IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO : A168/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

27/02/14.
DATE

SIGNATURE

In the matter between:

NICOLE ROMEY DE VILLIERS **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MONAMA J

[1] On 4 March 2009 the appellant was arrested. She was granted bail of R5000.00 on 5 March 2009. On 18 September 2009 she was charged in Johannesburg Regional Criminal Court on some 31 count of fraud from the employer Schwellnus Incorporated [the Law Firm] and one count of the contravention of the Prevention of the Organised Crime Act.[1]

[2] During the trial, and at the hearing of the application for leave to appeal the sentence she was legally represented. She pleaded guilty to the charges and her statement in terms of Sect. 112(2) of Act 55 of 1977 was read into the record. She admitted her

[1] Section 4(b)(i)(ii) read with Section 7(1) and 8(1) of Act 121 of 1998.

knowledge of unlawfulness of her actions and that they were punishable in law. The plea of guilty was given freely, voluntarily and without any undue influence.

[3] After her plea of guilty, she was convicted as charged. She had no previous conviction. The case was adjourned for expert assessment report on sentence and her bail was extended.

[4] On 7 March 2011 she was sentenced to 8 years imprisonment. The court took all the 32 charges as one for the purposes of sentence. The trial court adopted that approach notwithstanding the fact that the conviction on count 44 carried a heavy sentence (contravention of the Prevention of the Prevention of Organised Crime Act). Three years of the imprisonment period was suspended on certain conditions. Immediately after the sentence she was granted leave to appeal the sentence and her bail was again extended pending the finalisation of this appeal.

[5] The relevant material background is very brief and uncomplicated. During the period between 30 September 2009 and 15 April 2010 the appellant was employed at Schwellnus Incorporated. Her duties included the handling of paralegal issues primarily relating to conveyancing. She was in total control of the finances. *A fortiori*, she dealt with the banks and bank guarantees. During the material time relevant hereto she received and stole an amount of approximately R1.5M. The appellant used that amount for her own purposes. The theft proven endured for a period of several months and only R800 000, 00 thereof has been repaid leaving a deficit of some R600 000,00. Part of the deficit must have been recovered from the Attorneys' Fidelity Fund. She was arrested on 4 March 2009 and was released on bail of R5000.00 the next day. She has been on bail until today.

[6] The appeal is against the sentence of five years direct imprisonment. The test when an appeal court can interfere is well known. It is trite that the appeal court, can only interfere with a sentence where there is a misdirection or where the sentence is inappropriate and engenders a sense of shock or differs materially from the one that

this court could have imposed. This has been a position since 1920.[2] This well-established test has been endorsed ever since.[3]

[7] The appeal rests on several grounds[4] including the inadequate assessment of remorse of the appellant. First, it is submitted that there is a strong foundation for rehabilitation. Secondly, part of the stolen money was repaid and the appellant demonstrated remorse for her action and that the custodial sentence will impact negatively on the welfare of the children.

[8] The issue before this court is to determine whether the trial court exercised the discretion properly and judiciously in imposing a sentence of five years direct imprisonment. The court relied on a *triad*[5] in imposing the sentence. Furthermore, any sentence imposed must be blended with mercy. The court considers both the mitigating and the aggravating circumstances of the parties.

[9] The following facts constitute the personal circumstances of the appellant. She is currently 34 years of age. At the time of the conviction she was married and had two minor children aged seven and five years. She is in the process of an acrimonious divorce. Prior to the conviction she had received treatment for drug addiction. She was assessed by various expert witnesses who recommended a non-custodial sentence. The expert recommendations are supported by her rabbi. She is staying with her mother and is working in an organisation which assists with drug problems.

[10] She relied on the expert reports and *viva voce* evidence in her mitigation. The expert reports are compiled by Ms A Veegeer who is the probation officer attached to the Department of Social Development, Ms Lang the social worker who compiled the psycho-social report, Ms Yvette Esprey who compiled the psychological assessment report by Dr WJ Levin.

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[2] S v Mapumulo 1920 AD 56 1t 57.
[3] S v Malgas 2001 (1) SACR 469 SCA.
[4] See Pages 2 [paragraph 6], 3 [paragraphs 9 – 11] and page 4 [paragraph 13] of the appellant's heads.
[5] S v Rabie 1975(4) SACR 855 (A)

[11] In addition to the written reports there was viva voce testimony by other witnesses who testified in mitigation for the appellant including Ms Du Toit who was attached to the employer who was a victim.

[12] The matter has taken some approximately three years to reach this stage. It is often said justice delayed is justice denied. In my view the appellant contributed somehow to this delay. The court had to beg the heads of argument from the appellant in order to prepare.

[13] The common thread in all those who testified in mitigation is that the appellant should not receive direct jail sentence. I have not found anything they said about the gravity of the offence and its impact on the society.

[14] The approach of how to deal with expert evidence is now well known[6]. The opinion advanced must be based on logical reasoning. The duty of an expert witness is to assist[7] the court irrespective of the party who called such experts. Their testimony should be and should be seen to be independent. In this case the reports are one-sided and have not commented about the impact of the crimes on the society and the economy.

