

SOUTH AFRICA / JUDGMENT

Marais v S (A04/2019) [2019] ZAGPJHC 305 (28 June 2019) [2019] ZAGPJHC 305

COURT

South Gauteng High Court, Johannesburg

BEFORE

P D Kekana, Twala M L

CASE / FILE NUMBER

A04/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A04/2019

JUSTIN LOUIS MARAIS APPELLANT

And

STATE RESPONDENT

JUDGMENT

KEKANA AJ:

- [1] The appellant in this matter is appealing his sentence of 7 years. He was charged in the Regional Court of Kemptonpark on one count of theft of R208 084.13. He was accused of having stolen the money from his employer over a period of time. He pleaded not guilty to the offence. He was convicted as charged and sentenced on the 09 February 2018.
2018. The appellant successfully applied to the trial court for leave to appeal his sentence which was granted court on the 19 November 2018.
- [2] At the beginning of this matter Mr Kruger, the appellant's legal representative brought a substantive application for

postponement. Mr Kruger indicated that the messenger in his office failed to file the application for postponement with the registrar on time and handed up the application. The reason provided for the postponement sought was that the appellant required time to petition the SCA.

- [3] According to Mr Kruger appellant initially made an application to appeal conviction only, which was refused on the 23 February
2018. He then petitioned the High Court and the petition was refused. He subsequently applied to the trial court for leave to appeal his sentence and he was granted leave. Mr Kruger indicated that the petition was not yet prepared because the court order that he needed to use had an error. He indicated that he had difficulty getting the registrar's office to correct the error on the order. He then requested that the matter be postponed sine die.
- [4] Upon enquiry from the court he confirmed that the appellant was out on bail. When quizzed further about the circumstances of the appellant's bail he decided to abandon the application for postponement and proceed with the appeal. It however became apparent that the appellant's bail lapsed when the petition was refused.

SENTENCE

- [5] It is trite that sentencing is a matter pre-eminently falling within the discretion of a trial court. The appeal court can only interfere with sentence where the sentence is vitiated by an irregularity or misdirection or is shockingly inappropriate. (See: Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA)).

- [6] It is contended on behalf of the appellant that the trial court misdirected itself by failing to call for a probation officer's

report. According to Mr Kruger, the legal representative who represented the appellant at the trial handled the case ineptly. He

submitted that the personal circumstances of the appellant were not fully canvassed and the trial court ought to have dug deep. He further submitted that a probation officer's report would have shed more light on the circumstances of the appellant, for example the fact that he has a child with mental retardation and he is the sole breadwinner.

- [7] It was submitted further that the trial court failed to enquire further about the appellant's sick children. Had the court

considered the interests of the children it would have imposed a non custodial sentence. It is contended that the failure to call for a probation officer's report constitutes a misdirection and that this matter ought to be remitted to the trial court.

- [8] Mr Ndou for the respondent submitted that the appellant was legally represented at the trial. I am in agreement with the respondent's

counsel that the appellant had a choice at the trial. He and his legal representative made a choice not to lead the evidence in

mitigation or to obtain a probation officer's report. It was therefore contended on behalf of the respondent that there was no misdirection on the part of the appellant.

- [9] Mr Kruger conceded that the probation officer's report in this case is discretionary and further that the recommendations by the probation officer are not binding. In sentencing the appellant the trial court took into consideration the fact that the appellant's wife and minor children were dependant on him financially and further that he had sick children. The trial court however rejected the submission that it should as a result issue a non-custodial sentence. I can therefore find no misdirection on the part of the trial court.
- [10] It was argued in the alternative that the sentence of 7 years was inappropriately shocking when one considers the amount of money stolen. Mr Kruger denied that the appellant is a white collar criminal but rather that he was an ordinary man who stole money to provide for his sick children.
- [11] It was submitted that the appellant was sacrificed on the altar of deterrence. Further that the trial court overemphasized the seriousness of the offence; the interests of the society; prevalence of the crime and the impact the crime had on the victim. It is further contended that Appellant had only one previous conviction for driving a vehicle while the concentration of alcohol in his blood was not less than 0.05 grams per 100 millilitres.
- [12] The Respondent submitted that: (a) the appellant showed no remorse for his actions; (b) he held a position of trust as a manager and abused the position he held at Cochrane Steel Products; (c) he committed this offence over a period of time and it appears to have been part of an elaborate plan.
- [13] The personal circumstances of the Appellant were placed before the trial court as follows:
- (a) he was 29 years old at the time
 - (b) he had three minor children; (c) he lost his job and he also lost his house and vehicle as he could no longer afford to make the payments;
 - (d) he was forced to move in with his parents-in-law doing odd jobs to support his family as his wife is unemployed.
- [14] The trial court found that the appellant violated his position of trust with the employer and that the crime he committed was serious. It treated the appellant as a first time offender but found that a non custodial sentence was not appropriate. It also found that the fact that the appellant stole the money because of his sick children was not an excuse.
- [15] It is my respectful view that the trial court approached the sentencing dispassionately, objectively and upon a consideration of all relevant factors. (See: *S v SMM* 2013 (2) SACR 292 SCA par 13). It arrived at a counterbalance between the crime, the offender and the interest of the society. There is no evidence to support the contention that one element was unduly accentuated at the expense of and to the exclusion of the others. (See: *R v Zinn* 1969 (2) SA 539 (A) at 540).

[16] I am of the view therefore that there was no material misdirection on the part of the trial court in imposing the sentence it imposed in this case. In the circumstances the appeal falls to be dismissed.

[17] I would therefore make the following order:

A. The appellant's appeal is dismissed.

B. The appellant is ordered to hand himself to the authorities within 24 hours of the handing down of this judgment.

P D KEKANA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree:

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE OF HEARING: 30th May 2019

DATE OF JUDGMENT: 28th June 2019

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