



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**Case no: AR169/24
Court a quo: RC41/116/2018**

In the matter between:

**FATHIMA KUDOOS
FADEELA KUDOOS
TASNIEM BIBI MUKHARIB
ZAINÉ KUDOOS**

**First Appellant
Second Appellant
Third Appellant
Fourth Appellant**

and

THE STATE

Respondent

ORDER

On appeal from: The Regional Court for the Regional Division of KwaZulu Natal held at the Specialised Commercial Crime Court, John Ross House Durban (Magistrate DM Soomaroo presiding):

1. The appeal by each appellant against sentence is dismissed.
2. The sentence imposed by the court a quo in respect of each appellant is confirmed save to exclude the last order and substitute same with the additional orders in paragraphs 3 and 4 below.
3. Given the sentences imposed in paragraph 2 above, the Department of Social Development together with the National Commissioner for Correctional

Services are directed to take all appropriate steps to ensure the elderly mother of the first appellant and the minor children of the second, third and fourth appellants are properly cared for in all respects during the respective appellants' period of imprisonment including, but not limited to if necessary, conducting further investigations:

- (a) involving the first appellant's elderly mother and members of the extended family, including the first appellant's two sisters, to find the best possible way of caring for the elderly mother;
- (b) into the wellbeing of the minor children of the second, third and fourth appellants and to take the most appropriate measures to ensure the safety and wellbeing of the minor children.

4. The National Commissioner for Correctional Services is to ensure:

- (a) insofar as reasonably practical, that the second, third and fourth appellants serve their sentence at a Department of Correctional Service Centre / facility close to their minor children;
- (b) that a social worker in the employ of the Department of Correctional Services visits the children of the second, third and fourth appellants at least once every two months during their incarceration and submits a report to the office of the National Commissioner as to whether the children are in need of care and protection as envisaged in s 150 of the Children's Act 38 of 2005 and, if so, to take the steps required by that provision.

JUDGMENT

Naidoo AJ (Henriques J concurring)

Introduction

[1] This is an appeal against the sentences imposed by the Regional Magistrate presiding at the Commercial Crime Court for the Regional Division of KwaZulu-Natal

on various counts of fraud and money laundering. Each of the appellants received a custodial sentence.

[2] The first appellant was convicted of one count of fraud, ten counts of money laundering in contravention of s 4, read with ss1 and 8(1) of the Prevention of Organised Crime Act 121 of 1998 ('POCA') and sentenced to ten years imprisonment.

[3] The second appellant was convicted of two counts of fraud and fifteen counts of money laundering and contravention of s 4, read with ss1 and 8(1) of POCA and sentenced to eleven years imprisonment.

[4] The third appellant was convicted of four counts of money laundering and contravention of s 6, read with ss1 and 8(1) of POCA and sentenced to five years imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 ('CPA').

[5] The fourth appellant was convicted of one count of money laundering and contravention of s 6, read with ss1 and 8(1) of POCA and sentenced to four years imprisonment in terms of section 276(1)(i) of the CPA.

[6] Leave to appeal against the sentences was granted on 25 April 2023. This matter serves before us as an appeal against the sentences imposed by the court a quo.

Background facts

[7] In summary, the appellants respective convictions arise from the following facts. The appellants are family members. The first and second appellants had applied for a loan from the complainant, a bank, ostensibly to finance a piece of equipment. They misrepresented to the bank that they were purchasing a new piece of equipment from a third party. The bank, acting on the misrepresentation, approved the loan and paid it into the bank account of the third party. At the instance of the first and second appellants, the money was dispersed into various accounts, including that of the third and fourth appellants.

[8] It transpired that the equipment was not new but was an old piece of equipment owned by the first appellant. The equipment was subsequently attached by the bank and sold on auction for a nominal amount. The appellants made an offer at the sentencing stage to repay the money in the form of a partial lumpsum of R70 000 and the balance in instalments over 60 months. The bank had rejected the offer.

[9] The thrust of the appeal on the papers is that the learned magistrate erred in imposing a sentence of direct imprisonment upon the respective appellants and ought to have imposed a sentence of correctional supervision and an order made in terms of s 297 of the CPA, coupled with a suspended sentence.

