

SOUTH AFRICA / JUDGMENT

Troskie v S (CA&R73/2016) [2016] ZAECHGC 53 (27 July 2016)

[2016] ZAECHGC 53

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S Rugunanan, M J Lowe

CASE / FILE NUMBER

CA&R73/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE NO : CA&R

73/2016

Date

heard : 27 July 2016

Date delivered : 27

July 2016

In

the matter between :

CARON

TROSKIE

Appellant

and

THE

STATE

Respondent

JUDGMENT

RUGUNANAN, AJ :

- [1] This is an appeal against sentence with the leave of the trial court. The appellant appeared before a magistrate in Port Elizabeth on a charge of fraud. She was legally represented and following a plea of guilty under section 112(2) of the Criminal Procedure Act 51 of 1977 ('the Act') she was sentenced to 3 years' direct imprisonment. The sentence incorporated a declaration of unfitness to possess a firearm.
- [2] The incident that led to the prosecution of the appellant is set out in the in the charge sheet and in her written statement under the Act. These items are incorporated in the record on appeal and it is considered unnecessary to detail their content save to state that the fraud was committed by the appellant on 13 February 2013 and occasioned an irrevocable loss of R15 000.00 to the complainant, her former employer.
- [3] A court of appeal will only interfere with the exercise of a trial court's discretion on sentence if the sentence imposed is strikingly disparate (stated otherwise, disturbingly inappropriate), or vitiated by irregularity, or misdirection (*S v Swart* 2000 (2) SASV 566 (HHA) at 574a; *S v Petkar* 1988 (3) SA 571 (AD) 574 C-D). These formulations with respect to the power of an appeal court to interfere with a sentence are aimed at determining what is fundamentally the same thing, namely, whether there was a proper and reasonable exercise of discretion by the court imposing sentence. The crux of the inquiry ultimately is that if the discretion was properly and reasonably exercised a court of appeal has no power to interfere; if it was not, then it is free to do so (*S v Kgosimore* 1999 (2) SACR 238 (SCA) at para [10]).
- [4] It was submitted on behalf of the appellant that the sentence is open to interference on the grounds of misdirection in that the magistrate failed to properly consider her personal circumstances and by doing so over emphasised the seriousness of the offence and the interests of society.
- [5] The appellant testified during mitigation. She was aged 36 at the time of the commission of the present offence. Her personal circumstances are that she is married but estranged from her husband with whom she has two minor children aged 7 and 9. The children live with their father in East London. Her level of education is matric, further to which she has an uncompleted course in public relations. She testified that she is currently serving a sentence of 7 years' imprisonment with 2 years suspended; this sentence was imposed on her during September 2013 following a conviction for fraud. It is relevant at this juncture to mention that the State did not prove any previous conviction/s against the appellant as is provided for in the Act. Accordingly, she was treated as a first offender. More about this is said below.

