IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

AR NO: 258/07

In the matter between:

WILLIAM STAINBANK APPELLANT

and

THE STATE RESPONDENT

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] The Appellant was convicted of fraud involving R44 252.36 and sentenced on 23 August 2006 to undergo 3 years imprisonment.

[2] He applied to the trial court for leave to appeal against his conviction and sentence. This application was struck off the roll. On 27 September 2006 Hugo J

granted an order in case No. 421/2006[1] that the appellant inter alia[2] be granted leave to appeal to the High Court of the Natal Provincial Division against conviction and sentence.

[3] It appears that Hugo J only granted the order, being satisfied that the relief claimed was appropriate, and did not deliver a judgment setting out his reasons for the order. Mr Matthews, who appeared for the Appellant, gave us the assurance that the fact that the application for leave to appeal was struck off the roll, as opposed to leave to appeal being refused by the court *a quo*, was raised before Hugo J. This issue was therefore no doubt considered. It appears that the learned Judge probably treated the magistrate's decision to strike the application for leave to appeal (which in the ordinary course appeared regular and should have been heard) off the roll, as a refusal by the court *a quo* of the application for leave to appeal.[3] No appeal was pursued in respect of the order by Hugo J. We accept that the present appeal is accordingly properly before us pursuant to a competent order of a Judge[4] granting leave to appeal.

[1] The application papers are not in the file and not available to me.

[2] The appellant was also released on bail pending this appeal.

[3] We were advised that this was also the attitude adopted by the State.

[4] At that stage, prior to the decision in *Shinga v The State; S v O'Connell* 2007 (2) SACR 28 (CC) at 54 d on 8 March 2007 which introduced the requirement that 'a petition contemplated in this section must be considered in Chambers by two Judges designated by the Judge President', section 309C(5)(a) of the Act required a decision from a single judge only.

[4] Broadly, three issues arise for determination in this appeal, namely:

(a) Whether the loss of documents in respect of the rival optometrist business, Bay Opticals (hereinafter referred to as 'Bay Opticals') conducted by the Appellant whilst he was employed by Moffat Optical Richards Bay (hereinafter referred to as 'Moffat') confiscated by the police at the Appellant's house and subsequently apparently mislaid, prejudiced him in his defence;

(b) Whether the Court *a quo* erred in finding that the State had proved the guilt of the Appellant beyond a reasonable doubt;

(c) Whether the sentence of three years' imprisonment is inappropriate and induces a sense of shock.

In what follows I shall consider the first issue when discussing the appeal against conviction, and shall thereafter deal with the appeal on sentence.

THE APPEAL AGAINST CONVICTION:

[5] It is trite law that the crime of fraud comprises of 'the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'.[5]

[5] See C R Snyman Criminal Law 4th edition pg 520.

[6] An accused is entitled to insist that any charge against him, should set out with reasonable clarity the case the State intends to prove against him. Where the charge is fraud, it is of material importance that he be informed of the nature of the misleading statement that he made or the conduct that he evinced. The charge must not be so vague that he has to speculate about the misrepresentations on which the State intends to rely.[6]

[7] The annexure to the charge sheet alleged:

'…THAT upon or about the period from 1997 to 2000 and at or near Moffat Optical Richards Bay in the District of Lower Umfolozi, the accused did unlawfully, falsely and with the intent to defraud give out and pretend to General Optical that the telephonic orders he placed for optical lenses where (*sic*) genuine orders for Moffet Optical patients and did then and there and by means of the said false pretences induce the said general optical to supply the said lenses so ordered to the prejudice or potential prejudice of Moffat optical to the value of R44 252, 36.

WHEREAS the accused when he gave out as above mentioned, knew that in truth and in actual fact he was not authorised to make such orders and that such orders on the said patient this (*sic*) were not genuine orders.'

[8] In the context of the facts of the present appeal, Mr Matthews submitted that the State had to prove that:

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[6] DuToit *et al* Commentary on the Criminal Procedure Act with reference to the decision in *S v Hugo* 1976 (4) SA 536 (A) at 540-2.

