IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A/608/06
Division: Second Division
Date: 5 September 2008

In the matter between:

IZAK JACOBUS NEL ENGELBRECHT Appellant

and

THE STATE Respondent

JUDGMENT

LE ROUX A.J AND OOSTHUIZEN A.J.

[1] The appeal against conviction and sentence imposed on the Appellant in respect of 157 charges of fraud in the Bellville Regional Magistrate's Court was dismissed by us on 19 June 2009. The Appellant now seeks leave to appeal against our aforesaid order, to the Supreme Court of Appeal.

[2] The application for leave to appeal against the conviction rests, essentially, on four grounds. Two of them criticised the weight attached to the evidence of Geldenhuys and Wiid. They were admittedly accomplices in the tax

evasion scheme which led to the criminal proceedings against Appellant. This Court's judgment of 19 June 2009, the evidence of Geldenhuys and Wiid as well as the criticism levelled at their testimony were fully analysed. We do not believe that there are reasonable prospects that a court will, on appeal, differ from the conclusions we drew regarding the weight, cogency and importance of the evidence of these two witnesses.

[3] The third ground of appeal in relation to the conviction dealt with the evidence of the state witness Riley. It was firstly admitted that she must have known of the irregularities being perpetrated and must, to that extent, be regarded as an accomplice and subjected to the normal cautionary rule applicable to the evidence of an accomplice. We find no merit in this contention. Riley's involvement was limited to that of a bookkeeper who attended to certain of the payments from time to time. It cannot realistically be contended that she was aware, in any realistic or meaningful sense, of the various simulated transactions which had been devised by the Appellant, Wiid and Geldenhuys in order to evade customs and excise duties. No such suggestion was made to her in cross-examination and it is in our view unrealistic to contend that any cautionary rule should be applied to her evidence. The court of first instance found Riley to be a good witness and that finding appeared to us to be justified.

[4] It was also suggested that Riley's evidence was of limited value, serving to corroborate only aspects which in any event were not disputed by Appellant. The most important aspect of Riley's evidence was her unequivocal testimony that Appellant was aware of the fact that vehicles purportedly sold to Namibian purchasers had in actual fact been sold to Quattro. Her evidence on this crucial issue was given in an eminently satisfactory manner and substantially detracts from the role which Appellant claimed he played in the scheme. We do not believe that another court would reach a different conclusion as regards the evidence of Mrs Riley.

[5] Lastly, in regard to the conviction, it is submitted that there are reasonable prospects that a court on appeal would interfere with the Magistrate and this Court's rejection of Appellant's evidence as not raising a reasonable doubt as to the State's case. In our judgment of 19 September 2009 we analysed the Appellant's evidence in detail, and gave close consideration to the various contradictions therein, and the important aspects of the State's case which were left unchallenged by him. We do not believe that a court of appeal will interfere with the finding that the State proved its case beyond a reasonable doubt.

[6] There is, in our view, no prospect of another court coming to a different conclusion as regards the conviction, and leave to appeal against the conviction is refused.

[7] We turn now to the application for leave to appeal against the sentence. It is, in this regard, necessary to consider the fact that substantially lighter punishments were meted out to Geldenhuys and Wiid. Such punishments were imposed in terms of Section 105(a) of the Criminal Procedures Act after they had concluded sentencing agreements with the prosecuting authorities.

[8] The issue of whether a marked disparity in the sentences handed out to participants in the same offence warrants interference on appeal was considered in **S v Giannoulis 1975 (4) SA 867 (A)**. After reviewing a number of authorities, Holmes JA said the following at **873 E – H**:

> *"Reviewing all of the foregoing judicial pronouncements over the past 60 years, there seems to me to be discernible a fairly consistent thread running in the same general direction. It may be expressed thus:*
>
> 1. *In general, sentence is a matter for the discretion of the trial court. Disparity in the sentences imposed on participants in an offence (whether tried together or in separate courts) will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial*

court and with the accepted limitation of appellate interference therewith.

2. *Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are not personal factors warranting such disparity, appellate interference with the sentence may, depending on the circumstances, be warranted. The ground of interference would be that the sentence is disturbingly inappropriate.*
3. *In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances."*

[9] The circumstances under which disparate sentences warrant interference on appeal were also pronounced in **S v Marx 1989 (1) SA 222 (A)** and, at **225 G – 226 B**, the following was said:

"*Hieruit blyk dit duidelik dat 'n Hof van appèl nie 'n onbelemmerde diskresie het om in te meng met ongelyke vonnisse wat ten opsigte van gelyke deelname aan dieselfde misdaad opgelê is nie. Inmenging kan alleenlik geskied volgens die riglyne neergelê in* ***Giannoulis*** *se saak. Soos blyk uit die tweede stelling, geskied inmenging waar die opgelegde vonnis ontstellend onvanpas ('disturbingly inappropriate') is. Uit die samehang blyk dit dat Holmes*

