

SOUTH AFRICA / JUDGMENT

Daniels and Another v S (A347/19) [2021] ZAGPPHC 555 (20 August 2021)

[2021] ZAGPPHC 555

COURT

North Gauteng High Court, Pretoria

BEFORE

Mahlangu SK, Tlhapi W

CASE / FILE NUMBER

A347/19

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A347/19

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

CIRCULATE

TO MAGISTRATES: NO

20

AUGUST 2021

In

the matter of:

COURTNEY

DANIELS 1st

Appellant

LYNETTE

STEVENS 2nd

Appellant

and

THE

STATE Respondent

JUDGMENT

MAHLANGU AJ

INTRODUCTION

1. The Appellants were charged and convicted on 19 October 2017 in the Regional Court of Pretoria on 12 counts of fraud, as well as one count of conspiracy to commit fraud in terms of Section 18(2) (a) of the Riotous Assemblies Act, Act 17 of 1956. They were each sentenced to 20 years imprisonment made up as follows:

Ad Count 1: 5 years imprisonment.

Ad Count 2: 5 years imprisonment.

Ad Count 3: 5 years imprisonment.

Ad Count 4: 15 year's imprisonment.

Ad Count 5: 5 years imprisonment.

Ad Count 6: 15 years imprisonment

Ad Count 7: 5 years imprisonment

Ad Count 8: 5 years imprisonment

Ad Count 9: 5 years imprisonment

Ad Count 10: 15 year's emprisonnent

Ad Count 11: 5 years imprisonment

Ad Count 12: 5 years imprisonment

Ad Count 13: 5 years imprisonment.

2. The court further ordered that, for purpose of sentence, counts 1,2 ,5 ,7 ,8 ,9 ,11, 12 and 13 are to run concurrently with count No.3. It was further ordered that counts 4 and 6 are to run concurrently with count no.10.
3. The Appellants applied for leave to appeal against their convictions and sentences. The court a quo refused leave to appeal except for Count 13 on all other counts on conviction, and granted leave to appeal on the totality of the sentences."
4. The Appellants applied for the late filing of their Heads of Argument, the application was not opposed, Condonation is granted.

FACTUAL

BACKGROUND

5. It is common cause that the first and second appellants were 24 and 42 years old respectively, when the offences were committed. The first appellant was employed by SBV (Pty) Ltd as a supervisor of tellers. He was responsible for defrauding his employer on different occasions of sums of money which were then deposited into the banking account of the 2nd Appellant. The amount stolen as reflected in the charges totaled an amount of R875, 000.00.
6. The second appellant approached an accountant who ran a Financial Services business and deposited an amount of R150, 000.00 into his business account to be invested on her behalf.
7. The appeal on Count 13 relates to a concession by both Counsel at trial that Count 13 constituted a duplication of the fraud charges because the state had proved beyond a reasonable doubt the completed offences of fraud.

ISSUES

8. The issues for determination in this appeal relates to:
 - a) whether or not count 13 constituted a duplication on the fraud charges.
 - b) Whether the court a quo misdirected itself by over emphasizing the seriousness of the offences by not giving due consideration to the personal circumstances of the appellants.

EVALUATION OF THE EVIDENCE

COUNT 13

9. I am of the view that the appeal against conviction in respect of count 13, which is a conspiracy to commit fraud should be upheld due to a duplication of conviction, as there was only a single intent and further due to the fact that a completed offence of fraud was proved.
10. In the case of *Sv Agliotti* 2011(2) SACR 437(GSJ) it was held that once the state has proved that the pre-planning to the commission of the offence, resulted in the completed offence, a conviction on conspiracy cannot be legally sustained. In dealing with Section 18(2)(a) of the Rioters Assembly Act 17 of 1956, Kgomo J in *Agliotti* (supra) stated :

this section does not differentiate between a successful conspiracy(that is one followed by the actual commission of the offence) and one not followed by any further steps towards the commission of the crime.High Courts have held that this provision ought to be utilised only if the envisaged crime has not yet been committed."

On the other hand, there is no absolute prohibition on the State to charge somebody with conspiracy even when the main crime has in fact been committed. It would of course be wrong to convict a person of both the conspiracy and the main crime since the two in fact merge, just like when the successful attempt to commit the crime merges with the completed crime".

The concession by the Counsel for the Stae was correct. The Appeal in respect of count 13 should succeed.