(a) The Appellant ordered the lenses;

(b) General Optical Company Limited (hereinafter referred to as 'GO') in fact supplied the lenses to Moffat;

(c) The lenses were received at Moffat;

(d) The lenses were not sent back or used in the genuine business and for *bona fide* patients of Moffat;

(e) Moffat in fact paid for these lenses so ordered.

In reply he added a further requirement namely that it was for the State to have called a witness from the courier company which would deliver the lenses to Moffat. This is not really a separate requirement but merely evidence which would prove receipt of the lenses by Moffat.

In the view I take of the matter I respectfully disagree, for reasons which will appear below, that the onus borne by the State extended as widely to all these issues listed by him.

[9] The formulation of the charge is somewhat inelegant and possibly lacked some particularity. However, no objection was taken to the charge as formulated. Nor were further particulars requested to the charge, nor was any amendment sought pursuant to the provisions of section 86 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as 'the Act'). As I shall endeavour to demonstrate with reference to the evidence which was adduced, any giving out and pretending to GO that the telephonic orders placed for optical lenses were genuine orders for Moffat patients and inducing GO to supply the lenses, did not *per se* result in prejudice or potential prejudice to Moffat. It was only once the lenses were received and then

internally processed by the appellant as lenses for patients of Moffat and for which Moffatt would thus be liable to pay GO, that actual or potential prejudice was suffered by Moffat in that the appellant knew that the lenses were not 'genuine orders'[7] for patients of Moffat.

[10] The evidence revealed the following:

(a) At all times relevant to the charge, the Appellant was employed as a technician by Moffat. He had his own laboratory within Moffat's business premises where only he worked, being the only technician employed by Moffat. In his laboratory he had the equipment to test the prescription (optical strength) of all ordered lenses received at Moffat, which were to be fitted in spectacle frames[8] for patients of Moffat. The task of cutting and fitting lenses to frames to make up spectacles for patients of Moffat, was exclusively and mainly his function.

(b) The procedure followed in Moffat was as follows:

(i) Existing and new patients would call to have their eyes examined by a registered optometrist, such as Mr Howard and Ms Cowley. Every patient would be assigned an unique patient number.

[7] As the charge alleged.

[8] The frames to which the Appellant fitted the lenses were either supplied by patients or chosen by patients of Moffat from a range stocked by Moffat.

(ii) If the particular patient's eye sight required correction the optometrist would determine the strength of the lens required. Correcting eye sight could be achieved either by a prescription of contact lenses or specific lenses to be fitted to spectacles. As the charge related to only lenses, only that aspect of the business was considered;

(iii) After the prescription for a patient has been determined by the optometrist, a small tray would be allocated in respect of each patient, reflecting the name and account number of the patient. The frame into which the lenses were to be fitted would be placed in this tray together with details of the prescription required as determined by the optometrist.

(iv) The tray with the frame and the prescription would then be taken by one of a number of the members of the administrative staff of Moffat, who would order the lenses required by the particular patient from Moffat's supplier of lenses. The supplier of lenses relevant to the charge was GO;

(v) Orders for lenses would almost invariably be placed in writing to ensure accurate communication of the details of each prescription required. Oral orders were from time to time phoned through to GO, where urgency or other considerations required it. These orders were phoned through by members of the administrative staff, but orders were also phoned through by Ms Cowley in instances of urgency and the Appellant also

placed orders by phone. Although the Appellant phoning through orders was not supposed to be the normal practice, there was nothing untoward in this, as the phoning through of orders and speedy processing of orders was facilitated by him also placing orders telephonically. In instances where lenses supplied might be damaged during the fitment process, or the lenses received, upon testing by the Appellant, found to be not be in accordance with the prescription, replacement lenses would be urgently required and this would often if not invariably be attended to by the Appellant;

