THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 604/08
No precedential significance

NURULLAH MIA

Appellant

and

Respondent

THE STATE

Neutral citation: **Mia v The State (604/08) [2009] ZASCA 47 (22 May 2009)**

CORAM: **STREICHER ADP, NUGENT, PONNAN, MLAMBO JJA and KROON AJA**

HEARD: **7 MAY 2009**

DELIVERED: **22 MAY 2009**

SUMMARY: Fraud – sentence – no substantial and compelling circumstances present – minimum sentence on each count confirmed – striking disparity between effective sentence imposed and that which appellate court would have imposed – sentence reduced from 20 to 15 years' effective imprisonment.

ORDER

On appeal from: The Pretoria High Court (Seriti J and Mavundla J) sitting as a court of appeal.

The appeal succeeds to the following limited extent:

(a) The appellant's sentence to a term of imprisonment of 15 years on each of the two charges is confirmed.

(b) The second term of 15 years' imprisonment is ordered to run concurrently with the first.

(c) The appellant is thus sentenced to an effective term of imprisonment of 15 years.

JUDGMENT

PONNAN JA (STREICHER ADP, NUGENT, MLAMBO JJA and KROON AJA concurring):

[1] The appellant, who was arrested on 2 July 2001, originally stood arraigned on six charges before the Pretoria Regional Court. At the commencement of the trial on 5 February 2004, three of the six charges were withdrawn by the State. To the remaining three – all charges of fraud – the appellant tendered a plea of not guilty. He did, however, admit the preamble to the charges in terms of section 220 of the Criminal Procedure Act 55 of 1977, save for paragraph 1.6.

[2] The general preamble to the charges, provided:

'**WHEREAS**, at all times relevant to the charge sheet:

1.1 Cheques, which included a complete chequebook with cheque numbers 117801 to 118000, all of which were for the account of Vodacom Service Providers Co (Pty) Ltd-Creditors were stolen during 2001.

1.2 Vodacom Service Providers Co (Pty) Ltd held account number 421033894 with Standard Bank.

1.3 The accused opened an account with the Brooklyn branch of ABSA, bearing account number 4052197013 and styled as N Mia t/a Azra's Transporters.

1.4 Cheque number 118000 for R920 000-00, emanating from the range mentioned in 1.1, was deposited to the account of the accused on 26 April 2001.

1.5 Cheque number 117893 for R4 800 000-00, emanating from the range mentioned in 1.1, was deposited to the account of the accused on 18 May 2001.

1.6 The accused knew, or ought reasonably to have known, that the abovementioned deposits to his account were fraudulent in nature.

1.7 The accused purchased a BMW on 25 May 2001 from Outo Glen Motors for the amount of R394 000-00. The accused paid with cheque number 111 drawn on the account mentioned in 1.3.

1.8 The accused purchased another BMW on 5 June 2001 from Randburg Motorlink for the amount of R450 000-00. The accused paid with cheque number 128 drawn on the account mentioned in 1.3.

1.9 On 14 June 2001 the accused handed cheque number 152, also drawn on the account mentioned in 1.3, and for the value of R950 000-00 to the personnel of Randburg Motorlink. This was for the purchase of 3 Mercedes Benz motor vehicles. The accused cancelled this deal but received the cash value of this cheque.

1.10 On 4 June 2001 the accused purchased a VW Microbus for the amount of R160 000-00 from Paarl Vallei Motors. The accused paid with cheque number 118 drawn on the account mentioned in 1.3.'

[3] The matter was then postponed and when the trial resumed on 24 May 2004, the court was informed that the appellant was desirous of altering his plea of not guilty to one of guilty on two of the remaining three charges. The court did not invoke the procedure envisaged in s 112 of the Act in respect of those two charges to which a plea of guilty had been tendered. Nor did the defence adduce a statement in terms of s 112(2) of the Act. Instead, a document headed ‘Formal Admissions in terms of s 220 of the Criminal Procedure Act, 1977’ was handed in on behalf of the appellant. It read**:**

'I, the undersigned,

NURULLAH MIA

(ID No. 620905 5246 087)

hereby declare as follows:

1

I am the accused in this matter.

2

As far as Counts 2 and 3 are concerned, I hereby formally admit:

2.1 that cheques which included a complete cheque book with cheque numbers 117801 to 118000, all of which were for the account of Vodacom Service Providers Co. (Pty) Ltd–Creditors, were stolen during 2001;

2.2 that Vodacom Service Providers Co. (Pty) Ltd held account number 421033894 with Standard Bank;

2.3 that I opened an account with the Brooklyn Branch of ABSA Bank, bearing account 4052197013 and styled as N Mia t/a Azra's Transporters;

2.4 that cheque number 118000 for R920 000.00, emanating from the range mentioned in 2.1, was deposited in my said bank account on 26 April 2001;

2.5 that cheque number 117893 for R4 800 000.00, emanating from the range mentioned in paragraph 2.1 was deposited in my said banking account on 18 May 2001;

2.6 that at the time the said deposits were made into my banking account I in fact foresaw the possibility that these were fraudulent in nature and nevertheless accepted these deposits in my said banking account.

3

I do hereby further admit:

3.1 that on 26 April 2001 and 18 May 2001, respectively, and at Southdale in the Regional Division of Southern Transvaal, I did unlawfully, falsely and with the intention to defraud, give out and pretend to ABSA Bank Limited that the respective cheque numbers 118000 for the amount of R920 000.00 and 117893 for the amount of R4 800 000.00, purported to be drawn by Vodacom Service Providers Co. (Pty) Ltd-Creditors on the Standard Bank Limited in favour of Azra's Transporters were good and valid cheques and that myself or Azra's Transporters were entitled to the proceeds of the said cheques;

3.2 that I induced ABSA Bank Limited to its prejudice to credit my said banking account with the respective amounts of the said cheques;

3.3 that when I gave out and pretended as aforesaid, I in fact foresaw the possibility that:

- the said cheques were not valid cheques;
- were not drawn by Vodacom Service Providers Co. (Pty) Ltd-Creditors;
- I nor Azra's Transporters were not entitled to the proceeds of the said cheques.

4

I do hereby further admit:

4.1 that I was not entitled to act as mentioned above and that I, at the time of my said conduct knew that what I was doing was wrong.

5

I am making these admissions out of my own free will and was in no way induced or influenced to make the same.'

[4] The state then closed its case without adducing any further evidence. As did the appellant. The appellant was thus duly convicted as charged on counts 2 and 3 and acquitted on count 4.

[5] On 4 March 2005, the appellant was sentenced to 15 years' imprisonment on each count, 10 years' of which on the second count was ordered to run concurrently with the sentence on the first. The effective sentence was thus a term of imprisonment of 20 years. An appeal to the Pretoria High Court (per Seriti J, Mavundla J concurring) solely in respect of sentence, having proved unsuccessful, the further appeal is with the leave of this court.

[6] It is common cause that Act 105 of 1997 (the so-called minimum sentencing legislation) finds application and that the offences in question fall within the purview of Part 2 of Schedule 2 of the Act. In terms of s 51(2)(*a*)(i) the legislature has ordained 15 years' imprisonment for a first offender found guilty of an offence of this kind, unless substantial and compelling circumstances are found to exist in terms of s 51(3)(*a*), which would justify the imposition of a lesser sentence. Neither the trial court nor the high court could find such circumstances to indeed be present. Each thus found itself unable to depart from the statutorily prescribed minimum sentence. In that, given the paucity of information adduced by the appellant as to the circumstances surrounding the criminal enterprise and his own role in it, as also the staggering amounts involved, neither court can be faulted.

[7] The approach of a sentencing tribunal to the imposition of the minimum sentences prescribed by the Act is to be found in the detailed judgment of Marais JA *S v Malgas* 2001 (1) SACR 469 (SCA). (See also *S v Fatyi* 2001 (1) SACR 485 (SCA) para 5; *S v Abrahams* 2002 (1) SACR 116 (SCA) para 13.)

[8] The circumstances entitling a court of appeal to interfere in a sentence imposed by a trial court were recapitulated in *Malgas* (para 12) where Marais JA held:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. . . . However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

[9] It has not been suggested that the sentence was vitiated by any misdirection. The thrust of the argument advanced on behalf of the appellant is that the two offences although distinctly separate were closely related and were in reality the execution of the same broad criminal transaction. It followed, so the argument went, that the second term of imprisonment of 15 years should have been ordered to run concurrently in its entirety with the first. I agree – there appears to me to have been no warrant for ordering a portion of the second sentence to run consecutively with the first. Such a course resulted in a sentence, the cumulative effect of which was manifestly severe. In my view the degree of disparity between the effective sentence imposed and that which this Court would have imposed is such that interference is competent and warranted. For, as it was put in *S v Sadler* 2000 (1) SACR 331 (SCA) para 8:

'The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate Court would have imposed a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So it is said that where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate Court would have imposed, interference is justified. In such situations the trial court's discretion is regarded (fictionally, some might cynically say) as having been unreasonably exercised.'

[10] In the result the appeal succeeds to the following limited extent:

(a) The appellant's sentence to a term of imprisonment of 15 years on each of the two charges is confirmed.

(b) The second term of 15 years' imprisonment is ordered to run concurrently with the first.

(c) The appellant is thus sentenced to an effective term of imprisonment of 15 years.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	A B Booysen Instructed by: De Meyer Serfontein Attorneys Pretoria Honey Attorneys Bloemfontein
For Respondent:	A J Rossouw Instructed by: The Director of Public Prosecutions Pretoria The Director of Public Prosecutions Bloemfontein