[10] At the hearing of the appeal, Mr *Jorgensen*, acting for the appellants, raised an issue that was not foreshadowed in the papers. The issue relates to the significance, if any, of the additional orders issued at the end of the sentencing ruling¹ where the learned magistrate ordered the Department of Social Development to undertake a full inquiry with regards to the elderly mother of the first appellant and the wellbeing of the two minor children of the second and fourth appellants.

[11] Mr *Jorgensen* sought to suggest that such investigation ought to have preceded the sentencing of the appellants and served no purpose once the sentences had been imposed. Mr *Jorgensen* contended that this constituted a misdirection on the part of the learned magistrate in that she did not take all the personal circumstances of the appellants into account, as she is enjoined to do, culminating in an unjust sentence of direct imprisonment.

[12] Mr *Jorgensen* called on the court to consider the sentence afresh instead of referring the matter back to the magistrate and to substitute it with a new sentence. If the court was amenable to the proposal, it would be bound by the record. Ms *Letsholo*, for the State, maintained that there was no issue with the sentence imposed and submitted there was no misdirection as alleged.

¹ Record, volume 2, at 339.

Evaluation

[13] For the reasons set out below, this court is not persuaded by the submissions that the additional orders constitute a misdirection on the part of the learned magistrate.

[14] It is clear from the record² that the learned magistrate did consider the pre-sentence reports compiled for the purpose of sentencing which included the probation officers' reports and the social workers' reports which dealt with the personal circumstances of the appellants, and the arrangements made for the care of the elderly parent and minor children.³ She ultimately found that these personal circumstances did not detract from the gravity of the offences nor did they warrant a non-custodial sentence. These findings are beyond reproach.

[15] The record reveals that the inclusion of the additional orders was a considered determination, which did not detract from the fact that the learned magistrate had made a full and proper assessment of the circumstances relating to the elderly parent and minor children and was intended to ensure that during the respective appellants' incarceration appropriate steps could be taken to ensure the wellbeing of the elderly parent and children.

[16] The court a quo was empowered to order the investigations foreshadowed in the additional orders because the extended family members had expressed reluctance to care for the elderly mother of the first appellant and the minor children of the second and fourth appellants. In those circumstances, the additional orders were made in the event that none of the family members would assume responsibility for the first appellant's elderly mother and the minor children of the second and fourth appellants. In such circumstances, the State would need to make the necessary arrangements for their care. There is accordingly a rational explanation for the inclusion of the additional orders, and they were clearly foreshadowed in the learned magistrate's findings.

[17] This is evident from the record at pages 313 and 314 which reads as follows:⁴

² Record, volume 2, at 313-314.

³ Record, volume 2, at 301-313.

⁴ Record, volume 2, at 313-314.

"The court finds that accused 2 and accused 8 to an extent are the primary caregivers to their children. In light of the fact that accused 8's father cannot care for his own grandchildren, the court can order that the children's be considered under the Child Care Act and if necessary, an inquiry be held in terms of the Children's Act and that their matter be dealt with appropriately.

In respect of the child of accused 6 her husband can care for her child as well as the extended family, should she be incarcerated, as she shares a good relationship with her extended family. The court is satisfied that the accused's children will be in the care of the father in respect of accused 6 and with regard to accused 1 and accused 8 that adequate arrangements can be made for the state to care for the said children.

The mother of accused 1, accused 2 cares for her aged mother who resides with her and has been for several years. The court is satisfied that a proper investigation was undertaken in respect of the wellbeing of her aged mother. Accused 1 and her two siblings were not, accused 1's two siblings, being her sisters, are not prepared to care for their own mother, should accused 1 be incarcerated, in the light of their refusal she can be cared for at a frail care centre and it would be up to the family member to make the necessary arrangements and there is a duty, indeed a duty on the accused's siblings to provide some form of care and security for their aged mother.

They will, under the circumstances, have to collectively assist their mom. The court finds that if accused 2 is imprisoned the extended family can consider all the options to care for their mother and it must indeed do so because of her frail health, which makes her vulnerable and therefore she is part of the group involving vulnerable persons."