(vi) The placing of oral orders with GO by the Appellant became so prevalent, it seems, that a point was reached where because of frequent telephone use, the telephone landline to the Appellant's laboratory was removed. He however continued to make calls from his private cell phone;

(vii) All orders placed with GO were identified with reference to the particular patient number for whom they were intended. In the case of an existing patient requiring further spectacles on a second or third occasion, this would be indicated by the suffix '/2' or '/3' being added to the patient number;

(viii) In instances where a written record in the form of a note apparently jotted down by an employee of GO at the time of

receiving an oral order was available[9], the Moffat patient number and details of the prescription in respect of the patient for whom the lenses were allegedly required, are clearly indicated;

(ix) Once GO had manufactured the required lenses, the lenses would be dispatched with a GO combined delivery note/invoice to Moffat. This document would inter-alia identify the party supplied as Moffat Board Walk or some variation of that name i.e. Moffat, the date of the order, the prescription of the lenses supplied, and the price. It would use as the order number, the number of the particular patient as allocated by Moffat with the suffix identifying which number order in respect of the particular patient of Moffat it allegedly represented i.e. the first or second or third or whatever order, and the date of the order;

(x) *Ex facie* the delivery notes, which became exhibits in the trial, each prescription had a specific delivery note in respect of a particular lense or set of lenses for the individual patients of Moffat;

(xi) The order (the delivery note/invoice and lenses) were sent by GO by courier to Moffat. It seems that because of frequency in trade, the individual orders dispatched some of which might indeed genuinely be required for patients of Moffat and others

[9] Some examples, such as exhibit 'K' were handed in without objection by the defence.

allegedly required, would from time to time, when ready for dispatch, be packaged together and delivered to Moffat;

(xii) At Moffat the package from GO would be received, generally by the administrative staff of whom there were up to five members, but it seems also on occasions by the Appellant. It seems that only the administrative staff should have received the packages but this was by no means a rigid rule. The packages should be sent by the administrative staff to the Appellant who should have been the one to open the packets and then perform the functions outlined below. It appears however that the administrative staff sometimes might have opened these packages for example to check whether the required number of lenses as per the delivery notes were in the packages. Accordingly, if the delivery note indicated that there should be 10 lenses, then they could verify whether there were in fact 10 lenses physically present in the packet. The administrative staff would however not be able to determine whether the lenses enclosed with the delivery note would be of the correct prescription;

(xiii) Irrespective of who received the packets and opened them, the lenses would be placed in the small trays containing the frames and prescription of the individual patients, for fitment by the Appellant. It seems that the placing of lenses in the individual patient trays might have been undertaken variously by members

of the administrative staff, the Appellant and also on occasions by Ms Cowley;

(xiv) Ultimately, it was the responsibility of the Appellant, and this function only he could perform, to test the strength/prescription of the lenses supplied by GO, with specialised equipment which he operated, and for him to correlate it with what was reflected on the delivery notes received from GO and to confirm that the lenses received were in accordance with what was originally determined by the optometrist upon examination of the patient and ordered (as per the optometrist's prescription in the tray) in respect of each particular patient. If the lenses correlated with what was ordered as also reflected on the delivery note, the Appellant would tick it off and send the delivery note/invoice through to the accounts section of Moffat for processing and payment. If he determined that the lenses were not correct, then the correct lenses would again have to be ordered, now probably as a matter of urgency, as the supply of the spectacles to the customer would have been delayed due to the wrong prescription having been sent. Where appropriate the process for an appropriate credit, if required, would also have to be initiated;

(xv) If the correct lenses were received, the Appellant would then make up the required spectacles for the particular patient.

(xvi) As the Appellant's sole and unique involvement in this regard is of particular significance, I set out below some of the verbatim evidence[10] given which stood uncontradicted.

Mr D J B Moffatt testified that:

'…the invoice arrives, it gets checked against the goods that are in the box, it gets initialled and the invoice gets sent to our accounts department. And the accounts department then at the end of the month check the invoices against the statements and when everything is correct obviously they pay the account'.