SENTENCE

11. It is trite that punishment is pre-eminently within the discretion of the trial court and, that a court of appeal, may only interfere with a sentence imposed where the sentence is disturbingly inappropriate, or, where as a result it could be said that the trial court misdirected itself, *S v Zalzwedel and Others* 1999 (2) SACR 586 (SCA) at 591 F-G.
12. Counsel for the appellants contended that the trial court overemphasized the seriousness of the offences, specifically the deterrent effect of the sentences thereby ignoring the personal circumstances of the appellants. Counsel for the respondent on the other hand contended that the trial court thoroughly considered the personal circumstances of the appellants and that the 'tenor of its judgment' was indication of such consideration.
13. Of the 12 counts only three counts namely count 4, 6 and 10 fell to be considered under the purview of section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the Act"). The amounts involved exceeded R100 000.00, which consequently called for a minimum prescribed sentence on each count of 15 years imprisonment, unless the court found substantial and compelling circumstances to be present, entitling the court to deviate from such prescribed sentence. The rest of the counts 1, 2, 7. 8. 9 and 12 were not impacted by the Act.
14. In commencing judgment, the trial court emphasized on the balance to be exercised when sentencing, in the trite principles stated by Schreiner JA in the locus classicus *State v Zinn*, being an accused person's personal circumstances, the seriousness of the offence and the interests of society. In respect of both

appellants, their personal circumstances had been articulated in pre- sentencing reports which the trial took cognizance of. The trial court also acknowledged its obligation to extend mercy where deserved. It is also evident from the trial record that the contents of the reports were fully addressed during mitigation.

15. The first appellant was 24 years old when the offences were committed and he was a first offender. Although his parents were on pension, as the only one employed he took over sole responsibility as breadwinner, for his extended family after the death of his brother. He had not committed any criminal offence after his arrest for the crimes in this matter and, even though he lost his employment with SBV he did not stand idle, he looked for other work. The second appellant was a 55 year old widow and she had previous convictions for fraud and theft. She had three children who had attained majority. She lived with her youngest child

who was twenty years old and was in a rehabilitation centre for drug abuse. She was temporarily employed at an old age home. It was also mentioned that the Asset Forfeiture Unit had put a hold on the policy investment she had with Old Mutual in

the amount of about R300 000, 00, which will be used to compensate for the loss suffered as a result of the fraud. The appellant had informed her legal representative that there was likelihood of her home also being forfeited. The said immovable property was not yet registered in her name in that a process first had to be engaged to transfer same from the Municipality, then to the estate of her deceased husband before it would be transferred to her. It was intended that if she was to be sentenced to a term of imprisonment

for a period of 15 years as envisaged in the Act, she would be released from prison as a 70 year old with no home to return to.

16. It is apt at this moment to state factors considered by the trial court:
 - (a) That it was not a spur of the moment incident of fraud; there was pre-planning involved of the various counts over a period of time; the crimes were serious;
 - (b) The first appellant was placed in an important position, a position of trust as a supervisor of tellers at the workplace which was mainly a cash facility, where vast amounts of money were dealt with on a daily basis;
 - (c) The first appellant in that position of trust facilitated the fraud and theft of a substantial amount of money;
 - (d) The money so stolen had not been recovered after a period of 13 years;
 - (e) The loss to SBV that was incurred according to evidence, far exceeded the amount stolen as testified to by Mr Wolmarans;
 - (f) The lack of consciousness of wrongdoing during commission of the multiple offences
 - (g) The conduct of both appellants which resulted in the trial being heard over a period of 13 years;
17. Having considered the personal circumstances and the above factors the court found that there were no substantial circumstances justifying a deviation and sentenced the appellants in respect of those offences falling under the Act to the minimum as prescribed of 15 years. In respect of the rest it sentenced the appellants individually on each count.
18. In *S v Malgas* 2000 (1) SACR 469 (SCA) the court prescribed that a sentencing court must be "conscious of the fact that the Legislature had ordained the prescribed sentence which should be imposed in the absence of justification. At Para [25] the court stated.

