



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

- | | |
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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |
| (4) | SIGNATURE: DATE:
N V Khumalo J 25/04/2025
Electronically delivered |

CASE NO.: A169/2023

In the matter between:

GARY RULE

APPELLANT

and

THE STATE

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 24 April 2024.

JUDGMENT

N V KHUMALO J (with NTANGA A J concurring)

Introduction

[1] The Appellant, stood trial at the Regional Court, Van der Byl Park, Pretoria (court a quo) on two counts of theft read with the provisions of s 51 (2) and s 51 (5), read with the provisions of part 2 of Schedule 11 of the Criminal Law Amendment Act 105 of 1997 ("Minimum Sentence Act"). He was convicted and sentenced to imprisonment for 10 years on count 1 and 5 years on count 2. The sentences were not ordered to run concurrently. He is therefore serving a sentence of 15 years. With leave of the court a quo he is appealing against both sentences.

[2] On count 1, he was charged with having unlawfully and intentionally stolen cash in the amount of R835 000 and on count 2 an amount of R230 000. Both amounts belonged to one PR Strydom ("Complainant"). The sentence imposed was benchmarked with the sentence of 15 years that is in terms of the applicable minimum sentence regime to be imposed on theft of an amount that exceeds an amount of R500 000.00 by a first offender.¹

[3] He was duly represented during the trial and had tendered a plea of guilty to both counts. In his statement in explanation of his Plea in terms of s 112 of

¹ Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 provides:

'(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) **Part II** of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.'

the Criminal Procedure Act 51 of 1977 ("CPA"), he admitted that he received the money from the Complainant in a car deal which he then decided to spend on paying his own debts that were caused by the COVID 19 Pandemic. He was now able to refund the Complainant over a period of time and asked the court to allow him to pay it over a period of 5 years.

[4] The court a quo allowed the Plea following the Appellants's confirmation of the contents of his 112 of the CPA statement and its acceptance by the State. The Appellant was convicted accordingly. The state confirmed that he had a previous conviction of assault for which he was sentenced to a fine of R1 000 or 60 days in imprisonment in 2014.

[5] The following submissions were made on his behalf in relation to the appropriate sentences to be imposed.

[5.1] He was 41 years old, married with 1 child, who was 14 years old. He takes chronic and anti-depression medication.

[5.2] He has a previous conviction for assault for which he was sentenced to a fine of R1 000 or 60 days in imprisonment in 2014. Since the previous conviction is not related to the two counts he has been convicted of, the court was moved to regard him as a 1st offender and be treated with more mitigation than previous convicted persons.

[5.2] He was self-employed, working as a second-hand car dealer for many years, buying and selling second hand furniture as well,

prior to his arrest. He also on the side worked as a painter for a contractor. From all this he expected to be able to make a monthly salary of between R25 000 - R30 000. He, as a result offered to pay back the money to the Complainant in monthly instalments for a period of 60 months.

[5.3] He stayed with his wife at her employment at a guesthouse in Ladysmith. The wife earns a monthly salary of R6000. The accommodation and utilities are free. His son is supported and looked after by his sister.

[5.4] Also the fact that the Appellant declared, in his explanation of plea that was accepted, that he primarily intended to deprive the complainant of his money by using it for himself and his business debts.

[6] Furthermore, a number of authorities were cited which were alleged to be comparable with his circumstances. Notable is the matter of *S v Erasmus* 1999 (1) SACR 93 (SE) where an accused was convicted of theft of almost R2 Million from his employer and sentenced to 5 years imprisonment in terms of s 217 of the Criminal Procedure Act 51 of 1977 ("CPA"). In *S v Bank* 1995 (3) SACR 62A, the Appellant was convicted of 48 counts of fraud that involves an amount of R9.75 million and sentenced to 7 years imprisonment. The sentence was confirmed on appeal. In *S v Finnegan* 1995 (1) SACR 13A, the Appellant was convicted of fraud in the amount of R8.5 million and sentenced to 4 years imprisonment, imposed in terms of s 276 of the CPA. Lastly, the matter of *S v Wasserman* 2004 (1) SACR 251 (T) was mentioned where an Appellant convicted

of theft involving an amount of R1 101 313.26 was sentenced to 5 years imprisonment.

[7] The State on the other hand submitted that it will accept that the sentences imposed with regards to both counts are to run concurrently and suggested a sentence of 7 years.

[8] In terms of the presentencing reports that were handed in as part of the evidence on sentencing, the Appellant was reported to have passed Grade 12 and to be on chronic and anti-depression medication. He felt ashamed and disappointed in himself for what he did. He took full responsibility for that and was very remorseful. He had known and done business with the victim for years and has built trust. That is the reason the money was paid to him, the Complainant believed that he will deliver the vehicles. Instead, he tried to revive a business that was no longer in operation due to Covid pandemic and paid his own debts.

[9] In accordance with the report a suspended and or correctional supervision sentence was recommended but in relation to him being able to obtain employment and pay back the money to the Complainant in at least monthly instalments of R10 000.