'… We had a system whereby the lenses that we were buying – the lenses that we were buying would tie up to the patient's record card'.

'The lenses would come back, they would be opened by our technician who would tick off that we had received them and he would then make the person's glasses up for him and we would get them in for collection. And that would be a normal and standard routine. And every order is tied back, as I said, to the patient's record cards, so if you were to get two pairs of glasses and your account number with us was 111, we would call it 111/1 for the first pair and 111/2 for the second pair….' (pg 22).

'(The Appellant) was responsible for opening the parcels in the laboratory and he was responsible for ticking off we had

[10] These extracts must obviously be read in the context of all the evidence adduced and not construed in isolation.

received them and that went through to our accounts department … but the accounts department would never see the lens and nor would the accounts department know whether the lens was for that particular individual because the lenses remained in the laboratory.' (pg 24).

'But those lenses, because he ticked off the packing slip, and because they used our patient account numbers, when that went through to our accounts department we assumed that it was our work. But some of it wasn't. All of this was charged to us, so we were paying inflated laboratory accounts which is what affected our gross profit.'

"And it was his responsibility to count the number of lenses in the box and check them against the packing slip. So in fact as long as we got that packing slip back signed by Mr Stainbank who was the technician, then that would then go through our/that would go through our accounting process in the normal way. So frankly I don't really see where it is going because no matter who opened them ultimately he had to count the lenses in the box, tally them with the packing slip, sign the packing slip, which would go to the accounts department. It was after he signed the packing slip that he took the lenses out, removed them and removed them from our premises. Nobody would take those lenses and know which pair of glasses they belong to, except for the technician. Because he has the instruments there to actually check the prescription and make sure that the correct

prescription is going into the correct frame for the correct patient. … He is the only person having that instrument". (pg 124).

The optometrist Mr J A Howard testified:

'And we found that our order numbers were being duplicated.'

'..We found with the orders that there would be a miscellaneous number 3 or 4 coming in the parcels which we had not ordered. When we enquired as to this from General Optical they said that the majority, well all of these orders, these miscellaneous ones were telephonically ordered by Mr Stainbank.'

Who/what are the duties of the technician after the order has been made? Who receives those boxes? … The technician at the time would receive the box from the couriers. He would open it in which he would find the orders. He would correspond the account numbers. In other words the patient account number with the lenses in the box and then he would cut the lenses into the frame … we use little boxes to store everything in and that would have the account number written it, so he would simply take the patient's box with his account number and match it to the orders in the correct box'.

'When we receive incorrect lenses we normally notify General Optical and then we process the lenses. We write it into a credit

returns book, so there is a policy. … and we await the credit approval'.

Ms Cowley testified that other staff members were all instructed not to order by telephone. She conceded that on occasion in emergency situations she had asked the Appellant to make orders telephonically but that this was on request by her. She also opened the packages when the Appellant was not there to help him but he 'did insist on doing it himself most of the time…'

During cross-examination she stated:

'(The Appellant) was employed as a technical/optical technician, that meaning we gave him the duty to open the box where all the patients lenses or glasses ... (indistinct). He had to open it up, match the number of the sent items with the patients' waiting trays. Check the prescriptions and then also cut the lenses that needed to be fitted. The lens comes in, it is about this big, and then it has to be cut down to the frame of the patient. And then it gets put on a special shelf for phoning …' (pg. 313).

[11] The State did not attempt to take a particular individual order of lenses reflected in a delivery note and present evidence:

(a) as to who at GO took such order, leading the evidence of such employee of GO to show that the appellant in fact placed the order;

(b) that the order thereafter was dispatched per courier under a particular reference to Moffat;

(c) that the courier service conveyed a parcel from GO to Moffat under such reference;

(d) as to who at Moffat signed for receipt of such package by adducing evidence of the particular employee of Moffat who had signed for the particular package and what he/she did therewith i.e hand it to the appellant, or whatever;

(e) that Moffat paid GO for the particular lenses; and

(f) that the patients in whose names the lenses were ordered never received spectacles with such lenses.

