IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR 483/05

In the matter between**:**

SUMENTHEN POOBALEN PILLAY APPELLANT

and

THE STATE RESPONDENT

APPEAL JUDGMENT Delivered on 26 June 2012

SWAIN J

[1] As long ago as 09 March 2005 the appellant was sentenced by the Regional Court at Durban, to six years' imprisonment, half of which was suspended for a period of three years, on condition that the appellant was not convicted of theft or attempted theft, committed during the period of suspension and for which the appellant was sentenced to a term of imprisonment. This sentence was imposed upon the appellant, as a consequence of his conviction on a charge of the theft of trust monies in the sum of R207,546.29, being the property of trust creditors of the appellant, in his practise of an attorney, following upon a plea of guilty by the

appellant. With the leave of the Court *a quo*, the appellant appeals against the sentence imposed.

[2] The argument advanced by Mr. Aboobaker S C, who together with Mr. Winfred, appeared on behalf of the appellant, was based mainly upon the proposition that regard being had to the inordinate delay in the finalisation of the appeal, together with evidence of events which occurred in the intervening period, this Court would be entitled to reconsider the sentence imposed upon the appellant. In order to achieve this objective the appellant applied for leave to place evidence before this Court and for such evidence to be taken into account, in the adjudication of the appeal against sentence. The respondent did not oppose the application and filed no answering affidavits dealing with the evidence tendered by the appellant.

[3] In terms of Section 309 (3) read with Section 304 (2) of the Criminal Procedure Act No. 51 of 1977 and Section 22 of the Supreme Court Act No. 59 of 1959, this Court sitting as a Court of Appeal, can hear further evidence, or direct that it be heard, in respect of any matter that is before it on appeal.

[4] As regards the exercise by this Court of such a discretion, the following words of Cloete J A in

S v E B 2010 (2) SACR 524 at 528 para 5

are apposite.

"Despite the wide wording of the statutory provisions, this court has laid down requirements which must be complied with before it would be prepared to hear evidence on appeal. Those requirements were summarised in *S v De Jager,* have been 'applied in countless cases since' and are as follows:

> *'(a)* There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
>
> *b)* There should be a *prima facie* likelihood of the truth of the evidence.
>
> *c)* The evidence should be materially relevant to the outcome of the trial.'

The same requirements apply equally to any court sitting as a court of appeal: *S v A*. In addition, the general rule is that an appeal court will decide whether the judgment appealed from (and that includes a judgment on sentence) is right or wrong, according to the facts in existence at the time it was given, not according to new circumstances subsequently coming into existence. Nevertheless, this court has previously indicated that the rule is not necessarily invariable, and the rule has recently been relaxed to allow evidence to be adduced on appeal, of facts and circumstances which arose subsequent to the sentence imposed, where there were exceptional or peculiar circumstances present: *S v Karolia, S v Michele, S v Jaftha*, and also where there were misdirections by the court which imposed sentence, which had the effect that the appeal court was at large to impose the sentence it considered appropriate: *S v Barnard*. (It is not necessary for present purposes to consider whether this latter situation should be subject to particular safeguards to prevent an abuse of the appeal procedure.) The more liberal approach by this court, shown by a comparison of the decision in *Verster* (where the court refused to take into consideration a delay in the hearing of an appeal as a reason for altering a sentence imposed by a magistrate) and the decision in *Michele (*where such evidence was taken into account and the sentence reduced), must not be interpreted as a willingness to open the floodgates. In cases such as the present, where the facts and circumstances

arose after sentence, the application must be carefully scrutinised to ascertain whether it does indeed disclose exceptional or peculiar circumstances. It is undesirable to attempt to define these concepts further".

S v de Jager 1965 (2) SA 612 (A) at 613 A
S v A 1990 (1) SACR 534 (C) at 540 c – d
S v Karolia 2006 (2) SACR 75 (SCA)
S v Michele 2010 (1) SACR 131 (SCA)
S v Jaftha 2010 (1) SACR 136 (SCA)
R v Verster 1952 (2) SA 231 (A)

[5] In *Michele* the Supreme Court of Appeal was satisfied that as regards the sentence imposed by the trial court, it had not exercised its discretion properly and the appeal court was accordingly entitled to interfere with the sentence. The "lamentable delay" (at 135 c) in the finalisation of the appeal of a period of six years, was however considered in the context of the mental anguish the appellants must have suffered because of a lack of "clarity as to their future" during this period, as being a factor which the appeal court should have regard to in the assessment of an appropriate sentence.

