FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 249/2009

In the matter between:-

RICHARDO WHITTAKER Appellant

versus

THE STATE Respondent

CORAM: CILLIé *et* MOCUMIE, JJ

HEARD ON: 1 FEBRUARY 2010

DELIVERED ON: 4 FEBRUARY 2010

APPEAL

MOCUMIE, J

[1] The appellant appeared in the Regional Court of Kroonstad on three counts of theft of diesel valued at R535 454.17. He pleaded guilty and was convicted as charged on all three counts on 11 May 2009. He was sentenced to 8 (eight) years imprisonment of which 2 (two) years were suspended for 4

years on certain conditions. All three counts were taken as one for purposes of sentence. He is now, with leave of the court *a quo,* appealing against sentence only. The appeal is opposed by the State.

[2] The circumstances surrounding the commission of these offences can be gleaned from the accused's statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ("the CPA").

[3] In short, the appellant was a manager at Engen (Pty) Ltd depot in Kroonstad. He was in charge of and responsible for the sale and despatch of processed petroleum products including diesel. On three specified occasions he, together with one Riaan van den Heever, stole fifty three thousand and twenty three (53023) litres of diesel from Engen depot and sold it to a farmer in the area of Senekal and kept the rest for themselves. He was paid R100 000.00 and Riaan R67 000.00 in return.

[4] The grounds of appeal as set out in the appellant's amended notice of appeal are that the trial court erred

(a) by finding that section 51 of the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentences Act") is applicable in this case;

(b) the sentence is shockingly inappropriate;

(c) by overemphasising the seriousness of the offence as well as the interests of the society and underemphasising the personal circumstances of the appellant;

[5] The approach to be adopted in an appeal against sentence is reflected in the following passage in the judgment of Nicholas AJA in **S v Shapiro** 1994 (1) SACR 112 (A) at 119j – 120c:

"'1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'"

[6] The purpose of sentencing is generally known. It has been repeatedly stated that a sentencing court must consider the three basic principles of sentencing, the triad, when considering an appropriate sentence, viz The seriousness of the offence, the offender and the interests of the society as propounded in **S v Zinn** 1969 (2) SA 537 AD. As Friedman J formulated it in **S v Banda and Others** 1991 (2) SA 352 (BG) at 355A - B:

"The elements of the triad contain equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation; the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his

> circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the Courts is sound and is incompatible with anything less".

[7] In as much as it is important not to overemphasise the seriousness of the offence or the interests of society so is it important not to overemphasise the personal circumstances of an accused. All three are equally important. See **S v Sadler** 2000 (1) SACR 331 (SCA). It is indeed correct to consider previous cases of similar circumstances but it must be kept in mind that previous similar cases are but just guidance in coming to a balanced and fair decision. Ultimately each case must be determined on its own unique set of facts so that the punishment meted out in a particular case must not only suit the offender but must suit the seriousness of the offence and the interests of society as well.

[8] Theft like any other offence is undoubtedly serious. The commission of serious crimes such as fraud and theft, "so- called white collar crimes", by persons in position of authority and trust is

becoming prevalent and pandemic in this country and in the province in particular as correctly noted by the presiding officer. Employers are consequently forced to employ security personnel and install sophisticated and expensive devices to curb the commission of offences committed under circumstances such as *in casu*. Engen Company suffered a huge financial loss estimated at R535 454.00.

[9] What counted in the appellant's favour were his personal circumstances which the presiding officer clearly took into account, as reflected on pages 51 to 53 of the transcribed record, where he stated that at the time the appellant committed these offences he was 45 years of age; he was married with two children aged 22 and 15 years respectively; he had never been convicted of any offence previously; he pleaded guilty which is a sign of remorse and acceptance of responsibility for the wrong he had committed; he reimbursed Engen Company for its loss and he has since lost the job that he has had for over 23 years.

[10] The most aggravating factors in this case are the following. The appellant did not of his own accord disclose to his company his unlawful behaviour. It was only discovered through the diligent work of the company's auditors. It was only when the appellant was confronted therewith that he came clean by admitting what he had done. The appellant committed these offences out of greed to gamble and lead a life style which he could not afford and was well aware, as a 45 year old in management position, of the repercussions of his actions.