[18] Generally, the record indicates that the learned magistrate had due regard to the triad of *S v Zinn*⁵ as well as the recognised objectives of sentencing. The court considered that the appellants were first offenders, their personal circumstances and particularly the circumstances of the minor children and elderly parents. However, the seriousness and prevalence of fraud and money laundering and its impact on the stability of banking institutions and ultimately on society were material considerations

⁵ *S v Zinn* 1969 (2) SA 537 (A) (*Zinn*) at 540G.

for the court. The court found that the offences were clearly premeditated, that it took a great deal of planning over a long period of time, involved several co-perpetrators and was premised on a series of deliberate misrepresentations.

[19] The time, effort and planning that the first and second appellants devoted to the implementation of the scheme weighed heavily with the court. They perpetrated the crimes in full knowledge that it would place their immediate families at risk. The departure from the minimum sentence in respect of the first and second appellants illustrates that a measure of mercy was nevertheless extended to them.

[20] The court took cognizance of the fact that the second appellant had previously attempted to defraud the complainant but was unsuccessful. She was, however, undeterred and persisted with her unlawful conduct and therefore the risk of reoffending is high.

[21] The learned magistrate found that whilst the third and fourth appellants were used as conduits for the money to be dispersed, they willingly participated in the scheme of concealing the funds thereby actively participating in the execution of the plan to defraud. Similarly, they too risked the well-being and security of their families when they agreed to be part of the fraud. The fourth respondent in particular took no responsibility for his actions and showed no remorse. The third appellant claimed to take responsibility for her actions but did so with a measure of hesitancy.

[22] The court found that the circumstances that gave rise to the guilty pleas and the timing thereof placed some doubt on whether there was true remorse on the part of the appellants. It was nevertheless considered a neutral factor when the court considered the mitigating factors.

[23] The court was mindful of the financial loss suffered by the complainant through the advancement of the loan amount and costs associated with the subsequent investigations, recovery, storage and sale of the equipment. The court took the view that there was too much uncertainty regarding the appellants' financial position and ability to repay the monies to order the payment of compensation as proposed.

[24] What emerged was that given the uncertainty regarding their respective financial positions, they would be reliant on their extended family for assistance. An aggravating factor was the fact that the appellants had not made any real effort to pay back any of the money prior to the sentencing hearing.

[25] The court also concluded that there was no evidence of genuine financial need which motivated the crime. The appellants failed to make a full disclosure of their motives, and the only inference was that the appellants were motivated by greed and acted with common purpose in perpetrating the crime.

[26] There appeared to be some confusion at the hearing of the appeal regarding the sentence imposed by the court a quo in respect of the third and fourth appellants. The third appellant was convicted of four counts of money laundering, which attract a custodial sentence of up to 30 years for each count. The fourth appellant was convicted of one count of money laundering which could attract a custodial sentence of up to 30 years.

[27] Notwithstanding the court a quo's finding that neither of the appellants demonstrated true remorse, in a show of mercy and having regard to their personal circumstances, the third and fourth appellants were sentenced to five- and four-years' imprisonment respectively, in terms of s 276(1)(i) of the CPA.

[28] In argument, Mr *Jorgensen* curiously sought an order that the sentences be substituted for ones in terms of s 276(1)(i) of the CPA. The court assumes in his favour that he intended to seek an order in terms of s 276(1)(h) of CPA, which does not involve any direct imprisonment, and the matter will accordingly be dealt with on that basis. This approach accords with the relief sought in paragraph 36.3 of the appellants' heads of argument. The appellants contend that the court a quo failed to properly consider their personal circumstances and over-emphasised the elements of retribution and deterrence.

[29] I have considered the decision in *S v Truyens*⁶ as well as the provisions of ss 276(1)(h) and 276(1)(i) of the CPA, which provide as follows:

'(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-

...

(h) correctional supervision;

(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board'.

[30] The facts of *Truyens* and that of the present matter are clearly distinguishable. In *Truyens* the appellant had stolen cattle from his employer to pay for medical costs for his three children. He was a mature first offender and the crime was committed out of need.