[10] The court a quo after taking into consideration and evaluating the circumstances presented to it for the purpose of sentencing, confirmed that the Appellant would be treated as a first offender since the previous conviction was in 2013 and was on a different, unrelated offence. His personal circumstances were acknowledged, taking cognisance of the purpose for sentencing, the effect

of the offence on the victim and the community, and that despite his offer to compensate the Complainant and the recommendation by the probation officer that he does so, upon which a suspended sentence or a correctional supervision sentence should be imposed, the court accordingly sentenced the Appellant to imprisonment, due to the fact that the Appellant was unemployed with no assets.

[11] The court further indicated that people are unjustly stealing from other people and some of them have never worked but live better than anyone else who is working and fighting for their living. They have made theft of money to be their profession and live out of it. However, none of this was said to be applicable to the Appellant. Furthermore, no mention was made to what was stated by the court a quo that for the victim to recover from this money, it is going to take him a long time and that it had taken him a very long time to accumulate the money. What however was mentioned was the Complainant's loss of a business opportunity that was going to give him money.

[12] The court a quo, as a result, reflecting on the interest of society and the victim that the appellant had to pay back the money or go straight to jail so that he is stopped from scamming other people, imposed a sentence of 10 years on count 1 and 5 years on count 2 which were ordered not to run concurrently. Effectively the Appellant to serve a period of 15 years imprisonment

[13] The Appellant is appealing against the sentences imposed and states the following to be the grounds of his appeal, that:

[13.1] The effective terms of 10 years imprisonment on count 1 and 5 years on count 2 are strikingly inappropriate in that it is out of proportion with the totality of the accepted facts in mitigation;

[13.2] The court a quo erred by not finding that a shorter term of imprisonment would be appropriate;

[13.3] The accumulative effect of the two separate sentences was not considered as the sentences on both counts were not taken together for the purpose of sentence;

[13.4] The Respondents' argument for the imposition of seven years and the recommendation on sentence in the presentence report was not considered.

[14] The issue is therefore whether considering the evidence that was before court and the principles applicable in sentencing, the court a quo exercised its sentencing discretion properly, that is if the sentence imposed is appropriate, given the Appellant's personal circumstances, the seriousness of the offence and the purpose of the sentence.

Legal framework

[15] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court², since it is steeped in the facts. The court enjoys a very wide discretion in

² *R v Maphumulo and Others* 1920 AD 56 at 57.

determining the kind and the severity of the sentence to be imposed guided by the relevant authorities and the legal principles.

[16] In evaluating the evidence tendered, to reach an appropriate sentence, one of very important principles applicable is the Zinn triad as determined in *S v Zinn*³ which consists of ‘the offender, the offence and the interests of society’. In terms thereof the court must weigh the personal circumstances of the offender against the nature of the offence and the interest of society. The appellant’s personal circumstances constitute mitigating circumstances, whereas the nature of the crime and the interests of society amount to aggravating circumstances.

[17] A balanced and fair consideration of the triad that does not overemphasise one and minimise the other was advocated in *Zinn* with Rumpff JA (with Steyn CJ and Ogilvie Thompson JA concurring) making the following comment in response to the remarks and conclusions made by the trial court, that:

*“not merely the strongly worded but justified condemnation of the indignant censor, but rather a hyperbole, exaggerating beyond permissible limits the nature and effect of the crime, and minimising the personality of the offender and the effect that punishment might have on the offender. The over-emphasis of the effect of the appellant’s crimes, and the underestimation of the person of the appellant, constitutes, in my view, a misdirection.”*⁴

[18] However with the promulgation of the Minimum Prescribed Sentences Act Mandatory Minimum Sentences Regime (Act 105 of 1997), the trial court’s discretion in certain offences is now limited. The sentence to be imposed is determined more by the nature of the offence committed, the severity of the offence playing a vital and prominent role in determining the sentence, due to the scourge of such crimes unabating and the devastating circumstances that are brought to bear in the communities. Although the courts still have a discretion to deviate from the minimum prescribed sentence where there are substantial and compelling circumstances, the fundamental principle of the Zinn triad remains germane so as to defuse the possible

³ 1969 (2) SA 537 (A) at 540G.

⁴ 540-E-F

overstretch of the nature of the offence, overshadowing the personal circumstances of the offender in situations where it might be unjustified to do so.

[19] In *S v Malgas*⁵ at paragraph 22 the court on factors to be considered if deviation from the prescribed minimum sentences justifiable spoke of finding something more than personal circumstances to convince the court stating that:

“What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

[20] It is trite that the court in order to deviate from the prescribed minimum sentence must consider whether the personal circumstances of the Accused constitute circumstances that are substantial enough to avoid being called “flimsy”.⁶

[21] The doctrine of *stare decisis* requires courts also to follow previous court decisions with material similar facts, however not blindly as this would amount to the misconstruing of the nature of the sentence to be imposed and its likely impact on what sentencing is intended for. The purpose is foremost to punish the offender but also to give the offender a chance towards rehabilitation whilst also intended to curb the scourge of the crime when and where it is prevalent in the interest of society. This is fundamental and not to be ignored by the courts to achieve an equilibrium in the sentencing of offenders.

