IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A31/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

SIGNATURE 09/11/2021 DATE

In the matter between:

GBENGA LEKAM OLUTOSIN **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGEMENT

MOSOPA, J

1. The issue in this appeal matter is whether the provisions of section 51(2) of Act 105 of 1997 are applicable and whether the court *a quo* misdirected itself by finding that no compelling and substantial circumstances existed when sentencing the appellant.

2. The appellant, who was accused 1 in the court *a quo* and who also represented his close corporation, OG Kateko Trading CC, was convicted on the strength of his plea on a count of theft by false pretenses to the value of R163 000.00. The offense was committed during the time period of August 2012 to August 2014. As a result of such conviction, the appellant was sentenced to fifteen (15) years imprisonment. The close corporation was sentenced to a fine of R100 000.00, which was suspended for four (4) years on condition that it is not convicted of any offense involving dishonesty as an element during the period of suspension.

3. This appeal is brought by means of leave to appeal which was granted by the court *a quo* on 8 June 2020 against sentence only. Leave to appeal against sentence was only granted to the appellant.

4. The appellant was legally represented throughout his trial.

CONVICTION

5. The facts which the State relied on to secure the conviction against the appellant can be summarized as follows;

    5.1 The complainants, Mr and Mrs David Currie, received scam emails from a company called Finders International Probate Genealogists in London, in which the appellant represented to the complainants that he is Mr Ian J Macky, an executive director and group finance director of HSBC Bank PLC in London.

    5.2 In such an email, the appellant misrepresented to the complainants that he was assigned to deal with the inheritance which was due to them and his task was to trace the missing beneficiaries or their identity and to locate them for the estate.

5.3 He further misrepresented himself to them that he is involved in the investigation of a client who shares the same surname as the complainants and circumstances surrounding investments made by the client in HSBC Bank, who had died and nominated no next of kin to inherit such an investment. He informed the complainants that they are the nominated beneficiaries of the estate.

5.4 The appellant was at that stage the sole member of OG Kateko Trading CC and the operational activities of the close corporation were conducted at 93 Lanork, 541 Adcock Street, Sunnyside, Pretoria, with the following banking details, First National Bank, account number 62325293405 and the appellant was its authorised signatory.

5.5 The appellant induced the complainants to deposit money into that bank account as legal fees and the complainants made payments to an amount totaling R163 000.00. The true fact is that the complainants were not beneficiaries of the investment made at HSBC Bank in London and there was no money due to the complainants.

ISSUES FOR DETERMINATION

6. In argument, Mr Masako on behalf of the appellant, contended that the provisions of section 51(2) of Act 105 of 1997 and their applicability in this matter was introduced by the court *a quo* for the first time, during the sentencing stage.

7. The appellant was not forewarned of the applicability of such provisions before he pleaded to the charge.

8. The charge sheet under which the appellant's charges were formulated is detailed and very lengthy. The appellant was initially charged with fraud (main count) and an alternative count of theft by false pretenses and money laundering in contravention of section 4(a)(i) of the Prevention of Organised Crime Act ("POCA") 121 of 1998. The fraud and money laundering charges were withdrawn by the State before the appellant pleaded to the charges and the appellant pleaded guilty to a charge of theft by false pretenses.

9. The charge sheet forms part of the record and certain portions of it were read into the record, as will become clearer later in this judgment. Put differently, it was only the preamble to the charge sheet which was read into the record by the state. The count which the appellant pleaded guilty to was not read into the record, as there was an agreement between the state and the defense that same has been explained to the appellant by his legal representative and as such, it was not necessary to read this portion of the charge sheet into the record. This was confirmed by both the appellant and his legal representative.

10. What can be gleaned from the record is the following;

> *"Prosecutor: Your Worship, since the accused is going to plead guilty on the alternative count of theft, I am going to… I am withdrawing the first charge of fraud against the accused and will read in… I will also withdraw the charge of money laundering and proceed on the alternative count. I am not sure if it is necessary for me to read into record, Your Worship?*
> *Court: Mmm (sound for yes)*
> *Prosecutor: The charge sheet as far as the theft by false pretenses has been explained to the accused by his legal representative, the defense can confirm same, Your Worship.*
> *Mr Nkanyani: As court pleases, Your Worship, I do confirm same.*
> *Court: Accused confirm?*
> *Accused: Understood, Your Worship, all the charges."* (sic)

11. Given that background, the portion which provides for the provisions of section 51(2)(a) of Act 105 of 1997 was cancelled or deleted on the charge sheet, but next to such cancellation or deletion, there is a word written "STET". Mr Maritz contended that this word simply means that the cancellation ought to be ignored.

12. Oxford English Dictionary, 5ed, Volume 2, defines "stet" as "indicating that a correction or deletion should be ignored and that the original matter is to be retained.". This definition supports Mr Maritz's contention.

