

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A73/2008

In the case between:

ANNA CATHARINE BEZUIDENHOUT

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* MOLOI, AJ

JUDGMENT:

MOLOI, AJ

DELIVERED ON:

12 FEBRUARY 2009

- [1] This matter came before us on appeal against the sentence of two (2) years imprisonment of which one (1) year imprisonment was suspended for a period of five (5) years conditionally imposed by the magistrate on a charge of fraud. The appellant was granted leave to appeal by the trial magistrate and was released on bail of R1 000,00 pending the outcome of the appeal.
- [2] The appellant had pleaded guilty to the charge of fraud and admitted all the allegations against her in a statement

submitted in terms of section 112(2) of the Criminal Procedure Act No. 51 of 1977 (“the CPA”). She admitted having submitted to her insurance company a false claim of loss of her gold and diamond ring valued in the amount of R12 999,00 in a robbery. During the investigation of the claim by the company and upon confrontation by the insurance company’s investigator before payment of the amount claimed was made to her, she admitted the falsity of her claim.

- [3] As reasons for her conduct the appellant stated that she was out of cash at the time; she was expecting a child; she was unemployed; she was sick and feared she would loose the child she was expecting because of the complications she had with the pregnancy and had no medical aid fund to cover her costs in a private hospital or clinic. She had not considered seeking assistance from a public medical facility available. At the time of the commission of the offence the appellant was 23 years of age, she and her husband were staying with her parents, she had one other child and the one she was expecting was six months old at the time of her

sentencing. She had nobody else but her mother to look after the children if she was sentenced to a term of imprisonment and it was undesirable to impose such a sentence on her in the interests of the children. She could afford to pay an amount of only R2 000,00 if a fine was imposed.

[5] A probation officer who investigated the appellant's circumstances had recommended the imposition of a suspended sentence in terms of the provisions of section 297(1)(b) of the CPA on condition that the appellant underwent life skills programme for a period of eight (8) weeks. Both the prosecutor and the defence agreed that the appropriate sentence would be a suspended sentence. The magistrate disagreed and found the sentence he imposed eventually to be the appropriate sentence.

[6] The appellant had a previous conviction of theft for which she was sentenced on 10 March 2005 to a period of four (4) years imprisonment in terms of the provisions of section 276(1)(i) of the CPA. After serving only six (6) months of the

sentence, she was released and placed under correctional supervision for the remainder of her direct imprisonment term. Just over a year of her release and on 7 August 2006 and while under correctional supervision, she committed the offence for which she was sentenced in this appeal. Though the appellant stated she had remorse for the commission of the offence, she insisted she was not guilty of the offence for which she was convicted in 2005 and for which she was sentenced to direct imprisonment for a period of four (4) years.

- [7] Emphasis was placed on the remorse the appellant expressed in her statement in terms of section 112(2) of the CPA and repeated in argument regarding mitigation of sentence by pleading guilty. The magistrate was correct in stating that a plea of guilty is not necessarily a sign, let alone an expression, of remorse. The use of the word 'remorse' alone is not indicative of that feeling of guilt which is regretted about something wrong done or not done. In many cases the word is abused as a mitigating factor without much ado. In this case the plea of guilty and the use of the word

remorse in the statement in terms of section 112(2) of the CPA followed upon the confrontation of the appellant by the insurance investigator. For the appellant to wait until she was confronted before she became clean about the fraud is not lending itself convincingly to a manifestation of the feeling of remorse. Her insistence of her innocence in the matter she had already been convicted of and sentenced does not advance her claim of remorse either.

- [8] No fault can be found with the magistrate's approach to the sentence imposed. He considered the appellant's personal circumstances sufficiently, he considered and dealt with the seriousness of the offence in great detail and he dealt with the interests of the community comprehensibly. The magistrate considered the various options of sentencing available in pursuit of the objectives of sentencing in a balanced manner. The fact that he went so far as to suspend half of the sentence imposed also illustrates the element of mercy he blended his punishment with in view of the appellant having previously been sentenced to direct custodial sentence of four years. The balanced effect of the

magistrate's consideration and his approach to the sentencing discretion of the appellant is borne out further by the attitude of the appellant's counsel on appeal who conceded no fault could be found with the magistrate's approach and made no adverse submissions.

- [9] It is trite that the sentencing function lies squarely within the discretion of the trial court. See **R v MAPHUMULO AND OTHERS** 1920 AD 56; **S v RABIE** 1975 (4) SA 855 (A); **S v BARNARD** 2004 (1) SACR 191 (SCA). The court of appeal can only interfere where the discretion was not exercised judicially and properly or where the sentence is out of proportion to the offence committed and inordinately harsh. In **S v BARNARD**, *supra*, at 194 C – D Mlambo, AJA stated as follows:

“A court sitting on appeal on sentence should always guard against eroding the trial court's discretion in this regard, and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal court should not be trivial but should be of such nature, degree or seriousness that it shows that the

court did not exercise its discretion at all or exercised it improperly or unreasonably.”

[10] In this matter there can be no talk of the trial court’s injudicious or improper exercise of the sentencing discretion let alone a misdirection in assessing the appropriateness of the sentence imposed.

[11] As a consequence the following order is made:

The appeal is dismissed.

K. J. MOLOI, AJ

I concur.

C. VAN ZYL, J

On behalf of appellant:

Adv. S. J. Reinders
On behalf of:
Hill, McHardy & Herbst
BLOEMFONTEIN

On behalf of respondent:

Adv. S. Chalale
On behalf of:
Die Direkteur:
Openbare Vervolgings
BLOEMFONTEIN

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