THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 158/05
REPORTABLE

In the matter between:

Maria Petronella SCHEEPERS Appellant

and

The STATE Respondent

Before: Cameron JA, Mthiyane JA and Cachalia AJA
Appeal: 1 November 2005
Judgment: 10 November 2005

Criminal law – sentence – section 276(1)(i) of Criminal Procedure Act 51 of 1977 – offers appropriate midway where imprisonment only appropriate sentence, but offences intrinsically less serious

---

JUDGMENT

CAMERON JA:

[1] In the magistrate's court at Belfast in Mpumalanga, the appellant was convicted of two counts of theft. The first involved R130; the second R1000. For these she was

sentenced to respectively one year's and two years' imprisonment, to run successively: an effective sentence of three years. An appeal to the high court in Pretoria (Van der Westhuizen J, Dunn AJ concurring) failed. That court refused leave, but the appellant petitioned this court and was granted leave for a further appeal against sentence.

[2] The two sums the appellant stole were relatively small. And neither complainant suffered any loss. The appellant's spouse repaid the R1000, and offered to repay the R130 (which it seems was credited to the complainant). To understand the sentences the magistrate imposed, one must thus go back to the events of 24 March 1999. We know little of them. The only glimmer we have is the appellant's SAP 69 form, which details her previous convictions. It records that on 28 January 2000 she was convicted of four counts of fraud committed on 24 March the previous year. On each of these counts, the same magistrate, Mr Green, sentenced her to one year's imprisonment. But he suspended the entire sentence for five years, on condition that she was not found guilty of theft or fraud or related offences committed within the period of suspension. Neither her counsel nor the State could tell us

more about the nature of the frauds or the amounts involved, if any.

[3] Far from avoiding further crime, the appellant committed the thefts at issue shortly after the suspended sentence. In July 2000, Mr Themba Steven Mazibuko sent his neighbour, Mr Zitha Johannes Nkabinde, to pay R130 in school fees for his granddaughter, a pupil at the Belfast Academy, where the appellant was an office worker. Nkabinde handed the money to her. She told him that she would give the child the receipt on Monday. But she never did, and Mazibuko's account remained in debit. He took the matter up with Nkabinde, who returned to the school and identified the appellant as the culprit. She denied all involvement, but the magistrate rightly accepted the accounts of the complainant, Nkabinde and the school principal, Mr Kruger.

[4] The second theft occurred on 27 October 2000. On that day, Mr Hendrik Jaars travelled from Waterval Boven to Belfast to pay his two children's school fees and bus fare. He found the appellant at reception. She told him that the cashier was at the doctor and would be back at 14h00. Jaars told her he could not wait until then. The appellant then suggested he leave the money with her; she would pay it to the cashier and give the

receipt to the children. He did so, but no receipt came. When Jaars phoned the cashier, she told him no money had been paid in. He returned to the school, where the appellant denied knowing him or ever receiving money from him. The principal encouraged him to lay a charge. He was later told that his money had been re-paid. From the evidence of the principal, it seems that had appellant's husband not paid the deficiency, Jaars's children risked losing their places on the school bus.

[5] From all the evidence – particularly that of Jaars, which involves the larger amount – it emerges that the appellant's acts of predation were opportunistic, in that on both occasions she found herself temporarily in a position where she was entrusted with cash amounts, which she then stole. But that is about all that can be said in extenuation of the thefts. As the magistrate, in passing sentence, and the high court, in dismissing the appeal, pointed out, the appellant exploited her position as an employee of the school and abused her employer's trust. She also violated the trust of persons who regarded her as being in a position of authority and were entitled to accept that she would deal properly with their money. Worse: it is plain that both complainants had sparse means. The appellant was stealing from the poor.

[6] Her thefts were also aggravated by lack of remorse and by what the magistrate called her ‘couldn't-care-less’ attitude (*traak-my-nie-agtig*) in court. At trial her lawyer could extract little from her personal circumstances to mitigate her crimes: when sentence was passed in October 2001 she was 44 years old (and is thus nearly fifty now). She has three adult children. When she was sentenced, one grandchild was living with her and her husband (a school principal in the neighbouring town of Machadodorp).

[7] Taken in isolation, as the magistrate pointed out in his full and carefully expressed reasons, the two thefts would not merit imprisonment. The critical question is what sentence their commission so soon after the four-year suspended sentence made appropriate.

