IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A519/2010

DATE: 16 FEBRUARY 2011

In the matter between:

CRYSTAL KOEN Appellant

and

THE STATE Respondent

JUDGMENT

BOZALEK, J:

The appellant was, pursuant to a plea of guilty, convicted in the Bellville Commercial Crime Court on 3 March 2010 on 62 counts of fraud involving an amount of R1 118 463,33. All the counts were taken together for the purposes of sentence and the appellant was sentenced to nine years imprisonment of which three years were conditionally suspended for a period of five years. With the leave of the magistrate, the appellant now appeals against the sentence only.

Background:

The appellant was represented throughout the trial and tendered a plea explanation in terms of section 112 of Act 51 of 1977, in which she described, *inter alia*, the method by which she defrauded the complainant, Metropolitan Life, of the monies in question. The following portions of the plea-explanation are material:

> "I worked at Metropolitan Life at its Bellville office from August 1996 to February 2009. I was eventually employed by Metropolitan Life ("the complainant") as a life, debt and risk manager. My duties, *inter alia*, entailed:
>
> 1. The recovery of debts owed to the complainant by its representatives and brokers.
>
> 2. Authorisation of payments made to complainant's creditors using my unique authorisation code.
>
> 3. The complainant operated a specific account known as 17956 commercial legal fees. The account was used primarily for payment to attorneys who collected money on behalf of the complainant's debtors or for services rendered by these attorneys to or on behalf of the complainant.
>
> When operating the account to process payments,

one of my subordinates/operators were required to capture the payment on the system by using a unique operator ID issued to such operator. After the operator had captured the payment, I was required to authorise such payment by using my unique authorisation ID. Instead of following this procedure, I had used the operators' unique ID, which was known to me, to enable me to process the payments forming the subject matter of these charges. I thus utilised the operator ID of one of my subordinates and thereafter authorised the payment initiated by myself by using my own unique authorisation ID."

The appellant then proceeded to describe in greater detail the method which she used to defraud the complainant. This involved substituting the banking details of genuine creditors of the complainant with the banking details of payees from whom she had received value in her personal capacity or, alternatively, recording as creditors entities which appeared on the face of it to be creditors of the complainant but were in fact entities from whose accounts, once the complainant's funds were paid to them, she was able to withdraw.

Two such entities which featured prominently were Kipling

Trading CC, a close corporation and Kipling & Associates, both entities being controlled by her husband. The complainant's plea-explanation continued:

> "I manipulated the internal account 17956 commercial legal fees of the complainant and abused my position as manager by using my subordinates operating ID's without their knowledge or consent to complete the transactions resulting in payment into the account from which I benefited. ... when performing the afore-mentioned actions (of defrauding the complainant) I knew that I was acting unlawfully and would be punished if prosecuted and convicted."

The appellant specifically admitted the details of each count of fraud the first of which took place on 18 July 2006 and the last of which on 10 February 2009. Before the appellant was found guilty, the state placed on record that it accepted the facts in the plea-explanation. In mitigation of sentence, the appellant led the evidence of a clinical psychologist, Mr M L Yodaiken ("Yodaiken"). He filed a report from which it appeared that he had consulted with the appellant extensively over a period of three months and interviewed various collateral sources. He described his brief as being to determine whether various

psychological factors underpinned the appellant's behaviour in her commission of the frauds and, if so, to what extent they could be used to understand the alleged crime. These psychological factors he stated as follows:

> "The fact that apparently during the entire time that she committed these acts, she and her husband were not short of money. She made no attempt to conceal her activities. The money was spent on mainly spurious expenses, for instance expenses aimed at home improvements and that the activities spanned such a long period of time, suggested to her attorney of record that there may be psychological factors underpinning her behaviour."

Yodaiken's diagnosis was that the appellant was:

> "Likely to be a personality disorder of mixed type comprising a combination of borderline personality disorder and obsessive personality disorder".

Later in his report, however, he appeared to narrow this diagnosis to one of a borderline personality disorder. Yodaiken recommended that the appellant be given a lengthy suspended sentence coupled with house arrest and community service and on condition that she undergoes psychiatric and

psychotherapeutic treatment at her own expense, as well as further other conditions.

