/09) [2010] ZASCA 71 (27 May 2010).

Coram: CLOETE *et* MLAMBO JJA *et* SALDULKER AJA

Heard: **18 May 2010**

Delivered: **27 May 2010**

Summary: Criminal appeal: Evidence: application to adduce new evidence not available when appellant sentenced: approach of appeal court.

ORDER

On appeal from: Eastern Cape High Court (Grahamstown) (Jansen and Sandi JJ sitting as court of appeal):
The appeal is dismissed.

JUDGMENT

CLOETE JA (Mlambo JA *et* Saldulker AJA concurring):

[1] On 6 May 2008 in the Eastern Cape Commercial Crimes Division of the regional court in Port Elizabeth, the appellant, an adult female aged 33 years, pleaded guilty to, and was convicted of, 67 counts of fraud. The first fraud was committed in June 2003 and the last, some three-and-a-half years later in January 2007. The appellant was employed by a close corporation as a bookkeeper. She made electronic transfers of money from the close corporation's bank account into the account of her husband and she also purchased goods, which she appropriated, from suppliers to the close corporation using the close corporation's money, whilst representing to the close corporation and its sole member that the transfers were to settle debts owed to the close corporation's creditors and representing to the suppliers that the goods had been purchased for the close corporation. The total amount involved was over R330 000 and nothing has been voluntarily repaid.

[2] On 9 June 2008, after a correctional supervision report had been submitted and evidence led from a probation officer (Ms van der Mescht), the appellant was sentenced, in a careful judgment by the regional magistrate, to five years' imprisonment of which two years were suspended conditionally for five years. The appellant served about four-and-a-half months of her sentence

and then brought an application on notice of motion in the regional court for condonation and leave to appeal against the sentence; and leave to place evidence, which was allegedly not available when she was sentenced, before that court and ultimately the court of appeal. At the same time the appellant brought an application for bail pending appeal. The application was supported by affidavits from the appellant, her attorney and her husband, and a report from a psychologist. The evidence that the appellant sought to adduce was that after she had been sentenced, her mother had died and the latter was therefore not able to give the appellant's children, a girl born on 12 April 1993 and a boy born on 29 January 1997, 'the necessary care, attention and love that they needed whilst I served my sentence'. Further, according to the appellant, her husband 'had to work extra long hours in order to make up for the loss of income that I was bringing to the family. As such my husband found it very difficult to look after the children as he could not be there when they returned from school and as my mother was no longer alive.' The psychologist's report comprised a psychological assessment of the two children 'because of the change in their personal circumstances after the incarceration of their mother and the recent death of the grandmother' and concluded: 'The family is in desperate need for a mother to take charge again of the emotional and physical wellbeing of the family. The children are not neglected but their emotional needs for a mother are great and much needed'. The submission in the affidavit by the appellant, and the submission on appeal, was that although the sentence was not inappropriate when it was imposed, the interests of the children should lead a court of appeal to substitute a non-custodial sentence. The magistrate granted condonation and leave to appeal and ordered the appellant's release on bail.

[3] In the court a quo (Jansen J, Sandi J concurring) the application and appeal were dismissed but that court (Jansen J, Froneman J concurring) subsequently granted leave to appeal to this court. The basis of the judgment in the court a quo dismissing the appeal was that an appeal must be decided

on the basis of facts in existence at the time the appellant was convicted or sentenced; that there are no exceptions to this rule; and that where an appellant wishes to rely on facts which came into existence after sentence was imposed, the proper remedy is not to appeal but to approach the executive authority. The court went on to point out that the Criminal Procedure Act[1] provides for the conversion of a sentence of imprisonment to a sentence of correctional supervision. The court a quo therefore did not consider the merits of the application to lead further evidence on appeal, although the court in its judgment granting leave to appeal considered that this court might do so because the interests of children were involved

[4] The power of a high court sitting as a court of appeal from a decision in the magistrate's court to hear further evidence derives from both the Criminal Procedure Act and the Supreme Court Act.[2] Section 309(3) of the Criminal Procedure Act provides that a provincial or local division sitting as a court of appeal shall 'have the power referred to in s 304(2)' and paragraph (b) of that section in turn provides that 'such court may at any sitting thereof hear any evidence and for that purpose summon any person to appear and to give evidence or to produce any document or other article'. Section 22 of the Supreme Court Act, which in terms also applies to this court, provides that:

'The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power ─

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary. . . .'

