

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: A70/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED

DATE: **27 JUNE 2024**

SIGNATURE:..

In the matter between:

BONGANI EDGAR LEOTLEA

SECOND APPELLANT

ANTHONY OKWECHUKU AMU

THIRD APPELLANT

And

THE STATE

RESPONDENT

Coram: **JUDGE NYATHI AND ACTING JUDGE KEKANA**

Heard 16 APRIL 2024
on:

Delivered: 27 JUNE 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system.

JUDGMENT

KEKANA AJ (NYATHI J CONCURRING)

INTRODUCTION

- [1] The two appellants were convicted in the Regional Court in Benoni on two counts Fraud in the amount of R 55 000 (count 1) and a contravention of section 4 read with section 8 of the Prevention of Organised Crime Act 121 of 1998 - money laundering (count 2).
- [2] The second appellant was sentenced to 10 years imprisonment on count 1, and 10 years imprisonment on count 2. It was ordered that 5 years imprisonment imposed on count 2 should run concurrently with sentence imposed on count 1. The effective sentenced is therefore 15 years.
- [3] The third appellant was sentenced to 10 years imprisonment on count 1 and 15 years imprisonment on count 2. It was ordered that 5 years imprisonment imposed on count 2 and should run concurrently with the sentence on count 1. The effective sentence is therefore 20 years.
- [4] The substratum of the appellant case is that the magistrate imposed a sentence which is shockingly harsh and did not exercise his sentencing discretion judicially and that he has imposed sentences with a sledgehammer, without showing mercy. The respondent's contention is that magistrate in this case exercised his discretion properly and judicially, that there is no misdirection to entitle the court of appeal to interfere with the sentence imposed.

[5] The appellants also submitted that the magistrate imposed the sentences with a sledgehammer, without showing any mercy emphasizing only the seriousness of the offences and the interest of the society, not taking cognisance of the mitigating factors pertaining to the second appellant alternatively the said factors were not considered adequately.

[6] The respondent's contention was that the factors alluded are in themselves largely immaterial. The respondent relied heavily on the case of *S v Vilakazi*¹ where it was stated that:

in cases of serious crimes, the personal circumstances of the accused will necessarily recede into the background. Once it becomes clear that the crime deserves a substantial period of imprisonment, the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are themselves largely immaterial.

[7] It is also submitted on behalf of the third appellant that magistrate erred in imposing the minimum sentence of 15 years as the amount involved before him was only R 55 000.00 (Fifty-five thousand) and as such the minimum sentence of 15 years is not applicable.

[8] I refer to the case of *S v Rabie*² at 18 where it was stated that:

fraud is always a grave and ugly offence and worse it is fanned human cupidity over a deliberate period. What is particularly heinous in this case is a factor that the fraud was deliberately planned perpetrated nineteen times over a period of seventeen months. The appellants [have] ample time for reflection and change of heart.

¹ 2009 (1) SACR 552 (SCA).

² 1975 ZASCA (78).

- [9] I am persuaded by the respondent's contention that the personal factors about the second appellant are largely immaterial considering the nature and the seriousness of the offence of fraud.
- [10] I now turn into the 15 years imposed on the third appellant on count 2, the appellant's submission is that the amount at issue is R 55 000.00 (Fifty-Five Thousand) and therefore the prescribed minimum sentence of 15 years imprisonment is not applicable.
- [11] I am of the view that magistrate erred on the imposition of 15 years imprisonment when the minimum sentence was not applicable, while the offences were committed by a syndicate, the amount before him was only R55 000.00 (Fifty-Five Thousand) and as such the imposition of 15 years imprisonment was judicially inappropriate.
- [12] In my view the sentence imposed by the trial court on its own safe for the 15 years imprisonment erroneously imposed on the third appellant on count 2 cannot be said to be inappropriate or shockingly harsh however, taking into account the cumulative effect thereof on the sentences previously imposed on the appellants by another court in 2015, one may arrive at a different conclusion, that the sentence is inappropriate and shockingly harsh. When determining an appropriate period of imprisonment, one is required to take into account the cumulative effect of several custodial sentences.³
- [13] When one takes into account the cumulative effect of the sentences imposed in this case to the sentences imposed in 2015 the ultimate results is 35 years (second appellant) and 38 years for (third appellant). Looking at the resultant years of imprisonment imposed for both appellants, one can conclude that the

³ *S v Coales* 1995 (1) SACR 33(A) at 37 A-D. Also, *S v Cele and Another* 1991(2) 256 (A) at 248 J.

effective sentence is shockingly harsh particularly as they sought to punish crime(s) arising out of the same investigation (various charges).

[14] In the case of *S v Rabie*⁴ at 2 it was stated by the Holmes JA:

that punishment is pre-eminently a matter for the discretion of the trial court. The appeal court should be careful not to erode such discretion. The test is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

[15] I am convinced that the effective sentence is disturbingly inappropriate. As such, having concluded the effective sentence is inappropriate, the appeal court is invited to consider the sentences imposed by the trial. It follows ineluctably that the aggregate sentence is unduly severe. This court is therefore at liberty to consider the sentences imposed in respect of both appellants on both counts.

[16] Therefore I make the following orders:

1. The appeal against the sentences in respect of counts 1 and 2 is upheld.

The sentences are set aside and substituted with the following:

On count 1 both appellants are sentenced to 8 years.

On count 2 both appellants are sentenced to 8 years.

2. The appeal against 15 years imprisonment imposed on the third appellant on count 2 is upheld. The sentence is set aside and substituted with the following:

⁴ Supra at 18.

The appellant is sentenced to 8 years on count 2 for money laundering.

3. The sentences imposed on count 1 and count 2 are to run concurrently.
4. In terms of s 282 of the CPA the sentence is antedated to the date they both were sentenced by the trial court.

N.D KEKANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

J.S NYATHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

JUDGMENT DELIVERED ON: 27 JUNE 2024

COUNSEL FOR THE APPELLANT: ADV N.M

INSTRUCTED BY: WILLESSTIJN ATTORNEYS

COUNSEL FOR THE RESPONDENT: ADV. J.J JACOBS (STATE)