[6] However, in *Jaftha,* the Supreme Court of Appeal was satisfied that there were no misdirections to be found in the sentence imposed by the Magistrate, such that the Appeal Court would not ordinarily interfere with the sentence. However, because of a delay of ten years in the finalisation of the appeal the Supreme Court of Appeal, in the light of the evidence of events in the intervening period, was satisfied the sentence imposed ten years ago should be set aside and a new sentence considered.

[7] In *Karolia* the Supreme Court of appeal was satisfied that the sentence imposed upon the appellant of correctional supervision was "startlingly inappropriate and grossly lenient" (at 93 b) and that a sentence of imprisonment was "plainly warranted". However, the Supreme Court of Appeal was satisfied that there were "exceptional and peculiar circumstances which occurred in this case subsequent to the imposition of sentence which it would be proper and just for this Court to take into account when considering an appropriate sentence". (at 93 i). These factors were that the accused had by the date of appeal, served the sentence imposed upon him by the Court *a quo* and had paid the sum of R250,000.00 which had been distributed to the minor children of the deceased, in accordance with the order of the Court *a quo* and which was probably irrecoverable.

[8] As regards the sentence imposed, Mr. Aboobaker submitted that the sentence was startlingly inappropriate and pointed to what he regarded as several misdirections by the Magistrate in imposing the sentence he did. I am however satisfied that the sentence imposed by the Court *a quo* was entirely appropriate in all of the circumstances, and that the Magistrate committed no misdirections in imposing the sentence that he did. The present case is consequently on all fours with the decision in *Jaftha*, the sole issue being whether by virtue of the delay of seven years since sentence was passed, due regard being had to evidence of events which occurred in the interim, exceptional or peculiar circumstances exist, which justify this Court in revisiting the sentence imposed upon the appellant.

[9] Such an enquiry demands a consideration not only of the

reasons for and extent of the delay, but also the evidence of subsequent events, relevant to a reconsideration of the sentence imposed.

[10] An important factor in considering the cause for the delay is whether the appellant took any steps to expedite matters. In the case of

S v Mthembu 2010 (1) SACR 619 (CC) at 621 para 4

the Constitutional Court, albeit dealing with the case where the applicant sought leave to appeal against sentence, where he was for a period of six years ignorant of the fact that his petition to the Supreme Court of Appeal had failed, expressed itself in the following terms:

"Convicted persons out on bail pending appeal or application for leave to appeal are under an obligation to ascertain the outcome of their appeal processes and to present themselves to serve their sentences if the appeal processes fail".

The Constitutional Court also remarked as follows at 521 e

"Different considerations may conceivably apply when a person is not legally represented, is indigent and uneducated....."

[11] In my view, these remarks apply equally to a convicted person who is prejudiced by a delay in the set down of an appeal against conviction or sentence. It ill-behoves such an individual to take no

steps to advance the process, by making enquiries as to the progress of the matter, or by requesting details of the set down of the matter from the Criminal Appeals Registrar at the relevant High Court or the Director of Public Prosecutions, in an attempt to minimise the prejudice suffered, and thereafter to cry foul, when the application is set down for hearing, on the basis of prejudice caused by the delay.

[12] Dealing firstly with the seven year delay and the steps taken by the appellant, in an attempt to expedite matters. The appellant alleges that:

[12.1] During 2007 he instructed attorney Suleman to establish what the status of the appeal was and what the reason was for the delay in the set down of the appeal. Attorney Suleman accordingly visited the Clerk of the Criminal Court Appeals Section at the Durban Magistrates' Court in the first week of June 2007. Attorney Suleman then telephoned the Registrar of the Criminal Appeals Section at the Pietermaritzburg High Court during the third week of June 2007, and followed this up with a visit during the first week of October 2007. He then telephoned the Criminal Appeals Clerk at the Durban Magistrates' Court during November 2007, and again telephoned the Criminal Appeals Registrar at the High Court, on the same day. During the third week of January 2008 he again visited the Registrar of Criminal Appeals at the High Court. The appellant states that all of these attempts were futile, because the file could not be located.

[12.2] During March 2008 Counsel was briefed to do all things

necessary to prepare for the appeal, because notwithstanding that the file could not be located, the appellant anticipated it would be set down and attempts would be made to reconstruct the file.