This court has itself heard evidence on appeal ─ in *R v Carr*[3] the court apparently over a period of four days heard the evidence of as many medical doctors (two for the appellant, two for the State) and itself evaluated the

[1] Act 51 of 1977.
[2] Act 59 of 1959.
[3] 1949 (2) SA 693 (A).

conflicting evidence they gave, because it considered that this was 'the course best calculated to achieve the due and expeditious administration of justice in the present case, the decision of which it was obviously most undesirable to delay. . . .'[4] (The appellant had been sentenced to death.) However, as pointed out in *S v De Jager*[5] the usual course, if a sufficient case has been made out, is to set aside the conviction and/or sentence and send the case back for the hearing of further evidence, with a suitable order[6] to guide the court that will hear the evidence. Such a course would be unnecessary where the evidence contained in the affidavit made in support of the application to receive it is accepted by the State (as in *S v Michele & another*[7]) or is incontrovertible (as in *S v Karolia*[8] and *S v Jaftha*[9]).

[5] Despite the wide wording of the statutory provisions, this court has laid down requirements which must be complied with before it would be prepared to hear evidence on appeal. Those requirements were summarised in *S v De Jager*,[10] have been 'applied in countless cases since',[11] and are as follows:

'(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it sought to lead was not led at the trial.
(b) There should be a *prima facie* likelihood of the truth of the evidence.
(c) The evidence should be materially relevant to the outcome of the trial.'

The same requirements apply equally to any court sitting as a court of appeal: *S v A*.[12] In addition, the general rule[13] is that an appeal court will decide whether the judgment appealed from (and that includes a judgment on sentence)[14] is right or wrong according to the facts in existence at the time it was given, not according to new circumstances subsequently coming into existence. Nevertheless, this court has previously indicated that the rule is not necessarily invariable[15] and the rule has recently been relaxed to allow evidence to be adduced on appeal of facts and circumstances which arose subsequent to the sentence imposed, where there were exceptional or

[4] At 700.
[5] 1965 (2) SA 612 (A) at 613A.
[6] See the order in *S v Wilmot* 2002 (2) SACR 145 (SCA) at 159d-g and the orders in the cases referred to at 159d.
[7] 2010 (1) SACR 131 (SCA).
[8] 2006 (2) SACR 75 (SCA).
[9] 2010 (1) SACR 136 (SCA).
[10] 1965 (2) SA 612 (A).
[11] Per Smalberger JA in *S v H* 1998 (1) SACR 260 (SCA) at 262i.
[12] 1990 (1) SACR 534 (C) at 540c-d.
[13] *R v Verster* 1952 (2) SA 231 (A) at 236B; *R v Jantjies* 1958 (2) SA 273 (A) at 279C-D and *Attorney-General, Free State v Ramokhosi* 1999 (3) SA 588 (SCA) para 8 at 593D-F.
[14] *R v Hobson* 1953 (4) SA 464 (A) at 465H-466B and 466F-G; *S v Barnard* 2004 (1) SACR 191 (SCA) para 19.
[15] *S v Immelman* 1978 (3) SA 726 (A) at 730H; *S v Marx* 1989 (1) SA 222 (A) at 226C.

peculiar circumstances present: *S v Karolia*;[16] *S v Michele*;[17] *S v Jaftha*,[18] and also where there were misdirections by the court which imposed sentence, which had the effect that the appeal court was at large to impose the sentence it considered appropriate: *S v Barnard*.[19] (It is not necessary for present purposes to consider whether this latter situation should be subject to particular safeguards to prevent an abuse of the appeal procedure.) The more liberal approach by this court, shown by a comparison of the decision in *Verster*[20] (where the court refused to take into consideration a delay in the hearing of an appeal as a reason for altering a sentence imposed by a magistrate) and the decision in *Michele* (where such evidence was taken into account and the sentence reduced), must not be interpreted as a willingness to open the floodgates. In cases such as the present where the facts and circumstances arose after sentence, the application must be carefully scrutinized to ascertain whether it does indeed disclose exceptional or peculiar circumstances. It is undesirable to attempt to define these concepts further.

[6] Apart from scrutinizing applications to ascertain whether they pass the exceptional or peculiar circumstances test, and in common with previous decisions of this court dealing with the circumstances under which a court of appeal would be prepared to hear new evidence in existence at the time of the trial, two further requirements must be complied with, being those set out in paragraphs (b) and (c) in *De Jager* quoted in para 5 above.

