In the High Court of South Africa

KwaZulu-Natal Division, Pietermaritzburg

Case No :AR41/14

In the matter between :

Roman van Niekerk Appellant

and

The State

JUDGMENT

Olsen J (Chetty J concurring):

[1] On 8th October 2012 the appellant, Mr Roman van Niekerk, was convicted in the Regional Court at Durban on nine counts of fraud committed over a period of nineteen months. The convictions followed pleas of guilty on all counts.

[2] The counts were taken as one for the purpose of sentence, and the total loss to the complainant, his employer, was some R708 000. The appellant was sentenced to seven years imprisonment. This appeal against sentence is brought with the leave of the Court a quo.

[3] The facts of the matter may be summarised briefly as follows. The appellant was employed by Kelly Group Limited ("Kelly") as an accounts executive. His employer was in the business of sourcing labour and employees for clients, one of whom was the eThekwini Municipality. People thus sourced would perform work for eThekwini Municipality but were paid for their services by Kelly; which in turn billed eThekwini Municipality. The appellant devised a method or scheme of creating what might be called 'ghost employees'. These were real people; there were nine of them who were charged and whose trials were separated from that of the appellant. They were 'ghost employees' because they did not actually perform any work for the municipality. The appellant managed to get them loaded onto his employer's

systems which resulted in Kelly paying them (and subsequently billing the municipality) as though they had performed services. The spoils in each case were paid directly into the bank account of the participant, and then shared with the appellant.

[4] Two pre-sentencing reports were obtained before the hearing on and imposition of sentence on 10th December 2012. The first was by a correctional official (as contemplated by s 276 A(1)(a) of the Criminal Procedure Act, 1977) on the subject of the appellant's suitability for a sentence of correctional supervision. The conclusion after a brief summary of the appellant's personal circumstances was that he met the 'physical criteria for correctional supervision' if the court should consider correctional supervision as a sentencing option. The report was brief and there is no need to mention the personal circumstances recorded therein as they are largely dealt with in the other report.

[5] The second report was from a probation officer in the services of the Department of Social Development at Johannesburg, to where the appellant had relocated subsequent to his dismissal by Kelly. The probation officer interviewed the appellant, his aunt, a friend of the appellant, his grandmother, his supervisor at his new place of employment, his former wife and a Mr Noome, a representative of Kelly, the complainant in the case. The probation officer expressed the view that a sentence in terms of s 276(1)(i) of the Criminal Procedure Act would be suitable as it would

'enable the accused to continue benefitting from the expertise of the correctional officers even after being released from custody, this will assist in the re-integration of the accused into the society. This option addresses the elements of rehabilitation, deterrence and retribution. It also entails that the accused will provide community services that will be to the benefit of the society.'

The probation officer expressed the view that a sentence of imprisonment under s 276(1)(b) of the Act would be harsh. The following is a brief summary of the material which generated the probation officer's recommendation.

(a) The appellant is 32 years of age. He was raised by a single mother as his parents were not married – he lacked a father's role in his upbringing. The appellant's mother died when he was about 20 years of age after a long illness and the appellant was quite emotionally affected by that and the loss of

a brother. The appellant upholds Christian values but is not presently a member of any church. He is physically and mentally healthy. He matriculated in 1997.

(b) His first job (which he took in 1999) was at a Game retail store as a cashier. He held several positions there until the store closed down in 2005 whereafter he commenced work at Kelly as an accounts executive. His income there was in the vicinity of R14 000 per month. His employment was terminated as a result of the offences which gave rise to the trial.

(c) According to the appellant it was not financial difficulties, but his 'love for the high life' which motivated the crimes. But he claims to have undergone a period of introspection, resulting in substantial adjustments to his life with the result that he now lives within his financial means.

(d) At the time of the assessment by the probation officer the appellant was employed as a recruitment consultant at a company called Higher Intelligence in Johannesburg. At the time of the report the appellant had been there for almost six months and his monthly income was about R10 000.

(e) The appellant was married in 2007 and divorced in 2011. He has a daughter, seven years of age at the time of the report. Because both the appellant and his ex-wife are based in Johannesburg the daughter stays with her maternal grandmother in Durban. The appellant informed the probation officer that he is actively involved in the upbringing of the child and that he 'financially' maintains her. This was confirmed by the appellant's ex-wife.

(f) The appellant's aunt described the appellant as well-behaved, hard-working, loyal and sensitive. She and the family were shocked to discover what he had done. The family nevertheless supports him. His friend described him as a generous person who assists others. Mr Noome informed the probation officer that the appellant was regarded as a trusted employee at Kelly, and that people involved in the company were struggling to understand what motivated his actions. The probation officer was informed by the representative of Higher Intelligence that the appellant had disclosed his difficulties with the law, that the company gave him time off to attend the case, and that she (the company representative) felt that the appellant had learnt from his mistakes and deserved a second chance.

