

IN THE SOUTH GAUTENG HIGH COURT,
JOHANNESBURG

CASE NO: 2013/7023



DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED:

A handwritten signature in black ink, appearing to be 'M. M. M.', is written over the text 'REVISED:'.

In the matter between:

SD WATERS

Applicant

and

MR TLADI N.O.

(In his capacity as Chairman of the

Parole Board, Diep Kloof Prison)

First Respondent

THE CASE MANAGEMENT COMMITTEE,

DIEP KLOOF PRISON

Second Respondent

THE DEPARTMENT OF CORRECTIONAL SERVICES

Third Respondent

JUDGMENT

SATCHWELL J:

1. Applicant ('Waters') was convicted in the Commercial Crimes Court of numerous counts of fraud and sentenced to serve a term of eight years imprisonment. From his place of confinement, he brings an application to review the decision of the first respondent (in his capacity as Chairman of the Parole Board) ('Parole Board') in which the Parole Board declined to recommend an application to the Regional Court, in terms of section 276A(3)(a)(ii) of the Criminal Procedure Act, that the custodial sentence imposed on Waters be converted to one of correctional supervision.
2. The chronology of events is not complicated:
 - a. Waters operated as an insurance advisor and was found, over a period of time, to have committed multiple counts of defrauding a client who was an elderly lady resulting in her almost destitution. In sentencing Waters, the learned magistrate referred to the position of trust which he occupied and which he betrayed, the planning involved in the 18 month period over which the frauds were committed, the rendering of the victim to a penniless position, that Waters did not play open cards with the court but placed everything in dispute including that the client was mentally incapable.
 - b. The report of a social worker was presented to the court with the recommendation of a non-custodial community service sentence. The learned magistrate took the view that such a sentence would not be commensurate with the offences committed. On 1st February 2011 Waters was sentenced to serve a term of five years imprisonment plus a further term of three years imprisonment suspended in whole on condition that Waters repay to the victim the capital amount of R 400 541.00 plus interest before 1 March 2011. The learned magistrate stated that "If for one or other reason the monies are not forwarded to the account that I specified you will serve another three years in prison."
 - c. Payment of the specified sum was not made in accordance with the order of the magistrate. The result is that Waters is currently serving a sentence of eight years imprisonment.
3. However, on 24th February 2012 payment of the aforesaid sum was made by or on behalf of Waters. Immediately, thereafter, on 24th February 2012, a meeting at the office of the Head of the Prison in which Waters is incarcerated was convened. Present were Water's legal representatives, the Head of the Prison and representatives of the Case Management

Committee. Proof of the late payment of the approximately R 400 000 was tendered and a request was made that the Case Management Committee approach the learned convicting and sentencing magistrate for Waters sentence to now be endorsed as being five and not eight years. Notwithstanding visits by Waters legal representatives, the learned magistrate declined to alter the sentence.

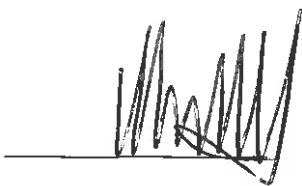
4. At the end of March 2012, Waters legal representatives requested the Case Management Committee to bring an application in terms of Section 276 (3)(a) of the CPA to ask for condonation of the late payment of the fine and for an order that the magistrate to reduce the sentence period from eight to five years. Part of the court record is the recommendation of the Case Management Committee for conversion of Waters sentence to correctional supervision. The "reasoning" for the recommendation is set out under the headings of "general behaviour and adaptation", "treatment programmes and reaction", "remorse and admission of guilt", "availability and stability of support systems", probability of further criminal activity".
5. In this application before me, it was argued that the views and recommendations of the CMC cannot be simply ignored or brushed aside. I do myself have the following concerns about the basis for this 'recommendation':
 - a. Firstly, there is reference to "the offender serving the sentence for armed robbery". This is clearly incorrect. It may be no more than a typing error. However, it does mean that the CMC failed to take into account the period over which the offences were committed, that Waters preyed on an elderly lady over a period of time, that a position of financial trust was abused.
 - b. Secondly, there is reference to "the offender shows remorse for committing fraud. He paid the money he defrauded the victim". There is no indication anywhere of any remorse. The learned magistrate commented upon this in sentencing. Quite clearly from the correspondence, the payment was made with the sole intention of reducing the sentence. No regret has ever been shown for the harm done to the elderly victim though there certainly is distress on the part of Waters at his incarceration.
 - c. Thirdly, I find certain comments by the CMC to be rather naïve and superficial – viz - "the offender feel that being in prison has robed him to maintain his family", "the offender enjoys the support of his family, who has undertaken to continue their support should he be released".
6. The Correctional Supervision and Parole Board gave consideration to this recommendation and, on 5th December 2012, "declined to forward Offender Waters application for conversion of sentence of direct imprisonment into correctional supervision to the court a quo". Numerous reasons were cited by the Parole Board ranging from the nature of the offences ("ninety four counts of theft and fraud" "committed over a periods of 18 months" involving a "careful

