Lom Business Solutions t/a Set LK Transcribers/HVR

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES YES/~~NO~~
(3) REVISED

DATE 16.9.2008 SIGNATURE

CASE NO: A294/06

DATE: 2008-08-18

In the matter between

THE STATE Applicant

and

OATES STEPHANIE CHARLENE Respondent

J U D G M E N T

JOFFE J:

1. The respondent pleaded guilty to and was convicted by the regional court of 20 counts of theft. All the accounts were apparently taken together for purposes of sentence. The regional magistrate sentenced the respondent on 21 June 2006 to 18 months correctional supervision in terms of S 276(1)(h) of the Criminal Procedure Act 51 of 1977 ("the Act"). The state now appeals against the sentence, it having obtained leave to appeal against the sentence in terms of S 301(A) of the Act on 31 August 2006

from a judge in this division.

2. The following conditions form part of the sentence imposed by the regional magistrate:

1. *"... the accused is placed under house arrest at 37 Aires Road, Brackenhurst for the full duration of the correctional supervision / 18 months; from 18h00 to 5h00 / on workings days, and from 24h00 to 24h00 on the days on which she does not work; provided that the house arrest shall not apply during the times reasonably required for the performance or attendance of the following:*

1.1 community service;

1.2 life skills programme;

1.3 8h00 – 12h00 religious service;

2. *the accused shall perform community service for 16 hours for month(s) of the sentence. The community service shall consist of as decided by the Commissioner of Correctional Services.*

3. *the hours and terms of house arrest and community service may in the discretion of the Commissioner of Correctional Services be reduced. The place where house arrest and / or community service has to be performed may be altered by the Commissioner of Correctional Services in his / her discretion;*

4. *The accused must attend and complete the following program(s). / The accused is placed under supervision of a*

probation officer or correctional officer.

5. *The accused is subjected to monitoring by the Commissioner of Correctional Services in order to fulfil the aim of his sentence.*

6. *The accused shall report to the correctional officer on 01/7/06 at cnr Trichart and Market, Boksburg Community Corrections.*

7. *The accused shall refrain from misusing intoxicating liquor or dependence producing substances other than that prescribed by a medical practitioner during the full duration of this sentence.*

8. *The accused shall execute any reasonable instruction regarding the compliance and administration of this sentence issued by the Commissioner of Correctional Services.*

9. *The accused may not change this residential or employment address without having given prior notice to the Commissioner of Correctional Services. The accused may not leave the magisterial district in which she resides without the prior approval of the Commissioner of Correctional Services.*

10. *The Commissioner of Correctional Services shall ensure that the conditions are observed, and if infringed to be dealt with in accordance with Section 48B of the Correctional Services Act, 1959 (Act 8 of 1959)" (sic).*

3. The total amount stolen by the appellant amounted to R4, 649, 300.54. The amount was stolen over a period commencing on 23 October 2003 and terminating on 15 July 2005. The smallest amount stolen amounted to R14 000.00. The largest amount stolen amounted to R681 363.99. Five of the amounts stolen exceeded R500 000.00. In terms of the Criminal Law Amendment Act 105 of 1997 these five thefts, in the absence of a finding of substantial and compelling circumstances, would each attract sentences of 15 years imprisonment.

4. The prosecutor in the Court *a quo* did not refer to the minimum sentence legislation during his submissions on sentence. The respondent's counsel did refer thereto. He made it clear that, in respect of certain of the convictions, absent of a finding of substantial and compelling circumstances which justified the imposition of a lesser sentence, the minimum prescribed sentence in respect of those convictions had to be imposed. After respondent's counsel had completed addressing the court on sentence the regional magistrate stated that: *"It is so the amount involved automatically triggers the minimum sentence of 15 years or above for this type of offence but as I have said and the Advocate has already stated that the court has to look whether there are any exceptional circumstances that will warrant the court not to impose that particular type of sentence."* Despite his awareness of the minimum sentence legislation there is no mention thereof in the regional magistrate's judgment on

sentence. There is certainly no finding of substantial and compelling circumstances (nor for that matter to "exceptional circumstances" as incorrectly referred to by the regional magistrate) and no recordal thereof as prescribed in S 51(3)(a) of Act 105 of 1997. In reasons submitted in terms of rule 67(5) of the magistrates' court rules, the regional magistrate ascribes his failure to deal with the minimum sentence legislation as an oversight. He adds that in determining sentence "*more emphasis was placed on the accused, without full regard to the provision of the minimum sentence Act*" (*sic*).

5. Whatever the reason for the regional magistrate's failure to refer to the minimum sentence legislation and to apply such legislation, such failure amounts to a misdirection by the regional magistrate and entitles this court to consider sentence afresh. This court will also be entitled to interfere with the sentence imposed by the regional magistrate if, after taking into account all the relevant circumstances, the sentence that this Court would impose is sufficiently disparate from the sentence imposed by the regional magistrate so as to result in the regional magistrate's sentence being regarded as disturbingly inappropriate. It was put thus in *Sadler* 2000 (1) SACR 331 (SCA) on 334: "*The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience when 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 require substantial qualification. If it would be taken too literally, it would deprive an appeal against sentence of much of the social utility it intended to have. So it is said that whether there exist 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". See also *Narker* 1975 (1) SA 583 (A) on 585D and 590A; *Mothibe* 1977 (3) SA 823 (A) on 830D.

7. It should perhaps also be pointed out that the regional magistrate commences his judgment on sentence by recording that the appellant had been convicted of fraud, when she had in fact been convicted on 20 charges of theft. There is also no expressed indication by the regional magistrate that all the convictions were taken together for the purpose of sentence as they must have been.

8. Before considering the facts relevant to the determination of an appropriate sentence there are two preliminary issues that have to be determined.

9. The first issue relates to an application by the respondent to place new facts before this court. The application is opposed by the respondent.

10. The new facts are contained in affidavits deposed to by the respondent. In the first affidavit the respondent states that the notice of set down of the appeal was received by her attorney of record on 30 May 2008. She further states in the affidavit that she 'successfully completed and served' the correctional supervision service that was imposed on her. She adds in the affidavit that from September 2006 to October 2007 she was employed by a company (Avbob, Alberton) and from November to date of deposing to the affidavit by another company (PXL Freight and Logistics). The respondent annexed documentation in support and in amplification of the facts set out above. The documentation is not on oath and as such is in inadmissible. The respondent further states in the affidavit that she contributes to her mother's living expenses and that her mother would not cope on her salary without her financial assistance. She states in the affidavit that: "*I humbly submit that it is important for the above mentioned factors to be placed before this Honourable court (sic) due to the fact that although the state was granted leave to appeal already as far back as August 2006 they waited for almost two years to set the appeal down for hearing. I have in the mean time (sic) served my sentence and I have made something of my life. I humbly submit that I am now gainfully employed. I further submit that I have*

been fully rehabilitated as is apparent from the contents of annexures 'SCO1 to 3'".

A further affidavit was filed on behalf of the respondent. In that affidavit reference was made to the fact that her present employer awarded her the title of employee of the year.

11. The general rule is that an appeal court must determine an appeal against sentence on the facts in existence at the time when the sentence was imposed and not according to new circumstances which came into existence after the imposition of the sentence. See *Verster* 1952 (2) SA 231 (AD) on 236B. An application similar to the application presently being determined came before the Supreme Court of Appeal in *Swarts* 2004 (2) 370 SCA. The following was held in regard thereto in paragraph 6 on 373: *"Section 322(2) of the Criminal Procedure Act provides that upon an appeal against sentence the Court of appeal may confirm the sentence or it may delete or amend the sentence and impose 'such punishment as ought to have been imposed at the trial.' It has been held that it is implicit in the powers conferred upon a Court of appeal that it may take account only of circumstances that existed at the time the trial court imposed its sentence. (R v Verster 1952 (2) SA 231 (A) at 236A-D; R v Hobson 1953 (4) SA 464 (A) at 466A-B; S v Marx 1992 (2) SACR 567 (A) at A573(i) to (j) but it has been suggested that exceptional circumstances might permit a departure from that rule (S v Marx 1989 (1) SA 222 (A) at 226C). I have assumed that this court may indeed admit further*

evidence in exceptional circumstances, bearing in mind particularly that the court is bound to ensure that every accused is given a fair trial as provided for in S 35(3) of the Bill of Rights."

12. The Supreme Court of Appeal applied the ratio set out above in Swart's case and held in the same paragraph as is set out above as follows: *"In the present case no such circumstances exist, for the evidence that is sought to be adduced does not take the matter further and its exclusion cannot prejudice the respondent. To the extent that the evidence is admissible at all it constitutes no more than confirmation that the respondent has thus far observed all the terms of the sentence that the trial Court imposed and that he is a person who is ordinarily polite and well-behaved. We would, in any event, assume that the respondent is complying with the terms in his sentence (if that were to be relevant) and the respondent's character was in any event established before the trial Court. The evidence accordingly adds nothing material and no purpose is served by admitting it."*

13. In the present application the evidence in regard to the serving of the correctional supervision sentence would in any event have been assumed. As in the Swart matter the respondent's character was established in the court *a quo*. The evidence that the respondent seeks to adduce in this regard adds nothing materially new and no purpose would be served in admitting it. The evidence of the appellant's employment is however of a different nature. It is material and it does add to the relevant facts that a

court would consider when determining an appropriate sentence. It should be emphasised that such evidence cannot be taken into account in determining whether the regional magistrate misdirected himself in determining the sentence which he imposed on the respondent. The evidence as to be the appellant's employment, as set out above, will be only taken into account in determining an appropriate sentence if it is found that the magistrate's sentence is wrong.

14. The second issue arises out of submissions made on behalf of the respondent. It is submitted on behalf of the respondent that the appellant did not pursue the appeal with reasonable expedition and that the respondent has been severely prejudiced by the appellant's inaction. In support of this submission reference was made to *Carter* 2007 (2) 415 (SCA) on 421(c) where it was held that: "*Appellants in criminal cases, whether the State or an accused, are under a duty to pursue the appeals with reasonable expedition. The proper administration of justice demands that they do so. Undue delay may in appropriate circumstances even amount to the abandonment of an appeal.*"

15. It is argued on behalf of the respondent that some 26 months had elapsed since sentence was imposed on the respondent and some two years had elapsed since the appellant obtained leave to appeal. It is submitted that the appellant did not pursue the appeal with reasonable expedition and that the respondent has been severely prejudiced by the appellant's inaction. In response

to the respondent's submission, which was contained in the respondent's heads of argument, the appellant put up an affidavit explaining the delay in the hearing of the appeal.

16. The method chosen by the respondent to raise this issue, namely by way of submission in her counsel's heads of argument, was not appropriate. The correct way for this to be done is for the necessary relief to be sought by notice of motion supported by an affidavit. The appellant would have filed an answering affidavit to which the respondent may have replied to if so advised. In that manner the relevant issues would have crystallised and the evidence relating thereto placed before the court. Despite this shortcoming it is possible to determine this issue in the manner that it serves before this court without any prejudice being occasioned to either party.

17. The affidavit put up by the appellant is deposed to by the Deputy Director of Public Prosecutions, Witwatersrand Local Division of the High Court who is presently in charge of the appeal section in the office of the Director of Public Prosecutions in this division. In the affidavit the deponent sets out the history of the matter. For present purposes it is not necessary to refer thereto from the commencement thereof. As already alluded to leave to appeal was granted on 31 August 2006. When granting leave to appeal the learned judge who granted the leave did so "*to the full bench of this division.*"

18. Immediate steps were taken for the judge's judgment to be

transcribed. Delays, not of the making of the judge or of the office of the Director of Public Prosecutions, were encountered in the transcription. Nothing more need be said of these delays save that they do not reflect well on the administration of justice.

19. On 2 November 2006 the signed transcribed judgment was received by the office of the Director of Public Prosecutions. On 7 November 2006 that office directed a letter to the senior public prosecutor at Kempton Park, which was the court at which the respondent was convicted and sentenced, requesting him to obtain reasons from the regional magistrate in terms of rule 67(5) of the Magistrates' court rules and to prepare the necessary appeal record once those reasons had been obtained. The appeal record was received by the office of the Director of Public Prosecutions on 30 November 2006. At that time Advocate Dakana headed the appeal section of the office of the Director of Public Prosecutions.

20. As leave to appeal had been granted to a full bench, Advocate Dakana approached the office of the Deputy Judge President of this division for a direction that the appeal could be heard by two judges of this division and not by three judges as suggested by the order granting such leave to appeal. According to a file note made by Advocate Dakana this approach was made on 22 January 2007. According to the affidavit Advocate Dakana was informed that the Depute Judge President was aware of the situation and that the file should be forwarded to the Depute Judge President for

the allocation of a date for the hearing of the appeal.

21. During April 2007 the Director of Public Prosecutions, Witwatersrand Local Division received a letter dated 19 April 2007 from the complainant in the prosecution of the respondent. In essence information was sought as to the enrolment of the appeal. This letter was replied to on 14 May 2007. In that letter it is stated that: "*This office referred the Full Bench appeal to the Deputy Judge President for a date and currently this office is waiting for a set down date for the said appeal.*"

22. During September 2007 the complainant directed a letter to the Deputy Judge President. This letter is dated 26 September 2007. In the letter the complainant requested that a date for hearing "by a full bench". On receipt of this letter the Deputy Judge President directed a letter to the Director of Public Prosecution, Witwatersrand Local Division. In the letter the Deputy Judge President points out that the appeal may be an ordinary appeal from the regional court and not a judge's appeal. This letter elicited the response from the Director of Public Prosecutions, Witwatersrand Local Division dated 20 November 2007. From this response it appears that the registrar of this court had failed to prepare a record for a full bench appeal and such record had not been forwarded to the Deputy Judge President for the allocation of a date for the hearing of the full bench appeal. It furthermore appears from the response that the record had been prepared and forwarded to the for the allocation of a date for the hearing of the

full bench appeal.

23. On 20 February 2008 the Deputy Judge President directed a letter to the learned Judge who had granted leave to appeal and enquired from him whether it was his intention that a court constituted by three judges should hear the appeal or whether it should be dealt with in the same manner as ordinary magistrate's court appeals. The Judge replied indicating that leave to appeal was granted to a court constituted by two judges. After the deponent to the affidavit was informed thereof the appeal was enrolled for hearing.

24. It is stated in the respondent's counsel's heads of argument, and it was accepted by appellant, the notice of set down which enrolled the appeal for the hearing before this court, was served on the respondent's attorney of record on 30 May 2008.

25. The delay in the hearing of this appeal can be ascribed to three main factors. The first factor is whether the appeal, in terms of the order granting leave to appeal, had to be heard by two or three judges. The second factor is the delay in allocating a date for the hearing of the appeal. The first factor impacts on the second factor. If the appeal was to be heard by a court comprising three judges a suitable date for the hearing of the appeal would be determined by the Deputy Judge President. If the appeal was to be heard by a court comprising two judges a suitable date for the hearing of the appeal would be determined by the office of the Director of Public Prosecutions of this division. The third factor is

the failure by the office of the Director of Public Prosecutions of this division, on its understanding of the matter as set out in the last sentence of paragraph 20 hereof, to follow up the allocation of a date for the hearing of the appeal with the Deputy Judge President.

26. Blameworthiness cannot be ascribed to the office of the Director of Public Prosecutions in respect of the first and second factors. It can be ascribed to that office in regard to the third factor. While there would be some natural reticence in reminding the Deputy Judge President to allocate a date for the hearing of the appeal, the failure to approach him in that regard at all cannot be countenanced. Likewise, when the letter was received from the complainant the failure for active steps to be taken cannot be countenanced.

27. S 35(3)(d) of the Constitution of 1996 provides that everyone who is arrested for allegedly committing an offence has the right to have their trial begin and conclude without unreasonable delay. This section of the Constitution was considered by the Constitutional Court in *Pennington and Another* 1999 (2) SACR 329 CC where it was held at 344i that: "*Undue delay in the hearing of criminal appeals is obviously undesirable, particularly when the appellants are in custody. It does not follow, however, that such delay constitutes an infringement of the constitutional right to a fair trial. That question can be left open, for even if it were to be regarded as an infringement of that or some other*

constitutional right, I am satisfied that it would not entitle the appellants to have their convictions set aside or their sentences reduced on appeal.

[42] Section 7 of the interim Constitution provides that the remedy for an infringement of a right entrenched in the Bill of Rights is 'appropriate relief'. It is in the public interest that persons who are guilty of crimes should be convicted and sentenced. The reversal of the conviction or the reduction of the sentence properly imposed on the appellants by the trial court could not be regarded as 'appropriate relief' for the delay in the hearing of what proved to be unsuccessful appeals. The cause of the delay was not referred to in the argument, or in the analysis of the alleged irregularities relied upon by counsel for the appellant. Even if the delay occurred without fault on the part of the appellants, it could not be said to have had any bearing on the convictions and sentences imposed on them. To grant them the relief that they seek would be contrary to the public interest and would bring the administration of justice into disrepute."

28. The application of S 35(3)(d) was considered in *Liebenberg* 2005 (2) SACR 355 (SCA); *Ngcina* 2007 (2) SACR 19 (SCA) and *Sohop* 2008 (1) SACR 552 (SCA). In none of these matters was it determined that the section applies to an appeal. In Swarts *supra,* at 374b it was assumed that the section applies to an appeal.

29. The respondent's counsel submits that S 35(3)(d) is applicable to an appeal. No argument was however addressed in support of

this submission. Nor was argument addressed to the court on the consequences of an infringement of the section on the assumption that it was applicable to appeals. What was submitted on behalf of the respondent was that the delay in placing the appeal on the roll severely prejudiced the respondent. It was submitted that she served the sentence imposed on her in full, that she is fully rehabilitated and that she has started a new life.

30. For present purposes it will be assumed that S 35(3)(d) is applicable to an appeal such as the present and that undue delay in the prosecution of the appeal can result in the court refusing to hear the appeal. The delay in the hearing of the appeal however is not inordinate. The appellant's culpability in regard thereto is limited as is set out above. The respondent, through her attorney's of record, was fully aware that the appellant had applied for leave to appeal and that leave to appeal had been granted. Furthermore the respondent apparently took no steps through her attorney of record to ascertain why there was a delay in the enrolment of the appeal. This is understandable. No doubt respondent feared that any enquiry in this regard would elicit action as did the enquiries by the complainant ultimately. Respondent was content to let the matter lie dormant and to hope the appeal would be forgotten. Regard being had to all the circumstances it cannot be held that the delay in the enrolment of the appeal is such as to justify a refusal to hear the appeal.

31. It should also be pointed out that the delay in the enrolment of the

appeal is not such as to be construed as an abandonment of the appeal as was alluded to in Carter *supra.*

32. Consideration must now be given to the facts relevant to the determination of sentence as they were established before the regional magistrate. Regard must also be had as to the impact that such facts have on the determination of a proper sentence.

33. The respondent was born on 9 January 1984. She did not have a stable upbringing. Her father was an alcoholic and he committed suicide when she was very young. She was only 19 years of age when she commenced stealing the money. She left school whilst in Grade 12. She thereafter continued with her education and matriculated in 2001. The respondent was a first offender.

34. The respondent's age at the time the offences were committed is an important consideration in the determination of a proper sentence. See in general in this regard *Mohlobane* 1969 (1) SA 561 (A) at 567 F-G; *Jansen* 1974 (1) SA 425 (A) at 427 in Fine at 428A. In *Nkosi* 2002 (1) SACR 135 (W) it was held that the following principles should guide a court in deciding on the suitability of an appropriate sentence for a child offender: "*The following principles are therefore applicable in guiding a court's discretion in deciding on the suitability of an appropriate form of punishment for a child offender:*

(i) Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender.

(ii) Imprisonment should be considered as a measure of last

resort, where no other sentence can be considered appropriate. Serious violent crimes would fall into this category.

(iii) Where imprisonment is considered appropriate it should be the shortest possible period of time having regard to the nature and gravity of the offence and the need of society as well as the particular needs and interest of the child offender.

(iv) If at all possible the judicial officer must structure the punishment in such a way as to promote the rehabilitation and reintegration of the child concerned into his/her family or community.

(v) The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.

35. The respondent was certainly no child as is contemplated in the aforegoing judgment at the time the offences were committed. Nevertheless, her age is an important factor to be taken into account as is the *dictum* in Nkosi's judgment.

36. The respondent is obviously an able and industrious employee. She commenced her working relationship with Avis Fleet at a relatively young age and seems to have advance rapidly and occupied positions of trust.

37. According to Mr Truter, the clinical psychologist who testified in

mitigation of sentence on behalf of the respondent in the Court *a quo*, the respondent suffers from a personality disorder, an eating disorder and depression. All these conditions played a role in the committing of the thefts. She utilised some of the proceeds of the theft to attract and maintain the attention of a male friend and to create a good emotional feeling for herself.

38. The twenty thefts were committed over a period of 22 months commencing on 23 October 2003 and terminating on 15 July 2005. The monies were stolen from the respondent's employer, Avis Fleet, while she was in their employ. Truter set out his conclusions in a written report, the contents of which he confirmed as correct at the commencement of his *viva voce* evidence. In his report he states that the respondent committed sixteen thefts during the period 23 August 2004 and 13 June 2004 and that R4, 448, 635.55 was stolen. This evidence is not in accordance with the respondent's plea of guilty to the twenty charges as set out in the annexure to the charge-sheet. The amount which the respondent admitted stealing amounted to R4, 649, 300.54 during the period commencing on 23 October 2003, when an amount of R14 000.00 was stolen. The theft of R14 000.00 on 23 October 2003 is omitted from Truter's report. Truter's report does not accord with the charge sheet in other non material respects. None of the aforementioned was taken up with Truter during cross-examination. It would seem that respondent was the source of Truter's information and that she may well have been

attempting to minimise the period during which and the extent of the thefts which she perpetrated but no finding need be made in this regard.

39. After the thefts were uncovered certain amounts were recovered by Avis Fleet. An amount of at least R1, 050, 000.00 has not been recovered nor was there any tender for the repayment thereof.

40. Truter testified that the appellant showed true remorse for her conduct. The minimisation of the theft as set out above and the absolute silence in regard to the unrecovered portion of the money stolen tends to cast doubt on Truter's opinion in this regard. It should perhaps be noted that it is accepted that respondent's earning capacity may not be sufficient to make meaningful inroads into the shortfall in the money stolen, the payment of a monthly amount, which probably would have been difficult for the respondent to afford, would however have gone some way in establishing true remorse on her part.

41. Truter testified that the frequency and the extent of the thefts concerned him. He accepted that a certain amount of greed motivated the thefts. Truter added that the thefts would have continued but for the fact that the respondent's employer moved its bank account to another banking institution.

42. The seriousness with which this type of 'white collar crime' must be viewed appears from a *dictum* in Sadler's case *supra* where it was held that paragraphs 11 and 12: *"I am satisfied that the circumstances of this case call for the imposition of a period of*

direct imprisonment and that the interests of justice will not be adequately served by leaving the sentence imposed by Squires J undisturbed. So-called 'white collar' crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of 'white-collar' crime as non violent crime and its perpetrators (where they are first offenders) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for 'white collar' crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from 'respectable' backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

These are heresies nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it."

43. Whilst of course each sentence must be determined on its own facts reference can be had to other judgments for similar type of offences. In this regard reference can be had to *Lister* 1993 (2) SACR 228 (A); *Sinden* 1995 (2) SACR 704 (A); *Blank* 1995 (1)

SACR 62 (A); *Sadler* 2000 (1) SACR 331 (SCA); *Erasmus* 1999 (1) SACR 93 (SE); *M* 2007 (2) SACR (CC) 1; *Wasserman* 2004 (1) SACR 251 (T) and *Nel* 2007 (2) SACR 481 (SCA).

44. It was contended on behalf of the respondent and correctly accepted on behalf of the appellant that substantial and compelling circumstances were present at the time the regional magistrate imposed sentence. These circumstances comprised the respondent's age at the time the offences were committed, the childhood trauma that she underwent, the fact that she suffered from personality defects, depression and eating disorders, the fact that she utilised some of the proceeds of the thefts to buy friends and in particular a male companion, the efforts she made to advance herself by matriculating after she left school, and the industriousness she displayed in advancing herself whilst employed by Avis Fleet. The regional magistrate ought to have found that the aforesaid substantial and compelling circumstances did exist which resulted in him not being compelled to impose the minimum prescribed sentence.

45. Had the regional magistrate come to that conclusion and then imposed the sentence which he imposed, regard been had to all the facts set out above and those contained in the record, such a sentence would have shown such a disparity with the sentence that this court would have imposed, as to justify this court interfering with the sentence. Accordingly this court is entitled to interfere with the sentence not only because of the misdirection

alluded to in paragraph 5 but on this ground as well.

46. In considering an appropriate sentence regard cannot be taken of only those fact served before the regional magistrate. Regard must also be had of the fact that the respondent served her sentence of correctional supervision and is gainfully employed. Furthermore regard must be had of the fact that the respondent has had the burden of awaiting the outcome of this appeal hanging over her head for some two years and that she has got on with her life as best she could in the circumstances. Had a custodial sentence be imposed on her when she was sentenced by the regional magistrate on 21 June 2006 she would already have served a substantial portion of that sentence and would have been well on her way to resume a normal life.

47. Finally it should be pointed out that in determining the appropriate sentence the complainant's understandable anger cannot be over emphasised as to result in an unbalanced sentence being imposed on the respondent. The sentence that is imposed on the respondent must take into account all the usual factors that are taken into account in the determination of a proper sentence and each factor must be carefully measured the one against the other.

48. Regard being had to all of the aforegoing and taking the relevant factors into account and having considered all the different forms of sentence available and taking all twenty convictions together for purposes of sentence, an appropriate sentence would be a custodial sentence of six years' imprisonment.

49. In the result the following order is made:

(1) The appeal is upheld.

(2) The sentence imposed on the respondent is set aside and substituted with the following sentence; all counts taken together for the purpose of sentence the respondent is sentenced to six years' imprisonment.

10