THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 742/12

In the matter between:

SADHASIVAN NOLAN CHETTY **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Chetty v The State* (742/12) [2013] ZASCA 6 (14 March 2013)

Coram: MPATI P, MTHIYANE DP AND PLASKET AJA

Heard: **27 February 2013**

Delivered: **14 March 2013**

Summary: **Sentence – absence of probation officer's report – necessary information placed before magistrate from bar – no need for probation officer's report – whether appellant primary caregiver of daughter.**

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Van Zyl J and Ploos van Amstel AJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

PLASKET AJA (MPATI P and MTHIYANE DP concurring)

[1] The appellant pleaded guilty, in the Regional Court, Durban, sitting as a Commercial Crime Court, to 49 counts of theft and 94 counts of fraud. He was convicted in accordance with his plea and sentenced to six years' imprisonment, three years of which were suspended for three years on condition that he was not convicted of 'fraud, theft or any of its competent verdicts committed during the said period of suspension'. His appeal against sentence to the KwaZulu-Natal High Court, Pietermaritzburg (Van Zyl J and Ploos van Amstel AJ) was dismissed as was his application for leave to appeal. His appeal is before us with the leave of this court granted on petition.

[2] The sole issue that arises in this appeal is whether the magistrate misdirected himself by sentencing the appellant in the absence of a probation officer's report on whether the appellant was the primary caregiver of his young daughter and on her best interests generally, having initially called for such a report but later deciding that it was not necessary.

[3] The appellant was employed as a clerk by Avis Rent A Car. He took advantage of this position to steal various amounts of cash belonging to his employer and which he was supposed to bank on its behalf.

[4] The amounts stolen ranged from R144.80 to R10 290.14. The 49 instances of theft were committed during the period 3 March 2008 to 31 May 2008 – a period of about three months. The total amount stolen by the appellant was R71 315.70.

[5] The 94 fraud convictions arose from the appellant either using for his own purposes motor vehicles that had been returned early by clients to Avis, or allowing family and friends to use the vehicles, while misrepresenting to his employer, to its potential prejudice, that the vehicles were in fact still being used by its customers. These acts of fraud occurred between June 2007 and June 2008 and caused Avis potential prejudice amounting to R477 177.90.

[6] After the magistrate had been addressed on sentence by the appellant's attorney and the prosecutor, he postponed the matter. He instructed that a correctional officer's report and a probation officer's report be furnished and that the latter deal with certain issues relating to the appellant's family circumstances. When the matter resumed, the correctional officer's report was available but the probation officer's report was not. The magistrate proceeded to sentence the appellant nonetheless.

[7] During the course of his judgment, he explained why he had called for a probation officer's report and why he no longer considered it necessary to have it. He said:

'Your attorney has put up a very strong argument and I commend him for it, it was one of the strongest arguments I have heard when he pleaded on your behalf in mitigation of sentence, and set down every little factor that he could in respect of your circumstances. That was the reason why I considered that maybe I need to get a probation officer's report to verify what Mr Maistry told me is the truth. I am also aware that he is an officer of this court and I have known him for many years. We have worked together before as well and I know that he would not stand before me and spew out garbage.'

[8] While the magistrate may not have expressed himself as clearly as one would have liked, it seems to me that he initially thought that it was necessary to obtain a probation officer's report to verify certain of the factual assertions made from the bar concerning the appellant's family circumstances, particularly those concerned with the care of his daughter who was two years old at the time. He had then thought better of it. Because of his personal knowledge of the integrity of the appellant's attorney, he was prepared to accept the facts placed before him from the bar by the attorney. It is clear from his judgment that this is precisely what he did.

[9] This was also accepted as being the case on appeal to the court below. Van Zyl J said that the magistrate, in proceeding to sentence the appellant without the probation officer's report, 'indicated that he accepted at face value the submissions made by the defence attorney and consequently one gathers he deemed it unnecessary to delay proceedings further to await the formal verifying report which had been outstanding for many months at that time'.