Had that been done, an iron clad case might have been presented and the task of this court would have been considerably easier. The fact that it was not done, does not however mean that the State necessarily failed to discharge the onus.

[12] The State's evidence on some aspects can justly be criticised. There is no credible direct evidence that it was indeed the Appellant who placed oral orders with GO in respect of each of the consignments referred to in the delivery notes which served as exhibits. Mr Meintjies of GO purported at the outset of his evidence to confirm that the Appellant had placed all these orders orally or telephonically with him. However, once subjected to cross-examination, it became clear that as a matter of probability he would not have taken these calls as the CEO of GO and that his personal knowledge might be confined to isolated orders placed. His evidence was mainly based on reports made to him allegedly by members of his staff.

[13] The placing of the orders telephonically by the Appellant has significance, being the misrepresentation relied upon in the annexure to the charge sheet. Ms Sibiya, on behalf of the State, has however argued that even if the individual employees of GO had been called and were to state that the Appellant had placed the orders telephonically[11], in the absence of them knowing the voice of the Appellant, it could still be disputed that it was in fact the Appellant who had placed the orders orally. There is merit in that submission.

[14] Ultimately, proof of the representation to GO could be proved either by direct evidence or alternatively by circumstantial evidence justifying as the only reasonable inference or as an overwhelming probability that it must have been the appellant who placed such orders.

[15] On a conspectus of all the evidence, I see the position as follows. It was the task of the Appellant to test and correlate consignments of lenses as per the delivery notes with the prescriptions of patients of Moffat, before sending the delivery notes/invoices through to the accounts department for further processing (which would also entail eventual payment to GO), when making up spectacles. In sending the delivery notes through to the accounts section (which they were, as payment was made to GO, Mr Meintjies of Go having testified that payment was received in full for

[11] It should be pointed out that the recording of orders by GO where available and attached to delivery notes in the exhibits did not identify the particular caller placing such order. Accordingly employees of GO who might have taken any order telephonically, even if identified with reference to their handwriting on the order, seemingly would have to rely purely on a personal recollection of such orders amongst probably hundreds or thousand orders they took.

these orders), the Appellant confirmed that the lenses received as per the delivery notes received, were genuinely required for patients of Moffat for whom he was making up their spectacles, and had been received at the prices indicated on the invoices. Implicit in and flowing from the aforesaid is that orders for such lenses had been placed with GO. Whether the lenses in fact existed or not, and who ordered them, and who opened the package is of little practical significance. The Appellant knew that in response to each order of lenses received and which he had confirmed as being in accordance with a prescription, and had sent the delivery notes/invoice to the account department, that payment would be made by Moffat to GO, or then, at the very least, that a liability by Moffat to GO would be created in the books of Moffat, to the prejudice of Moffat.

[16] It was not necessary for the individual patients of Moffat to testify that they did not receive the spectacles. Mr Howard and Ms Cowley could, and did testify that the lenses on the delivery notes which served as exhibits, were not for the patients of Moffat identified on the delivery notes, inter alia:

(a) Some patients had simply attended consultations with no prescription for spectacles ever being issued;

(b) Some patients had previously been provided with spectacles with a prescription and the strengths of the lenses reflected on the delivery notes did not accord with the prescription in respect of that particular patient, such as the little girl who had been examined by Ms Cowley, a prescription prepared, but then subsequently lenses found to have been ordered and received which were wholly inappropriate to her.

[17] The State proved that through the system that was employed, lenses were received for and on behalf of the account of Moffat by the Appellant and acknowledged to have been received thus, by the delivery notes/invoices being processed and sent through to the accounts department. These lenses were not for patients of Moffat. If the lenses were not for the patients indicated by each patients unique number on the delivery notes, which on the evidence they were not, then the Appellant wrongfully and intentionally through his conduct had evinced that these lenses were for the account of Moffat when they were not, resulting in the prejudice to Moffat. If these lenses were not required for patients of Moffat, then a useless stock of prescription lenses would have built up in the Appellant's laboratory with Moffat, which would be a non sensical thing to do.

