THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 46/06
REPORTABLE

In the matter between:

HEATHER JUNE SMITH **APPELLANT**

and

THE STATE **RESPONDENT**

Before: Cameron, Mlambo JJA et Theron AJA

Heard: 19 March 2007

Delivered: 28 March 2007

Summary: Sentence – motor vehicle theft – first offender – sentence of four years' imprisonment – on appeal sentence found to be inappropriately severe justifying interference – sentence reduced by suspending two years conditionally.

Neutral citation: This judgment may be referred to as *Smith v The State* [2007] SCA 40 (RSA).

MLAMBO JA

[1] This is an appeal, with the leave of the Cape High Court (Goso AJ, Waglay J concurring), against that court's dismissal of an appeal against a sentence of four years' imprisonment imposed by the Wynberg Regional Court on one count of motor vehicle theft. The appellant had pleaded guilty to that count as well as four others of theft of money totalling some R6 500. She was sentenced to four years' imprisonment on those latter counts taken together, which was suspended for five years on condition that she was not convicted of theft or fraud or attempt to commit theft or fraud committed during the period of suspension. The four-year term of direct imprisonment on the motor vehicle theft conviction was imposed despite a recommendation in a correctional supervision report that the appellant be sentenced in terms of s 276(1)(h) of the Criminal Procedure Act, Act 51 of 1977. The appeal is against only that sentence.

[2] The facts in relation to the relevant offence are that the appellant, a salesperson employed by Pierre Masado, trading as Steward Car Centre, in Diep River in the Western Cape, stole a Mazda 626 motor vehicle the property of her employer and sold it to her daughter who used her own Honda Ballade motor vehicle as a trade in. She pocketed the proceeds. (It seems from the evidence that her daughter was also a victim of the appellant's misdeed, being innocent of complicity in it.)

[3] The appellant resigned when her employer, noting that the business was struggling to make a profit even though it was selling cars, initiated an investigation. The investigation uncovered the appellant's deceit regarding the Mazda and other thefts of money.

[4] All in all the investigation uncovered a loss of R89 000 as a result of the appellant's chicanery for which she signed an acknowledgement of debt coupled with an undertaking of repayment at R2 000 per month. The Mazda had been valued at R25 000 of which her employer received an insurance payout of R15 000.

[5] When imposing sentence the regional court correctly criticized the correctional supervision report as unhelpful and lacking in substance. The regional court confirmed that the appellant was a suitable candidate for correctional supervision because she was gainfully employed and had a fixed residential address. The court further noted that it was significant that the appellant was a first offender and that courts do not lightly sentence a first offender to direct imprisonment. The regional court also noted that, by pleading guilty, the appellant had shown remorse though observing that (given the strength of the state case) she did not have much of a choice.

[6] The regional court also took account of evidence led in aggravation of sentence from Mr Masado. He informed the court that despite the appellant's undertaking to pay off her debt in monthly instalments of R2 000, she had failed to make any payments even though she had obtained a job after her dismissal. This evidence exposed the appellant as having lied to the correctional officer when she stated that she was in fact paying off the amount.

[7] Masado told the court that when the appellant was approached for information about the whereabouts of the stolen Mazda she lied, claiming that she had sold it to a Mr van Eck – but offered no cooperation in tracing him or in providing any details about him, until her daughter

surfaced, seeking assistance to register the motor vehicle in her name.

[8] The regional court also considered the appellant's personal circumstances as recorded in the correctional supervision report. At the time of her trial she was 45 years old and married with four children aged 28, 26, 23 and 16 years. Her husband, though sickly, was in the employ of Telkom earning a modest income.

[9] Against this background the regional court found that motor vehicle theft was a serious offence: the more so because the appellant had stolen from her employer, thus abusing her position of trust. The regional court in those circumstances concluded – though mindful that it would severely affect her – that direct imprisonment was the only appropriate sentence.

[10] In this court, counsel for the appellant criticised the regional court for imposing direct imprisonment and submitted that the regional court had misdirected itself in not giving appropriate cognizance to the fact that the appellant was a first offender and that she had shown remorse by pleading guilty. Counsel also submitted that the regional court had misdirected itself by considering the circumstances around the commission of the theft of money (counts 2 to 5) as aggravation for the motor vehicle theft count. It must be said in this regard that Masado's evidence painted a poor picture of the appellant's scrupulousness, truthfulness and integrity.

[11] It is correct that a plea of guilty is an indication of remorse and the regional magistrate though acknowledging this appeared to downplay its significance. This cannot however be viewed as a misdirection in itself.

In fact I can find no misdirection in the regional court's reasons in arriving at its sentence. Certainly the theft of a motor vehicle by an employee who breaches a position of trust merits in my view a custodial sentence, and not merely correctional supervision. In my view, however, the sentence is excessive if one takes account of two cardinal facts: first, that the appellant was a first offender, and second that the car she stole was of relatively low value. I refer in this regard to the judgment of this court in *S v Gerber* 2006 (1) SACR 618 (SCA). There this court gave global consideration to sentences imposed in a number of cases on first offenders for motor vehicle theft. This court concluded – in a case that involved, like the present, a 'white collar' offender – and the theft of vehicles of considerably higher value than in the present case – that a sentence of ten years' imprisonment, of which three years were conditionally suspended, was excessive. A sentence of seven years' imprisonment with two years conditionally suspended was substituted. The reasoning (at 623G) was:

'Die appellant verdien beslis 'n straf wat aan die boonste grens van gangbare strawwe lê. Nietemin dink ek dat die opgelegde straf met inagneming van huidige vlakke van strafoplegging en die persoonlike omstandighede van die appellant, treffend onvanpas is.'

[12] Indeed consistency in the sentencing of offenders in desirable and should be strived for. This however does not mean that courts should tailor-make their sentences in keeping with sentences imposed in other cases, in total disregard of the particular circumstances of each particular case. In this case the factors in favour of the appellant which can be regarded as mitigatory are that she is a first offender and demonstrated remorse by pleading guilty. Although some damaging evidence in

aggravation was led, my view is that the sentence is inappropriately severe, the more so because the loss she occasioned to her employer was mitigated. The magistrate took no discernible account of the fact that the appellant's employer received an insurance pay-out for more than half of the on-sale value of the vehicle. The loss eventually suffered thus totalled only R9 000. That is toward the lowest end of losses inflicted by the crime of vehicle theft.

[13] In these circumstances in my view an appropriate sentence is one of four years' imprisonment, two of which are suspended for five years on condition that the appellant is not convicted of theft or attempted theft of a motor vehicle within the period of suspension.

[14] The appeal therefore succeeds. The sentence imposed by the regional court is set aside and replaced with a sentence of four years' imprisonment, two of which are suspended for five years on condition that the appellant is not convicted of theft or attempted theft of a motor vehicle within the period of suspension.

D MLAMBO
JUDGE OF APPEAL

CONCUR:
CAMERON JA
THERON AJA