"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be imposed by imposing that sentence, it is entitled to impose a lesser sentence"

19. With regard to the first appellant I cannot say that there were any substantial and compelling circumstances that could be identified. However, the fact that he was not found to have engaged in criminal conduct for 13 years should count in his favour, especially where one has to consider the effect of a lengthy term of imprisonment long after the commission of the crime. While the trial court put blame on the appellants for the long duration of the trial, blame should also have been accorded to the State, which could have attempted to bring the appellants speedily to trial and conclude same.
20. What was not mentioned in my view in the judgment in respect of the second appellant was the fact that the Asset Forfeiture Unit had its eye on an amount of about R300 000, 00 invested with Old Mutual and also the possibility of her also forfeiting her residence. This could have served as a substantial and compelling factor. Regarding both the appellants what was not also fully addressed were the other aspects of deterrence and retribution. While society has a right to be protected against serious crime, the courts must in deserving cases exercise some mercy.
21. Counsel for the appellants addressed a plethora of cases which involved substantial amounts and where lesser sentences were imposed. The trial court also gave attention to these, but misdirected itself in not considering the fact that the payment of R300 000.00 from the second appellant's investment could have reduced the amount involved. Mr Wolmaran's evidence did not give any details regarding the value of the loss to SBV over and above the amount which was stolen
22. It is important to mention that the trial court did give consideration to taking some of the counts together for purposes of sentences as argued by counsel for the appellants in mitigation but decided against it. In a plethora of cases the undesirability of globular sentences is recognized In the unreported judgment of *Karabo Rantlai v The State* Case 1178/2016 (SCA) delivered 13 September 2017) Bosielo JA stated at paragraph 10 and 11 :

"[10] As it is clear.... that there is no absolute bar against imposing globular sentences, there seems to be unanimity in our courts that depending on the facts of each case, it can be effectively used as exceptional circumstances, See *S V Nkosi* 1965(2) SA 414 at 416. This is because there will be circumstances where for instance it can be used to ameliorate the effect of sentences which may appear to be shockingly inappropriate. Furthermore, such a sentence may be appropriate where an accused person pleaded guilty to multiple offences which are closely connected in terms of time and common fact and in respect whereof the individual sentences, may cumulatively amount to a sentence that induces a sense of shock. There may be other cases where such sentences might be appropriate. (My underlining).

[11] The serious difficulties which are likely to be caused by imposing such a Sentence were highlighted as far back as Nkosi supra where the court stated at 415-416:

"In the majority of cases no practical advantage results from imposing a globular sentence. A reasonable sentence can usually be determined by deciding upon a reasonable sentence for each offence and then by scaling down the sentence if the cumulative effect renders the total unreasonable.

23. It is common cause that in this matter the appellants did not plead guilty. In Rantlai supra it was recommended that in mitigation, the cumulative effect of the sentences imposed, that some of the sentences were to be ordered to run concurrently. This is exactly what the trial court implemented. It took the trial court 13 years to finalize the matter. Instead of sending the matter back for considering sentence afresh, I am of the view that the court has sufficient information to deal with the matter and may deal with a fresh sentence. Having determined that there were substantial and compelling circumstances present, I would reduce sentences prescribed in respect of the prescribed counts 4, 6 and 10 and opt for a globular sentence in respect of the lesser offences.

24. In the result the following order is granted.

[24.1] The appeal against conviction in respect of count 13 is upheld, and the sentence of 5 years imprisonment is set aside.

[24.2] The appeal against sentence in respect of counts 1-12 is upheld and the sentences imposed in respect of counts 1-12 are set aside and are to be substituted by the following:

24.2.1 Counts 1, 2, 3, 5, 7, 8, 9, 11 and 12 are taken together for purpose of sentence and a sentence of 15 years imprisonment is imposed.

24.2.2 Count 4 a sentence of 12 years imprisonment is imposed;

24.2.3 Count 6 a sentence of 12 years imprisonment is imposed;

24.2.4 Count 10 a sentence of 12 years imprisonment is imposed;

24.3 It is ordered that the sentence imposed in respect of 24.2.1; 24.2.2 and 24.3 are to run concurrently with the sentence imposed in respect of count 2.4.

MAHLANGU SK

Acting Judge of the High Court of South Africa

Gauteng Division PRETORIA

I agree,

TLHAPI W

Judge of the High Court of South Africa

Gauteng Division, PRETORIA

For the Appellant: Adv P F Pistorius, Pretoria

For the Respondent: Adv S. Scheepers, Pretoria

Date of hearing: 28 May 2021

Date of judgment: 20 August 2021

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