[18] Specific lenses are peculiar to particular persons. The Appellant was operating Bay Optical, a rival optometrist business in competition with the business of Moffat. Bay Optical provides the outlet for which these otherwise useless stockpile of lenses which would build up were destined. It also provides the motive for the Appellant ordering these lenses. The evidence of Ms Neethling, the receptionist at the business of the Appellant is also significant. She testified that she was charged with taking prescriptions in respect of patients as assessed by the optometrist employed at Bay Optical to the Appellant at Moffat with the frames for spectacles to be made up, and the frames supplied now fitted with lenses intended for Bay Optical's customers would later be received from the Appellant. No orders for spectacles were made up inside Bay Opticals. Frames from Ray Ban, Calvin Klein and Bondi Blue and contact lenses from Bausch and Lomb were ordered by the Appellant and collected for Bay Opticals at the Post Office. She made no reference,

and it was never suggested to her, that lenses were ordered and received at Bay Optical for customers of Bay Optical. As the practice of her taking prescriptions for patients of Bay Optical to the Appellant at Moffat continued and enquiring glances came to be cast on her frequent regular visits to the Appellant at Moffat, the exchanges of prescriptions by her to the Appellant occurred clandestinely in a passage outside the toilets. This evidence irresistibly points to only one reasonable inference, namely that the Appellant used the lenses he procured from GO in the manufacture of spectacles for customers of Bay Optical without him having to pay for them, and in fact with Moffat having to foot the bill. As prescription lenses are peculiar to patients and dependent on prescription being determined after examination of a particular patient's eyes, the orders for such lenses placed with GO could only have been placed by the Appellant or someone on his behalf.

[19] There would be no incentive whatsoever to any third party placing these orders telephonically with GO where the lenses were as their final destination to be received in the hands of the Appellant at Moffat.

[20] The Appellant through his conduct, having regard to the system that was employed in Moffat, acknowledged that these lenses were in fact supplied at the offices of Moffat by GO and were received in his laboratory and were not sent back or otherwise dealt with.

[21] In that factual scenario, the totality of the evidence points irresistibly to the guilt of the Appellant in respect of each of the orders represented by the various delivery notes which served as exhibits in the trial.

[22] Whatever records the Appellant might have kept in respect of his rival optometrist business and which were lost following the search by the police, would not have affected this issue one iota. Certainly no such prejudice was demonstrated on the record. He was not prevented from advancing his defence fully. It has not been shown that as a result of the records of Bay Optical being lost, that he did not have a constitutionally fair trial. No specific arguments on this point were advanced at the hearing of the appeal by Mr Matthews.

AD SENTENCE:

[23] In sentencing the Appellant to three years imprisonment the learned magistrate took into account the value of the lenses involved, stated to be R44 252,36, and that the Appellant occupied a position of trust where Moffat relied on him to conduct himself honestly in the interest of its business. The magistrate concluded that the Appellant had developed and employed a practice ‘in such a way that the complainant could lose millions of rands and according to him, he indeed lost far more than could be proved in court’.

[24] The magistrate also did not consider correctional supervision to be 'severe enough … to tally with the gravity of the offence'. He commented that the Appellant did not show any remorse and concluded that if a person fails to realise the seriousness of his wrongful act that it is doubtful whether correctional supervision will have any impact on him.

[25] That this was indeed an instance of white collar crime, cleverly planned, and that breaches of trust by employees can cause businesses to suffer so badly that they might face closure, are no doubt correct.

[26] In my view however, the learned magistrate committed misdirections in apparently being influenced to believe that the loss was 'far more than what could be proved in court' and in concluding that 'correctional supervision was not severe enough to tally with the gravity of the offence'. Although an instance of an abuse of trust, the amount was only R44 252,36. That is the amount proved and on which a sentence must be based, and not some suspicion of the amount involved being 'far more than what could be proved in court'. I consider imprisonment of three years to be too severe.