(g) The probation officer also recorded considerations, facts and circumstances revealed by the interview with Mr Noome of the victim, Kelly. He was informed that Kelly was running at a loss (presumably at the office at which the appellant had been employed) because of the appellant's actions and that the employees had been deprived of their bonuses as a result of that loss. Ethekwini Municipality had terminated the contract with Kelly as a result of what the appellant had done, and about 500 people had lost their jobs as a result of that. It was necessary to put the appellant through a full disciplinary process because he denied everything. But he was dismissed as the evidence against him was overwhelming. There was not only financial loss but a loss of reputation; the company was brought into disrepute. The appellant was one of the company's trusted employees. He betrayed that trust. From the company's perspective the appellant should be dealt with in a manner that would send a message to other employees.

[6] The two pre-sentencing reports were handed in by consent, it being recorded that they had been read in particular by the appellant. The appellant gave evidence in mitigation of sentence, a topic to which I will revert. The truth of the factual averments emanating from the complainant, Kelly, and recorded in the probation officer's report, was not challenged.

[7] In sentencing the appellant the learned magistrate took into account the appellant's personal circumstances, the nature of the crime and the public interest in an appropriate sentence, as well as the sentencing options available to him. He discounted, in my view correctly, the proposition that leaving the appellant out of prison would result in him being able to compensate his former employer for the loss it had sustained. The learned magistrate regarded a fine as inappropriately lenient. His conclusion regarding imprisonment in terms of s 276(1)(i) of the Act was to the same effect. He accepted the State's submission that direct imprisonment was called for. (The learned magistrate's view of the period of imprisonment required in this case, seven years, in any event put the sentence beyond the scope of s276(1)(i).) The learned magistrate's reasons and conclusions regarding sentence were expressly stated to be premised on the proposition that the appellant is a first offender. No previous convictions were proved by the State.

[8] In argument before us the attorney for the appellant argued that this court should uphold the appeal and impose a sentence in terms of s 276(1)(i) of the Criminal Procedure Act. He argued that the learned magistrate had misdirected himself in certain respects, and that the sentence was disturbingly inappropriate. For the State it was argued that there was no misdirection (or certainly none that mattered), and that although the sentence was at the higher end of the scale it was not disturbingly inappropriate. In particular the State has pressed the point that the determination of a proper sentence is a matter for the discretion of the trial court, and that care should be taken not to erode such discretion. (*S v Rabie* 1975 (4) SA 855 (A)).

[9] The court in *S v Kgosimore* 1999 (2) SACR 238 (SCA) at para [10] described the role of a court hearing an appeal against sentence as follows.

'It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing sentence. Various tests have been formulated as to when a court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true enquiry (*S v Pieters* 1987 (3) SA 717 (AA) at 727 G – I). Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so.'

Accordingly, when considering arguments to the effect that there has been misdirection, two questions fall to be answered, not one. The first and obvious question is whether in fact there has been a misdirection. The second is as to whether a single misdirection, or misdirections cumulatively, have brought about that the discretion given to the trial court with regard to sentence has not been properly and reasonably exercised. In some cases the impropriety of the misdirection may render the answer to the second question obvious. But in others, where the materiality of the misdirection (i.e. its effect and role in the determination of the sentence) is not perfectly obvious, overlooking the need to examine the question as to whether the misdirection renders the exercise of the discretion improper and

unreasonable would tend to erode the discretion of the trial court contrary to the admonition in *S v Rabie (supra)*.

[10] Turning to the misdirections for which the appellant's attorney contends, the first of them is an allegation that the magistrate over-emphasised the seriousness of the offence by equating the crime of fraud with a crime where violence is an element. This contention misconceives the passage in the judgment on sentence referred to in support of it. In the passage the magistrate was speaking figuratively, pointing out that whereas in white collar crimes weapons are not employed, it is nevertheless the position that the trust reposed by employers is 'assaulted by the employees who take advantage of the nature of trust that has been placed upon them'. In my view no misdirection is involved. Furthermore whilst the distinction between white collar crime and crimes of violence is obvious, it cannot be employed as a reasonable yardstick when evaluating the seriousness of a particular crime of either type.

