IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No A76/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

September 2017
DATE

SIGNATURE

In the matter between:

NXELE, CLIVE THULANI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

R. FRANCIS, AJ:

[1] The appellant, Mr Nxele, pleaded guilty to 83 counts of theft from his employer totaling R8 910, 240.88 committed over a period of four years and nine months. He was sentenced to an effective term of 20 years imprisonment. Upon petitioning he was granted leave to appeal against the sentence imposed.

[2] Mr Nxele concedes that a term of imprisonment is a suitable sentence. However, contends that the period of 20 years is shockingly inappropriate and that a 12 year term of imprisonment is appropriate.

[3] The trial court imposed a sentence of 15 years on count 36 which involves an amount of R516 589,67 falling within the minimum sentencing regime provided for in terms of section 51(2) read with Part 11 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. A further 15 years was imposed for the balance of the 82 counts totaling R8 393 381, 21. In terms of section 280(2) of the Criminal Procedure Act 51 of 1977, ten years of the sentence imposed on the 82 counts which did not attract the minimum sentence obligation was ordered to run concurrently with the sentence imposed on count 36.

[4] The power of the appeal court to interfere with a sentence is constrained. In *S v Rabie* [1] the court held that the imposition of a sentence is solely within the discretion of the trial court and that a court of appeal will not interfere with that discretion unless it is satisfied that the trial court exercised its discretion unreasonably. In an evaluation of

[1] 1975 (4) SA 855 (A)

judicial discretion an appeal court may not interfere with a sentence merely because it would have imposed a different sentence than the one imposed by the trial court[2]. Nevertheless, a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court remains an element for interfering with the trial court's sentencing discretion.[3] Additionally the power of the appeal court to interfere with a sentence extends to a finding of irregularity and misdirection of sentencing powers.

[5] It is trite that when determining an appropriate sentence, the court has to consider the sentencing principles established in *S v Zinn*[4] being to consider the offence, the offender and the interests of society. The ideal outcome is to achieve a proper balance between the triad: namely the nature of the crime, the personal circumstances of the appellant and the interests of society. In *S v Isaacs* [5] it was held that the purpose of punishment is retribution, prevention, deterrence and reformation.

[6] Sentencing of white collar crimes presents its own difficulties. Such crimes are deemed to be non-violent but cause substantial loss and mistrust. In whatever form, theft remains serious in nature. Society expects courts to deal with offenders of such crimes sternly and decisively. In the interests of the community specialized commercial crime courts have been established to deal with the scourge of white collar crimes.

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[2] *S v Skenjana* 1985 (3) SA 51 (A)
[3] *Director of Public Prosecution KZN v P* 2006 (1) SACR 243 SCA
[4] 1969 (2) SA 537 (A)
[5] 2002 (1) SACR 176 (C)

[7] In *S v Malgas* [6] the court held that it is impermissible to deviate from a prescribed minimum sentence 'lightly and for flimsy reasons which could not withstand scrutiny'. A sentencing court is required to look at the ultimate cumulative impact of all the factors in order to determine whether a departure from the prescribed minimum sentence is justified.

[8] One basis for the appeal is the failure to have considered the personal circumstance of the appellant, namely his drug dependency during the commission of the crime. The trial court did consider the drug dependency on sentencing but did not consider this a mitigating feature. The appellant told the court that his drug dependency consumed most of the monies defrauded. The trial magistrate, upon a calculation, concluded that it would only account for a fraction of the money stolen. The learned magistrate concluded that the bulk of the money could not have been spent on his drug habit but that he must have lived a lavish lifestyle.

[9] The appellant did not need any help for the drug addiction and reported to have self-rehabilitated himself without any professional assistance. The magistrate found this hard to believe on the basis that the appellant had been addicted to cocaine for such a long time. Further no health concerns were advanced. In the particular circumstances, the appellant's drug use cannot justify the actions of theft, but no less it was a contributing factor to the theft.

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[6] 2001 (1) SACR 469 (SCA)

[10] It appears from the judgment of the court below that the Magistrate did consider the general factors for sentencing. He considered that the offence that the appellant was convicted of is prevalent in the court's jurisdiction. The appellant was dishonest and betrayed his positon of trust as an accountant in the very company that provided him with employment. It was evident that the reason for his crime was to enrich himself. Further the appellant could not account for at least R7 million of the money. Some of the money was used to build himself a house, buy furniture, cars, go on holidays and lead an expensive lifestyle.

[11] On the issue of the prescribed sentence, s 51(2) of the Criminal Law (Sentencing) Amendment Act 105 of 1997, the appellant as a first time offender must be sentenced to a minimum period of fifteen (15) years imprisonment, unless substantial and compelling circumstances exist which warrant the imposition of a lesser sentence.

