REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A02/2021

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

SENYATSI ML ***03-09-2021***
SIGNATURE **DATE**

In the matter between:

MOLEFE, GEORGE SEROKE **First Appellant**

KNOWLEDGE AND FOOTPRINT CC **Second Appellant**

MOSADI TSHEPO **Third Appellant**

and

THE STATE **Respondent**

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 03 September 2021*

SENYATSI J:

[1] This is an appeal with leave of the trial Court against the sentence imposed by the Court sitting at the Johannesburg Regional Magistrate on 23 May 2018. The only appellant is Mr Tshepo Mosadi as his co-accused Mr George Seroke Molefe passed away during the trial.

[2] The appellant was convicted of six counts of theft after he had pleaded not guilty. The conviction stems from receipt of six payments from the Department of Justice and Correctional Services made to Knowledge and Footprint Close Corporation ("the CC") from 21 December 2012 to 1 March 2013 totalling R1 315 770.43. The payments were not due to the CC and appellant.

[3] The appellant was the sole member of the CC at the time of payment. The appellant had access and control of the CC's bank account. From the evidence, before it, the trial court found that the appellant was fully aware that the deposits were not due and payable to the CC and he proceeded to utilise the funds unlawfully.

[4] The CC was sentenced to a fine of R300 000 which was wholly suspended for five years. The appellant was sentenced to eight (8) years direct imprisonment.

[5] The appellant, who was a first offender, raises the following grounds for appeal against the sentence, namely:

5.1. The sentence of 8 (eight) years direct imprisonment is shockingly inappropriate in the light of the totality of the acceptable facts presented in mitigation;

5.2. It was reported that he was addicted to alcohol and gambling and was recovering from such. The appellant complains that the learned Magistrate misdirected herself by rejecting the recommendations by the probation officer and the correctional supervisor's report. The appellant contended that the leaned Magistrate erred in not considering the fact that the applicant had an alcohol and gambling addiction;

5.3. The learned Magistrate erred in not considering rehabilitation properly and in not accepting a fine as an option proposed by the probation officer and/or correctional supervision;

5.4. The learned Magistrate erred in sentencing the appellant on account of a non-repayment of the stolen money;

5.5. The learned Magistrate erred failed to consider that the appellant did not act in concert with employees of the Department of Justice to have the money paid into the CC's account;

5.6. The trial court also failed to appreciate that our courts have held that retribution does not play a significant role in the sentence process and that the personal circumstances of the appellant are more important in determining an appropriate sentence;

5.7. The trial court paid lip service to the fact that the admissions made by the appellant proved remorse;

5.8. The trial court also erred by not differentiating between individual and general deterrence; and

5.9. Imposed the sentence by ignoring the element of mercy.

[6] In order to deal with the grounds of appeal on the alleged misdirection by the trial court, it is important to restate the legal principles on sentencing of the convicted person which are settled in our law. Punishment is pre-eminently a matter for discretion of the trial court. In *S v Sadler*[1] by restating the principle as follows:

> "In every appeal against the sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial Court and (b) should be careful not to erode such discretion: hence a further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[7] The circumstances under which the appeal court can interfere with a sentence are limited. It is only in cases where the trial court misdirects itself that the appeal court may interfere.

[8] On the approach to be followed by a court of appeal, the court in *S v Hewitt*[2] held that:

> "An appellate court may not interfere with [the discretion of the trial court] merely because it would have imposed a different sentence. In other words, it

[1] [2000] 2 ALL SA 121 (A), (57/99) [2000] ZASCA 13 at para 6
[2] [2016] ZASCA 100 para [8]

> is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required, it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court committed a misdirection of such a nature, degree and seriousness that it shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised."

[9] In addition to the above, our courts have held that a trial court must take account of all the objectives of punishment; which include the elements of deterrent (deterrence), preventative (prevention), reformative (reform) and retributive (retribution).[3] Ultimately, the punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.[4]

[10] In affirming and applying the above principles, the court in *S v Swart*[5] held that:

> "… in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead, proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and

[3] See S v Rabie 1975 (4) SA 855 (AD) at 862 A-B
[4] See same 862 G-H
[5] 2004 (2) SACR 370 (SCA) at 378 para [12]

deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role."

[11] On the effect that a sentence should have, the court in *Mudau v S*[6] approved of what was said in *S v Cott-Crossely* 2008 (1) SACR 223 (SCA) and said the following:

> "Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishment they are not the only ones, or for that matter, even the overriding ones."
>
> "… it is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society."

[12] The approach on what considerations the court should bear in mind when dealing with sentence was outlined as follows in *S v Tonga*[7]:

> "Injured feelings and interests of complainants (and close relatives) as well as the attitude of the community are relevant, but equally relevant are the consequences of punishment for the offender. Modern times and recent penal development require of the presiding officer considering- a sentence to impose an effective punishment. A sentence is only effective when it strikes a fine balance rather between the interests of society and of the offender. It brings

[6] (547/13) [2014] ZASCA (31 March)
[7] 1993 (1) SACR, P365

about retribution but of a balanced nature; it deters moderately, individually, as well collectively or generally."