[31] Correctly interpreted, in my view, is the fact that correctional supervision is but one of the sentencing options for a court to consider when sentencing, but it is not mandatory. The use of the word 'may' in s 276(1) of the CPA is supportive of this interpretation.

[32] The submission that the appellants should have, because of their personal circumstances, been sentenced to correctional supervision or community service or a suspended sentence ignores the fact that a court is also required to consider the other two elements of the *Zinn* triad when sentencing, namely the crime and the community, and post Constitution requires that the impact of the crime on the victim is a further consideration.

[33] The personal circumstances of the third and fourth appellants do not support the submission that a term of direct imprisonment is inappropriate. The third appellant is married and is part of a large and supportive extended family. Both her husband and mother are available and able to attend to the needs of the minor children. There are accordingly satisfactory arrangements in place to care for the minor children whilst the third appellant is incarcerated.

⁶ *S v Truyens* [2011] ZASCA 110; 2012 (1) SACR 79 (SCA) (*Truyens*).

[34] Whilst it is true that the children of the second and fourth appellants will be left without parents for the period of imprisonment, their current living arrangements suggest that they will be adequately cared for. The same applies to the first appellant's elderly mother.

[35] The first, second and fourth appellants reside in the same home which is situated on what appears to be communal property. The remaining family members are the first appellant's husband who is the grandfather of the minor children as well as two of the first appellant's sisters who live in different homes on the same property. There are accordingly several adult family members who live near the minor children and the elderly parent and who can assist with seeing to their needs in their current home. In the unlikely event that the extended family eschews its obligations in this regard, the pre-sentence and social worker reports indicate that there are suitable alternative arrangements for the care of the minor children and the elderly parent. This court will also issue additional orders to mitigate any prejudice.

[36] In the circumstances, this court takes the view that a non-custodial sentence as proposed by Mr *Jorgensen* is not appropriate. It accordingly finds no reason to depart from the sentences imposed by the court a quo in terms of s 267(1)(i) of the CPA.

[37] The appellants contend further that any order made in terms of s 297 should have been coupled with a suspended sentence. It is common cause that the provisions of the minimum sentence legislation were applicable to the offences of fraud for which both the first and second appellants were convicted. The learned magistrate found that there were, to an extent, substantial and compelling factors which entitled her to deviate from imposing the prescribed minimum sentence of fifteen (15) years. There is no appeal against this finding.

[38] In *Hildebrand v The State*,⁷ the court held:

'It should be clear that s 51(5) refers to "a minimum sentence imposed in terms of this section". Self-evidently, this section does not apply to sentences imposed after a finding that substantial and compelling circumstances exist, because such a sentence is not one imposed in terms of

⁷ *Hildebrand v The State* [2015] ZASCA 174 para 10.

s 51. The sentence imposed by the regional magistrate accordingly did not fall within the restrictive provisions of s 51(5).’

[39] In the circumstances, there is no need for this court to say anything further on the subject as the sentence of the court a quo did not fall within the restrictive provisions of s 51. Furthermore, the appellants have failed to make out a case that the learned magistrate did not exercise her discretion judiciously.

[40] The learned magistrate conducted a proper and considered assessment of the personal circumstances of the appellants as well as the various pre-sentencing reports. The court satisfied itself that appropriate arrangements had been made to take care of the minor children and elderly parents. In doing so the learned magistrate had regard to the legal principles regarding the best interests of a child and the need to balance those rights with the objectives of sentencing. The learned magistrate after having found substantial and compelling circumstances to exist, found there were no additional circumstances that militated against the imposition of a custodial sentence.

[41] The learned magistrate’s approach accords with the guidelines set out in *S v M (Centre for Child Law as Amicus Curiae)*⁸ which promotes uniformity of principle, consistency of treatment and individualisation of outcome. The Constitutional Court held that if on the *Zinn*-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated. The sentence imposed by the court a quo, coupled with the additional orders, meets this requirement.

[42] It is trite that the imposition of sentence is the ‘prerogative of the trial court’.⁹ An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. *Sadler* pointed out that ‘[s]omething more is required’; it must conclude that its own choice of penalty is the

⁸ *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC) para 36.