[27] The report by the Correctional Department's Ms Mabuyakhulu had found the Appellant to be a suitable candidate for a sentence of correctional supervision in terms of section 276 (1) (h) of the Act.

[28] In *S v R* 1993 (1) SA 476 A Kriegler AJA commented that the legislature has distinguished between offenders who ought to be removed from society by means of imprisonment and those who, although deserving of punishment, should not be so removed from society. As a whole, punishment, whether it be rehabilitative or, if need be, highly punitive in nature, is not necessarily or even primarily attainable by means of imprisonment. It is now clear that it is possible for a trial court to impose severe punishment upon even very serious offences without making use of imprisonment (and without thereby sometimes, if not most of the time, destroying whatever good characteristics remain as far as the offender or prisoner is concerned). A severe punishment can be imposed and the interest of the community served by imposing a deterrent and strict sentence, other than imprisonment.

[29] Fraud and corruption have become a cancer destroying our society. In *casu*, notwithstanding attempts having been made to curb the Appellant's abuse of his landline phone to his laboratory, he persisted in making regular calls (and placed orders) over an extended period of time from at least January 1999 to July 2000.

[30] I am not persuaded that the Appellant falls into the category of offenders who should be removed from society. He was a first offender, 37 years old and self-employed, engaged to be married with three minor children and a pregnant fiancée, a sole supporter of his family and not a danger to society.

[31] That having been said however, the abuse of the position of trust in which he had been placed, calls for a strong message to be sent out that such conduct will not be tolerated. In my view that can be achieved by a 'finely tuned sentence' of correctional supervision.

[32] The sentence referred to in the order below would in my view be appropriate and satisfy all the objectives of sentencing.

[33] Accordingly:

(1) The appeal against conviction is dismissed;

(2) The appeal against sentence is upheld.

(3) The sentence of the court *a quo* is set aside and substituted with the following

'The accused is in terms of section 276(1)(h) of the Criminal Procedure 51 of 1977, sentenced to three years correctional supervision.

The correctional supervision shall comprise of the following measures:

House arrest at his residential home:

[a] for the full duration of the correctional supervision.

[b] from 18h00 to 6h00 on working days and for 24 hours on non working days.

Provided that the house arrest shall not operate during the periods reasonably required for the following activities:-

(i) Community service;

(ii) Church services;

(iii) Attendance of programmes;

(iv) Acquisitions of household goods during periods to be determined by the Supervision Committee.

Community Service for a period of 16 hours per month,

The Supervision Committee is empowered to amend the order regarding community service.

Participation in the programs determined by the Supervision

Committee, under the control of the Supervision Committee.

Other Conditions:

The accused shall:-

[a] take up and remain in employment, must perform his work to the best of his ability, comply with the conditions of any contract of employment and may not leave his place of employment or business during working hours for purposes unrelated to the employment or business without the permission of the Commissioner of Correctional Services.

[b] contribute financially towards the costs of the community corrections to which he is subjected, the amount to be determined by the Commissioner of Correctional Services and he must also provide the said Commissioner with a statement of income and expenditure.

[c] reside at a fixed address.

[d] refrain from abusing alcohol or drugs.

[e] refrain from committing any criminal offence for which imprisonment without the option of a fine is imposed.

[f] subject himself to monitoring by the Supervision Committee.

[g[The accused is restricted to the magisterial district in which he is residing and is in employment.

The accused must report to the Supervision Committee on or before 10 June 2013.

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HENRIQUES J

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DATE OF HEARING: 16 MAY 2013

DATE OF DELIVERY: 4 JUNE 2013

APPELLANT'S COUNSEL: ADV. S MATTHEWS

APPELLANT'S ATTORNEYS:

RESPONDENT'S COUNSEL: ADV. B.P. SIBIYA

RESPONDENT'S ATTORNEYS: