SOUTH AFRICA / JUDGMENT

Mohlomi v S (A126/2017) [2017] ZAFSHC 198 (3 November 2017)

[2017] ZAFSHC 198

COURT
Free State High Court, Bloemfontein

BEFORE
Reinders, Mathebula

CASE / FILE NUMBER
A126/2017

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A126/2017

In the appeal between:

MELATO JACOB MOHLOMI

Appellant

and

THE STATE Respondent

CORAM:

REINDERS, J et MATHEBULA,J

JUDGEMENT:

REINDERS, J

HEARD ON:

16 OCTOBER 2017

DELIVERED ON: 03 NOVEMBER 2017

[1] The appellant was arraigned in the district court of Botshabelo on one count of fraud. He pleaded not guilty to the charge on 4 May 2016 but was convicted on 19 October 2017 and sentenced to imprisonment for eighteen months on the same date. Leave to appeal against sentence was granted by the court a quo and this appeal lies against sentence only.

[3] Heads of argument was prepared by Mr Monyamani on behalf of the appellant however, Mr Ramaili assisted by Ms Khooe appeared before us. In the heads of argument as well as in oral submission before us it can be gleaned that the upshot of the attack on the sentence imposed by the court a quo is as follow:

The learned magistrate misdirected herself in finding that the seriousness of the offence and interest of society outweighed the

personal circumstances of the appellant, in finding that a fine, suspended sentence or correctional supervision was not a suitable

sentence and in overemphasizing the retributive element of punishment in relation to rehabilitation of the appellant. In essence it is submitted that the sentence imposed by the magistrate is shockingly inappropriate, excessively long without mercy and compassion and accordingly warrants interference by this court.

[4] Ms Nameka on behalf of the State supported the sentence on the papers and in argument before us. She contended that the trial court did not misdirect itself in any way.

[5] A brief exposition of the facts upon which the appellant was found guilty appears from the record as follows:

The appellant was in the employ of First National Bank ("the bank") as a relations manager. During one of the visits at the branch by a task group who ensures that the correct procedures in transactions were adhered to, certain irregularities was found. The state witness Ms Van den Berg (a forensic investigator) testified that she was informed of same and after an investigation established that there were several incidents where appellant performed unauthorised transactions (a reversal of service fees). These transactions amounted to R 6 161.26 and were done over the period 17 October 2013 to 17 October 2014. Same ended up in the accounts of the appellant and even some of his family members. Appellant had no authority to perform transactions of such reversals in his capacity as a relations manager. The appellant denied that he was not authorised to do these transactions.

[6] This appeal lies against the sentence imposed by the court a quo. It is trite that sentencing is pre-eminently a matter for the the discretion of the trial court.

See: Moosajee v S [1999] 2 All SA 353 (A).

Interference on appeal with the sentence so imposed is not justified in the absence of a material misdirection or irregularity. It is limited to the extent that the sentence is disproportionate or harsh or the sentence imposed is so startingly inappropriate as to induce a sense of shock.

See: S v Pieters 1987(3) SA 717 (A).

See also: S v Sadler [2000] 2 All SA 121 at 334d - 335g.

[7] It is evident from the record that the learned magistrate considered the triad consisting of the crime, the criminal and the interest of society.

The court a quo had regard to the appellant's personal circumstances. It was argued however that the trial court only "fleetingly"

referred to the personal circumstances of the appellant which "leaves any reasonable reader of a record with the impression that the court a quo totally overlooked the appellant's personal circumstances". In handing down sentencing the learned

magistrate made mention thereof that appellant is a 45 year old first offender who has a family whom he maintains and that he lost his employ as a result of the fraudulent transactions. In my view it is clear that the trial court took the personal circumstances of the appellant into consideration.

[8] Ms Khooe elaborated on the consideration of the personal circumstances of the appellant with specific reference to the constitutional imperative of also considering the best interest of minor children. Although not mentioned in appellant's heads of argument, we were referred by her to S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008 (3) SA 232 (CC). The Constitutional Court considered the duties of the sentencing court in light of s 28 (2) of the Constitution where the person who was being sentenced was the primary caregiver of minor children. It is of importance to note that in dealing with the proper

approach to be followed, it was held at para [28]:

"The directions in this matter referred to sentencing of primary caregivers, not the wider class of breadwinners. Simply put, a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and the child attends school regularly."

[9] In casu it is evident that the appellant as breadwinner is not also the primary caregiver. From his own testimony under oath in mitigation of sentence the appellant indicated that he has three children (twins 12 years of age and a 4 year old) and his wife is not employed. He however is. The court a quo considered that the appellant maintains his family. The personal circumstances of the appellant (which includes the effect of the sentence on his spouse and children) is but one factor and not the only factor to be balanced by the court a quo to arrive at a just sentence.

[10] The learned regional magistrate in handing down sentence balanced the personal circumstances of the appellant against the seriousness of the crime. She considered the prevalence of the crime and the interest of society, especially in having confidence in banks when dealing with their money. She acknowledged that the amount was small but weighed it up against the gravity of the offence. She alluded to the fact that that the appellant had been

in a fiduciary relationship with the bank. Had the fraudulent transactions not been discovered, it is uncertain for how long it would have continued. From evidence supplied by the bank it is clear that fraudulent transactions is of great concern to the banks as there are continuing high levels of fraud committed by employees.

[11] Counsel for the appellant argued that the learned magistrate erred in not applying the element of mercy in sentencing. I cannot agree with him. Having concluded that a suspended sentence or correctional supervision would not be suited she indicated that the she took into account the mitigating factors in deciding upon the term of incarceration that she imposed.

[12] In this matter, I was not referred to any comparative cases justifying the argument that the learned magistrate erred in imposing

the aforementioned sentence which induced a sense of shock. Instead she was correct in imposing custodial sentence demonstrating that the conduct of the appellant is frowned upon by the courts. The sentiment of the court was succinctly emphasised in NDV v S 2015 (4) All SA 268 (SCA) at paragraph (51]. There the Supreme Court of Appeal said:

"I therefore consider that the fraud committed by NDV against her employer, when she was in a position of trust, is such that a custodial sentence is required. Society must be assured that persons who abuse positions of trust for their own gain are not allowed to walk free".

[13] The personal circumstances of the appellant weighed against the objective gravity of the offence, it's prevalence as part of economic crimes in our country and the message send out to other employees in the banking system do not tip the balance in the favour of the appellant in my view.

[14] I have not been convinced by the appellant that the court a quo erred in arriving at the sentence as she did nor am I of the view that the sentence is shockingly harsh or startingly inappropriate. I therefore come to the conclusion that the appeal against appellant's sentence should fail.

[15] I accordingly make the following order:

The appeal is dismissed.

C. REINDERS, J

I concur.

MATHEBULA, J

On behalf of the Appellant: Adv. M Ramaili

Assisted by:

Adv. N. J. Khooe

Instructed by:

Bafana Monyamani Attorneys

c/o Mphafi Khang Inc

BLOEMFONTEIN

On behalf of the Respondent: Adv. C.Z. Nameka

Director:

Public Prosecutions

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