IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A18/2014

In the appeal between:

M[…] S[…] L[…] Appellant

and

THE STATE Respondent

CORAM: DAFFUE, J *et* MURRAY, AJ

JUDGMENT BY: DAFFUE, J

HEARD ON: 20 OCTOBER 2014

DELIVERED ON: 30 OCTOBER 2014

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[1] On 5 June 2013 appellant was convicted of fraud by the magistrate of Viljoenskroon and sentenced the same day to 3 (three) years' imprisonment.

[2] Appellant pleaded guilty to fourteen counts of fraud committed over a period of seven and a half months involving a total amount of R13 000.00.

[3] The court *a quo* granted appellant leave to appeal against her sentence of direct imprisonment.

[4] The following appear from the record:

4.1 Appellant pleaded guilty and a section 112(2) statement was prepared on her behalf, signed by her and handed in to the court *a quo*. Therein she admitted liability and she was duly convicted.

4.2 She was the branch manager of the post office in Viljoenskroon when the offences were committed.

4.3 She prepared fourteen withdrawal notices without the knowledge and consent of one J[…] C[…], the guardian of M[…] C[…], during the period from 3 February 2012 to 20 September 2012 and in doing so, pretended to be J[…] C[…]. M[…] C[…] was a client of the post bank and held an account with this institution from which the funds were withdrawn.

4.4 All counts were taken together for purposes of sentence and appellant was sentenced to 3 (three) years' imprisonment.

4.5 At the time of conviction and sentence appellant was thirty four years old, unmarried and the mother of a sixteen year old child. At the time she was the prime caregiver of the child and also cared for her mother and her niece. She was employed at the post office for thirteen years, but was dismissed as a consequence of her actions. She was still unemployed when she was sentenced.

4.6 The attorney appearing for appellant in the court *a quo* did not deem it necessary to lead any evidence pertaining to the circumstances at appellant's home at the time, bearing in mind that she was unemployed. He did not request a pre-sentence report from a probation officer to determine whether appellant was in fact the prime caregiver of her child and, more in particular, to ascertain the child's best interests and more importantly, the plight of the child should the mother be incarcerated. The court *a quo* also failed to heed the guidelines formulated by the Constitutional Court in **S v M** 2007 (2) SACR 539 (CC) at paragraph [36] to which I shall refer *infra*.

4.7 Appellant is not a first offender. On 26 May 2010 she was convicted of fraud committed on 5 January 2009 and sentenced to R12 000.00 or thirty months' imprisonment of which R8 000.00 or twenty months' imprisonment was suspended for five years on condition that she is not convicted of theft or fraud committed during the period of suspension.

4.8 The court *a quo* tabulated the mitigating and aggravating circumstances and concluded that appellant had a chance to rehabilitate, but that she did not grab the opportunity afforded to her and instead committed the present offences notwithstanding a suspended sentence hanging over her head.

[5] Mr Lencoe, who appeared for the State, submitted that an accused should not be allowed to abuse and undermine the criminal justice system by continuing to commit crimes in the hope that she will escape a custodial sentence by using the welfare of her minor child as an excuse. He submitted that a non-custodial sentence runs the risk of making a mockery of the criminal justice system and eroding the public confidence in the system. Finally he submitted that the appeal should be dismissed.

[6] Mr Vertue, who appeared for the appellant, conceded that direct imprisonment would in any other circumstances be a fair and just sentence. However, *in casu* the court *a quo* failed to consider the interests of appellant's child and did not make any enquiries as to the plight of the child in the event of appellant's imprisonment. He relied on section 28 of the Constitution in support of his argument. He finally submitted that the appeal should succeed and that the sentence to be imposed must allow appellant to care for her child.

[7] I requested from Mr Vertue details in respect of the child and he informed us from the Bar that the child was busy writing

his final Grade 12 examinations. He stated that his attorney had informed him that the child will be turning seventeen in December 2014. This appears to be wrong. Not only was it placed on record in June 2013 in the court *a quo* that the child was sixteen by then, but it is nowadays unheard of that children finish their Grade 12 year at the age of sixteen. The probabilities are that the child will be turning eighteen, but the order that I intend to make will cater for the interests of appellant's child on the assumption that he is still a minor and will remain a minor in the foreseeable future.

[8] The appellant was in a position of trust. She unlawfully withdrew funds to which a minor or disabled person was entitled. The amounts involved are not huge, but the consequences of the losses suffered by the account holder might be tremendous. The community must be protected against abuse of this kind. One certainly regards one's bank manager or post master as a person of integrity and does not expect such a person to steal money out of one's account.

[9] The Supreme Court of Appeal has come out strongly in favour of stricter sentences for white collar crimes and I quote the following from **S v Sadler** 2000 (1) SACR 331 (SCA) at 335g – 336b paras [11] and [12]:

> "[11] … So called 'white-collar' crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such

> inadequate penalties are the classification of 'white-collar' crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for 'white-collar' crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from 'respectable' backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.
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> [12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it."

[10] Section 28(2) of our Constitution stipulates that a child's best interests are of paramount importance in every matter concerning the child. This is echoed in section 9 of the Children's Act, 38 of 2005. In normal circumstances and especially in the event of infants or young children I would have upheld the appeal and referred the matter back to the court *a quo* to comply with the guidelines set out by the Constitutional Court in **S v M** (*supra*). Clearly our sentencing courts must adhere to these guidelines in order to give due respect to our Constitution and the rights of children in particular. The appeal record speaks for itself. The court *a*

quo did not apply its mind to whether it would be necessary to take steps to ensure that the child would be adequately cared for while his caregiver is incarcerated. However a referral to the court *a quo* would be impracticable *in casu*. The appellant is out on bail and would have been in a position to care for her child since the imposition of sentence in June 2013 until now. If the matter is remitted to the court *a quo* it will be heard during 2015 only. By then the child would have finished his schooling and most probably would have become a major.

[11] It was submitted on behalf of appellant in the court *a quo* as follows:

> "Sy is die alleen broodwinner in die huis. Sy sorg vir haarself, haar ma, haar kind en vir haar niggie."

Even if appellant's mother does not contribute financially towards the upbringing of the child, she stays in the same house and, there being no evidence to the contrary, will probably be able to care for the child in his mother's absence.

[12] In **<u>MS v S</u>** 2011 (2) SACR 88 (CC) the majority dismissed an appeal of a 33-year old mother with two young children of eight and five years old respectively who was not totally responsible for their care. As was done in that case – see paragraphs [66] to [68] – it seems that I should order the National Commissioner of Correctional Services to ensure

that a social worker visits the child regularly and that he/she provides the relevant Department with reports on his well-being during his mother's absence and only until he reaches the age of eighteen. This will mitigate the possibility of the child enduring hardship during his mother's absence.

[13] For these reasons the appeal should fail.

[14] The following order is made:

1. The appeal against sentence is dismissed.

2. The National Commissioner for Correctional Services is directed to ensure that a social worker in the employ of the Department of Correctional Services visits the child of the appellant, M[…] S[…] L[…], at least once every month during her incarceration, only until he reaches the age of eighteen, and submits reports to the Office of the National Commissioner as to whether the child is in need of care and protection as envisaged in section 150 of the Children's Act, 38 of 2005 and, if so, to take the steps required by that provision.

J. P. DAFFUE, J

I concur.

H. MURRAY, AJ

On behalf of appellant:	Adv L.P. Vertue Instructed by: Rossouws Attorneys BLOEMFONTEIN
On behalf of respondent:	Adv M. Lencoe Instructed by: Office of the Director of Public Prosecutions BLOEMFONTEIN

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