THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Not reportable

CASE NO: 218/07

In the matter between :

ALAN MICHAEL VERMAAK Appellant

and

THE STATE Respondent

Before:	**STREICHER, HEHER JJA & KGOMO AJA**
Heard:	**3 MARCH 2008**
Delivered:	**31 MARCH 2008**
Summary:	**Sentence – application to receive new evidence – no case made out – no misdirection on the part of magistrate.**
Neutral citation:	**Alan Vermaak v The State (218/07) [2008] ZASCA 45 (31 March 2008)**

KGOMO AJA

KGOMO AJA:

[1] The appellant was convicted on four fraud charges in the Uitenhage regional court pursuant to his plea of guilty. These counts were taken together for purposes of sentence and he was sentenced to five years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act, No 51 of 1977. The High Court, Eastern Cape Division, dismissed an appeal against the sentence imposed but granted the appellant leave to appeal to this court.

[2] The appeal was heard by us on Monday 3 March 2008. On Friday 29 February 2008 the appellant delivered an application to place 'new evidence' before us. The evidence is contained in two unsigned letters on the letterhead of a Dr James Potts dated 1 June 2008 and 13 February 2008 respectively. According to the letter dated 13 February 2008 the following diagnosis had been made in respect of the appellant:

Diagnosis:

(i) Coronary artery disease
(ii) Previous coronary bypass x2 (1998 and 2004)
(iii) Peripheral vascular disease (syptomatic claudication)
(iv) Hypertension
(v) Left ventricular dysfunction (EF 30%)
(vi) Previous depression
(vii) Angina pectoris

[3] The general rule is that this Court must decide the question of sentence according to the facts in existence at the time when the sentence was imposed and not according to new circumstances which came into existence afterwards (see *S v Immelman* 1978 (3) SA 726 (A) at 730H). It is not necessary to consider what exceptions there may be to the general rule as no case has been made out by the appellant that the evidence which he now wishes to place

before us, is new. The appellant's health problems started before sentence was imposed by the magistrate, evidence of those health problems were placed before the magistrate and he had regard to such evidence in imposing sentence. No case has been made out by the appellant that there has been a material deterioration in his health. For these reasons the appellant's application for the admission of 'new evidence' is dismissed.

[4] The appellant and his co-accused were partners in a used-car dealership. They jointly devised a scheme through which they sold several vehicles to unsuspecting different buyers and secured financial backing from commercial financial institutions for each duplicated transaction. They achieved this by falsifying motor vehicle registration documents. The partners would then share the proceeds from these ill-begotten gains.

[5] The appellant was 45 years old when he was sentenced in 2003. He was married and had two young children one of whom was in matric and the other (no age given) a budding rugby player. The appellant worked and maintained his family. He suffers from a chronic heart condition which led to a double heart by-pass operation. Due to this disability he was boarded by Transnet for whom he worked for a considerable period.

[6] The trial court took into consideration the appellant's personal circumstances, that the appellant pleaded guilty and displayed a measure of remorse, that he co-operated with the police and undertook to testify against his partner. As a consequence of the appellant's co-operation with the police the appellant's partner also pleaded guilty to fraud involving R400 000.

[7] Counsel for the appellant submitted that the magistrate did not place enough, if any, emphasis on the mitigating factors that were present. He

contended, furthermore, that the magistrate misdirected himself in not regarding the fact that the appellant had initiated steps to resolve the problem created by his fraud, as a mitigating factor. The magistrate said in this regard:

'Skade is gely of deur die eienaars of deur instansies en die bedrag is aansienlik. Dit is ook deur die Staat aanvaar dat u in 'n stadium beoog het om dinge te probeer beredder en inderdaad reëlings getref het met 'n prokureur mnr Paul Roelofse en hom kom sien het en in 'n proses was om 'n verband op u woning uit te neem om die storie te probeer uitsorteer. `n Hartaanval het dinge laat hande uitruk en is u ten einde laaste gesekwestreer.

Of hierdie punt werklik versagtend is is by my 'n vraagteken en of dit nie werklik daaroor gegaan het dat dit 'n poging was om die bedrag wat inderdaad gepleeg is verder te verdoesel nie.'

[8] In my view the magistrate did not misdirect himself in any respect. There is no evidence as to when the steps to raise money were taken by the appellant, they could, therefore, well have been taken in order to prevent detection. The magistrate, therefore, was entitled not to treat them as constituting a mitigating factor. All the mitigating factors were taken into account by the magistrate and the sentence imposed by him is an appropriate sentence. In the circumstances this court is not at liberty to interfere with the sentence.

[9] The appeal is dismissed.

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F D KGOMO
ACTING JUDGE OF APPEAL

CONCUR:

STREICHER JA)

HEHER JA)