

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: MTHATHA)**

CASE NO: RCUMB 36/05

In the matter between

THE STATE

APPELLANT

And

MARIO QUINTON PETERS

RESPONDENT

APPEAL JUDGMENT

PAKADE J.:

[1] This is an appeal by the Director of Public Prosecutions against the sentence of R10 000-00 or three years imprisonment plus a further three years imprisonment which was suspended on condition that the respondent paid South African Revenue Service(SARS) an amount of R112 925- 90 not later than a specified date. The appeal is with the leave of two judges of this Division granted in terms of section 310A of the Criminal Procedure Act, 51 of 1977.

[2] The conviction and sentence arose from six charges of theft of value added tax (vat) amounting to R112 925 -90. The respondent was convicted on his plea of guilty to the charges and for purposes of sentence all the charges were treated as one.

[3] The sentence is challenged on the ground, *inter alia*, that it is inappropriate and out of proportion to the magnitude of the offences for which the respondent was convicted because as submitted by Adv Van Drunick, counsel for the state, the magistrate, while over-emphasizing the personal circumstances of the respondent, also under-emphasized the economic impact of the offences to the *fiscas*; is irregular, unreasonable, unbalanced and based on an improper exercise of discretion which brought about a miscarriage of justice.

[4] The Magistrate has justified the sentence as appropriate on the grounds that the respondent is capable to pay back the embezzled amount, that there was some delay in the finalization of the trial, that he is a first offender and also that his plea of guilty indicates that he is remorseful. In arriving at the sentence, the magistrate does not appear to have balanced the mitigating factors against the aggravating circumstances, save only to mention that the offence is serious as having been actuated by greed and had constituted a breach of trust. If she did the balancing exercise that should have been reflected, but was not, in the type of the sentence imposed.

[5] The record shows that the respondent is a 34 year old young family man who is a bread winner. His wife was pregnant with twins who were due to be born in two weeks time from the date of sentence. He is a sole member

of a close corporation, the MP Civils Construction CC. The close corporation is registered as a vendor for the collection of value added tax for the purposes of paying it to the South African Revenue Service.

[6] During December 2002 and October 2003, the respondent collected vat amounting to R112 925 -90 but failed to deposit it to SARS although he had a credit balance in his bank account. This is theft and he was correctly convicted.

[7] It cannot be correct, however, that a mere plea of guilty constitutes an element of remorse. The accused must go further than merely tender a plea of guilty. The element of remorse must be inferred from the surrounding circumstances of the plea itself, like spilling the beans and confessing his guilt, making good the damage he has caused to the complainant and handing himself over to the police. The plea of guilty must show genuine penitence on his part. This view is fortified by Ponnann JA in *S v Matyityi*¹ in which he said:

“Remorse was said to be manifested in him pleading guilty and apologizing through his counsel (who did so on his behalf from the bar) to both Mrs KD and Mr C. It has been held, quite correctly, that a plea of guilty in the face of open and shut case against an accused is a neutral factor. The evidence linking the respondent to the crimes was overwhelming...

Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an apprehension and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. *It is to the surrounding actions of the accused rather than what he says in court that*

¹ Case no: (695/09)[2010 ZA SCA at p. 7] par [13]

one should rather look (emphasis mine). In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions”.

[8] All these factors are peculiarly within the knowledge of the respondent in *casu* who knowingly withheld them from the *court a quo* for it to explore his allegation of remorse. Because he has not given evidence, the court still remains oblivious of his motive to commit the offence and what caused his subsequent change of heart. The documentary evidence provided conclusive proof of his guilt beyond a reasonable doubt, thus closing every escape route for him. In my view, the plea of guilty in the circumstances of his case does not constitute an element of remorse and the magistrate, with respect, misdirected herself in finding that it does.

[9] The principles of sentencing have been laid down and followed in a number of authoritative cases. The test for interference with a sentence on appeal was restated by **Marais JA** in the classical case of **S v Malgas**² as follows:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to *usurp* the sentencing discretion of the trial court.

Where material misdirection by the trial court vitiates its exercise of that

2 2001 (1)SACR 469(SCA); 2001(2) SA 1222; [2001] All SALR 220) par 12 at 478 d-g

discretion, an appellate court is of course, entitled to consider the question of sentence afresh. ... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court... when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as ‘shocking’ ‘startling’ or ‘disturbingly’ inappropriate”.

[10] In **S v Salzwedel and others**³ the lenient sentence imposed on the respondent upon a conviction of a horrendous premeditated, brutal murder on a disabled hunch back was set aside on appeal. The trial court had reasoned that direct imprisonment would serve no purpose other than retribution and sentenced them to wholly suspended sentences.

[11] The difference between the sentence that was imposed by the trial court and the sentence that the appeal court would have imposed had it been sitting as a court of first instance was so marked that it called for interference with the sentence. The appeal court found that the trial court exercised its penal discretion unreasonable. The appeal court also found that the trial court had underemphasized the seriousness and the gravity of the offence and that it is what resulted in an unreasonable and improper exercise of its discretion⁴.

[12] As already alluded to above, the sentence imposed by the magistrate is not the culmination of a balancing exercise of the basic triads of sentencing as set out in **S v Zinn 1969 (2 SA 537)(A)**. There is no indication in the

³ 1999 (2 SACR 586 [SCA]

⁴ {See also S v Sadler 200 (1) SACR 331 A at 334 par 8: page 335 par 10: S v Swaart 2000(2) SACR 556(A)}.

record that apart from the personal circumstances of the respondent which the trial court appears to have overemphasized, the gravity of the offence and the interest of society were ever taken into consideration as factors also affecting the imposition of the sentence. These factors have to be taken into consideration on an equal basis without over or under-emphasizing the one against or above the other. The seriousness of the offence and the protection of society should be considered on a equal basis with the mitigating factors. This, the sentencing court did not do.

[13] The sentence imposed on the respondent was fashioned in such a way that once he paid the fine and refunded the embezzled amount, he would be a free man. The three years suspended sentence would have no effect on him and the fine was not of sufficient deterrence. In my view that type of sentence sends a wrong message to the public, especially in a serious offence involving theft of public funds by a person entrusted with a duty to collect and pay them over to the Receiver of Revenue.

[14] In the circumstances, the magistrate committed a misdirection of the nature which justifies interference with the sentence imposed on the respondent.

The following order is therefore made;

1. The appeal succeeds;
2. The sentence is set aside;
3. The accused is sentenced to pay a fine of R10 000-00 or in default to undergo (3) three years imprisonment.

4. The accused is further sentenced to undergo (3) three years imprisonment suspended for five (5) years on condition the accused is not convicted of theft or an offence involving an element of dishonesty committed during the period of suspension.
5. The accused is ordered to refund the South African Revenue Service an amount of R112 925-90.
6. The sentence is antedated to 17 February 2009.

L.P PAKADE

JUDGE OF THE HIGH COURT

02 FEBRUARY 2011

I agree:

D.Z DUKADA

ACTING JUDGE OF THE HIGH COURT

For the Appellant	:	Adv A. Van Drunick
Represented by	:	National Public Prosecution
For the Respondent	:	Adv A.R. Duminy
Instructed by	:	Keightley Incorporated

Heard on : 20 November 2009

Delivered on : 10 February 2011