THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 100/13

In the matter between:

GEOFFREY MARK STEYN **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Geoffrey Mark Steyn v The State* (100/13) [2014] ZASCA 20 (27 March 2014)

Coram: Mhlantla and Bosielo JJA et Van Zyl AJA

Heard: 24 February 2014

Delivered: 27 March 2014

Summary: Appeal against sentence – delay between sentencing and hearing of appeal – no misdirection committed by court below – appeal dismissed.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Horn J,Tshabalala J concurring sitting as court of appeal):

1 The appeal is dismissed.

2 Paragraph 2 of the order of the high court of 31 August 2012 is amended by the insertion of para (b) thereto to read:

'(a) The accused is sentenced to three years' imprisonment in terms of section 276 (1)(*i*) of the Criminal Procedure Act 51 of 1977.

(b) It is recorded that the accused has already served a period of five months in prison.'

JUDGMENT

Mhlantla JA (Bosielo JA and Van Zyl AJA concurring):

[1] The appellant was convicted in the Regional Court, Johannesburg of 23 counts of fraud, six counts of theft and one count of assault. All the counts of fraud and theft were taken together for purposes of sentence and he was sentenced to ten years' imprisonment. The regional magistrate suspended two years thereof on certain conditions. A sentence of one month' imprisonment with an option of a fine was imposed for the assault charge. An appeal against sentence was upheld by the South Gauteng High Court, Johannesburg (Horn J, Tshabalala J concurring). The court below set aside the sentence and imposed one of three years' imprisonment in terms of section 276(1)(*i*) of the Criminal

Procedure Act 51 of 1977 (the Act). The appellant appeals against that sentence with the leave of the court below.

[2] The essence of the attack on the decision of the court below is two-fold. First, it failed to adequately take into account the appellant's rehabilitation and erred when it imposed a sentence of direct imprisonment. Second, there is no indication on the record that the court below had considered the fact that the appellant had already served a period of five months before his release on bail pending his appeal and whether he should be given credit for the time served.

[3] The facts are briefly stated. From 1992, the appellant conducted a business of fixing and selling motor vehicles. He operated from his brother's home in Kibler Park, Johannesburg. Once a prospective customer showed an interest in purchasing a motor vehicle from the appellant, they would meet in order to finalise a transaction for the sale of that vehicle. The customer would pay a deposit and receive a receipt as proof of payment. The appellant promised to deliver the vehicle once a roadworthy test had been conducted.

[4] The appellant however never delivered these vehicles to the respective customers. He refused to meet or speak to them when they returned to enquire about the date of delivery of the vehicles. The appellant promised to repay the deposit in monthly instalments but failed to do so. As a result, the customers suffered losses of between R170 000 and R180 000. They eventually preferred charges of theft and fraud against the appellant.

[5] In 1995, the appellant was charged with various counts of fraud and theft as well as one count of assault. The offences in question were committed over a long period from April 1992 until February 1995. The trial in the Regional Court commenced on 15 January 1997. There were various delays during the trial. The matter was eventually finalised on 12 December 2003 when the appellant was convicted of 23 counts of fraud, six counts of theft and one count of assault and the sentences referred to in para [1] above were imposed.

[6] After the trial, the appellant was granted leave to appeal against the convictions and sentences imposed. The magistrate however refused to release him on bail pending his appeal causing him to commence serving his sentence. During April 2004, the appeal against the denial of bail was upheld and the appellant was released on bail. At that stage he had served a period of five months of his sentence.

[7] On 30 August 2012, almost nine years after the conclusion of the trial, the appeal came before Horn J and Tshabalala J in the court below. Before the hearing, the appellant abandoned his appeal against the convictions and only persisted in his appeal against the sentence imposed on the counts relating to fraud and theft. Before considering the merits of the appeal, the court below dealt with the issue relating to the delays in prosecuting and hearing the appeal. The court accepted that the delays from April 2004 until 2008 were due to, what the court described as lapses in the administration and processing of the appeal, as well as the fact that the record was defective and had to be reconstructed. It concluded that the blame for the delay could not be attributed to any specific party. Regarding the delays from 2008 until 2012, the court held that both parties were to blame.

