THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 57/99

In the matter between

THE STATE **Appellant**

and

BRADLEY TALBERT SADLER **Respondent**

CORAM: MARAIS, SCOTT JJA *et* MTHIYANE AJA

DATE HEARD: 14 March 2000

DATE DELIVERED: 28 March 2000

Sentence - appeal by State - increase of - when justified - "white collar" crime.

JUDGMENT

MARAIS JA

MARAIS JA: [1] This is an appeal with the leave of this court by the Attorney General of Kwazulu Natal against the sentences imposed by *Squires J* consequent upon the conviction of respondent upon three counts (counts 1, 3 and 4) of contravening the Corruption Act 6 of 1958, seven counts (counts 5, 7, 9, 10, 11, 12, and 13) of contravening the Corruption Act 94 of 1992, one count (16) of forgery and uttering and eleven counts (counts 17, 18, 19, 20, 21, 22, 23, 24, 27, 28 and 29) of fraud.

[2] The sentences imposed were these: in respect of counts 1, 3 and 4 (corruption), two years imprisonment the whole of which was suspended for five years on condition that respondent performed one thousand hours of community service; in respect of counts 5, 7, 9, 10, 11, 12 and 13 (corruption), a fine of R500 000 or 5 years imprisonment; in respect of count 16 (forgery and uttering), and counts 23, 24 and 27 to 29 (fraud), five years imprisonment the whole of which was conditionally suspended for five years. Respondent was acquitted

upon counts 2, 5, 6, 8, 14, 15, 26, 30 and 31. The fine has been paid and the thousand hours of community service has been rendered.

[3] It is unnecessary to review the circumstances in detail. It will suffice to sketch the picture in broad outline. Respondent occupied a senior managerial position in NBS Corporate Bank. His particular responsibility was to evolve internal systems to facilitate the proper evaluation of risk by the bank when considering whether or not to advance money and to apply them when considering whether or not to authorise advances himself or when making recommendations concerning advances to higher authority within the bank.

[4] The system required him to assemble all information relevant to the risk and to take particular account of the extent to which the bank might already be at risk by reason of previously made advances either to the applicant himself or to his businesses or to other persons for whose debt he might be liable as a surety. This collation of relevant information was known within the bank as

"grouping".

[5] Respondent's own authority to make advances was limited initially to R1m but later to R2m. He was an experienced and able credit analyst with a reputation for conservatism which earned him the sobriquet "Dr No". His fall from grace was precipitated by his indulgence in the following forms of venality and dishonesty. In order to ensure that certain persons received advances from the bank he either deliberately concealed the true extent of the bank's existing exposure to those persons and falsely represented it to be less than it was or placed false and misleading information before it. In one instance he forged the signature of a director of the bank upon a document in order to induce others in the bank to sanction an advance which would not otherwise have been made. All this was done with a view to enriching himself by way of acceptance of a *quid pro quo* of one kind or another from the relevant applicant for an advance. In the main they took the form of money but there were also instances of valuable

goods (a Rolex watch and BMW and Mercedes Benz motor vehicles) and a large loan (R400 000) on favourable terms being given to him.

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

"It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by *Holmes JA* in *S v Rabie* 1975 (4) SA 855 (A) at 857D-F:

> '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.'"

[7] Counsel for the state submitted that the trial court had misdirected itself in various material respects when imposing sentence. I do not find it necessary to reach any firm conclusion in that regard. I shall assume in favour of respondent that no such misdirections exist.

[8] The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate court would have imposed a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So

it is said that 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, interference is justified. In such situations the trial court's discretion is regarded (fictionally some might cynically say) as having been unreasonably exercised.

[9] The problem is to give practical content to these notions. The comparison involved in the exercise may sometimes be purely quantitative, say 3 years versus 6 years imprisonment or a fine of R50 000 versus a fine of R100 000, or it may be qualitative, say a custodial versus a non-custodial sentence. Where quantitative comparisons are involved there is the problem of deciding how great the disparity must be before it attracts the epithet "striking" or "startling" or "disturbing". Where qualitative comparisons are involved one faces a similar problem. When compared with a sentence of wholly suspended imprisonment which an appellate court considers would have been appropriate, a trial court's

decision to impose a substantial fine with an alternative of imprisonment may not be regarded as giving rise to a disparity of that character. As against that, the distinction which exists between a non-custodial and a custodial sentence as those terms are commonly understood is so generally recognised to be profound and fundamental that, save possibly in rare instances, the conclusion that a custodial sentence was called for where a non-custodial sentence has been imposed (or vice versa) will justify interference with the sentence imposed.

[10] However, even in the latter class of case, it is important to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been *an* appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is *the* appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. However, the

hierarchical structure of our courts is such that where such differences exist it is the view of the appellate court which must prevail.