⁹ *S v Hewitt* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) (*Hewitt*) para 8; *S v Sadler* 2000 (1) SACR 331 (SCA) (*Sadler*) para 8; *S v Swart* 2000 (2) SACR 566 (SCA) para 21; and *S v Pieters* 1987 (3) SA 717 (A) at 727F-H. See also, *S v L* 1998 (1) SACR 463 (SCA) at 468f; and *S v Blank* 1995 (1) SACR 62 (A) at 65h-i.

appropriate penalty and 'that the penalty chosen by the trial court' is not.¹⁰ Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it.¹¹ So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed.¹² And in such instances the trial court's discretion is regarded as having been unreasonably exercised.

[43] The power of an appeal court to interfere with the sentence imposed is limited. The Supreme Court of Appeal in *S v Barnard*¹³ stated the following:

'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 a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably.'

[44] In *S v Romer*¹⁴ the following was held:

'It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal have been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence is —

- “(a) disturbingly inappropriate;
- (b) so totally out of proportion to the magnitude of the offence;
- (c) sufficiently disparate;
- (d) vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and
- (e) is otherwise such that no reasonable court would have imposed it.” (Footnotes omitted.)¹⁵

¹⁰ *Sadler* para 10.

¹¹ *S v Pillay* 1977 (4) SA 531 (A) at 535E-F.

¹² *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

¹³ *S v Barnard* 2004 (1) SACR 191 (SCA) para 9.

¹⁴ *S v Romer* [2011] ZASCA 46; 2011 (2) SACR 153 (SCA) para 22.

¹⁵ See also *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) para 10; *S v Kibido* 1998 (2) SACR 213 (SCA) at 216G-J; and *S v Giannoulis* 1975 (4) SA 867 (A) at 873G-H.

[45] On appeal, the test is not whether this court would have imposed the same sentence, but rather whether on the facts of the particular matter the court *a quo* properly applied its mind to the imposition of sentence.

[46] In determining the appropriateness of the sentences imposed, I have considered the decision in *Ntonzini v S*¹⁶ where the appellant was 60 years old at the time the offence of fraud and money laundering was committed. Her sentences of fifteen years' imprisonment for the fraud conviction and five years' imprisonment for the money laundering conviction, were confirmed on appeal. The magistrate had considered her age and found that it did not justify a substantial and compelling circumstance. The appeal court held that the correct balance was struck by the magistrate.

[47] Similarly, in *Hewitt*,¹⁷ the court held that although the advanced age of an accused has been considered to be a mitigating factor, it does not mean that such an accused cannot be sentenced to imprisonment. Although the element of rehabilitation bore little relevance in this case because of the appellant's age, the sentences would still serve the other important purposes of sentence, that is, deterrence and retribution. The appellate court accordingly had no right to interfere.

[48] In *Van Jaarsveld v S; Ras v S*,¹⁸ the court found that the role of a primary caregiver necessitates a more nuanced consideration of the sentencing options. In that case, the appeal court held that there was an apparent lack of explicit consideration of the best interests of Mr Van Jaarsveld's children as mandated by s 28 of the Constitution and the relevant case law. This omission constituted a misdirection which warranted the appeal court's intervention.

[49] This is not the case in this matter where the interests of the minor children and the second, third and fourth appellants' roles as primary care givers were extensively canvassed and considered by the learned magistrate. In my view, there is no scope for interference on this basis.

¹⁶ *Ntonzini v S* [2020] ZAECGHC 104 paras 5 and 9.

¹⁷ *Hewitt* paras 15 and 17.

¹⁸ *Van Jaarsveld v S; Ras v S* [2025] ZASCA 92 para 20 (*Van Jaarsveld*).

[50] A key element of restorative justice is an acknowledgement of wrongdoing. In *casu*, the court was not persuaded that the appellants had demonstrated any true remorse for their conduct. Accordingly, the learned magistrate's finding that a term of direct imprisonment is warranted, is beyond reproach.

[51] In my view, having regard to the judgment on sentence the appellants have not succeeded in showing an irregularity, misdirection or any other basis to warrant any interference by this court with the sentence imposed.

[52] Having regard to the personal circumstances of the appellants, the circumstances under which the offence was committed and the interests of society the sentences do not induce a sense of shock, are not unduly harsh nor are they disturbingly or strikingly inappropriate. I agree with the sentiment expressed by the Supreme Court of Appeal that a 'first offender has no right to be kept out of jail.'¹⁹

[53] In determining an appropriate sentence, the court a quo took cognizance of the fact that the first and second appellants were found guilty of fraud, which attracts a prescribed minimum sentence of 15 years for a first offender, unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. Coupled with that, all four appellants were found guilty of money laundering in terms of ss 4 and 6 of POCA, which renders them liable for a fine not exceeding R100 million or imprisonment for a period not exceeding 30 years.

[54] To put it in perspective, the first and second appellants would in the absence of substantial and compelling circumstances be liable for imprisonment for a period of 15 years for each count of fraud and up to 30 years for each count of money laundering. It bears mentioning that the first appellant was found guilty of one count of fraud and ten counts of money laundering and the second appellant of two counts of fraud and fifteen counts of money laundering.

[55] To ameliorate the potential prejudice to the first and second appellants as set out above, the court a quo had regard to the fact that the counts of money laundering

¹⁹ *S v Packereysammy* 2004 (2) SACR 169 (SCA) para 12.

emanate from the fraud and accordingly all counts were taken as one count for the purposes of sentencing. The court a quo was also mindful of the personal circumstances of the appellants and that the facts of the case fall outside the realm of the usual fraud cases.

[56] Beyond the factors set out above which incorporate the principle of mercy, this court is unable to find any further extenuating factors that would warrant interfering with the sentence imposed by the court a quo in respect of the first and second appellants. The court takes cognizance of the fact that the second appellant had previously attempted to defraud the complainant but was unsuccessful. She was, however, undeterred and persisted with her unlawful conduct and therefore the risk of reoffending is high.

[57] In the circumstances, the court considers a term of imprisonment of 10 years for the first appellant and 11 years for the second appellant to be wholly appropriate.

[58] A further ground of appeal is that the learned magistrate ought to have ordered payment of compensation to the complainant alongside an order in terms of s 297 of the CPA.

[59] The court is mindful of the financial loss suffered by the complainant through the advancement of the loan amount and costs associated with the subsequent investigations, recovery, storage and sale of the equipment. The court a quo took the view that there was too much uncertainty regarding the appellants financial position and ability to repay the monies to order the payment of compensation as proposed. An aggravating factor was the fact that the appellants had not made any real effort to pay back any of the money prior to the sentencing hearing. The complainant has rejected all offers to repay the money on the terms proposed by the appellants.

[60] In the light of the terms of direct imprisonment imposed on the appellants, this court is not persuaded that there are grounds to depart from the position adopted by the court a quo and accordingly declines to exercise its discretion to make a compensatory order.

[61] The court further considers as an aggravating factor, the fact that none of the appellants have taken the court into their confidence and disclosed the motive for the crimes. There is accordingly no evidence of genuine financial need which motivated the crime. The only inference is that the appellants were motivated by greed and acted with common purpose in perpetrating the crime.

[62] The court has considered the personal circumstances of the appellants as well as the various pre-sentencing reports. The court has satisfied itself that appropriate arrangements have been made to take care of the minor children and elderly parent.

[63] In *Van Jaarsveld* it was stated that:²⁰

‘While the seriousness of the offences, particularly those involving dishonesty, cannot be understated, the unique circumstances of Mr van Jaarsveld as a primary caregiver necessitate a more nuanced consideration of the sentencing options. This Court is mindful of the trial court’s discretion in sentencing. However, the apparent lack of explicit consideration of the best interests of Mr van Jaarsveld’s children, as mandated by s 28(2) of the Constitution and the relevant case law, constitutes a misdirection. This also warrants this Court’s intervention.’

