THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 851/2013
Not Reportable

In the matter between

DENVOR PAUL FIELIES **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Fielies v The State* (851/2013) [2014] ZASCA 191 (28 November 2014)

Coram: Bosielo, Majiedt and Willis JJA

Heard: **11 November 2014**

Delivered: **28 November 2014**

Summary: Criminal appeal against sentence – appellant convicted on his plea of guilty of 39 counts of corruption involving R649 827 – sentenced to imprisonment for 5 years with 2 years suspended for 5 years on suitable conditions – failure by the trial court to call a probation officer – its effect – did the trial court have sufficient information about the appellant to enable it to impose an appropriate sentence.

ORDER

On appeal from: Western Cape High Court, Cape Town (Griesel J and Boqwana AJ sitting as a court of appeal):

The appeal is dismissed.

JUDGMENT

Bosielo JA (Majiedt JA concurring):

[1] The appellant was convicted on his plea of guilty by the regional magistrate sitting in the Specialized Commercial Crimes Court (SCCC), Bellville on 39 counts of corruption in terms of s 4(1) of the Prevention and Combating of Corruption Activities Act 12 of 2004 ("the PCCA") on 25 October 2012. All the counts were taken together for purposes of sentence and the appellant was sentenced to a fine of R60 000, payment whereof was deferred in terms of s 297(5) of the Criminal Procedure Act 51 of 1977 (CPA) to 31 December 2010, in default whereof he was to undergo imprisonment for 2 years. In addition, he was sentenced to 12 months imprisonment, suspended for five years on suitable conditions.

[2] Aggrieved by this sentence, the respondent sought and obtained leave to appeal against the sentence to the Western Cape High Court in terms of s 310A of the CPA on the basis that, given the nature and

seriousness of the offences for which the appellant was convicted, the sentence imposed was disturbingly lenient and inappropriate.

[3] On appeal, the high court held that the sentence imposed by the regional magistrate was disturbingly inappropriate. It set the sentence aside and, instead imposed a sentence of imprisonment for 5 years with 2 years suspended for 5 years on suitable conditions, all 39 counts having been considered together for purposes of sentence. Aggrieved by this sentence, the appellant obtained leave from the court below to appeal against the sentence. Hence this appeal.

[4] I interpose to state that before the appeal was heard before us the appellant's counsel objected to the filing of the transcript of the parties' oral submissions on sentence in the SCCC on two grounds. Firstly, that it is not a proper transcript as it was not reconstructed in terms of the rules of court and, second, that the transcript was not placed properly before us. He sought to persuade us not to have recourse thereto.

[5] In response, the respondent's counsel submitted that the transcript is not a reconstruction of the record but a transcript of the submissions recorded during the trial. He submitted further that as the transcript was certified as a true and correct transcription of the proceedings in the SCCC by the transcriber, Mrs S Truter of Legal Transcriptions (Western Cape), it was properly admitted. It suffices to state that the appellant's counsel subsequently abandoned all attempts to impugn the correctness and authenticity of the transcript.

[6] I find it necessary to state that in terms of the rules of court it is the appellant's duty to ensure that a proper and complete record is filed. He failed to do that. It is the respondent who filed the transcript of the proceedings in the regional court to complete what was an incomplete record. As alluded to already, the transcript was certified as a true and correct transcription of the proceedings in the SCCC by the transcriber. In any event this objection was only raised exparte before us. To my mind, this is nothing but a desperate, albeit ill-fated attempt by the appellant to save his skin – a proverbial clutching at straws by a sinking man. It follows that the objection has no merit.

[7] On appeal before us, the appellant's counsel restricted his attack against the sentence to the failure of the trial court to call a probation officer to testify. It was the appellant's sole contention that the trial court misdirected itself by proceeding to sentence the appellant when it did not have all the relevant facts to sentence. Based on this it was contended further that as a result the trial court was denied the opportunity to have an understanding and appreciation of the appellant, and in particular what led him to commit this series of crimes over a period of approximately 2 years. The high-water mark of the appellant's contention is that this failure ineluctably led to the trial court failing to explore the option of a non-custodial sentence for the appellant.