[13] The issue that must be determined is whether the Magistrate misdirected herself and imposed a sentence that was shockingly inappropriate. The primary ground for this complaint hinges on the imposition of a custodial sentence as opposed to a non-custodial sentence and the alleged failure by the trial court to consider the appellant's personal circumstances.

[14] Even though not binding on the court, I have carefully considered the judgment of the trial court in the light of comparable cases and sentences imposed on appeal to gauge whether the complaint is well founded. I observe that in *S v Price and Another*[8] the court had to consider whether a 15 year sentence imposed by the trial court on an attorney for the money laundering of R2 million trust monies was shockingly inappropriate. The sentence was confirmed by the appeal court.

[15] In *S v Kwatsha*[9] the accused, an employee of the Department of Home Affairs was convicted of theft and conspiracy to commit fraud involving government cheques. No real loss was suffered by the Department as the accused was arrested timeously. An amount of almost R2 million was involved. The accused was sentenced to a term of 7 years imprisonment of which 2 years was suspended conditionally.

[8] 2003 (2) SACR 551 (SCA)
[9] (2) SACR 564 (E)

[16] The court in *S v Rudman*[10] confirmed a 9 year imprisonment sentence on appeal for a theft conviction involving R3 million. In *S v Piater*[11] a 4 year imprisonment was confirmed on appeal for a theft conviction involving R384 000 of government cheques. In *Preston and Another v S,* on a conviction of theft of company monies amounting to R5.3 million, a 15 and 12 year sentence imposed on the accused was reduced to 12 years and 9 years respectively. The court in *S v Mackenna*[12] confirmed a 10 years' imprisonment where it was found that the accused had engaged in a self-enrichment scheme.

[17] It is evident from the authorities quoted above that an appeal court will unlikely interfere with the discretion of the trial court where misdirection on sentencing cannot be established from the trial record.

[18] White collar crime is endemic in our society and it is for this reason that our courts impose appropriate sentences on those found guilty. In *S v Sadler*[13] the court said the following about white-collar crime:

> "So called 'white-collar crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justification often advanced for such inadequate penalties are the classification of 'white-collar' crimes as a non-violent crime and its perpetrators (where they are a first offender) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no-help in assessing appropriate sentences for 'white-collar' crime. Their premise is that prison is

[10] 2017 JDR 0980 (ECG)
[11] 2014 JDR 1927 (SCA)
[12] 2019 JDR (JDR)
[13] Same as above

> only a place for those who commit crimes of violence and that it is not a place for people from 'respectable' backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment and entailed gross breach of trust."

[19] From the record of the trial, it is evident that the trial court considered the recommendations from the probation officer's and the correctional supervision officer's reports for the purposes of sentence. The content of the probation officer's report was also considered and fully appreciated.[14] The court took account that the appellant was a first offender, 40 years old, married with children and had a tough upbringing without a father. He had passed grade 12 and was running his own business with the result that he was contracted to the Department of Justice and Correctional Services as a service provider. The trial court, correctly stated that the recommendations were the expression of opinion for the guidance of the court to apply its mind to the relevant considerations in so far as they affect sentence. These factors were considered when the trial court imposed the custodial sentence.

[20] It is also evident from the record that the appellant was not remorseful. The record reveals that he did not take accountability for what took place in his business as he claimed to have no financial skills and he blamed Apartheid for his lack of skills. He could not explain to the trial court how he billed his clients. He could not even explain what services the CC rendered to the Department of Justice and Correctional Services. Furthermore, the appellant could not explain

why he received six payments. He admitted that his company was engaged to do work for the Department of Justice and Constitutional Services on two occasions. His explanation that he left one of his employees to attend to invoicing as she deemed fit was not adequate.

[21] We are of the view that our courts should stand firm and impose sentences that are not only appropriately retributive and rehabilitative but will also send a strong message to those who continue to commit these type of crimes, that the perpetrators of this crime will not be treated leniently.

[22] The appellant took advantage of his own client, by stealing, not once but six times. The total amount stolen was indeed substantial. Stealing from the State has become a scourge in our Republic. No day goes by without the media reporting about a qualified report from the Auditor General involving State organs who cannot account fully for money entrusted to them to effect service for the public benefit. The amount stolen could have been put to good use by having access to more court interpreters which is one of the critical elements of administering justice in our courts.

[23] For the reasons stated above, we do not find there was any misdirection by the *court a quo.* There is no basis to interfere with the sentence imposed by the trial court.

[24] As a result, the appeal must fail and the sentence is confirmed.

ORDER

[25] The following order is made:

The appeal is dismissed.

SENYATSI ML

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

I concur,

SIWENDU T

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

REPRESENTATION

Date of hearing: 10 May 2021

Date of Judgment: 03 September 2021

Third Appellants' Counsel: Adv Ndlovu

Instructed by: Ngobeni Attorneys

Respondents' Counsel: Adv D Van Wyk

Instructed by: National Director of Public Prosecutions, Johannesburg