[11] I am satisfied that the circumstances of this case call for the imposition of a period of direct imprisonment and that the interests of justice will not be adequately served by leaving the sentence imposed by *Squires J* undisturbed. So called "white-collar" crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of "white-collar" crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being "criminals" or "prison material" by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for "white-collar" crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people

from “respectable” backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

[12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it. [13] It is unnecessary to repeat yet again what this court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration. In the present case we have a bank official of some seniority. He was employed specifically to devise and implement a system to enable the bank to evaluate the creditworthiness of applicants for bank credit and to eliminate as far as possible the potential losses inherent in extending

credit to persons unlikely to be able to meet their obligations to the bank. He was given authority by the bank to advance credit himself within given parameters.

[14] He deliberately sidestepped the very controls he had been employed to devise and implement. He knowingly put the bank at risk in circumstances in which it would never have gone on risk had they not been fraudulently concealed from it. The extent of that risk ran to millions of rands and the risks eventuated. In return for so doing he corruptly accepted large sums of money and other valuable benefits over a lengthy period of time. He forged the signature of a director of the bank in order to further his fraudulent scheme to induce the bank to make an advance in circumstances in which he knew the bank would not have been prepared to do so. He did all these things in order to ingratiate himself with certain customers of the bank and to enrich himself.

[15] His misconduct was premeditated and persistent. His position was one

of the utmost trust in an organization in which the need to repose trust in employees is far greater than in most. The losses sustained by the bank have not been made good. They are substantial. The benefits he received are difficult to quantify with accuracy but they certainly exceed R300 000. In the light of that gain, what appears at first blush to be a very large fine (R500 000) seems less so. The wholly suspended prison sentences and the 1000 hours of community service and the fine with which they were coupled were, in my view, a strikingly inappropriate response. In saying that I have not lost sight of respondent's previous history and his status as a first offender.

[16] It is a question whether or not respondent subjectively believed that the advances which he engineered deceitfully would be repaid in due course. If he did not, his crimes are graver still. I am prepared to assume in his favour that he did have that belief but the fact remains that he must at least have appreciated that there was a substantial risk that they might not be repaid. He must have surmised

that, given the true facts, the Bank would not have been prepared to take the risk. If that were not the case, why did he resort to deceit to have the advances made? He deliberately exposed the bank to those risks for his own personal gain.

[17] It was argued by counsel for respondent that the trial judge's sentences amounted to an attempt to avoid an unjust disparity between those sentences and the sentence imposed by another court upon one of the state witnesses for having stolen money from the bank. First, the learned trial judge made no reference whatsoever to that sentence when imposing sentence or when refusing leave to appeal. Second, very little is known of the circumstances of that case. Third, there is nothing to suggest that that person's crime was connected in any way with respondent's crimes. Fourth, that person was sentenced to direct imprisonment of 4 years which was converted to correctional supervision after he had been imprisoned for just over a year. I do not think anything can be made of this point.

[18] It remains to substitute what I consider to have been the appropriate penalty. In doing so I bear in mind that respondent has already suffered in many ways. He has had to bear the strain and anxiety of the criminal proceedings for an unusually long time. His trial had to recommence after it had run for well nigh a month because of a successful recusal application. The appeal by the Attorney General has prolonged the process and respondent has had to endure the suspense of not knowing what his fate would ultimately be. He has no doubt had to live with a constant sense of guilt for subjecting those near and dear to him to the trauma and disruption of their family life which his fall from grace must have caused. One cannot but feel deeply for them. Regrettably, one cannot allow one's sympathy for them to deter one from imposing the kind of sentence dictated by the interests of justice and society.

[19] Respondent has performed the 1000 hours community service and paid his fine. The fine can of course be repaid. The community service cannot be

undone. I intend therefore to leave that sentence undisturbed. In imposing sentence upon the counts in respect of which respondent was either fined or given a suspended sentence of imprisonment, I shall bear in mind the other ways in which respondent has suffered in the particular circumstances of the case and that counts 1, 3 and 4 must be disregarded because he has already "served" that sentence.

[20] In the result the appeal by the Attorney General against the sentences imposed in respect of counts 5, 7, 9, 10, 11, 12, 13, 16, 23, 24, 27, 28 and 29 must be upheld. Had I been in the shoes of the court *a quo* I would have imposed specific terms of imprisonment in respect of each of the counts to cater for the possibility that an appeal might conceivably result in the setting aside of one or more of the convictions. The need for that no longer exists (this being a court of last resort). Instead I shall take all those counts together for purposes of sentence.

[21] It is ordered that the appeal against the sentences imposed in respect of counts 5, 7, 9, 10, 11, 12, 13, 16, 23, 24, 27, 28 and 29 is upheld. The sentences are set aside and there is substituted for them a sentence of four (4) years imprisonment, all such counts being taken together for purpose of sentence. The appeal against the sentence imposed in respect of counts 1, 3 and 4 is dismissed.

R M MARAIS
JUDGE OF APPEAL

SCOTT JA)
MTHIYANE AJA) CONCUR