[12.3] During October 2007 the appellant instructed attorney Suleman to prepare an application for his re-admission as an attorney. However, after meeting with representatives of the KwaZulu-Natal Law Society in November 2007 he was advised that his re-admission could not be considered, until the criminal appeal had been disposed of. The appellant alleges that the setting down of the criminal appeal consequently became even more urgent. These averments are confirmed in a supporting affidavit by attorney Suleman.

[12.4] During August 2009 the appellant instructed attorney Morgan to prosecute the appeal on the appellant's behalf. The appellant alleges that attorney Morgan attempted on a least four occasions by way of visits to the Criminal Appeals Clerk at the Durban Magistrates' Court,to ascertain the status of the appeal and the reasons why the appeal was being delayed. These efforts were again futile because the file could not be located. The visits by attorney Morgan occurred during December 2009, February and April 2010. On 04 May 2010, attorney Morgan wrote to the Criminal Appeals Clerk enclosing the notice and grounds of appeal , together with four copies of the record, requesting these to be forwarded to the High Court and a date for the hearing to be obtained. A copy of the letter, together with an affidavit by attorney Morgan confirming the a foregoing is annexed to the appellant's affidavit.

[13] As pointed out above, no affidavit has been filed by the

respondent dealing with these allegations, or offering any explanation for the delay in setting the appeal down. It is clear however that the appellant did not sit idly by and took steps to expedite matters. What this evidence also reveals is a damning indictment of the administration of the Criminal Justice system. An inordinate delay of seven years in setting down the present appeal is inexcusable, which is aggravated by the failure of the respondent to even attempt to explain the delay, by filing no affidavits in response to the appellant's application. Mr. du Toit, who appeared on behalf of the respondent, was unable to offer any explanation for the delay, stating that when he enquired from the Registrar of the Criminal Appeals section at this Court, he was told the reason was that the file could not be located. In the hope that remedial action may be taken to prevent a recurrence of such a delay in the set down of criminal appeals, I intend referring this matter to the Registrar of the Criminal Appeals at this Court, as well as the Director of Public Prosecutions for investigation and for remedial steps to be taken, to prevent a recurrence of such a delay in the set down of criminal appeals.

[14] Turning now to a consideration of the evidence of events, which have occurred in the interim, and which the appellant submits are relevant to a reconsideration of the sentence imposed upon him.

[14.1] After his conviction the appellant obtained employment as the manager of C N L Security CC at a salary of R5,000.00 per month, where he remained until the business was sold in August 2008.

[14.2] During 2003 and before his conviction, the appellant

enrolled for an L L M degree at the University of KwaZulu-Natal which he completed and graduated in, in 2009.

[14.3] In 2005 the appellant enrolled for a Master of Business Administration degree, with the Management College of South Africa, which the appellant has completed, save and except for a dissertation.

[14.4] During 2008 the appellant enrolled for an L L M degree in taxation with the University of South Africa and has completed two-thirds of the course work required for the degree.

[14.5] Since 2005 he has been involved in the affairs of the Shree Emprumal Temple of which he is a member. The Temple is actively involved in community work as well as devotional work. The appellant alleges that he is involved in spiritual study, providing support to the Priest and assistance in co-ordinating the spiritual calendar. The appellant offers his services as a legal advisor to members of the Temple and any other person who seeks his assistance. An affidavit by the chairman of the Temple is annexed in support of these allegations.

[14.6] Subsequent to the appellant's conviction he was divorced and re-married and has a two and a half year old daughter. The children born of his first marriage are now adults and the appellant alleges that he has been able to support them during their university studies. The appellant maintains that the appellant's present wife, who is a State Advocate, has provided stability and direction to his life.

[14.7] The appellant is presently employed as a consultant

with Pele Accounting & Risk Consultants (Pty) Limited, and maintains that he has carried out this work competently and diligently.

[14.8] The appellant maintains that he has now acquired greater maturity, discipline and regulation in his life and has gone through what he refers to as a "watershed period" in his life since his conviction. The appellant maintains that he is no longer the man that he was and has every intention of repaying the monies that he misappropriated. He alleges that he made arrangements with the Attorneys Fidelity Fund to repay the amount owing at the rate of R1,000.00 per month. He states that although he was unable to pay for a period of time, he has now paid all arrears and to date has paid R67,000.00 towards the capital and interest due to the Fund.

[14.9] The appellant maintains that he understands the error of his ways, believes that he is fully rehabilitated and that there is no possibility of his repeating the indiscretions of the past.