[11] Next it is contended that the learned magistrate did not in fact consider the personal circumstances of the appellant because, had he done so, he would have restated them instead of referring to them as being 'contained in the social worker's report'. Firstly the learned magistrate referred both to the report and the material to which the appellant himself testified. Secondly, the report of the probation officer is remarkably lucid, and contains as clear and persuasive an account of the appellant's personal circumstances as the appellant could have wished to have stated. The reports were handed to the magistrate on the day sentence was passed. Unless one is going to suppose that he did not read them, the learned magistrate must have been fully aware of the contents of the reports. Some of the salient features of those reports were mentioned in argument. I cannot agree that one can draw the conclusion from the way in which the reports were referred to that the magistrate failed to consider the personal circumstances of the appellant.

[12] For the rest, the arguments going to misdirection concern the magistrate's treatment of the appellant's evidence in mitigation on the subject of the effect of a sentence of imprisonment on his child. Two factors were raised, namely the impact of his incarceration on the right of his child to the benefit of a father-figure, and his contribution to the maintenance of the child. It is in this latter respect that there is said to have been misdirection. The argument is that the learned magistrate found

- that the appellant attempted to masquerade as the sole supporter of the child - whereas that had not been his evidence;

- that the appellant intentionally failed to disclose that the mother of his child contributed to the child's upkeep - whereas his evidence was to the effect that he did know what she contributed; and

- that the appellant was being untruthful in this latter regard because the child's mother, his ex-wife, must have disclosed her contribution (and earnings) when the maintenance court directed the appellant to pay R2 000 per month for the child - whereas in fact the maintenance order accompanied the divorce order which had been granted in 2011.

Whilst in my view this analysis of what the learned magistrate had to say on the subject of maintenance is perhaps overstating the elements at which the criticism is directed, I think it is correct say that the learned magistrate's analysis of the evidence given by the appellant is not perfectly accurate, and that there was an element of misdirection.

[13] However properly analysed the gravamen of the complaint of the learned magistrate concerning the way in which the appellant dealt in evidence with the question of the maintenance of his child is that the court ought to have been put in a position to make a proper assessment of the significance of the appellant's maintenance contribution, but was deprived of that because of the appellant's refusal to spell out facts of which he ought to have had knowledge if he was in fact the concerned father he claimed to be. Whilst it may very well be correct to say that the appellant did not explicitly claim to be the sole supporter of the child, one cannot help but draw the conclusion from an overall conspectus of the appellant's evidence on this issue that it was all aimed at persuading the learned magistrate that he had to proceed at least on the assumption that depriving the child of the maintenance payment of R2 000 per month would be devastating. Two short passages from the appellant's evidence illustrate that the learned magistrate's concern on this issue was not unfounded. Under cross-examination the appellant stated that his ex-wife works as a receptionist at a Sandton clinic. In answer to a direct question as to how much she earns per month he said 'I am not too sure, I've got no idea.' When it was put to him that his ex-wife obviously contributes to the maintenance of the child his

answer was 'Well, I wouldn't know, I wouldn't know because I just pay my R2 000, my R2 000 that I was told to pay'. The answers are evasive. They may very well be untrue. But if they are not they undermine the appellant's contention that his incarceration will result in depriving his child of the tender loving care of a concerned and dedicated father. In my view whilst the learned magistrate may have misunderstood the particulars of the evidence on this subject, he did not misdirect himself as to the overall impact of it. If one accepts that there was misdirection, it was not such as to undermine the proper and reasonable exercise of the magistrate's discretion on sentence.

[14] On the question as to whether the sentence imposed is disturbingly inappropriate, the appellant's attorney referred to a number of cases which illustrate the wide range of sentences, and especially sentences of imprisonment, imposed in cases of fraud and like offences. The argument was that they are characterised by inconsistency. I am not sure how far one can take that argument bearing in mind that judgments on sentence inevitably cannot paint the full picture, or give a full account, of everything that bears upon the appropriateness of the sentence under consideration in a particular case. Furthermore it is not clear to me how pointing to these inconsistencies advances the cause of the appellant in this particular case.

[15] There is a range of sentences which might be imposed in a case like the present one, and it is the exercise of the discretion of the trial court which determines where in the range a particular case must be placed. Counsel for the State conceded that the sentence is at the upper end of the range, but not that it falls outside the range, making it inappropriate. I agree that a lesser sentence could have been imposed, and that a sentence of five years would not have been inappropriate, and would have carried the advantage that it could have been passed under s276(1)(i) of the Criminal Procedure Act. The positive attributes of the appellant, largely to be derived from the probation officer's report, go to support such an outcome. These were stressed by the appellant's attorney in argument before us.

[16] However the magistrate was not swayed by like arguments, and there are some features of this case which are disturbing and which would support a conclusion that the magistrate was correct in not being swayed. Some of the arguments made by the attorney for the appellant are affected by these features.

