IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A650/2007

DATE: 8 AUGUST 2008

In the matter between:

LYNETTE JANE ERWEE APPLICANT

Versus

THE STATE RESPONDENT

JUDGMENT

CLEAVER, J

On 3 August 2007 the appellant was convicted in the regional court of Cape Town on a plea of guilty of 54 charges of fraud. She had forged the signatures of her employers on cheques and created false entries in the books to hide her conduct. In the result she misappropriated R535 000,00. On 5 September 2007 she was sentenced to eight years imprisonment, of which two years were suspended for five years.

She now comes on appeal to this Court with the leave of the Court *a quo*.

On behalf of the appellant it was submitted that the sentence imposed by the regional magistrate was shockingly inappropriate and that a sentence of correctional supervision ought to have been imposed.

When coming to her conclusion in regard to the sentence, the regional magistrate had before her a report from a probation officer who had recommended a sentence in terms of section 276.1(i) of the Criminal Code. She was of the view that a sentence in terms of terms of section 276.1(h) would not have been appropriate because of the large amount of money involved.

The regional magistrate also had before her a report from a correctional officer whose recommendation was that a sentence in terms of section 276.1(h) ought to be imposed.

In a carefully reasoned judgment, the regional magistrate came to the conclusion that correctional supervision ought not to be imposed. She was particularly concerned about the fact that the theft had been brought about through greed and not need and that it had been repeated on 54 occasions where the appellant had misused her position of trust. The regional magistrate also considered that it would not be feasible to

repay the large amount.

She did indeed take into account the fact that the appellant was a single parent, the mother of two adult children and a young daughter. She had feeling for the position and the situation of the appellant, for although the minimum sentence legislation applied, she imposed a much lesser sentence.

At the time of the judgment by the regional magistrate, the judgment in the case of S v M (Centre for Child Law as *Amicus Curiae*) 2007(2) SACR 539 (CC) had not yet been reported. That judgment was handed down on 26 September 2007 by the Constitutional Court. It is a groundbreaking judgment in that the situation of a primary caregiver is pertinently dealt with. That situation had not previously been addressed authoritatively in our law. The judgment has as its base the need to give recognition to the importance of a family and also the rights of children. Five guidelines were set out in order to enhance the uniformity of principle, security, and to secure consistency of treatment and outwardly foster individualisation of outcome, and these were:-

1. That the sentencing Court must establish whether a convicted person is a primary caregiver. Simply put, the Court said a primary caregiver is the person with whom

the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly.

2. It is not necessary in each case to rely on a probation officer's report to determine whether a convicted person is the primary caregiver; the Court could find that out for itself.

3. Where the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the Court is required to apply its mind to the question whether it is essential that steps be taken to ensure that the child or children concerned would be adequately cared for while the primary caregiver is in prison. The question whether the appropriate sentence is clearly a custodial one must be determined with reference to the "Zinn" triad (S v Zinn, 1969(2) SA 537A at 540G to H) consisting of the crime, the offender and the interests of society.

4. Where the appropriate sentence clearly does not warrant imprisonment, the Court must determine the appropriate sentence bearing in mind the interests of the child or children.

And 5, the final guideline:-

If there is a range of appropriate sentences on the Zinn

approach, then the Court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence it is to impose.

In M, the Court applying this principle declined to allow the appellant to remain in custody any longer than she was at the time, and ordered that the balance of the sentence which had been imposed be suspended on the condition that the accused was not found guilty of any crime of dishonesty during the period of suspension and that the appellant underwent correctional supervision.

When this matter came before us on 6 June, it was apparent that we did not have adequate information in regard to the position of the minor child and it was accordingly postponed until today in order to obtain a social welfare report. We are now in possession of such a report compiled by Ms Hood. This reveals the following: that the appellant is the mother of two adult children, aged 22 and 25, who live away from her independently. They are the children from an earlier marriage and therefore as I understand the report have little to do with the appellant and certainly with the child. The child is today aged 11 and lives with the appellant. She is a young girl. She is born of a relationship which came to an end when the father learnt of the appellant's pregnancy with the young

daughter. The daughter has been living with the mother ever since and was two years old when the family as it then was moved to Cape Town. The report has attached to it a report from the school which the young girl attends and also previous reports from paediatricians.