[8] The magistrate expressly listed the sentencing alternatives: a fine; another wholly suspended sentence; correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977; or imprisonment under s 276(1)(i) (where a

person sentenced to five years or less may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services or a parole board after serving at least one-sixth of the sentence).[1] The magistrate doubted whether the appellant would benefit from being granted 'another chance'. He discounted the necessity for an obligatorily graduated approach to punishment (with a straight term of imprisonment becoming permissible only after a fine, correctional supervision, and then a sentence under s 276(1)(i)). He therefore concluded (my translation) –

'Appellant has proved she cannot or will not change her ways, not under the sword of four years' imprisonment; why would she do so with any other sentencing option? Appellant could advance many arguments as to why a sentence other than imprisonment should be imposed, but the court

---

[1] In terms of s 73(7) of the Correctional Services Act 111 of 1998:
'(a) A person sentenced to imprisonment under section 276 (1) (i) of the Criminal Procedure Act, must serve at least one sixth of his or her sentence before being considered for placement under correctional supervision, unless the court has directed otherwise, but if more than one sentence has been imposed under section 276 (1) (i) of the said Act, the person may not be placed under correctional supervision for a period exceeding five years.
(b) If a person has been sentenced to imprisonment under section 276 (1) (i) of the Criminal Procedure Act, and to imprisonment for a period not exceeding five years as an alternative to a fine the person must serve at least one sixth of the effective sentences before being considered for placement under correctional supervision, unless the court has directed otherwise.'

considers that these will just be attempts to keep the appellant out of prison. The only appropriate sentence that can be imposed is imprisonment.'

The high court endorsed this. It considered that though the sentence was severe, a further suspended sentence would not suffice as an alternative.

[9] Both courts' reasoning is in essence that because neither another suspended sentence nor correctional supervision are appropriate, a three-year term of imprisonment is. This approach seems to me mistaken, for it fails to consider the mid-way. That is a term of imprisonment, but one mitigated by the provisions of s 276(1)(i), which permits the discretionary conversion of the prison sentence into correctional supervision.

[10] The particular advantage of s 276(1)(i) should always be in the foreground when the sentencer considers that a custodial sentence is essential, but the nature of the offence suggests that an extended period of incarceration is inappropriate. In such cases, s 276(1)(i) achieves the object of a sentence unavoidably entailing imprisonment, but mitigates it substantially by creating the prospect of early release on appropriate conditions under a correctional supervision programme. This sentencing option seems tailor-made for the

appellant's offences. Neither the magistrate nor the high court considered its precise advantages. Their failure to do so requires us to intervene.

[11] Appellant's counsel urged us in doing so to impose a sentence of correctional supervision, contending that the matter should be remitted to the trial court for it to receive the necessary reports, and impose appropriate conditions. I do not think we can accede. It is difficult to fault the reasons the magistrate gave for discounting correctional supervision. It is true that we do not know the circumstances of the fraud the appellant committed 24 March 1999, or the amount, if any, that was involved. But they were serious enough for the magistrate to impose a four-year sentence. There was no appeal. Doubtless because the appellant was a first offender, he suspended the whole. The purpose of a suspended sentence is to spare the offender the rigours and humiliation of prison; but the risk that the suspended sentence will be brought into effect is designed to operate as a deterrent. That deterrent purpose was spilt on sand when the appellant committed these two thefts. The proximity between the suspended sentence and the repeat offences is not only pronounced, but obtrusive. And the appellant offended not just once, but a second time,

only three months later. The magistrate cannot be faulted for concluding that her path required a severe corrective. A prison sentence can hardly be avoided.

[12] Despite this, a three-year unmitigated term of imprisonment seems to me not only severe and avoidable, given the unconsidered alternative; but shocking in its disproportion to the thefts. In addition, the appellant runs the further risk that the state may choose to apply for her previously suspended sentence to be brought into effect. That consequence, too, must be added to the scale in determining how heavily the previously committed frauds should weigh in the current sentencing. In my view the magistrate misdirected himself in failing to balance the need for a prison sentence with the need for it to be proportionate to the offences committed. Section 276(1)(i) achieves the balance.

[13] In addition, the magistrate omitted to consider the cumulative effect of the two sentences. It is correct that the two thefts were quite different offences, separated in time by three months. But three years in respect of both seems to me disproportionately harsh. The sentences should be ordered to run concurrently.

[14] The appeal therefore succeeds. The sentence imposed by the magistrate is set aside. In its stead the following sentence is imposed:

One year's imprisonment on the first count of theft, and two years' imprisonment on the second count. The sentences are to run concurrently. Both sentences are imposed under s 276(1)(i) of the Criminal Procedure Act 51 of 1977.

E CAMERON
JUDGE OF APPEAL

CONCUR:
MTHIYANE JA
CACHALIA AJA