He opined that the psychiatric and psychological help available to the appellant in the prison setting was not sufficiently sophisticated given the complex nature of her condition, and that any opportunity for her to rehabilitate would be seriously compromised by incarceration. Yodaiken provided the following reasons for his recommendations from his report:

> "The fact that Ms Koen's crimes were impulsive, associated with stress/activated by stress, were largely self-destructive given the history within the company and her anticipated future progress. In the light of the personality disorder and history of sexual abuse, begs that this entire matter be seen in a clinical rather than a forensic light. As such the approach to Ms Koen would, in the opinion of the writer, need to be a curative and rehabilitative approach rather than a punitive one."

In aggravation of sentence, the state led the evidence of Ms Estelle de Jongh, a forensic consultant with Metropolitan Life. She spoke of the damaging publicity which the company had been exposed to as a result of the fraud, it's motto being to

protect and grow the wealth of its policyholders. She mentioned that "huge problems" had been created within the relevant division, that a number of employees had been at risk of losing their jobs had they not resigned. She testified that the appellant had advanced relatively quickly in the company and had been granted micro loans and special leave as well as a housing subsidy and group life cover on favourable terms.

She emphasised that the appellant was in a position of trust and was the custodian in her department, tasked with guarding against and protecting fraud within her division. She confirmed that the appellant's pension monies had been retained by Metropolitan Life but that, as at the date of testifying, no assets had been recovered from the appellant in satisfaction of the money stolen. The appellant's pension monies and other monies owing to her and provisionally retained by the company amounted to approximately R400 000,00. It was not put to Ms De Jongh that the frauds had been perpetrated in such a manner that they were easily discoverable. In fact De Jongh's evidence was that the documentation in respect of the various payments, on the face of it, appeared correct.

The magistrate's findings:

The magistrate first sentenced the appellant's husband, her co-accused, on his plea of guilty to one count of contravening

a section of the POCA Act 121 of 1998 involving money laundering, namely the receipt into accounts controlled by him of a large portion of the monies fraudulently stolen by the appellant from the complainant. The magistrate sentenced the appellant's husband to a wholly suspended sentence. In sentencing the appellant, he took into account her personal circumstances, that she was a married woman with two minor children, at that stage two sons aged 15 and 20 years of age, the latter being at university, and that she was a first offender.

The magistrate was critical of certain aspects of Yodaiken's report, a matter to which I will revert. He emphasised the duty of the court to impose a balanced sentence taking into account the Zinn triad of factors. The magistrate found that the fact that the appellant had stolen monies from her employee over an extended period of time was an aggravating factor and, taking into account the amounts involved, the circumstances of the case, the relationship between the appellant and the complainant and the opportunities which she had to desist from her behaviour, he concluded that a term of imprisonment, partly suspended, would be appropriate. The magistrate also took into account that the appellant's children would be appropriately cared for by her husband, who had received a totally suspended sentence.

The grounds of appeal advanced on behalf of the appellant concentrate almost exclusively in what is said to be the magistrate's erroneous approach to evaluating Yodaiken's evidence and associated misdirections. It is alleged that the magistrate misdirected himself by treating such evidence with extreme suspicion and thus effectively disregarding it by stating on several occasions that Yodaiken was approached by the defence to submit a report and paid a fee in respect of his services; in finding that Yodaiken recommended what, in his opinion, was best suited to the needs and circumstances of the appellant; in disregarding the fact that Yodaiken's report was the product of having applied his mind objectively; in finding that he had not been prepared to make certain reasonable concessions; in failing to understand the thrust of Yodaiken's evidence in various respects; in not accepting unchallenged evidence that the appellant suffered from a borderline personality disorder and in drawing an adverse inference from the fact that she had not disclosed certain details of her childhood to the correctional officer. Finally, it is alleged that the magistrate erred in over-emphasising the seriousness of the offence at the expense of the personal circumstances of the appellant, in failing to individualise the sentence and imposing a sentence which was startlingly excessive and inappropriate.