[12] The cases are clear that it is incumbent upon a court, before it imposes the prescribed sentence, to assess and consider all circumstances of a particular case and whether the prescribed sentence is indeed proportionate to the particular offence. In this regard the court in *S v Fortune* [7] held the following:

> "Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the

[7] 2014 (2) SACR 178 (WCC)

> essence of *Malgas* and of *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice."[8]

[13] By imposing the minimum sentence of 15 years on the basis that the single amount of R516 859,67 involved in count 36 marginally exceeded the threshold of R500 000, the sentence becomes wholly disproportionate to the sentence imposed in respect of the other 82 counts of theft totaling R8 393 381, 21. These 82 counts were taken together for sentencing and warranted an effective single sentence of 15 years of which ten years were ordered to run concurrently with the sentence imposed in respect of count 36. The *modus operandi* was the same in all 83 counts with the same intent to defraud. The moral blameworthiness was not different either. There appears to be no basis to distinguish between the single count of fraud (count 36) and the remaining 82 other counts.

[14] Disproportionate sentences may infringe upon a convicted person's rights. In *S v Fortune* the court held that:-

> "What is clear though is that the criminal law courts have the duty to approach sentence treating each case on its individual merits and mindful of the need to apply the minimum sentence legislation in a manner that does not result in punishment that is disproportionate having regard to the peculiar circumstances of the commission of the offence and the personal circumstances of the offender.' [9] Punishment that is disproportionately severe infringes the convicted person's right in terms of s 12(1)(e) of the Constitution not to be punished in a cruel, inhuman or degrading way. The provisions of the prescribed minimum sentence legislation fall to be applied in a manner that avoids an infringement of the convicted person's basic rights in terms of s 12 of the Bill of Rights."[10]

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[8] *S v Fortune* 2014 (2) SACR 178 at 185H-I
[9] *S v Fortune* 2014 (2) SACR 178 at 185H-I
[10] *S v Fortune* 2014 (2) SACR 178 at 186 F-H

[15] A sentence of 15 years' imprisonment on count 36 alone is disproportionate and 'disturbingly inappropriate' compared to the sentence imposed in respect of the other 82 counts. In *S v Malgas*[11] it was held that even in the absence of a material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the Appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".

[16] The sentence taken as a whole imposed in respect of the 82 counts is disproportionate to the sentence imposed in respect of the single count 36. In balancing mitigating factors with aggravating factors the mitigating factors outway the aggravating factors.

[17] For consideration of an appropriate sentence the court found in *S v Rawat*[12] that in circumstances of theft by employees from employers a deterrent sentence be imposed to send out the message that such conduct will severely be punished. The accused had stolen R402 000 from his bank employer and was given a sentence of seven years on appeal.

[18] In the present case the fraud on count 36 although being an amount more than R500 000 should be taken together with the other 82 counts to justify an appropriate sentence. It is my view that all 83 counts are to be taken together for sentencing

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[11] 2001 (1) SACR 469 (SCA)

[12] 1999 (2) SACR 398 (W)

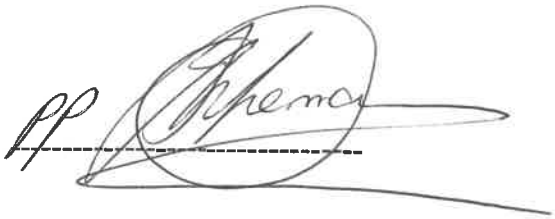
purposes and that an effective sentence of fifteen (15) years imprisonment would be appropriate.

[19] In the result I propose the following order:

1. The appeal against the sentence is upheld.

2. The sentence of 20 (twenty) years' imprisonment imposed by the trial court is set aside and substituted with one of 15 (fifteen) years' imprisonment, effective from 12 February 2015.

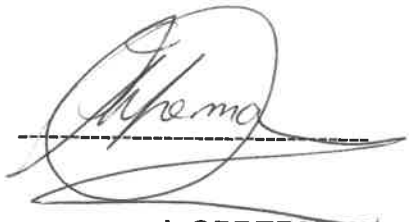
3. The appellant remains unfit to obtain a licence to possess a firearm and, insofar as a search and seizure in terms of section 103(4) of Act 60 of 2000 has not occurred, such search and seizure remains authorised.



R. FRANCIS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree



I. OPPERMAN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appellant's Attorney: Mr RC Krause

Instructed by: BDK Attorneys

Counsel for the State: Adv TR Chabalala

Instructed by: Director of Public Prosecutions

Date of Hearing: 7 August 2017

Date of Judgment: September 2017