amount of planning" while he "was in a position of trust" in relation to a "helpless not very astute lady in her twilight years who died penniless". There is reference to the "p". It is commented that "the offender did not take responsibility for his crimes, he did not show remorse during the trial, he declared his victim unfit to testify". The Board found "the offender's presentation during the CSPB sitting was not convincing. He did not take responsibility for his crime. He blamed others – bad advice he received from his legal team, victims family attitude and the difficult magistrate who presided". Waters comments to the Board that failure to grant him correctional supervision will cause "his religious involvement to suffer", "his family will be devastated", his "31 year old marriage will be affected" were viewed by the Board as "reasons emphasizing personal interest and self preservation rather than victim/complainant/relatives interest".

7. It was argued in this application that factors taken into account and/or the reasons given by the Parole Board are confined to those which are 'aggravating' ie which conduce towards a harsher sentence. For instance, it was submitted that the Parole Board did not take into account that Waters had eventually made payment of the sum of four hundred thousand rand which was indicative of remorse. However, the letter of 30th March 2012 addressed to the sentencing magistrate makes it clear that payment of this sum was made with the intention of attempting to resuscitate the reduction of sentence from eight years to five years through revival of the community service portion of the order. There was no mention of 'remorse'. The only reason ever given for payment of those funds was to secure reduction of sentence.
8. In his founding affidavit, Waters states that "what the Parole Board did was to rehash the aggravating factors taken into consideration by the learned magistrate in imposing a custodial sentence". I fail to see why this approach is, per se, objectionable. These are exactly the factors and considerations which are relevant to the imposition of sentence. Waters states in his affidavit that by so doing the Parole Board is "to literally punish me again by considering those aggravating factors and then declining to recommend a conversion of the custodial sentence to one of correctional supervision". Of course, Waters has now served just over two years of his eight year sentence of imprisonment. There are certain arrangements for remission and amnesty of which he is the beneficiary. But there is no right to a non-custodial sentence as Waters in his affidavit almost seems to suggest.
9. Waters says that the Parole Board should have taken into account the period of time he had spent in prison "both as an awaiting trial prisoner". Why? This is what is done by the court when determining an appropriate sentence. Waters says that his conduct in prison has been "exemplary". That is what is expected by judicial officers – it should be the norm not the exception. Waters says that he has a "warm, lovely and stable family and permanent resident". One must then ask why he stole over R400 000 from an old lady over a period of time – clearly, this family environment was no deterrent to planned crime. He refers to his repayment of the R 400 000. That does not conduce towards a change in sentence. It was not done in advance of trial nor during the trial nor within the time period ordered by the

magistrate. It was done for his own benefit not because it was the moral thing to do. Waters states that his evidence to the Parole Board is that "I am remorseful at what I did". The Parole Board expressed its own views on this as did the learned magistrate. The correspondence and meetings to which have referred above are also instructive in this regard.

10. Waters makes other complaints in his affidavit. He seems to believe that there is something untoward in the granddaughter of his victim in declining to be involved in either discussing or supporting this application. Waters appears to have some difficulty in appreciating what he has done, the results thereof and the (dis)regard in which third parties are entitled to hold him.
11. I do not see that the decision of the Parole Board is one which is indicative of any bias against Waters. None was argued. He appears to have been treated as would any applicant. I was not alerted to inadmissible considerations to which the Parole Board gave any or undue weight. It has not been suggested that the Parole Board failed to take into account relevant considerations.
12. The only criticisms of the Parole Board at the hearing were that it failed to follow the recommendation of the Case Management Committee and that it focussed on the 'aggravating' factors. I see no merit in either of these arguments. The CMC makes recommendations not decisions. As one sees in the reasons of the Parole Board, the Parole Board takes into account, not only the recommendations of the CMC but also forms its own views – hence it heard from Waters and formed a view with regard to his approach to his current predicament. The Parole Board is certainly not bound by any 'recommendation' of the CMC.
13. In the result an order is made as follows:
 - a. The application is dismissed with costs.



K. SATCHWELL

Counsel for the Applicant: Adv. S.S. Cohen

Attorneys for the Applicant: Larry Marks Attorneys

Counsel for the Respondents: Adv. R. Poore

Attorneys for the Respondents: State Attorney

Date of hearing: 14th May 2013

Date of Judgement: 7th August 2013