

SOUTH AFRICA / JUDGMENT

Rudman v S (CA&R103/2012)

[2017] ZAECHGC 71 (2 June 2017)

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COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, N Molony

CASE / FILE NUMBER

CA&R103/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO CA&R103/2012

DATE HEARD: 17/05/2017

DATE DELIVERED:

02/06/2017

In

the matter between

ROYDEN

ROY RUDMAN

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] The appellant and one Mr Adrian Botha stood trial in the Regional Court, Port Elizabeth, on 28 counts of fraud and one count of contravening s 11 of the Banks Act 94 of 1990. The appellant was convicted on all counts and Botha was acquitted on all counts. The counts of fraud were treated as one for the purpose of sentence and the appellant was sentenced to nine years' imprisonment. He received a suspended sentence for contravening s 11 of the Banks Act. This appeal lies against the sentence of nine years' imprisonment, leave having

been granted on petition to the Judge President.

- [2] The fraudulent scheme devised by the appellant was the following: he was the sole member of a close corporation trading as Makana Financial Services, a micro lending business (the business). He invited investors to invest in the business on the pretence that the business was providing bridging finance to members of the South African National Defence Force (the SANDF) who had qualified for severance packages. The bridging finance would only be available to SANDF members if confirmation that they qualified for severance packages was received from the SANDF and if they were Absa Bank account holders. The SANDF member would be required to sign a debit order authorising Absa Bank to transfer the severance package to the business once the severance package was paid to the SANDF member. The appellant represented to the four complainants that the scheme would earn a certain percentage return per transaction. The complainants would also be repaid the full amount of his/her capital investment. However the business, to the knowledge of the appellant, was not providing bridging finance to SANDF members, Absa Bank was not involved in an arrangement to debit the accounts of SANDF members, and there was no scheme in terms of which the complainants would receive a return on their money. The appellant's misrepresentation induced the complainants to invest sums of money in the business during the period August 2001 to April 2002. The total amount invested was R3 127 000.00.

While some interest payments were made to the some of the complainants, and one of the complainants was repaid a portion of his

capital investment of R160 000.00, the bulk of the capital investments were not recovered.

- [3] The trial commenced on 6 June 2006 and the appellant was convicted on 7 March 2008. Thereafter he applied to this court to review and set aside the proceedings on the basis of incompetent legal representation. The application was dismissed and the appellant

was similarly unsuccessful on appeal. He was ultimately sentenced on 8 August 2012. Leave to appeal against sentence

was refused by the trial court but, as already mentioned, granted on petition to the Judge President. The appellant served 11 months of his sentence before being released on bail. The appellant then applied to the trial court for leave to appeal the conviction but leave was refused. He then petitioned the Judge President for leave to appeal the convictions. This petition was unsuccessful, as were further applications for leave to appeal to the Supreme Court of Appeal and the Constitutional Court. This process delayed the hearing of the appeal against sentence, which was eventually heard on 17 May 2017.

- [4] The appellant was in his early thirties when the offences were committed and 43 years old at the time he was sentenced. Three sentencing reports were obtained: a correctional supervision report, a probation officer's report, and a psycho-social

report compiled by a private social worker. These reports contained details of the appellant's personal circumstances.

He appears not to have had a happy childhood. His father abused alcohol and frequently assaulted him and his mother. After leaving school the appellant was employed as a farm manager. At the time of the preparation of the reports he was involved in a business which bought and sold scrap metal, and was a one-third shareholder in a mining company whose intended business was the exporting of semi-precious stones.

- [5] The appellant is married and at the time of sentencing had five dependent children: three from a previous relationship and two from his marriage.
- [6] In 1991 he was convicted of nine counts of fraud and was sentenced on each count to 60 days' imprisonment, conditionally suspended for five years.
- [7] According to the private social worker the appellant was of the view that he had not acted with the intention to defraud the investors. The social worker was of the view that the appellant was trying to demonstrate his innocence and that he found it difficult to verbalise remorse. The Correctional Services official reported that the appellant accepted guilt and was very remorseful and for this reason was not a candidate for direct imprisonment. She recommended correctional supervision. The probation officer reported that the appellant admitted the offences and expressed regret and was prepared to repay the complainants at the rate of R10 000.00 per month.
- [8] At the hearing of the appeal, the appellant applied for further evidence to be admitted with regard to sentence. The gist of the evidence, as contained in his affidavit and an annexure thereto, related to how he has conducted his life since his release from prison in 2013, although he also included material which existed at the time he was sentenced and recounted his unpleasant experience while in prison. From February 2014 he found work on a contract basis and eventually became a project manager for a company during which employment he trained previously disadvantaged persons in skills and development. In 2015 he opened his own business and employed more than 30 people. The business has grown successfully. He is a member of a business forum which aims to provide job opportunities and uplift the community. He is in the process of acquiring a quarry licence for prospecting and expects to employ more than 40 people in this venture. It was also accepted that he and his wife have since had another child.
- [9] In the matter of *Terblanche v S ZAECGHC 13* (5 March 2015) the appellant had been sentenced to ten years' imprisonment and six years passed before his appeal against sentence was heard. In that matter there was an application to lead further evidence which consisted of the appellant's successful business endeavours, track record and family life following his release on bail pending the appeal. Chetty J, with Pickering J and Plasket J concurring, said the following at para [6]:

“There is a long line of authority to the effect that an appellate tribunal may only take account of the circumstances which existed at the time the trial court imposed its sentence. Corbett JA expressed the position thus in S v Immelman:

“The general rule is that this Court must decide the question of sentence according to the facts in existence at the time when the sentence was imposed and not according to new circumstances which came into existence afterwards (R v Hobson 1953 (4) SA 464 (A) at 466A) and, even if there are exceptions to this rule (see Goodrich v Botha and Others 1954 (2) SA 540 (A) at 546A - C), this case does not appear to constitute such an exception””.

[10] Chetty J referred to the matter of S v Swart 2004 (2) SACR 370 (SCA) where Nugent JA at para [6] stated:

“Section 322(2) of the Criminal Procedure Act provides that upon an appeal against sentence the Court of appeal may confirm the sentence or it may delete or amend the sentence and impose 'such punishment as ought to have been imposed at the trial'. It has been held that it is implicit in the powers conferred upon a Court of appeal that it may take account only of circumstances that existed at the time the trial court imposed its sentence (R v Verster 1952 (2) SA 231 (A) at 236A - D; R v Hobson 1953 (4) SA 464 (A) at 466A - B; S v Marx 1992

(2) SACR 567 (A) at 573i

- j) but it has been suggested that exceptional circumstances might permit a departure from that rule (S v Marx 1989 (1) SA 222 (A) at 226C). I have assumed that this Court may indeed admit further evidence in exceptional circumstances, bearing in mind particularly that a court is bound to ensure that every accused is given a fair trial as provided for in s 35(3) of the Bill of Rights. In the present case no such circumstances exist, for the evidence that is sought to be adduced does not take the matter further and its exclusion cannot prejudice the respondent. To the extent that the evidence is admissible at all it constitutes no more than confirmation that the respondent has thus far observed all the terms of the sentence that the trial Court imposed and that he is a person who is ordinarily polite and well-behaved. We would, in any event, assume that the respondent is complying with the terms of his sentence (if that were to be relevant) and the respondent's character was in any event established before the trial Court. The evidence accordingly adds nothing material and no purpose is served by admitting it.”

[11] Chetty J concluded as follows at para [8]:

“The fallacy in the argument advanced before us arises from the conflation of the term “exceptional circumstances” with the appellant’s current personal circumstances. The facts that (i) six (6) years have elapsed since sentence was imposed, (ii) the appellant was incarcerated for eight (8) months, and (iii) has in the interim remarried and become a successful businessman, may be mitigatory, but do not themselves, constitute the exceptional circumstances that would justify their admission as evidence. In other words, the factors may have been relevant to a reconsideration of the appellant’s sentence had exceptional circumstances been present to justify a taking into account of factors not in existence at the time sentence was imposed.”

[12] I am of the view that this conclusion is utterly apposite to the present case. In particular, the delay in the hearing of the appeal is attributable to the efforts of the appellant in applying for leave to appeal against the convictions. The evidence sought to be admitted does not constitute exceptional circumstances and is thus irrelevant and should not be admitted.

[13] Before considering whether or not there are grounds for interference with the sentence, there are two aspects of the appellant's

argument which need to be dealt with.

[14] The first relates to the trial court's factual findings in convicting the appellant. There were numerous references in the appellant's counsel's heads of argument to aspects of the evidence of two of the complainants which, so it was submitted, demonstrated that they were untruthful. The trial court had overlooked such evidence or had been misled. In dealing with a particular aspect of the evidence of one of the complainants, counsel went so far as to say that:

"Furthermore, a document purporting to be an agreement between the Second Complainant, Mr Michau and Mr Rudman is so clearly false that it is disturbing that the Magistrate and the Courts that refused leave to appeal, despite the attention being drawn to it did not notice what was clearly a false document." (My emphasis.)