[8] The appellant made application and was afforded an opportunity to present further evidence on appeal before the high court. This concerned his personal circumstances since 2003 and the manner in which he had rehabilitated himself since his conviction. In this regard, he stated that he had to a certain extent been influenced by his elder brother and that he managed to improve his life after moving out of his brother's house. Since his conviction and sentence in 2003, he has not been charged with any offence nor were any charges investigated. There are no criminal cases pending against him. He is self-employed as a mechanic and vehicle restorer and is the sole breadwinner. In 2008 he joined the local community policing forum and is the deputy chairperson thereof. He works closely with members of South African Police Service at the Alberton and Brackendowns Police Stations. He visits schools and orphanages to foster relationships with the local community and ensure the safety and security of these establishments. These services are performed without reward. He is prepared to compensate the victims at R5000 per month. He has already served five months of his sentence. He is prepared to commit himself to house arrest and monitoring when not working and render community service.

[9] After considering the further evidence, the court below concluded that the delay of the appeal since 2003 constituted exceptional circumstances and that it was at large to interfere with the sentence imposed by the trial court. The court accepted that the appellant had shown true remorse and had mended his ways. It upheld the appeal, set aside the sentence and replaced it with a sentence of three years' imprisonment in terms of section 276(1)(*i*) of the Act. The appellant now appeals against that order contending that a non- custodial sentence in terms of section 276(1)(*h*) of the Act should have been imposed.

[10] Before us, it was submitted that the court below committed a misdirection in that it failed to take into account the changed circumstances of the appellant as well as the period of five months already served by him.

[11] The imposition of sentence is pre-eminently within the discretion of the trial court. A court of appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or so totally out of proportion to the magnitude of the offence, sufficiently disparate, vitiated by misdirection showing that the trial court exercised its discretion unreasonably or is otherwise such that no reasonable court would have imposed it.[1]

[12] In so far as the first challenge is concerned, I am not persuaded that the court below misdirected itself. It has to be borne in mind that each case must be determined in the light of its own facts and circumstances. It may be necessary to consider comparative cases in determining whether the court below exercised its discretion properly.

[13] The first of these cases is *S* v *Karolia* [2] where the accused had served the sentence imposed on him by the court a quo and had paid compensation of R250 000. The court found that if the accused were to be rearrested and required to serve a lengthy prison sentence, it would be callous in the extreme. The court imposed a sentence of ten years' imprisonment on the charge of murder, four years' imprisonment on the charge of attempted murder and one year's imprisonment on the charge of assault with intent to do grievous bodily

[1] *S* v *Romer* 2011 (2) SACR 153 (SCA) para 22.
[2] *S* v *Karolia* 2006 (2) SACR 75 (SCA).

harm. The court suspended the sentences, save for eight months thereof. It further recorded that the accused had already served the period of eight months' imprisonment and he had paid the requisite compensation.

[14] In *S* v *Michele and Another*,[3] the appellants had been convicted of fraud and sentenced to seven years' imprisonment, two years of which were suspended. There was a substantial delay of six years before the appeal was heard. This Court considered the delay and the effect of the fraud on the complainant. It held that it would be callous to leave out of account the mental anguish the appellants must have endured by waiting for a period of six years without clarity as to their future. The Court concluded that the actual loss suffered was less severe and took into account the delay. The sentence was reduced to four years' imprisonment, two years of which were suspended.

[15] In *S* v *Jaftha*, [4] the accused had been charged for driving while under the influence of alcohol. He pleaded guilty and was convicted. This was the third time he had committed this offence. A sentence of three years' imprisonment in terms of section 276(1)(*i*) of the Act was imposed. He lodged an appeal against the sentence and was released on bail pending his appeal. He was not aware that his appeal against sentence had failed. This aspect was brought to his attention ten years later. He appeared to have been rehabilitated. This Court accepted his undisputed evidence that he had completely reformed. It interfered with a sentence of three years' imprisonment and imposed a sentence of two years' imprisonment or payment of a fine of R10 000.