[8] In response to questions from one member of the Bench, the appellant's counsel submitted that consideration should have been given to the imposition of a sentence in terms of s 276A(1)(*i*) of the CPA.

[9] The respondent's counsel countered by submitting that the appeal court took all the facts and circumstances relevant to sentencing into account in considering an appropriate sentence for the appellant. The gravamen of the contention by the respondent's counsel is that, given the nature and seriousness, the fact that the charge consists of 39 separate counts committed over a long time and its impact on society in general including its prevalence, that a non-custodial sentence in terms of s 276A(1)(*i*) would not be appropriate as it would fail to reflect the seriousness of the offence and society's abhorrence thereof.

[10] I turn to consider the provisions of s 276A(1)(*i*) which reads:

'[2] Punishment shall, subject to the provisions of section 77 of the Child Justice Act, 2008, only be imposed under section 276 (1)(*i*) –

(*a*) If the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and

(*b*) for a fixed period not exceeding five years.

[Sub-s. (2) submitted by s 99(1) of Act 75 of 2008 and amended by s 9(*b*) of Act 42 of 2013.]'

[11] It should be clear that s 276A(1)(*i*) does not require a probation officer's report before a court can sentence an accused. It is s 276A(1)(*h*) which mandates a sentencing court in peremptory terms to secure the report of a probation officer before sentencing an accused person. It follows that the exclusion of the requirement for a probation officer's report before sentencing in s 276A(1)(*i*) is not fortuitous. To my mind, it is reasonable to conclude on the maxim *alterius inclusio alterius* that this was a conscious decision by the Legislature. However, this does not preclude a sentencing court from invoking s 276A(1)(*i*) when the facts of

the case requires him or her to do so. This is not such a case. It follows that any reliance on s 276A(1)(*i*) by the appellant is misplaced.

[12] In any event, we have had the benefit of the transcript of the proceedings. It shows clearly that all of the appellant's personal circumstances relevant to sentence were placed before the court. As a result both the regional magistrate and the high court had a complete picture of the appellant and his family, his scholastic career, his employment history, his salary and his family commitment, including the position he occupied at the Hessequa Municipality when these offences were committed. In addition, the appellant disclosed the modus operandi and the amounts involved in the 39 counts including his personal benefit amounting to R39 000. The appellant's counsel was at pains to point out any relevant facts which the probation officer could put before the court in addition to what was placed before the court already. To my mind, there was no need for any further reports. It follows that this contention is devoid of any merits.

[13] When asked if he was relying on any misdirection regarding sentence, the appellant's counsel answered in the negative. Given this response, the question to be answered is whether in the absence of any misdirection by the court below, it is permissible for this Court, sitting as a court of appeal to interfere with a sentence which has been properly imposed by a court exercising its discretion.

[14] This Court reiterated the salutary approach by an appellate court in an appeal on sentence as follows in *S v Malgas* 2001 (1) SACR 469 (SCA) at 478D-E:

'…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….'

The learned judge concludes as follows at p478I-479A:

'…The tests for interference with sentences on appeal were evolved in order to avoid subverting basic principles that are fundamental in our law of criminal procedure, namely, that the imposition of sentence is the prerogative of the trial court for good reason and that it is not for appellate courts to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised….'

[15] It should be clear from *Malgas* (supra) that the powers of a court of appeal to interfere in a sentence imposed by a trial court are clearly circumscribed. This is intended to avoid an erosion if not a usurpation by the appellate court of the sentencing discretion which resorts pre-eminently with the sentencing court. See *S v Pieters* 1987 (3) SA 717 (A); *S v Kibido* 1998 3 All SA 72 (A); *S v Botha* 1998 (2) SACR 206 (SCA) and *S v Kgosimore* 1999 (2) SACR 238 (SCA) and recently *S v Barnard* 2004 (1) SACR 191 (SCA). It follows that this court is not at large to interfere with the sentence imposed by the appeal court.

[16] The appeal is dismissed.

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L O BOSIELO
JUDGE OF APPEAL

Willis JA (Dissenting):

[17] My respectful point of departure from the judgment of Bosielo JA concerns the question of the relevance and the potential application of s 276A(1)(*i*) of the CPA.