[10] The purpose of a probation officer's report in a case such as this, in which the magistrate's concern was whether the appellant was the primary caregiver for his daughter and the impact of the sentencing of the appellant on her best interests, was dealt with in *S v M (Centre for Child Law as amicus curiae)*.[1] Sachs J stated that while a trial court should 'find out whether a convicted person is a primary caregiver whenever there are indications that this might be so', it was not necessary to obtain a probation officer's report in every case: the accused could be asked for the necessary information or be required to lead evidence if needs be.[2]

[11] In other words, the probation officer's report is not an end in itself. It is but one means of placing reliable information before a court in order to enable it to impose a properly informed sentence, taking into account along with all of the other relevant factors, the best interests of an accused person's minor children who will inevitably be prejudiced by the sentencing of their parent. If that information can be placed before the court in another satisfactory way, there is no need for a probation officer's report.

[12] In this case, that is precisely what happened. The relevant information was furnished by the appellant's attorney and the magistrate decided that that information could be accepted at face value. He considered it and took it into account, so the appellant can hardly complain. He was not prejudiced in the least by the magistrate deciding that it was not necessary for a probation officer to confirm the information when he imposed sentence; indeed, he obtained the advantage of his information

[1] *S v M (Centre for Child Law as amicus curiae)* 2007 (2) SACR 539 (CC).
[2] Para 36.

being placed before the court without it being scrutinised by a probation officer or tested by the State.

[13] In *MS v S (Centre for Child Law as amicus curiae)*[3] Cameron J warned against the application of *S v M* 'in cases that lie beyond its ambit'.[4] It only applies when the accused is a primary caregiver of a child, not when he or she is a breadwinner. A primary caregiver is 'the person with whom the child lives and performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly'.[5]

[14] In this case, it is clear from the information placed before the magistrate that the appellant was not his daughter's primary caregiver. He and his wife lived together, along with their daughter, and in the same premises as his parents. Both the appellant and his wife were employed and so, it can safely be assumed, contributed to the maintenance and well-being of their daughter. This was not a case like *S v M* where the appellant was a single mother who had to care for her children without the assistance of anyone else. Despite that, the magistrate considered the effect of the incarceration of the appellant on the best interests of his daughter.

[15] The argument was advanced that because the appellant's wife had been injured in a motor accident some 11 years before, and is disabled to an extent as a result, the imposition of a custodial sentence on the appellant would work hardship on the appellant's daughter because the appellant was responsible for most of the

[3] *MS v S (Centre for Child Law as amicus curiae)* 2011 (2) SACR 88 (CC).
[4] Para 62.
[5] *S v M* (note 1) para 28.

physical caring for his daughter. The appellant's attorney conceded that the appellant's extended family was able to help with the care of the child but argued that it would not be as beneficial for the child as the continued presence of her father. That is no doubt so but, as Cloete JA pointed out in *S v EB*,[6] while one has sympathy for children in situations such as this, 'their emotional needs cannot trump the duty on the State properly to punish criminal misconduct where the appropriate sentence is one of imprisonment'.

[16] *S v M* is not authority for the proposition that when incarceration is otherwise appropriate, the fact that it will cause collateral harm for the criminal's children is sufficient to render that sentence inappropriate.[7] Given the appellant's attorney's concession that the gap left as a result of the appellant's incarceration could and would be filled by a member or members of the appellant's extended family, it cannot be suggested that, to borrow the words of Cameron J in *MS v S*,[8] the 'fundamental needs or the basic interests' of the child will be neglected if the appellant is incarcerated. More importantly, for present purposes, the magistrate considered this issue on the basis of the information placed before him by the appellant's attorney, even though the appellant was not the child's primary caregiver. He cannot be faulted in that regard.

[17] There is, consequently, no merit in the argument that the magistrate erred in sentencing the appellant without a probation officer's report. I have also shown that the magistrate considered properly the effect of sentencing the appellant to

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[6] *S v EB* 2010 (2) SACR 524 (SCA) para 14.
[7] Note 1 para 42.
[8] Note 3 para 64.

imprisonment on the best interests of the appellant's daughter, even though the appellant is not a primary caregiver. I conclude that there is no basis for interference with the magistrate's sentence on either account. I can discern no other misdirection on the part of the magistrate and, in my view, it most certainly cannot be said that the sentence imposed by the magistrate induces a sense of shock. That being so, there is no basis upon which the sentence may be interfered with and the appeal must fail.

[18] The appeal is dismissed.

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C Plasket
Acting Judge of Appeal

APPEARANCES:

For the Appellant:	S D Slabbert
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For the Respondent:	S Naidu
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