[17] It is argued that it should be taken into account that the appellant pleaded guilty. But, firstly he did not make his confession when confronted by his employer, as a result of which it was necessary to conduct a disciplinary enquiry; and secondly, as pointed out by the State, and conceded by the appellant when he was cross-examined, a plea of guilty from day one would have been more indicative of remorse than what actually transpired, that is to say that the case was on the roll for more than a year before the appellant decided to plead guilty.

[18] It is argued that the appellant showed genuine contrition and remorse. Much of his evidence was directed at persuading the trial court that he was both able and willing to pay compensation to his former employer. However, despite the fact that he was the linchpin and principal protagonist in respect of all nine counts, the appellant's offer of compensation was restricted to his share of the spoils. When this was put to him his answer was the following.

'Like I said that yes, there were a few of us that were involved in this process and like I say if push comes to shove and I have to pay back the full amount, I'm willing to do that as well if I have to do that.'

When he gave that evidence the appellant was fully aware of the consequences for his employer of his deeds; of the consequences for those who through his employer had obtained work at the municipality; and of the consequences for his former co-employees. His attitude is in my view inconsistent with true remorse and contrition.

[19] The appellant's attorney argued that we should regard the appellant's crimes as a mere lapse or fall from grace as they were not in line with his character. People were shocked by what he had done. The difficulty with crimes of fraud is that these circumstances are often likely to be present. The perpetrator gains the trust which he or she breaches by appearing to be trustworthy, not by behaviour which suggests that a brush with the law is imminent. The words of Marais JA in *S v Sadler* 2000 (1) SACR 331 at paragraph 11 are especially significant in this case.

'So-called "white-collar" crime has, I regret to have to say, often been visited in South African Courts with penalties that are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of "white-collar" crime as non-violent crime and its perpetrators (where they are first offenders) 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. The premise is that prison is 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 breaches of trust.”

As to the last sentence of this passage, each of the circumstances there described is a feature of this case.

[20] There is an element in this case to which the learned magistrate made but passing reference, namely that the appellant recruited people to commit these frauds. The statement made by the appellant in terms of s112 of the Criminal Procedure Act makes unhappy reading. The first person involved was a Ms Precious Miya. She apparently came to seek a job at Kelly and, according to the appellant, he colluded with her in order to use her as a vehicle for the first fraud in time. The second person was also a job-seeker. The third person was after a job for her son. The next one came to make application for a job and, according to appellant, was not aware of what was going on. The same applied to the following person. The next person was somebody to whom the appellant owed an amount of R5 000. (In this case the appellant asked for his creditor’s banking details, and that was how he got involved. Over R33 000 was paid into his account, but he kept R5 000 only for himself and paid the rest to the appellant.) The last three people were persons with whom the appellant said he colluded to commit the crime. All of these people became involved in criminal activities at the instance of the appellant. They were charged and their trials were separated from that of the appellant. There was no evidence at all of remorse on the part of the appellant for the fact that he was responsible for involving these people in criminal activities. (On the contrary, as already mentioned, the appellant took the view that Kelly should look to them, and them alone, for repayment of the money which was not paid across to the appellant.) On the face of it the job seekers amongst the appellant’s former co-accused were a vulnerable group, and he took advantage of that.

[21] The nine counts of fraud in this case were taken as one for the purpose of sentence. That was presumably justified by the fact that the same methodology was employed in each case and by the fact that the same victims (i.e. Kelly and the municipality) were involved in each case. But in considering whether a sentence of seven years imprisonment is excessive it should not be overlooked that a co-

perpetrator was necessary in each case; and that a different one was employed on each occasion. There were nine singular crimes which were perpetrated over a period of nineteen months. It was not obligatory to treat the nine counts as one. It is not difficult to imagine how an effective term of direct imprisonment of seven years might have been generated if the counts had not been taken as one for the purpose of sentence.

[22] The State's concession that this sentence is on the high side is correctly made. But that does not on its own justify upholding the appeal. In my view the State is correct in its submission that the sentence is not startlingly inappropriate and does not induce a sense of shock. The fact that this court might have considered a lesser sentence does not generate a conclusion that the discretion exercised by the learned magistrate was improper and unreasonable.

The following order is made.

1. **The appeal against sentence is dismissed.**
2. **The sentence of seven years imprisonment imposed on the appellant in the Regional Court at Durban is confirmed.**

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DATE OF HEARING:	23 September 2014
DATE OF JUDGMENT:	14 October 2014
FOR THE APPELLANT:	B S Laing from Laing & Associates
FOR THE RESPONDET:	T Ramkilawon instructed by the Director of Public Prosecutions for KwaZulu-Natal.