- [6] The magistrate delivered an *ex tempore* judgment on sentence. Without intending criticism, the judgment is decidedly brief but it does not necessarily follow that because something has not been mentioned, therefore it has not been considered. With reference to the triad identified in *S v Zinn* 1969
- (2) SA 537 (A) at 540 G-H consisting of the crime, the offender and the interests of society, what appears significantly absent from the magistrate's reasoning is the relative weight attached to these various aspects which influenced his decision on sentence. But immediately apparent, as a striking feature, is his emphasis on the impact a sentence would have for potential offenders.
- [7] Despite having voluntarily disclosed her other conviction, there is nothing to suggest that the appellant is a habitual fraudster. The offences were committed during the period 2009 to 2013. The present offence was committed on 12 February 2013 and proceeded to trial on 16 September 2015 when the appellant was summarily convicted and sentenced following her plea of guilty. On being questioned by the magistrate, the appellant stated in respect of the other offence that she had not been convicted for it when the present offence was committed. Her sentence for the other offence was imposed during September 2013. On this basis the appellant was treated as a first offender, and correctly so.
- [8] Although nothing is known of her personal circumstances during the aforementioned period nor of the origins of her fraudulent conduct, the appellant contritely acknowledged that she 'did not make the right decisions'. It is considered appropriate to mention at this point that the plea of guilty discloses that the appellant committed the offence of fraud for personal gain. Whether this can be attributed to greed or need, is uncertain. During her evidence in mitigation she also disclosed that the amount of money involved has never been repaid to the complainant. This emerged under cross-examination. While incarcerated it is also evident that she has persevered in becoming a responsible member of society. She attended several rehabilitation programs conducive to character development and decision making and is currently, through sponsorship assistance, studying towards a bachelor's degree in ministry. Seemingly influenced by these programs, she pleaded guilty to the present charge and expressed remorse for her wrongdoing. In this regard her potential for rehabilitation was either completely overlooked or received insufficient consideration by the magistrate and was in fact under-emphasised. By emphasising the impact of a sentence on potential offenders without attaching sufficient weight to her potential for rehabilitation, the approach adopted by the magistrate points to the sacrifice of the appellant on the altar of deterrence.
- [9] Respectfully, the result achieved does not lend itself to a conclusion that there was a proper and reasonable exercise of discretion by the magistrate upon imposing sentence. The magistrate's approach amounts to a misdirection which entitles this court to interfere with the sentence imposed and to revisit the identification of a sentence which is appropriate in all the circumstances of this matter.

- [10] It is also considered that the sentence of 3 years' direct imprisonment in the particular circumstances of this case induces a sense of shock. In *S v Sinden* 1995 (2) SACR 704 (A) a sentence of 6 years' imprisonment with 2 years conditionally suspended was confirmed by the court of appeal on facts indicating that the appellant, a first offender, had shown no sign of true remorse for having committed theft of R148 000 from her employer in circumstances where the motivation arose from greed rather than need. In *S v Landau* 2000
- (2) SACR 673 (WLD) an appeal by a broker against a sentence of 5 years' imprisonment following a conviction on a plea of guilty to some 48 counts of fraud, alternatively theft from his employer, absent genuine remorse, was dismissed notwithstanding the fact that the appellant was a first offender. A sentence of 5 years' imprisonment was considered appropriate in *S v Erasmus* 1999
- (1) SACR 93 (SECLD) in the case of an accused who stole some R2 million from his employer and was genuinely remorseful for the consequences of his conduct. Although the mitigating and aggravating factors in each of the cases mentioned may vary, the cases lend support for the view regarding the sentence imposed in the present matter.
- [11] A consideration of the totality of the evidence with regard being had to the nature of the offence, the appellant's personal

circumstances and the interests of society leads to the conclusion that a sentence of 2 years' direct imprisonment is justified in the circumstances of the matter. It bears mention that the practical effect of this sentence is that it does not assume concurrent status with the other sentence. It is within the discretion of a court to order that any sentence imposed by it, or a portion thereof, runs concurrently with a sentence previously imposed by a different court. It is stated in *R v Breitenbach* 1988 (4) SA 286 (TPD) at 293 A-B, that this consideration "vorm deel van die hof se algemene diskresie met betrekking tot vonnis en vorm veral deel van die oorweging van die kumulatiewe effek van vonnisse op n beskuldigde."

[12] In the result the following order will issue :

[12.1] The appellant's conviction is confirmed; the appeal against sentence succeeds;

[12.2] The sentence of 3 years' imprisonment is set aside and substituted with a sentence of 2 years' imprisonment, 6 months of which is ordered to run concurrently with the sentence previously imposed;

[12.3] The substituted sentence is ante-dated to 16 September 2015.

S RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

I agree. It is so ordered.

M J LOWE

JUDGE OF THE HIGH COURT

Appearances:

For Appellant : Adv H Charles instructed Grahamstown Justice Centre

For Respondent : Adv D Els instructed National Director of Public Prosecutions, Grahamstown

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2016/53.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/troskie-v-s-unknown-topic-aecghc-2016>

Prepared on 11 October 2026 · Esheria