[7] The first additional requirement ─ that there should be a prima facie likelihood that the evidence is true ─ did not arise for consideration in *Karolia*, where the facts which arose subsequent to the imposition of sentence were described as 'unquestionable';[21] or in *Michele* where the six-year delay fell into the same category; or in *Jaftha*, where Lewis JA was at pains to emphasize[22] that the State did not question the truth of the allegations made by the appellant. It was inter alia for that reason that Lewis JA decided in the latter case that there was no point in referring the matter back to the trial court to

[16] Above, n 8.
[17] Above, n 7.
[18] Above, n 9.
[19] Above, n 14, paras 19 tot 21 and p 197h-i.
[20] Above, n 13.
[21] At 93i-94a.
[22] Para 16 at 139f-g, para 19 at 140d and para 20 at 140e.

hear evidence.[23] Ordinarily, if the new evidence is accepted, there is no reason why the matter should be referred back as an appeal court can itself impose an appropriate sentence, taking into account the new evidence, as happened in *Karolia*, *Michele* and *Jaftha*. It is not the usual practice of this court, or of high courts sitting as courts of appeal,[24] to refer a matter back for re-imposition of sentence if a misdirection is discovered; and in the interests of saving unnecessary delay and expense, this approach should apply equally where evidence which is admitted by the State is allowed on appeal. But where there is a dispute, or where the State wishes to challenge the evidence by cross-examination or to lead rebutting evidence, different considerations apply. It is notable that Schreiner JA in *Goodrich v Botha & others*,[25] quoted and followed in *Karolia*,[26] only considered cognisance of subsequent events by a court of appeal 'where, for example, their existence was unquestionable or the parties consented to the evidence being so used'. But the right to hear evidence (in terms of the Criminal Procedure Act) and the right to receive further evidence or to remit the case for further hearing (in terms of the Supreme Court Act) are not qualified or made subject to any limitations. And in my view the policy reasons that underly the justifiable reluctance of appeal courts to receive evidence of events on appeal[27] would not be compromised if, in the very limited circumstances set out in this judgment, an appeal court were to set aside the sentence and remit the matter to the trial court with directions as to the hearing of further evidence which the appellant, the State or the court might wish to adduce. Such a procedure has been followed by this court from as early as 1935 in *R v Mhlongo & another*[28] in cases where the further evidence subsequently obtained casts doubt on whether there should have been a conviction; and I see no difference in principle between

[23] Para 20.
[24] The practice in the Constitutional Court appears to be different : *S v M (Centre of Child Law as* amicus curiae) 2007 (2) SACR 539 (CC) para 49.
[25] 1954 (2) SA 540 (A) at 546B-C.
[26] Above, n 8 para 36 at 93g and 93 in fine-94a.
[27] See *S v De Jager* above, n 5 at 613A-C; *R v Jantjies* above, n 13 at 279D-E.
[28] 1935 AD 133.

that type of case and a case such as the present.

[8] So far as the 'materially relevant' consideration is concerned, the appeal court should only allow the evidence tendered if satisfied that there is at least a probability, not merely a possibility, that the evidence, if accepted, would affect the outcome (*R v Weimers & others*)[29] – in casu, whether the evidence warrants interference with the sentence. In my view the evidence would not have to be decisive. The dicta to the contrary in English decisions referred to by Schreiner JA in *Weimers*[30] date from a time when courts of appeal were most reluctant to allow evidence on appeal in criminal matters and before the position was regulated by statute.[31]

[9] In the present matter, the appellant fails at every hurdle. It is convenient to deal with the three requirements for admission of evidence on appeal in a case such as the present which I have set out above, in reverse order.

[10] First, the evidence is not materially relevant. The unchallenged evidence given by the probation officer, Ms van der Mescht, was that the appellant herself had told her that her husband would be responsible for looking after the children if she were not able to do so; and the probation officer said that the appellant's mother was apparently very ill so she would not have been in a position to care for the children. The appellant was accordingly sentenced on the basis that her mother would not have been of assistance in caring for the children. The magistrate said:

'Die kinders is 'n probleem en dit gee altyd vir ons, wat veral dames voor ons het om te vonnis, hoofbrekens. Die Grondwet bepaal aan die eenkant dat die belange van die kinders vooropgestel moet word wanneer hulle belange betrokke is by enige iets, soos in hierdie tipe geval. Gelukkig in hierdie situasie is daar 'n ander ouer wat

[29] *R v Weimers & others* 1960 (3) SA 508 (A) at 514F-515B and 515G.

