THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 477/08

In the matter between:

JOHN OUPA MICHELE	**FIRST APPELLANT**
KHAZAMULA JOSEPH MASHABANA	**SECOND APPELLANT**
v	
THE STATE	**RESPONDENT**

Neutral citation: *Michele v S* (477/2008) [2009] ZASCA 116 (25 September 2009).

Coram: Lewis, Mlambo JJA, Leach AJA

Heard: 8 September 2009

Delivered: 25 September 2009

Summary: Criminal procedure – appeal against sentence – undue delay in dealing with an application for leave to appeal – mental anguish caused as a result taken into account by appeal court in determining appropriate sentence – sentence reduced.

ORDER

On appeal from: High Court, Pretoria (Daniels J and Van Loggerenberg AJ sitting as a full bench).

The following order is made:

The appeal succeeds. The order of the high court is set aside and substituted with the following:

'1 The appeal succeeds.

2 The sentence imposed by the regional magistrate on each appellant is set aside and replaced with the following:

"Four years' imprisonment, two years of which are suspended for three years on condition the accused is not convicted of fraud committed during the period of suspension."'

JUDGMENT

LEACH AJA (LEWIS and MLAMBO JJA concurring)

[1] This is an appeal against the sentence imposed on the appellants in the Regional Court at Polokwane in April 2002 pursuant to their conviction on a charge of fraud to which they had pleaded guilty. They were each sentenced to seven years' imprisonment, two years of which were conditionally suspended for three years. Their appeal to the High Court, Pretoria, against this sentence was unsuccessful and was dismissed on 20 October 2003.

[2] A week later, on 27 October 2003, the appellants proceeded to lodge an application for leave to appeal to this court. However, despite the Director of Public Prosecutions having addressed a number of letters to the registrar of the high court asking for the matter to be enrolled for hearing, almost five years passed before the application was eventually heard on 25 August 2008. The circumstances which gave rise to this undue delay are shrouded in mystery with the application appearing in some way to have become lost in an administrative morass in the office of the registrar. The situation may have been exacerbated because the judge who presided at the appeal retired.

[3] Be that as it may, when the application was ultimately heard the court expressed the view that the lengthy delay was a factor which this court might take into consideration in regard to the question of sentence, and for that reason granted leave to appeal. In this way the matter has now reached this court more than seven years after sentence was initially imposed. I shall return to this aspect of the matter in due course.

[4] The subject matter of the charge against the appellants was a fraud they perpetrated against Old Mutual Insurance Company Limited. On 8 October 1998 the appellants took out a life policy with Old Mutual insuring the life of one Manaka who was employed by the first appellant. The first appellant was the nominated beneficiary of the policy which came into effect in January 1999 and provided for the sum of R377 520 to be paid on the death of Manaka, including an initial amount of R20 000 to cover funeral expenses.

[5] On 23 February 1999, the appellants submitted a claim under the policy to Old Mutual, falsely stating that Manaka had died on 14 February 1999 as a result of a head injury sustained in a motor car accident. The claim was lodged with fraudulent intent as the appellants knew that Manaka had not died. Unaware of the truth, Old Mutual immediately paid the agreed funeral cover of R20 000 to the first appellant by way of an electronic transfer of funds. Fortunately, it later ascertained that the claim was fraudulent and refused to pay the balance of R357 520 claimed under the policy.

[6] Both appellants were businessmen who were in receipt of an adequate, albeit not large, income. The first appellant owned both a filling station and a construction company and also carried on business as an insurance broker. The second appellant conducted both a security business and a cleaning service. Both appellants were first offenders and regular churchgoers. At the time sentence was imposed in the trial court the first appellant was 32 years of age, unmarried but maintaining a minor child, while the second appellant was 42 years of age, married with six children between the ages of 17 and 7 years.

[7] On behalf of the appellants it was argued that they had both shown remorse by pleading guilty and showing their willingness to repay to Old Mutual the money it had disbursed under the policy, and that the trial court had misdirected itself by not placing sufficient emphasis on their remorse. Although it is indeed so that during argument their legal representative suggested to the trial

court that the appellants should be ordered jointly and severally to repay the amount, the clearest evidence of their remorse would have been their immediate repayment of the embezzled money. If the appellants were truly remorseful, it is surprising, to say the least, that they did not do so and it is not without significance that in the heads of argument filed in this court it is again suggested on their behalf that a suspended period of imprisonment, conditional upon them repaying the amount of R20 000, would be appropriate. This, too, hardly smacks of remorse. However, for present purposes I am prepared to accept the suggestion of appellants' counsel that the appellants had been ill advised by a previous legal representative and that they had at all times been willing to repay. But that fact and their plea of guilty does not necessarily mean that the appellants were truly remorseful, particularly as their fraud, once discovered, would have been almost impossible to deny. A guilty plea in an open and shut case is often a neutral factor.

[8] The trial magistrate nevertheless accepted a degree of remorse on the part of the appellants, evidenced by their plea of guilty and their offer to repay, and in my view it has not been shown that he in any way misdirected himself by not placing more emphasis on this factor. I am also not persuaded by the appellants' further argument that the trial magistrate misdirected himself by failing to take into account the fact that their numerous employees would suffer if they were to be incarcerated. This possibility was specifically mentioned by the magistrate in his judgment but was not considered as being sufficient to justify a non-custodial sentence.

[9] The severity of the appellants' crime cannot be gainsaid. They acted purely out of greed and their scheme was carefully planned and executed as is shown by their having lodged false documents including police statements, a death certificate, a post mortem medical report, a police accident report and a certificate from a local prosecutor relating to a police docket, in support of their claim. The severity of white-collar crime such as this should not be

underestimated. Evidence was led that the Old Mutual alone suffers loss of some R2m per annum from similar frauds. Of course the result of this type of conduct is that innocent persons have to pay higher premiums to obtain insurance cover. And while the actual loss suffered by Old Mutual was limited to the R20 000 paid out for funeral expenses, had the fraud not been discovered its potential loss amounted to a further R357 520.

[10] As was pointed out in this court in *S v Sadler*[1] 'white-collar' crimes such as fraud have a corrosive effect on society and even first offenders should expect rigorous punishment including, where appropriate, incarceration. As was remarked by Mlambo AJA in *S v Barnard*[2] the decision in *Sadler* 'dispelled the notion that persons convicted of this type of offence were not criminals and were therefore entitled to be kept out of prison'.

[11] As a general rule an appeal court may not interfere with a sentence unless there is a material misdirection by the trial court or unless the sentence is startlingly inappropriate with there being a striking disparity between it and the sentence the appeal court would have imposed. The essential question to be addressed is whether the sentencing court properly exercised its discretion properly.[3]

[12] I share the trial court's view that imprisonment was called for in this case. However, the trial court did not give sufficient weight to the fact that although the potential prejudice to the complainant was substantial, the actual loss suffered was far less severe. Moreover, in my view, a sentence of no more than five years' imprisonment, two years suspended, should have been imposed. There is sufficient disparity between that sentence and the sentence imposed for this court to interfere. In the light of both that disparity and the trial court's

[1] 2000 (1) SACR 331 (SCA) paras 11-13.
[2] 2004 (1) SACR 191 (SCA) para 15.
[3] See eg *S v Pieters* 1987 (3) SA 717 (A) and *S v Sadler* above para 8.

misdirection, I conclude that the trial court did not exercise its sentencing discretion properly and that this court is entitled to interfere.

[13] In considering what would be an appropriate sentence, it is necessary to return to the lamentable delay which occurred after the application for leave to appeal to this court was lodged in the high court. While an appeal court will generally only consider the facts and circumstances known when sentence was initially imposed, this court has recognized that in exceptional circumstances factors later coming to light may be taken into account on appeal where it is in the interest of justice to do so.[4] In *S v Roberts*[5] this court was called upon to increase a wholly suspended sentence imposed on the respondent who had murdered his wife. In considering what period of imprisonment would be appropriate, it remarked that it would be 'callous to leave out of account the mental anguish the respondent must have endured' during a period of about two years between the state setting the appeal process in train and the appeal being heard. In the present case, where the appellants have been obliged to wait for a period of six years without clarity as to their future, there is all the more reason to do so. In my view, it is a factor to which this court should have regard in the assessment of an appropriate sentence.

[14] Taking it and all the other circumstances I have mentioned into account, I am of the view that a sentence of four years' imprisonment, two years suspended, is the appropriate sentence for each appellant. The sentence of the trial court must therefore be set aside.

[15] In the result, the appeal succeeds. The order of the high court is set aside and substituted with the following:

'1 The appeal succeeds.

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[4] See eg *S v Karolia* 2006 (2) SA 75 (SCA) paras 36-38.
[5] 2000 (2) SACR 522 (SCA).

2 The sentence imposed by the regional magistrate on each appellant is set aside and is replaced with the following:

"Four years' imprisonment, two years of which are suspended for three years on condition the accused is not convicted of fraud committed during the period of suspension."'

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L E LEACH

ACTING JUDGE OF APPEAL

APPEARANCES:

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