In brief, the report sketches a most unfortunate picture in regard to the young child. She appears to be totally dependent on her mother, appears to be a very difficult child. According to the various documentation before us it would appear that both she and her two brothers suffer from the condition known as attention deficit syndrome, for which she receives drugs.

The report from the school is to the effect that the school was concerned that the child had not been receiving the drugs which she requires and that until these drugs were made available recently, the child presented clear behavioural problems.

According to information given to the social worker, the daughter is a great responsibility for the appellant, who has to help her tend to her hair, to attend to her medication and to give her emotional support. The social worker is of the view that the disorder to which I have referred has made a great

impact on her life with the child. She reports that the child is dependent on the medication and that the procurement of such medication brings about financial difficulties for the appellant. She concludes that the child is very much attached to the mother, who is the only person whom the child can rely on. She concludes with the following worrying statement:-

> "Die betrokke kind het die reg op 'n stabiele huishouding, opvoeding, liefde en geluk. Dis ook in die beste belang van die betrokke kind dat sy nie deel van die statistieke raak wat deel uitmaak van artikel 14.4 van die Wet op Kindersorg."

The import of the judgment in S v M was not available to the regional magistrate when she came to the conclusion to which she did. As I have said, it introduces an entirely new dimension in the sentencing procedure when one has to do with a primary caregiver.

In these circumstances, I am satisfied that there would be reason to interfere with the sentence, in the sense that this Appeal Court could reconsider what an appropriate sentence would be.

Having concluded that the Appeal Court can reconsider the sentence, the issue which requires attention is whether it be appropriate to refer the matter back to the regional court for the judgment in S v M to be taken into account in reconsidering the sentence? In my view, that would not be appropriate. The matter is a particularly sensitive one, particularly having regard to the child. One does not know how much time would elapse before the matter would be dealt with by the regional court, and once it goes back to the regional court, that might not be the end of the matter. In my view it would be appropriate to deal with the matter now.

Counsel for the State correctly pointed out that the offence is a particularly serious one, and he also indicated the serious consequences which flowed from the actions of the appellant insofar as her previous employers were concerned.

We must, however, be more concerned about the offence itself and of course all the factors which are to be taken into account as far as sentence is concerned. It is true, as counsel for the State pointed out, that the regional magistrate did have regard to the fact that the appellant was a single mother, but as I think I have explained, the considerable weight which the primary caregiver is now to be accorded was not taken into account.

Her reaction to the suggestion that correctional supervision ought to be imposed is of course simply that one would be inclined to say that correctional supervision is an easy sentence and if imposed, the appellant would be getting away with a crime which justifies the stricture of society. However, it has been pointed out in S v R 1993(1) SA 476(A), that if properly structured, correctional supervision need not be an easy sentence.

After careful consideration I am of the view, having regard to:-

1. the fact that the Courts have made it clear that as a general principle correctional supervision can be imposed for any offence; and

2. the paramountcy principle regarding a primary caregiver,

That a sentence of correctional supervision would be appropriate, and in this regard I am particularly persuaded by the final sentence of the social welfare's report which I read in to the record.

However, I consider that it will be necessary for the appellant to pay a debt to society and that a carefully structured sentence will be necessary.

The sentence which will be imposed is the following:-

1. The appellant is sentenced to CORRECTIONAL SUPERVISION FOR THREE (3) YEARS which must include the following: she is to perform service for the benefit of the community for a certain number of hours per week, and I will come back to this, for the three years, the form of such service and the mode of supervision to be determined by the Commissioner for Correctional Services.

2. She is to undergo counselling on a regular basis with such person or persons and at such times as to be determined by the Commissioner of Correctional Services.

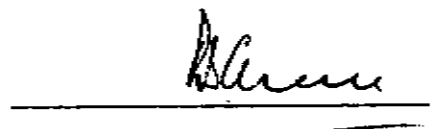
In addition, the appellant is SENTENCED TO FOUR (4) YEARS IMPRISONMENT, WHICH IS SUSPENDED FOR FIVE (5) YEARS on the condition that she is not, during the term of suspension, found guilty of any crime of which dishonesty is an element.

As far as the form of the correctional service is concerned, I am not sure whether more detail or not is required. I leave

that to the counsel for the parties to see me in chambers in order that I can approve a form which gives effect to everything that I consider necessary. The basis is to be what I have already indicated in court.

CLEAVER, J

I agree.



ZONDI, J