[30] At 515A-D.

[31] For the present position in England see *Halsbury's Laws of England* (4th ed) vol 11(4) para 1867.

byderhand is en wat die ouerlike werk kan behartig.'
But that apart, even if the evidence which the appellant seeks to place before the court (summarised in para 2 above) were to be accepted, it would, for the reasons which immediately follow, make no difference.

[11] The magistrate, with obvious regret, concluded that a sentence of direct imprisonment was the only appropriate sentencing option (although he suspended two of the five years' imprisonment which he imposed specifically because the appellant's children were young, so that her absence from them would not be, as he put it, unnecessarily long). I agree that direct imprisonment was the only legitimate option which could have been considered. The appellant was a first offender. Apart from that, there is very little that can be said in her favour. She pleaded guilty, but that fact is not necessarily an indication of remorse as where there was a paper trail as there must have been in this case, she would have had little option. The uncontested evidence of the sole member of the close corporation was that the appellant's confession to him some 14 days after she had resigned was due to the fact that her fraudulent scheme was going to be uncovered anyway; and that the amount she confessed to was far less than the actual amount involved. She was furthermore in a position of trust; the offences were committed over a fairly long period of time (three-and-a-half years); a substantial sum of money was involved (over R330 000); and nothing has been repaid voluntarily (a sale in execution of the appellant's goods realised only R4 950 and the cost of the proceedings amounted to just less than R10 000). The appellant also implicated a co-employee who could have lost his job. She entered appearance to defend the civil proceedings instituted against her by the close corporation. She threatened the member of the close corporation that she would report him to the SARS and expose an insurance fraud should he (as he put it) not 'back off'. She was motivated by pure greed — she wished to maintain a standard of living above the family's means. And she continued to defraud the close corporation when she knew that its business was suffering financially to the extent that employees, including her own brother, were being laid off in consequence of the frauds she continued

to commit. In addition the sole member of the close corporation was obliged to extend the close corporation's overdraft and to borrow money from his brother and his mother to meet the payroll.

[12] In *S v M (Centre of Child Law as* amicus curiae*)*[32] Sachs J, writing for the majority of the Constitutional Court, said:

'There is no formula that can guarantee right to results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.

. . .

(c) If on the *Zinn*-triad[33] approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

. . .

(e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

. . .

A balancing exercise has to be undertaken on a case-by-case basis. It becomes a matter of context and proportionality. Two competing considerations have to be weighed by the sentencing court.

The first is the importance of maintaining the integrity of family care.

. . .

The second consideration is the duty on the State to punish criminal misconduct. The approach recommended . . . makes plain that a court must sentence an offender, albeit a primary caregiver, to prison if on the ordinary approach adopted in *Zinn* a custodial sentence is the proper punishment. The children will weigh as an independent factor to be placed on the sentencing scale only if there could be more than one appropriate sentence on the *Zinn* approach, one of which is a non-custodial sentence. For the rest, the approach merely requires a sentencing court to consider the situation of children when a custodial sentence is imposed and not to ignore them.'

[32] Above, n 24 paras 36-39.

[33] *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

For these reasons the evidence which the appellant seeks to place before the court is not materially relevant as it would not result in a non-custodial sentence being substituted.

[13] Second, the application does not satisfy the requirement that there should be a prima facie likelihood of the truth of the evidence. When leave to appeal was sought in the magistrate's court, counsel representing the appellant (who is not the same counsel who argued the appeal before this court) submitted that because the State had not filed opposing affidavits, it was bound by the allegations made in the appellant's affidavit, and counsel for the State appearing in those proceedings accepted this submission. The argument is quite wrong. There is a difference between the evidence of the probation officer, Ms van der Mescht[34] and the appellant's affidavit,[35] in regard to whether the appellant's mother was in a position to look after the children. To give the appellant the benefit of the doubt, Ms van der Mescht may have been dealing with the appellant's mother's ability to care for the children physically whilst the appellant may have been dealing only with the ability to take care of their emotional needs. But there are other discrepancies. The appellant says in her affidavit that:

'[M]y husband found it very difficult to look after the children as he could not be there when they returned from school and as my mother was no longer alive. The two children had to look after themselves whilst alone at home. This basically meant that my 15 year old daughter had to act as a mother to my 11 year old son and, inter alia, cook for him and ensure that he does his homework etc. and look after him whilst my husband is working late hours. . . . I am worried that something is going to happen to [my children] being such young children left on their own. There is absolutely no-one in the area whom my husband or I can call on to assist us to look after the children whilst my husband works these lengthy hours.'