[64] In *Swanepoel v S (Leave to Appeal)*²¹ the court held the following:

‘Trite, where a person convicted of an offence is the primary caregiver of minor children their best interests are of paramount importance in every matter concerning them. The measure of the best interests principle has never been given definitive content but it is necessary that the standard be flexible as the circumstances of each case may determine. In that regard it has been held that when considering the best interests of children a court must consider evidence as to their current position to determine what their best interests require including evidence on the quality of their care. The paramountcy principle does not lay down that in all cases the direct or indirect impact of a measure or action on children must oust, override or unrealistically trump all other considerations. It simply requires that the interests of children who stand to be affected be given due consideration.’ (Footnotes omitted.)

[65] In *casu*, a significant part of the evidence during the sentencing proceedings turned on the care of the minor children and the elderly parent. The learned magistrate was fully cognizant of the necessary considerations with due regard to the provisions of s 28(2) of the Constitution. The additional orders were issued to cater for any future

²⁰ *Van Jaarsveld* para 20.

²¹ *Swanepoel v S (Leave to Appeal)* [2023] ZAECKMHC 76 (*Swanepoel*) para 19.

complications which may arise regarding the care of the elderly parent and the minor children. The additional orders accord with those issued by the appeal court in *Swanepoel*.

[66] This court agrees that there are no factors which militate against the imposition of a custodial sentence and that there was a proper and reasonable exercise of discretion of the sentencing court. The court a quo paid sufficient and informed attention to the interests of the minor children and elderly parent. The appellants were shown mercy by the sentencing court as it found substantial and compelling circumstances and also ameliorated the sentence. Even if I am wrong in upholding the learned magistrate's findings on sentence and I accept that the additional orders were a misdirection, on the facts and on the record, I would not have imposed different sentences.

[67] In *Swanepoel*, the court was mindful of the various competing interests. It issued the following additional orders:²²

'This case, without question, involved highly competitive interests. In recognition of Mr and Mrs Swanepoel's advanced ages and to moderate any negative impact or hardship on the minor child as much as possible during the appellant's incarceration, this Court may permissibly resort to its inherent jurisdiction as upper guardian to fulfil that duty through an appropriate order. It is considered pragmatic, as was done by Cameron J in *MS v S*, to order the Department of Correctional Services to ensure visitation by a social worker and that he or she provides the department with reports on the child's well-being during his mother's absence.' (Footnotes omitted.)

[68] This court is inclined to supplement the orders of the court a quo and issue a similar order to ensure the well-being of the minor children and the elderly parent in the event that the extended family cannot assist in their care.

[69] It is for these reasons that I am of the considered view that the appeal against the sentences in respect of each appellant ought to be dismissed.

²² *Swanepoel* para 61.

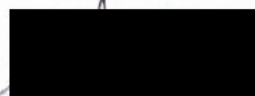
Order

[70] In the result the following orders will issue:

1. The appeal by each appellant against sentence is dismissed.
2. The sentence imposed by the court a quo in respect of each appellant is confirmed save to exclude the last order and substitute same with the additional orders in paragraphs 3 and 4 below.
3. Given the sentences imposed in paragraph 2 above, the Department of Social Development together with the National Commissioner for Correctional Services are directed to take all appropriate steps to ensure the elderly mother of the first appellant and the minor children of the second, third and fourth appellants are properly cared for in all respects during the respective appellants' period of imprisonment including, but not limited to if necessary, conducting further investigations:
 - (a) involving the first appellant's elderly mother and members of the extended family, including the first appellant's two sisters, to find the best possible way of caring for the elderly mother;
 - (b) into the wellbeing of the minor children of the second, third and fourth appellants and to take the most appropriate measures to ensure the safety and wellbeing of the minor children.
4. The National Commissioner for Correctional Services is to ensure:
 - (a) insofar as reasonably practical, that the second, third and fourth appellants serve their sentence at a Department of Correctional Service Centre / facility close to their minor children;
 - (b) that a social worker in the employ of the Department of Correctional Services visits the children of the second, third and fourth appellants at least once every two months during their incarceration and submits a report to the office of the National Commissioner as to whether the children are in need of care and protection as envisaged in s 150 of the Children's Act 38 of 2005 and, if so, to take the steps required by that provision.



NAIDOO AJ



HENRIQUES J

CASE INFORMATION

Dates of hearing: 2 May 2025

Date of judgment: 28 October 2025

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