The correct approach to sentencing:

The circumstances in which an appellate court will interfere with sentence on appeal are limited. See S v Van Eck 2003 (2) SACR 563 (SCA), where Scott, JA at 658e stated as follows:

> "As has been said time without measure, the power of a court of appeal to interfere with the sentence imposed by the trial court is limited. It may do so only when the exercise of the trial court's discretion is vitiated by misdirection or the sentence imposed is so inappropriate as to indicate that the discretion was not properly exercised."

Furthermore:

> "A mere misdirection is not by itself sufficient to enable the appeal court to interfere with the sentence. It must be of such a nature, degree or seriousness that it shows directly or inferentially that the court did not exercise its discretion at all or exercised it improperly or unreasonably."

See S v Pillay 1977 (4) SA 531 (A) at 535. As regards the question of a striking disparity between the sentence imposed

and that which would have been imposed by the appeal court, the following passage from S v Whitehead 1970 (4) SA 424 AD at 4360 encapsulates the test:

> "... whether there exists such a striking disparity between the sentences passed by the learned trial judge and the sentences which this court would have passed, or to pose the inquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this court to be so startlingly inappropriate as to warrant interference with the exercise of the learned judge's discretion regarding sentence."

What is clear is that the ultimate test is whether there has been an improper exercise of his discretion by the trial judge. See also S v Ramanka 1949 (1) SA 417 AD at 420. In the heads of argument filed on behalf of the appellant, it is stated that the magistrate's most glaring misdirection was his failure to give any weight to Yodaiken's opinion that the appellant suffered from a borderline personality. However, I do not read the magistrate's judgment as stating or even implying such a rejection. The magistrate explicitly accepted Yodaiken's opinion in stating, correctly, that it was not in a position to dispute that the appellant might be classified as having a

borderline personally disorder.

However, the magistrate took issue with the sentencing recommendations made by the witness, *inter alia*, on the basis of various criticisms he expressed on aspects of Yodaiken's report and his reasoning. The magistrate referred to Yodaiken's opinion that a "curative and rehabilitative rather than a punitive one" needed to be adopted with the appellant and his recommendation that she be given a non-custodial sentence. In this context he made the self-evident, although unnecessary, remark that Yodaiken had been paid by the defence for his services. However, he went on to state as follows:

> "That is not to suggest that his report will be coloured purely for that reason."

The magistrate emphasised that the responsibility for imposing a balanced sentence always remained that of the court when he stated as follows:

> "The Courts on the other hand have a duty to the accused to impose a balanced sentence, balanced taking into account the famous triad that has already been mentioned, but the court has a duty

also to society to ensure that by sentencing that the administration of justice is not seen to fall into disrepute, and in assisting the court in arriving at such a balance, the court must then take into account the crime for which the accused has been convicted."

I do not consider that these remarks reveal any misdirection on the part of the magistrate. Indeed his description of the respective roles of the court and recommendations to be found in any pre-sentencing report of whatsoever nature, are entirely correct. Dealing with such reports in Guide to Sentencing in South Africa, 2nd Edition, S S Terblanche LexisNexis, the author states as follows:

"The duty to impose an appropriate sentence rests with the presiding judicial officer. This duty cannot be delegated to anybody else. The function of the pre-sentence reporter is the same as that of any expert evidence giving evidence in court, namely to express his opinion; but the court has to make the decision. In this process the court has to analyse the pre-sentence report carefully and critically. The presiding judicial officer may, therefore, not simply follow the recommendation of the pre-sentence

reporter."

See in this regard S v Lewis 1986 (2) PHH 96 (A) and S v M 1999 (1) SACR 91 (T) at 101g. Nor do I find substance in submissions that the various criticisms expressed by the magistrate of the report amounted to misdirections. The magistrate's remarks regarding Yodaiken being paid by the appellant were made in the context of his distinguishing between the different roles of the court and an expert briefed to prepare a report on behalf of an accused person. As I have already stated, he accepted Yodaiken's professional opinion in his particular field of expertise, namely that the appellant suffered from a borderline personality disorder.