But according to the psychologist's report, there is a domestic worker employed by the appellant's husband full time during the week. In addition, it appears from the affidavit of the appellant's husband that her father lives at home and that although he is employed full time (by a security company), he is only 63 years old. There seems to be no good reason why he cannot be of physical assistance in the evenings and over the weekends even if, as the appellant's husband said, he is heavily in mourning and not much company to the children. The appellant has accordingly not produced evidence that is probably true in regard to the physical needs of the children. I shall deal with

[34] Para 10 above.

[35] Para 2 above.

their emotional needs immediately below.

[14] Then finally, there are no exceptional or peculiar circumstances present which would justify reception of the evidence. The fact that the appellant's mother could not act as a physical caregiver for the children was an existing fact when sentence was passed, not a consequence of her death thereafter. No doubt, as counsel who argued the appeal before us emphasized, the children were left in an emotional void once their mother, and shortly thereafter their grandmother, was no longer part of the household. As the father put it, 'they are "lost at sea" at present. They are exceptionally emotional with the loss of their beloved grandmother and appear to me to be lost at times, bearing in mind that I (their father) are not able to be present in the house as often as I was in the past.' One has the greatest sympathy for the children but their emotional needs cannot trump the duty on the State properly to punish criminal misconduct where the appropriate sentence is one of imprisonment. As Sachs J said in *S v M*:[36]

'[S]eparation from a primary caregiver is a collateral consequence of imprisonment that affects children profoundly and at every level. Parenting from a distance and a lack of day-to-day physical contact places serious limitations on the parent-child relationship and may have severe negative consequences. The children of the caregiver lose the daily care of a supportive and loving parent, and suffer a deleterious change in their lifestyle. Sentencing officers cannot always protect the children from these consequences. They can, however, pay appropriate attention to them and take reasonable steps to minimise damage. The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.'

In the present matter, as I have said, the magistrate specifically suspended two years of the sentence imposed because of the interests of the children. And if it be accepted that the appellant's husband has to work long hours to make up for the income lost in consequence of the appellant's imprisonment, that is exactly what one would expect. Nor can the appellant legitimately contend that her sentence should be reduced on appeal (as was done in *Michele*)[37] or that a non-custodial sentence should be substituted for the remainder of the period of imprisonment imposed (as was done in *S v M*)[38]

[36] Above, n 24 para 42.

[37] Above, n 7 para 13. See also *S v Roberts* 2000 (2) SACR 522 (SCA) para 22.

[38] Above, n 24 paras 57 to 76. See also *Karolia* above, n 8 paras 38 and 39.

because of the delay in her completing her sentence and the undesirability of sending a person back to jail. Of course it is harsh to send a person back to jail, particularly a mother who has no doubt re-bonded with her family, and her family with her. But the process which led to the appellant's temporary release was not only initiated by her, it had no prospect of success. The decision of the Constitutional Court in *S v M* was published in the law reports a year before the date on which the appellant deposed to her affidavit. In the circumstances it would be quite wrong to allow the appellant to benefit from these ill-conceived proceedings and escape the consequences of what, it is common cause between the appellant and the State, was a fair sentence.

[15] Before making the appropriate order, I would emphasize that the procedure in terms of s 276A of the Criminal Procedure Act, which would enable the appellant's sentence to be reconsidered by the magistrate at the instance of the Commissioner or a parole board, remains open.[39] That section provides:

'(3)(a) Where a person has been sentenced by a court to imprisonment for a period ─

(i) not exceeding five years; or

(ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act 8 of 1959, and the regulations made thereunder is not more than five years in the future,

and such a person has already been admitted to a prison, the Commissioner or a parole board may, if he or it is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court a quo in order to reconsider the said sentence.'

The views expressed in this judgment are in no way a bar to that procedure being followed as some additional and different considerations apply and the enquiry is not the same as that in the present appeal.

[16] The appeal is dismissed.

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T D CLOETE

[39] Cf *S v M* above, n 23 para 65.

JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	E Kammies
	Instructed by Lee Strydom Fourie Inc, Port Elizabeth Hill McHardy & Herbst Inc, Bloemfontein
RESPONDENTS:	Ms U L de Klerk
	Instructed by The Director of Public Prosecutions, Grahamstown The Director of Public Prosecutions, Bloemfontein