13. Based on this, it cannot be correct to hold that the provisions of section 51(2) of Act 105 of 1997 was only introduced by the court *a quo* during the sentencing stage. The appellant, before he pleaded, was fully aware of the applicability of this provision and he pleaded guilty to the charge knowing what the sentencing regime is likely to be.

14. Does the fact that the court *a quo* did not personally inform the appellant of the applicability of the minimum sentencing regime amount to an irregularity? Further, does this failure render the trial of the appellant unfair?

15. It is well known that the foundation of a criminal trial is the accused's right to a fair trial as set out in section 35(3) of the Constitution, with specific reference to section 35(3)(a), which provides that an accused has the right to be informed of the charge with sufficient detail to answer it (see ***S v Tshoga 2017 (1) SACR 420 (SCA)*** at 424f).

16. *In casu*, the appellant was legally represented and the provisions of section 51(2) of Act 105 of 1997 were mentioned in the charge sheet. The appellant was informed, with sufficient detail, of the charge preferred against him in the charge sheet. The appellant even confirmed this position before he pleaded guilty to the charge. What is not present on record is the presiding magistrate warning the appellant of the Minimum Sentencing Act.

17. A vigilant examination of the relevant circumstances is necessary to determine whether an accused has had a fair trial. Put differently, the evidence before conviction should encompass all the elements that bring it within the purview of the Minimum Sentencing Act and the increased penal regime (see ***S v Legoa 2003 (1) SACR 13 (SCA)***).

18. In the matter of ***S v Ndlovu 2003 (1) SACR 331 (SCA)***, following the approach adopted in ***S v Legoa*** *(supra)*, Mpati JA observed;

> *"The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the*

sentencing regime created by the Act a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position to properly appreciate in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to properly conduct his defence."

19. I see no prejudice suffered by the appellant as a result of the presiding magistrate's failure to appraise him of the provisions of section 51(2) of Act 105 of 1997, as that was clearly and with sufficient detail stated in the charge sheet.

COMPELLING AND SUBSTANTIAL CIRCUMSTANCES

20. Section 51(2) of Act 105 of 1997 provides as follows;

"51(2) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in –

(a) Part II of Schedule 2, in case of,

(i) a first offender, to imprisonment for a period not less than 15 years."

21. Part II of Schedule 2, amongst others, makes reference to the offence of theft involving amounts of more than R100 000.00, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

22. The offence which the appellant is convicted of falls squarely within the purview of section 51(2), as the amounts involved total R163 000.00. Section 51(3)(a) of Act 105 of 1997 empowers the court which has convicted an accused person of a

section 51(2) offence to deviate from the imposition of the prescribed sentence, if the accused satisfied the court that substantial and compelling circumstances exist which justify a lesser sentence.

23. After the consideration of all the factors placed before it, the court *a quo* found that no substantial and compelling circumstances exist and thus imposed the prescribed minimum sentence. The complainants in this matter are elderly people who are pensioners. All their pension money which they invested for their entire working life was taken by the appellant through his fraudulent conduct and they were left with nothing with which to survive. They had to sell their house so that they could move to an old age home. They currently depend wholly on the state pension grant and from that money, they still have to pay for their accommodation. Mr Currie is a sick person and he can no longer afford his monthly medical aid premiums, so his medical aid has now been terminated.

24. In the seminal judgment of ***S v Malgas 2001 (1) SACR 469 (SCA)***, when dealing with the concept of "substantial and compelling circumstances", the court gave four aspects which must be considered by a sentencing court, that;

    24.1 The prescribed sentences are the point of departure;
    24.2 If a departure is called for, the court should not hesitate to depart;
    24.3 Weighing all the traditional sentencing considerations, and;
    24.4 Depart when the prescribed sentence would be unjust.

25. It is trite that punishment is pre-eminently within the discretion of the trial court. The court of appeal can only interfere with the sentence imposed by the trial court when it is vitiated by irregularity, misdirection or it is disturbingly inappropriate (see ***S v Rabie 1975 (4) SA 855 (A)***; ***S v Le Roux 2010 (2) SACR 11 (SCA)***).

26. No irregularity or misdirection was committed by the court *a quo* in this matter and the court *a quo* exercised the discretion it had in a fair manner, which did not render the trial of the appellant unfair, and it is not necessary for this court to interfere with its finding.

ORDER

27. In the consequence, the following order is made;

1. The appeal against sentence is dismissed.

MJ MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

I agree,

M MBONGWE

JUDGE OF THE

HIGH COURT, PRETRIA

APPEARANCES

For Appellant:	Adv ID Masako
Instructed by:	Poto Attorneys
For Respondent:	Adv GJC Maritz
Instructed by:	The DPP
Date of hearing:	19 October 2021
Date of delivery:	Electronically transmitted