The magistrate noted that the sources consulted by Yodaiken all appear to be connected to the appellant. That was no more than a fact and, in the context within this remark was made, appears not to have been a factor which weighed particularly with the magistrate in his evaluation of the report. A further charge against the magistrate is that he criticised Yodaiken for not conceding that, with her abilities and intelligence, the appellant ought to have realised and appreciated what she was doing was inappropriate and that she ought not to have engaged in that conduct.

In my view the criticism has some merit and, to the extent that Yodaiken testified that the appellant's conduct was compulsive or obsessive, both the admitted facts and the appellant's own admission that when she performed the fraudulent act she knew that she was acting unlawfully and would be punished if prosecuted and convicted, point in the opposite direction. The facts indicate a prolonged systematic and calculated process of deception on the part of the appellant. In this regard it was submitted by Mr Parker on appeal that since the state was in possession of Yodaiken's report at the time when it accepted the appellant's plea, it was bound by the contents of the afore-mentioned.

In the absence of an explicit agreement that the state would regard itself as bound by the alleged facts contained in Mr Yodaiken's report, this submission is untenable. In this regard it is significant that the appellant's plea explanation initially contained a further section in which she sought to explain what she termed the most pertinent relevant circumstances of a psychological nature which impacted upon her conduct. This explanatory section was, however, struck out of the plea-explanation, clearly indicating that the state and the appellant's legal representatives were not in agreement that this material would form part of the agreed facts upon which the appellant would be found guilty.

On behalf of the appellant, the complaint was made that the magistrate criticised Yodaiken for not conveying to the appellant the urgent need for treatment of her condition. I agree that this criticism should not be weighed against Yodaiken, whose brief was in effect to prepare a pre-sentencing report. Nevertheless, it must be emphasised that the magistrate accepted Yodaiken's central finding and to the extent that the afore-mentioned criticism weighed with him, it was in the context of his explaining why he was not prepared to accept Yodaiken's sentencing recommendation.

The criticism that the magistrate erred or misdirected himself in attaching weight to the fact that the appellant failed to mention certain facts relating to the correctional officer, but only disclosed these facts to Yodaiken, appears to stand on a somewhat different footing. As I understand it, this passage in the magistrate's judgment implied that there may have been a lack of candour on the part of the appellant. Again I do not consider that this factor improperly influenced the magistrate in his evaluation of the report. Furthermore, the fact remains that ultimately this question could not be resolved since the appellant did not testify in mitigation of sentence. The magistrate was, in my view, entirely correct when he criticised the assumption made by Yodaiken in his report that the frauds were committed openly without any real attempt to conceal

them and in circumstances such that it was inevitable that they would be discovered.

This was certainly not the evidence of Ms De Jongh and is completely at odds with the appellant's own description and her plea explanation of her *modus operandi*. Similarly, to the extent that it formed part of the appellant's case that her acts of fraud were obsessive or compulsive in that she spent the money on mainly "spurious expenses", there is no substance thereto. Such evidence as there was, indicated that some, or perhaps even a good deal of the monies had been spent on home renovations or home improvement by way of direct payments to the service providers. I fail to see how these can be regarded as "spurious expenses", nor do I see what significance lies, in this particular case, and exactly what the appellant used the money for. It was common cause that the appellant had no need for the stolen monies.

I have dealt with most of the misdirections which the magistrate is said to have committed and found that they are not substantiated. I do not propose to deal with each and every misdirection mentioned in argument or cited in the grounds of appeal, save to state that upon careful consideration of the magistrate's judgment and the criticisms raised against it, I do not consider that any such misdirection

was made. Even if I am incorrect in this finding, I do not consider that any such misdirection was of such a nature, degree or seriousness that it shows directly or inferentially that the court did not exercise its discretion at all or exercised it improperly or unreasonably.