[15] A similar attempt to revisit the merits was made in Terblanche (*supra*). It is worth quoting in full what Chetty J had to say in this regard at para [2]:

"It behoves me further, as a precursor to a consideration of the validity of the submissions advanced on behalf of the appellant, to dispel the notion that the dictates of justice require us to revisit the trial court's factual findings on the merits. Suffice it to say that this court is not competent to consider the merits of the conviction. During his address in the application for leave to appeal, counsel for the appellant expressly refrained from making any submissions on the merits. The argument advanced was confined solely to the propriety of the sentence imposed. The court a quo dismissed the application for leave to appeal against the conviction but granted leave only against the sentence imposed. Notwithstanding,

the appellant's prolix heads of argument contain copious references to evidence adduced on the merits in order to persuade us that the trial court's factual findings require revisitation. In argument before us appellant's counsel verbalized such invitation. We decline the request. It is disingenuous, under the guise of an appeal against sentence, to inveigle an appellate court to embark upon a reconsideration of a trial court's factual findings. The appropriateness of the sentence imposed must be considered solely in light of the trial court's factual findings extant the judgment on the merits and sentence."

[16] I would add that the remark that it was “disturbing” that not only the trial court but the High Court, the Supreme Court of Appeal and the Constitutional Court failed to notice a factor relating to the convictions, was gratuitous, pointless, and bordered on contempt. Counsel, who was also counsel for the appellant in Terblanche, knew that the end of the road had been reached insofar as the convictions were concerned and that reconsideration of the evidence

pertaining to the merits was impermissible.

[17] The second aspect related to the acquittal of Botha. It was submitted that he was equally guilty and because he was acquitted,

all the blame was laid at the door of the appellant. This was a factor, so it was submitted, to be taken into account in deciding whether or not the sentence induced a sense of shock.

[18] This is quite an unusual submission. The acquittal of Botha cannot be revisited. This court cannot decide that he was in fact guilty and should have shared the blame. His acquittal therefore plays no part in deciding whether or not there are grounds for interference with the sentence. The appellant, as the convicted person, stood to be sentenced in accordance with the accepted principles of sentencing. The same would have applied to Botha had he too been convicted.

[19] In his very thorough judgment on sentence, the magistrate took into account the appellant's personal circumstances, the undisputed seriousness of the offences, and the interests of society. It was submitted on behalf of the appellant that the magistrate did not adequately consider the mitigating factors and concentrated on the aggravating factors. A reading of the judgment does not bear out this submission. The magistrate specifically mentioned the appellant's personal circumstances, including his difficult life as a child and the lasting impact it had made on him. With regard to the seriousness of the offences, the magistrate took into account that they had been committed over a period of time and not in a moment of weakness. He took into account the amount of the loss suffered by the complainants and that the appellant had not made any attempt to compensate them. He was of the view that the appellant had tried to delay the proceedings by bringing the review application and this underscored his lack of remorse and ability to accept responsibility for his actions. He was further of the view that because no reason had been offered for the appellant's conduct, he had committed the offences to improve his lifestyle.

[20] With regard to the interests of society, the magistrate referred to what was said by Kroon J in *S v Clifford and Others* [2009] ZAECPEHC 1 (3 March 2009)

“Dat bedrog op sigself as ‘n ernstige misdaad aangemerkt moet word, is nou eenmaal so. Die reg wat elke lid van die gemeenskap het, en waarby die gemeenskap as geheel ‘n belang het, om kommersiële transaksies aan te gaan sonder die risiko dat die ander kontrakterende party hom aan bedrog rakende die transaksie skuldig maak, is ‘n reg waarop die howe baie jaloers is. Die gemeenskap het verder ‘n belang daarby dat aanvaar kan word dat die bankwese in die land ingevolge normale bankpraktyk bestuur word. Dít is ‘n houding wat uitbasuin moet word. Dit moet ondubbelsinnig by julle, asook

andere wat eendersdenkend mag wees, tuisgebring word dat bedrieglike optrede eenvoudig nie geduld sal word nie. Die beskerming deur die howe van die gemeenskap teen sulke optrede dra by tot die ekonomiese vooruitgang van die gemeenskap as geheel.”

[21] The magistrate considered other sentencing options, namely correctional supervision and imprisonment in terms of 276 (1) (h) and s 276 (1) (i) of the Criminal Procedure Act 51 of 1977 respectively. He was however of the view that neither sentence would reflect the seriousness of the offences or act as a deterrent.

[22] In *S v Bogaards* 2013 (1) SACR 1 (CC) the following was said at para [41]:

“Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.”

[23] I can find no irregularity or misdirection in the magistrate's judgment. He meticulously and fairly considered all the relevant factors and other sentencing options. Nor do I regard the sentence as disproportionate. The appellant operated his calculated and intricate fraudulent scheme over many months, causing a combined loss to the complainants of a very large amount of money. A sentence of direct imprisonment for a substantial period was entirely appropriate.

[24] The appeal is dismissed.

J M ROBERSON

JUDGE OF THE HIGH COURT

MOLONY N:-

I agree

N MOLONY

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the Appellant: Adv T N Price SC, instructed by Netteltons Attorneys, Grahamstown

For the Respondent: Adv W J de Villiers, Director of Public Prosecutions, Port Elizabeth

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