[18] In the judgment of the high court, Boqwana AJ said:

'In the light of these factors my view is that the sentencing magistrate erred by not imposing an effective term of imprisonment in these circumstances. The sentence he imposed was too lenient and not in keeping with the general sentencing approach followed by the courts in white collar crimes. My view is that he sentence is disturbingly inappropriate warranting this Court's interference by substituting an unsuspended period of imprisonment for the sentence imposed by the magistrate.'

With all of this I agree but nowhere is any mention made of the provisions of s 276A(1)(*i*) of the CPA. Where the sentence of imprisonment does not exceed five years, and the court has directed that the provisions of this section are to apply, a prisoner may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services after having served one sixth of his sentence.

[19] A number of decisions in this court have made it plain that where a sentence of less than five years is to be imposed, the provisions of s 276A(1)(*i*) should always be in the foreground, precisely because the judicial officer has considered that a custodial sentence is essential but is also of the view that a lengthy period of imprisonment is inappropriate. In these judgments it has also been made plain that, where sentence in excess of five years' imprisonment is not called for and the sentencing court fails to consider the application of the provisions of s 276A(1)(*i*), the court of appeal is obliged to intervene.

[20] Ever since *S v R*, which was endorsed by the Constitutional Court in *S v M* (*Centre for Child Law* as *Amicus Curiae*), the criminological jurisprudence underlying the necessity for considering provisions such as those contained in s 276A(1)(*i*) has been trite: the sentence retains its punitive character, will serve both as a general and specific deterrent, promotes rehabilitation and strikes a balance between the interests of the offender and society. As was said by this court in *S v Truyens*, it is important to bear in mind that early release from custody under correctional supervision will occur only where the circumstances of the offender warrant it.

[21] I endorse what Bosielo JA has said about corruption being an evil that must be combatted. I do not agree that five years' imprisonment, unalleviated by the provisions of s 276A(1)(*i*) is required in order to do so effectively. I come to this conclusion for a number of reasons: (i) a conviction such as this will, in all probability, destroy the prospects of his being employed in a similar position, with the privilege of receiving a commensurate salary – a massive deterrent for others; (ii) a thorough revision of tender procedures and criteria in our country would achieve the desired results almost immediately; and (iii) education sets us free and education that the economic consequences of corruption are such that the primary victims thereof are the poor – every rand that is diverted into a corrupt official's pocket is a rand that could be spent on the provision of social services elsewhere – will do more good for society than packing our prisons with those who think that individual acts of corruption are largely inconsequential.

[22] Section 12 of our Constitution enshrines the freedom of everyone. Freedom is indivisible: whenever anyone loses his or her freedom, we all lose a little of ours too. A truly free society would be one in which there were no prisons at all. The necessity for prisons is a reminder that collectively we, as a society, have fallen short of our own potential.

[23] Johannes Voet has drawn our attention to the fact that, as long ago as the Roman republic, Cicero cautioned against judges having 'misplaced pity' for offenders. This expression has perhaps been immortalised, among South African lawyers, by Holmes JA in *S v Rabie*, when he recast it as 'maudlin sympathy'. Nevertheless, as Schreiner JA said in *R v Karg*, 'righteous anger should not becloud judgment.' There must always be a degree of sorrow, if not reluctance, when a judge deprives a person of his or her freedom.

[24] In my opinion, the overall circumstances of this case cry out for the provisions of s 276A(1)(*i*) to apply. If I understood counsel for the state correctly, when I put it to him that an order to this effect should be made, he had no serious difficulties with the proposition. In my opinion, the appeal should have been upheld to the limited extent that the provisions of s 276A(1)(*i*) were made to apply.

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NP WILLIS
JUDGE OF APPEAL

Appearances:

For Appellant	:	J Engelbrecht SC (with him SS Green) Instructed by: T Swartz Attorneys; Cape Town Symington & De Kok, Bloemfontein
For Respondent	:	JA Agulhas Instructed by: Director of Public Prosecutions; Cape Town Director of Public Prosecutions, Bloemfontein