AR nie hier in gedagte gehad het die geval van 'n vonnis wat ontstellend onvanpas is geoordeel bloot aan die feite en omstandighede van die betrokke misdaad nie. Die vraag of die vonnis waarteen geappelleer is ontstellend onvanpas is, moet klaarblyklik beantwoord word aan die hand van 'n vergelyking tussen daardie vonnis en die minder vonnis wat opgelê is op 'n veroordeelde met 'n gelyke aandeel in die pleging van dieselfde misdaad, en met vergelykbare persoonlike omstandighede. Selfs al is daar 'n treffende verskil tussen die twee vonnisse wanneer hulle vergelyk word, beteken dit nie noodwendig dat daar ingegryp sal word nie. Daar is 'n verdere vereiste. Ingryping is alleenlik geregverdig as die ligter vonnis 'n redelike of gangbare vonnis is. Slegs dan, weens die wanverhouding in die vonnisse, kan die swaarder vonnis versag word as synde ontstellend onvanpas. ... Waar die ligter vonnis egter as onredelik of duidelik onvanpas aangemerk kan word, en die swaarder vonnis in al die omstandighede 'n gepaste een is, sou ingryping met, en versagting van, laasgenoemde vonnis nie geoorloofd wees nie, desondanks die wanbalans wat die vonnisse betref. Geregtigheid vereis dat gepaste strawwe opgelê moet word. Die stelling in ***S v Moloi and Another*** *1987 (1) SA 196 (A) op 224A is onderhewig aan bogemelde kwalifikasie."*

[10] The fact that there is a disparity in the sentences imposed by different courts on participants in the same crime is thus not *per se* a ground upon which a court of appeal can interfere. The question remains throughout whether the sentence imposed on the specific appellant under consideration is disturbingly inappropriate and/or whether the court of first instance misdirected itself in relation to the specific sentence under appeal. Lenient sentences imposed on co-perpetrators do not in themselves constitute such a misdirection, especially where it appears as if the sentences imposed on such co-perpetrators were startlingly or inappropriately lenient. This, we suggest, is also the position which prevails whenever co-perpetrators are separately tried by different courts, whether such separation is attributable to the fact that certain of the perpetrators pleaded guilty and were dealt with in terms of Section 112, whether they entered into plea bargaining arrangements or whether the trials were separated for other procedural reasons.

[11] In **Hansen v Regional Magistrate Cape Town & Another 1999 (2) SACR 430 (C)** the applicant had been declared a habitual criminal after being found guilty of housebreaking with intent to steal. The applicant had exhausted his appeal remedies. Thereafter the applicant's brother, who had participated in the same offence, was sentenced to a far more lenient sentence, by another court. Applicant brought review proceedings to set aside his own sentence on the basis of a new ground, namely the disparity

of sentence imposed upon him compared to that imposed on his brother. The judgment dealt primarily with a procedural question, namely whether a court of review could still interfere where an accused had exhausted his various appeal remedies – that question is not presently relevant. In delivering judgment Davis J did suggest (albeit *obiter*) that the guarantee of equality before the law contained in Section 9(1) of the Constitution might, where there is an unjustified disparity in the sentences handed out to co-accused, include the right to have the heavier sentence suitably ameliorated. As stated above, a disparity *per se* does not constitute a ground for interfering on appeal, especially where the more lenient sentence appears wholly inappropriate. We do not read the judgment in **Hansen v Regional Magistrate Cape Town** as suggesting the contrary.

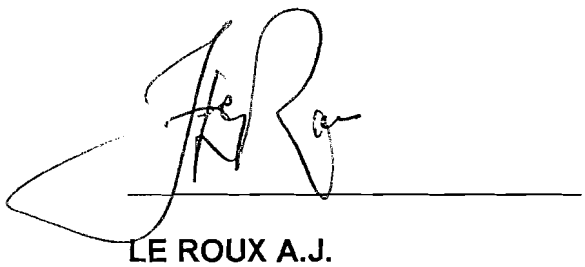
[12] Different considerations obviously appear where co-accused are sentenced by the same court, in the course of a single trial. If, in that situation, a heavier sentence were to be imposed by the same court, in the same trial, on certain of the accused and a far more lenient sentence on others who participated to the same degree, then that discrepancy would have to be justified. If no justification can be found in such a case, then the heavier sentence unjustifiably imposed could, at least *prima facie*, warrant interference on appeal. Similar considerations do not, however, apply where the more lenient sentence was imposed by another court, especially where the more lenient sentence was the result of a plea bargaining process

which, in itself, would frequently result in a more lenient sentence. (**S v Esterhuizen & Others 2005 (1) SACR 490 (T); S v Yengeni 2006 (1) SACR 405 at 429 (B) S v Yengeni 2006 (1) SACR 405 at 429 (B)).**

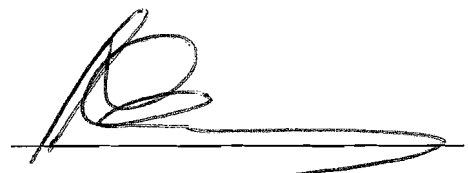
[13] In the present matter, we are not persuaded that the disparity that exists between the sentence handed out to the Appellant and that imposed on his co-participants in the plea bargaining process is *per se* a factor indicating that another court might conclude that the Appellant's sentence should have been reduced. The key consideration is whether the sentence imposed by the court of first instance was disturbingly inappropriate or constituted a misdirection. We have once again considered the judgment of the trial magistrate, the arguments advance on appeal and when leave to appeal was sought. We are not persuaded that there is a reasonable chance that another court might find that the sentence imposed was disturbingly inappropriate or was the result of any misdirection by the trial magistrate. We are thus of the view that leave to appeal against the sentence should not be granted.

[14] An order granting the appellant bail pending the determination of the application for leave to appeal is currently valid. The state indicated that it had no objection to such bail being further extended until the finalisation of any application which the Appellant might now direct to the Supreme Court of Appeal, for leave to appeal against our judgment.

[15] The application for leave to appeal is refused. The Appellant's bail is extended until the expiry of the period within which the Appellant has to apply to the Supreme Court of Appeal for leave to appeal. If such application is brought, bail is extended until such application for leave to appeal has been finally dealt with.



LE ROUX A.J.



OOSTHUIZEN A.J.