⁵ 2001 (1) SACR 469 SCA at para 22

⁶ *S v Bodibe* (CC 14/2021) [2021] ZAGPPHC 715 (20 October 2021)

[22] In my view, *in casu*, the court ignored the importance of the caution raised to guard against misapplying the principles and the mentioned doctrine of *stare decisis*. It also misconstrued what sentencing is intended for. In *S v Fraser*⁷ the court rejected the blanket comparison of sentences imposed in cases where the same offence was committed as the facts might be different. It pointed out in relation to the offence of kidnapping committed by the Appellant in that matter that it might be correct that the offence was prevalent in society however did not agree that every kidnapping is necessary a violent crime as suggested by the magistrate. The Appellant in that matter had instead stressed that no violence was to be used and none was used. In most of the kidnapping cases the court was referring to, the motive was also to obtain a ransom or commit further other crimes like rape or indecent assault on the victim. Those cases could not be compared with Fraser's motive who rather just wanted to be with his child. His moral blameworthiness in that instance was reduced which ought to have been reflected in the sentence. Since that was overlooked, the court found that there was justification for reconsideration of the sentence.

[23] *In casu*, the Appellant has been indicated to have had a long relationship with the Complainant thus in a position of trust, which he has obviously abused. The court *a quo* emphasized the hardship the Appellant's criminality has caused the Complainant. It overemphasized the fact that a lot of money was involved that takes a long time to accumulate and the Appellant took it, just like that. Also, that it will take a long time for the Complainant to be able to accumulate such a lot of money again, facts which were not put before court. The nature of the offence overshadowing the personal circumstances of the offender in circumstances where it might be unjustified to do so.

[24] The trial court instead disregarded the fact that the Appellant pleaded guilty. He was very remorseful and took full responsibility of the circumstances brought to bear on the Complainant. He was not only ashamed of what he had done to his trusted long time business friend but also on chronic and anti-depressant medication. He had also offered to reimburse the Complainant, although he had failed to do so after he misused the money. He only made the offer after his arrest, during trial. His conduct as a result still reprehensible. In addition, he was nevertheless unemployed at the time of his

⁷ *S v Fraser* (258/04) [2005] ZASCA 132; [2005] 4 All SA 5 00 (SCA); 2005 (1) SACR 455 (SCA) (31 March 2005)

arrest. The belated argument in the Appellant's heads of argument of his intention not to permanently deprive the Complainant of the money is hence misguided. His offer, however, makes his wrongdoing devoid of a morally unacceptable motive.

[25] On the other hand, the court was correct to disregard the option of a suspended or a correctional supervision sentence with an option of a fine as inappropriate under the circumstances, taking into consideration the seriousness of the crime. Also, his offer to pay back the money as he was already unemployed at the time of his arrest and had nothing but dependent entirely on his wife, even though a reduced moral blameworthiness is justified. Even their child was being looked after and maintained by his sister.

[26] The further argument raised belatedly in the Appellant's heads of argument in relation to the plea, seemingly now challenging also his conviction that procedurally the court a quo was supposed to subject the Appellant to the s 113 enquiry as it seems he did not accept all the elements of the offence of theft he was charged with, is misguided due to the following:

[26.1] The Appellant only applied and was granted leave to appeal the sentence imposed and therefore inappropriate to attempt to appeal his conviction in his heads of arguments. Such a contention also must be brought under review not an appeal.

[26.2] The prospects of that flying as well if it had been properly brought before court and leave thereon granted are non-existent. He had pleaded guilty which was followed by a s112 statement in explanation of his plea that was read into the record that partly stated that he received the money in a car deal and decided to spend it on his debts. He was 'willing and able to pay the complainant. He confirmed the contents of the statement. He clearly without authorization appropriated the money for his own use'. His willingness to pay back the money only indicated at the commencement of trial.

[27] Taking into consideration all relevant facts, the Appellant's personal circumstances in mitigation qualify as substantial and compelling circumstances for

imposition of a lesser sentence. In my view the appropriate sentence under the circumstances would be 5 years imprisonment on count 1 and 3 years on count 2. Both sentences to run concurrently. The sentence will certainly serve as a deterrent but also afford the Appellant an opportunity in rehabilitation.

[28] The following order is as a result made:

1. The appeal against sentence is upheld.
2. The sentence of the Appellant by the court *a quo* to 10 years imprisonment on count 1 and 5 years imprisonment on count 2 is set aside and substituted with the following sentence and order:

'The accused is sentenced to 6 years imprisonment on count 1 and 3 years on count 2, which sentences are to run concurrently, and the sentences antedated to 23 August 2023, the date on which he was sentenced by the trial court'.



N V KHUMALO (MS)
JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

I agree,



M NTANGA
ACTING JUDGE OF THE HIGH COURT
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