[14.10] The appellant maintains that the delay in setting down the appeal has been nerve-wracking and a daily source of stress and mental anguish.

[15] As regards the additional requirement referred to in *de Jager*, that there should be a *prima facie* likelihood of the truth of the evidence, in the present case, as in *Jaftha*, the State did not question the truth of the allegations made by the appellant. In such a case, as pointed out in E B (at 530 b), "if the new evidence is accepted, there is no reason why the matter should be referred back, as an

appeal court can itself impose an appropriate sentence, taking into account the new evidence as happened in *Karolia, Michele* and *Jaftha*". If however "there is a dispute, or where the State wishes to challenge the evidence by cross-examination or to lead rebutting evidence, different considerations apply" (E B at 530 c – d). In such an event the Appeal Court may "set aside the sentence and remit the matter to the trial court with directions as to the hearing of further evidence which the appellant, the State or the Court might wish to adduce". (E B at 530 e – f).

[16] As regards the further requirement referred to in *de Jager*, that the evidence be "materially relevant" it is clear that "the Appeal Court should only allow the evidence tendered, if satisfied that there is at least a probability, not merely a possibility, that the evidence if accepted, would affect the outcome – *in casu*, whether the evidence warrants interference with the sentence". (E B at 530 g – h).

[17] The evidence of the appellant is not disputed by the State and there is consequently a *prima facie* likelihood of its truth. In addition, the evidence is materially relevant as it illustrates totally different circumstances regarding the appellant's personal situation, compared to those which prevailed seven years ago, to justify interference with the sentence that was imposed. The evidence also reveals that the appellant took steps to advance the set down and hearing of the appeal. A delay of seven years in the set down of the appeal is clearly an exceptional circumstance. Due regard being had to all of the above, I am satisfied that the evidence should be admitted and considered by this Court in revisiting the sentence imposed.

[18] The crime of theft by an attorney of trust money is an

extremely serious offence and as I have said, the sentence imposed by the Magistrate of six years' imprisonment of which three years was suspended, was entirely appropriate when imposed, some seven years ago. However, in the light of the appellant's evidence that he is fully re-habilitated, which is not disputed by the State, I can see no purpose in imposing a custodial sentence upon the appellant seven years after his conviction. Mr. du Toit, fairly and properly conceded that a sentence of imprisonment, or correctional supervision, in the light of the undisputed evidence would not be justified. The sentence to be imposed however, due regard being had to the seriousness of the offence, must still have a punitive and deterrent effect. This purpose will in my view be achieved if a sentence of six years' imprisonment is imposed, the whole of which is suspended on conditions, including the condition that the appellant repay the entire amount outstanding to the Attorneys Fidelity Fund, within the period of suspension. Mr. du Toit stated that he had established from the Attorneys Fidelity Fund, that the appellant had to date repaid R70,000.00 to the Fund. Mr. Aboobaker advised me that the appellant would be able to repay the full amount within a period of two years. When regard is had to the interest which is payable, payment within a period of three years would be more realistic.

I grant the following order:

a) The appeal against sentence succeeds, the

sentence is set aside and replaced with the following sentence –

"The accused is sentenced to six years' imprisonment all of which is suspended for a period of three years on the following conditions:

i) That the accused is not convicted of theft, or attempted theft, committed during the period of suspension and for which the accused is sentenced to a term of imprisonment, without the option of a fine and

ii) That the accused pays to the Attorneys Fidelity Fund, the full amount outstanding, including interest, within the period of suspension of the term of imprisonment".

b) This sentence is to take effect from the date on which this Judgment is delivered.

c) This Judgment is referred to the Registrar of Criminal Appeals at this Court, as well as the Director of Public Prosecutions to investigate the reasons for the delay in setting this appeal down, and to furnish to this Court a report detailing their

findings, as well as steps to be taken to prevent a recurrence of such a delay in the set down of

criminal appeals, within a period of thirty days from the date of this Judgment.

SWAIN J

I agree

HENRIQUES J

Appearances: /

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For the Appellant	:	Mr. T. N. Aboobaker S C with Mr. N. Winfred
Instructed by	:	Abbas,Latib & Company C/o Ayoob Attorneys Pietermaritzburg
For the Respondents	:	Mr. J du Toit
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Date of Hearing	:	21 June 2012
Date of Filing of Judgment	:	26 June 2012