[15] As stated above the approach is whether there was a misdirection. First the court *a quo* approached the issue of the sentence meticulously and in a balanced way. The trial court commenced its assessment of the appropriate sentence in this matter by reiterating how the sentence should be approached. It emphasized the *triad*[8] and that the court must adopt a balancing approach without overemphasising or underemphasising any of the elements of the *triad*. Further it was conscious about the purposes of punishment. The approach so adopted was correct. The court commented that the crimes for which the appellant was convicted of fall under the category of the so-called "white collar" offence. The appellant was convicted on some 31 transactions of theft and one of contravention of Act 121 of 1998. Its conclusion that the crimes were premeditated cannot be faultered. In this regard I find no misdirection.

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[6] Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001(3) SA 1188 SCA at 1200 I-J. 2nd Edition by DT Zeffert and AP Paizes

[7] See: The South African Law of Evidence Page 330

[8] See Footnote 6 Supra.

Everything that was placed before it was carefully considered. The theft was committed to finance a high standard of life of the De Villiers clan. The theft was not for necessities. She was simply just greedy.

[16] I now turn to the mitigating circumstances of the appellant. At the time of the imposition of the sentence, the appellant had moved into her parental home. Her mother is also a primary care giver regard being had to the appellant's addiction past. The submission on her behalf is that the children will be prejudiced by any direct imprisonment. The children would not have sufficient opportunity to attend to their Jewish religion and any imprisonment will offend the provisions of the Constitution[9] which provides that:

> *"-Every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment;"* [the underlining mine]

The trial court came to the conclusion that the maternal grandmother is also giving the necessary parental care. She is assisted by the synagogue and the appellant.

[17] I do not read the authority[10] relied upon by the appellant that a primary care giver can never receive a direct imprisonment. The necessary precautions were investigated and found adequate. She was the first offender and was approximately 30 years old. All these factors were competently and meticulously dealt with in considering an appropriate sanction.

[18] The second point of misdirection relied upon relates to the alleged remorse. It was strongly argued that the plea tendered by the appellant translates into a remorse. This argument is thin in substance. It totally ignored the facts. The appellant was the only person who was in charge of and directly responsible for the collection and banking of

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[9] Section 28(b) of Act 108 of 1996.
[10] S v M (Center for Child Law as Amicus Curiae) 2007 (2) SACR 539

the money. Accordingly, the finding that the case was open and shut has valid foundation. The remorse was not genuine, but self-serving.

[19] In aggravation, the trial court found the crimes to be serious. That is not disputed and they are indeed very serious.[11] The appellant occupied a position of trust. Her conduct as stated above, destroyed that trust. It is so that an amount of R800 000.00 was repaid by the appellant and her in laws. The trial court meticulously considered the option of a fine. It took into account the purposes of punishment. It correctly, in my view, concluded that direct imprisonment was the only option opened to it. It considered the age of the appellant and the position of her children. It found that the aggravating factors far outweigh the personal circumstances. Every other factor placed before the court was assessed and accorded the necessary weight.

[20] The next enquiry is whether the sentence of eight years imprisonment is appropriate. The court held the sentence is appropriate taking into account the seriousness and the prevalence of the offence. It reached such a conclusion after exploring other possible sentences as held in **S v Lister**[12] where a sentence of four years for similar offences was considered appropriate. The test is not the pity to the appellant but whether there is a misdirection based on the proven facts. Having regard to the sentences imposed by other courts on almost similar facts, albeit involving lesser amounts, the sentence imposed by the Court a quo is on par with those sentences.

[21] The appellant's counsel suggested a sentence in terms of Section 276(1)(h) of the Act and in the alternative sentence in terms of Section 276(1(i) of the Act. I conclude that the suggestion is untenable and must be rejected. The rejection is based on the gravity of the offence the time taken to commit same. I am in full agreement with the views of Makgoka J in his detailed judgment when he states that:

> *"-The broader community has an expectation that serious offences ought to be properly punished."*[13]

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[11] S v Sadler 2001 (1) SACR 331 (SCA) at 335 G-J; S v Kwatsa 2004(2) SACR 564 (ECD) at 569 H-J.
[12] 1993(2) SACR 228 (AD) at 232 I -J
[13] S v Piater 2013(2) SACR 254 GNP at 267.

[22] In my view the argument by the appellant's counsel disregards the other wo factors of the "*triad*" *vis* the seriousness of the crime and the societal interests by emphasising the personal circumstances of the appellant.

[23] The trial court committed no misdirection justifying interference by this court. In the result, I make the following order:

23.1 In the result the appeal against the sentence is dismissed.

RE MONAMA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

ND TSHABALALA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the appellant:	Adv. M Witz
Instructed by:	Witz and Iskow Attorneys, Hyde Park, Johannesburg
For the respondent:	Adv. A Carstens
Instructed by:	Director of Public Prosecutions, Johannesburg
Date of hearing:	24 February 2014
Date of judgment:	27 February 2014