[3] *S* v *Michele and Another* 2010 (1) SACR 131 (SCA) para13.
[4] *S* v *Jaftha* 2010 (1) SACR 136 (SCA).

[16] In *S* v *Malgas*,[5] the appellants, who were police officers, were sentenced in 2003. They were released on bail pending their appeal, which was eventually heard in 2012. There was no proper explanation for the delays. It was clear that they had decided not to do anything but wait for the appeal to be brought to court. This Court held that the long delay could not operate in their favour and dismissed their appeal against sentence.

[17] In *MS* v *S* [6] (*Centre for Child Law as Amicus*), the Constitutional Court concluded that a sentence in terms of section 276(1)(*i*) of the Act was appropriate where it considered a custodial sentence essential but found that the nature of the offence and circumstances of the offender warranted a shorter period of incarceration.

[18] The common factor in the cases referred to above and the present matter is the delay before the appeal was heard or when the appellant became aware of the outcome of the appeal. There are however distinguishing factors between the facts of these cases and the facts of this case. For example, in *Karolia* one of the reasons this Court decided to suspend the sentences was the fact that the accused had already complied with the order and paid compensation. In *Michele* this Court declined to suspend the entire sentence, but reduced the prison term. In *Jaftha* the conviction related to a traffic offence. There was no prejudice to any victim. The impact on society was therefore less severe.

[5] *S* v *Malgas* 2013 (2) SACR 343 (SCA) paras 20 & 21.
[6] *MS* v *S* (*Centre for Child Law as Amicus Curiae*) 2011 (2) SACR 88 (CC) para 57.

[19] On the other hand, in the case before us, the offences were committed over three years. The appellant had time to reconsider his actions but proceeded to defraud the complainants who suffered huge financial losses. The court below therefore took into account the appellant's circumstances that he had shown remorse and rehabilitated himself. It also considered the inordinate delay, the gravity of the offences which were committed over a period of time and the losses incurred by the complainants. Against that background, it reassessed the sentence. In my view, the contention that the court below over-emphasised the elements of retribution and deterrence at the expense of the appellants' personal circumstance is without merit. It is evident that the court placed much emphasis on the question of delay and the appellant's personal circumstances. This resulted in the sentence imposed by the trial court to be substantially reduced leaving a sentence that is lenient under the circumstances. Accordingly, there is no basis for interfering with the sentence.

[20] Regarding the second attack, counsel for the appellant submitted that the court below failed to take into account the period already served by the appellant. It is correct that the court below did not make specific reference that it had taken the five month period into account in arriving at its decision to impose the sentence it did. It is however clear from a reading of the judgment that the court was well aware of the fact that the appellant had already served a period of five months' imprisonment before his release on bail. I am not convinced that this aspect alone should be accorded much weight having regard to the aggravating factors in this matter so as to justify a sentence other than one of direct imprisonment. In my view this is no basis for interfering with the sentence. The appeal therefore cannot succeed.

[21] Thus although the appeal should otherwise be dismissed, the court below should have recorded in its order that the appellant had already served a period of five months of his sentence. In the result, the order of the high court has to be amended to reflect the period already served. That period will be accommodated by the insertion of an appropriate *caveat* in the order. I will amend the order accordingly.

[22] In the result, the following order is made:

1 The appeal is dismissed.

2 Paragraph 2 of the order of the high court of 31 August 2012 is amended by the insertion of para (b) thereto to read as follows:

'(a) The accused is sentenced to three years 'imprisonment in terms of section 276(1)(*i*) of the Criminal Procedure Act 51 of 1977.

(b) It is recorded that the accused has already served a period of five months in prison.'

N.Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

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