That leave the remaining ground of appeal, namely that the sentenced imposed by the magistrate appears to be so startlingly inappropriate as to warrant interference by this court on the basis that the magistrate must have failed to exercise its discretion properly. Notwithstanding that three thereof are conditionally suspended, the sentence of nine years imprisonment is undoubtedly a severe one. The essential facts in this matter are that over a prolonged period of time, the appellant systematically defrauded her employer of an extremely substantial sum of money. At the time she occupied a position of considerable responsibility and her actions were a gross breach of trust.

At the relevant time the appellant was earning approximately R30 000,00 per month and the household's income, including her husband's income, amounted at times to R90 000,00 per month. Although the appellant did not steal the monies in equal amounts on a regular basis, the appellant's larceny amounted to the equivalent of an additional income of

R40 000,00 per month over the period during which the frauds were committed.

Against these aggravating features must be weighed the appellant's personal circumstances and various mitigating factors. Chief amongst these are the appellant's position as a first offender, the evidence relating to her borderline personally disorder, her plea of guilty and expressions of remorse. What must also be taken into account is that the appellant and her husband are likely to lose all the assets which they have built up. Even the appellant's pension may conceivably be lost to her. Furthermore, her conviction for fraud will no doubt impact heavily on the appellant in her working and social life for the foreseeable future.

Notwithstanding these mitigating and personal factors, I can find no fault with the magistrate's decision to impose a custodial sentence. The extent of the fraudulent scheme, its serious and systematic nature, exclude the possibility, in my view, of a non-custodial sentence or even a sentence in terms of section 276(1)(i) of the Criminal Procedure Act. I agree with the magistrate that such a sentence would tend to bring the administration of justice into disrepute by focusing on the personal circumstances of the appellant at the expense of the interest of the community and the seriousness with which the

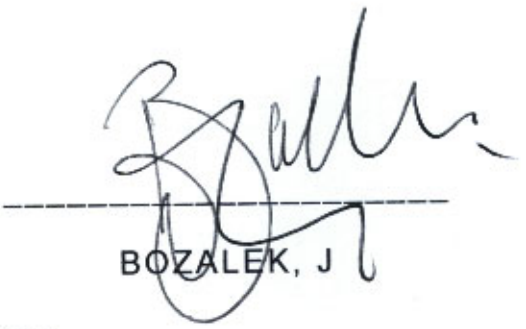
offences should be viewed.

Although every case is different and must be treated on its own merits, I found it of value to consider a range of recent reported decisions, many of them Supreme Court of Appeal decisions, in which the key issue was sentence in matters similar to the present. They include S v De Sousa 2009 (1) ALL SA 26 (SCA), S v Olivier 2010 (4) ALL SA 503 (SCA), S v Michelle & Another 2010 (1) ALL SA 446 (SCA), S v Jansen 2010 (1) SACR 237 (ECG), S v Sadler 2000 (1) SACR 331 (SCA), S v Wasserman 2004 (1) SACR 251 and S v Sinden 1995 (2) SACR 704 (A).

The purposes of sentencing, it is as well to remind oneself, are in no particular order, prevention, deterrence, reformation and retribution. Any balanced sentence must also be tempered with mercy. Having regard to the particular circumstances of this matter, to the triad of factors and to sentences imposed in similar cases, I consider that an appropriate sentence in this matter would have been one of seven years imprisonment with three years thereof conditionally suspended. This produces a difference of two years between the effective sentence which I would have imposed and that imposed by the magistrate. That disparity, amounting to one third of the effective sentence is, in my view, sufficiently striking to warrant interference with the

sentence imposed by the magistrate.

In the circumstances I consider that the appeal against the sentence should succeed with the sentence of nine years being set aside and being **REPLACED WITH A SENTENCE OF SEVEN (7) YEARS IMPRISONMENT**, of which **THREE (3) YEARS ARE SUSPENDED FOR FIVE YEARS** on condition that the appellant is not convicted of theft, fraud or a contravention of section 4 of the Prevention of Organised Crime Act 121 of 1998. In terms of section 282 of Act 51 of 1977, I would antedate the sentence to 7 April 2010.



BOZALEK, J

FORTUIN, J: I agree.

FORTUIN, J