[11] Once he started the first time and was not caught, he consciously set out his second and the third treacherous deeds which suggests to me that he did not act on the spur of the moment or spontaneously. He consciously planned and plotted with other staff members and members of the community to the detriment of Engen Company. The ripple effect of his deeds is immeasurable even against the society at large because inevitably if Engen were to become bankrupt numerous people would lose their jobs. The interests of society and the deterrent

objective of sentencing require that effective imprisonment should be imposed to stamp out white collar crimes.

[12] Mr Van Rensburg submitted that our courts have in a number of cases considered a term of imprisonment in terms of section 276(1)(i) of the CPA to be appropriate that is a short term of imprisonment coupled with correctional supervision which would see appellant spend only ten months in prison or even less subject to the discretion of the Commissioner of Correctional Services. He referred this Court to, amongst others, **S v Wasserman** 2004 (1) SACR 251 (T).

[13] The **Wasserman**-case is distinguishable from this case in that Wasserman was diagnosed with pathological gambling disorder some years before the commission of the offences she had committed. The court *a quo* found the disorder to be a compelling and substantial circumstance justifying a lesser sentence than the prescribed. *In casu* the appellant was not a diagnosed gambler and the presiding officer did not invoke the provisions of the Minimum Sentences Act. He clearly started on

a clean slate and considered the three basic principles of sentencing to wit the seriousness of the offence, the offender and the interests of the society and came to the conclusion that a term of imprisonment partly suspended was the most appropriate in the circumstances. As Patel J stated in **Wasserman**, *supra*, at 256a:

> “In the Supreme Court of Victoria, Court of Appeal, in R v Petrovic [1998] VSCA 95, 10 Charles J, with whom Orminsten JA and Tagdell JA concurred, said:
>
> '20. The fact that an offender was motivated to the commission of the crimes in question by an addiction to gambling will no doubt usually be a relevant, and may be an important, consideration for a judge sentencing the offender for those crimes. But as Tagdell JA said in R v Cavillin (unreported, Court of Appeal, 24 July 1996) at 10:
>
> "It is . . . important that the public does not assume that a crime which is to some extent generated by a gambling addiction, even if it is pathological, will, on that account, necessarily be immune from punishment by imprisonment."
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> 21. It is considerations such as these which have led this Court to say more than once that it will be a rare case indeed where an

> offender can properly call for mitigation of penalty on the ground that the crime was committed to feed a gambling addiction; see R v Scott Aiden Dawson (unreported, Court of Appeal, 27 May 1997) at 6; R v Gregory Frank Pascoe (unreported, Court of Appeal, 29 April 1998) at 4 - 5.'

> This case, in my view, is not one of those rare cases

> 'where appellant can properly call for mitigation of penalty on the ground that the crime was committed to feed a gambling addiction.'

Mr. Van Rensburg could not argue convincingly that the presiding officer misdirected himself or committed any irregularity in this regard.

[14] In the case of **S v Prinsloo** 1998 (2) SACR 669 (WLD) Leveson J at 672b emphasises this point succinctly when he states the following:

> "I adhere to the view that theft from an employer must be heavily penalised. The employer is entitled to expect unswerving honesty from the employee in return for the wages he pays and the benefits he gives him. Nothing but implicit acceptance of that obligation will keep the wheels of commerce turning smoothly.."

[15] Further on at 672f-g he states:

> "I continue to hold the view that it must be brought home to the public and to employees in particular that light-fingeredness with respect to employer's property will not be tolerated by the courts."

I am in agreement with the above dicta.

[16] The fact that the appellant was a manager and not just an ordinary employee is a strongly aggravating factor. There is no justification for this Court or any other reasonable court to come to the conclusion that the presiding officer misdirected himself in any manner. In the result I conclude that not only is imprisonment the most appropriate sentence in the present case but I also consider that a period of effective six years imprisonment is fitting to the crime, both because of the circumstances of the case and the substantial amount involved in this offences. In my view the appeal must be dismissed.

[17] Lastly I find it unnecessary to traverse Mr Van Rensburg's submissions on the applicability of the Minimum Sentences Act in this set of facts as the presiding officer did not invoke the applicable legislation.

[18] **In the premises I make the following order.**

Order

1. The conviction is confirmed.

2. **The sentence imposed on 11 May 2009 is confirmed.**

B.C. MOCUMIE, J

I concur.

C.B. CILLIé, J

On behalf of the appellant: Adv. Van Rensburg
Instructed by:
Justice Centre
Bloemfontein

On behalf of the respondent: Adv. M. Strauss

Instructed by:
Director of Public Prosecution
Bloemfontein

BCM/sp