THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 432/05
Not reportable

In the matter between

THE STATE **First Appellant**

and

EJAZ SAEED **Respondent**

Coram**:** **Mthiyane, Lewis, Heher JJA**

Heard: **10** March 2006
Delivered: 29 March 2006

Summary: Not appropriate for court of appeal to remit matter to trial court to impose a particular sentence where that sentence has been properly considered and regarded as unsuitable by trial court. No misdirection by trial court: sentence imposed by it reinstated.

Neutral citation: This case may be cited as *State v Saeed* [2006] SCA 43 (RSA).

JUDGMENT

LEWIS JA

[1] The respondent, Mr Ejaz Saeed, was charged in the Bellville Regional Court with 18 counts of fraud, alternatively 18 counts of contravening s 59(1)(a) of the Value-Added Tax Act 89 of 1991. The state alleged that over a period of 34 months he had submitted false VAT returns, fraudulently claiming VAT refunds in the sum of R279 152.18.

[2] Saeed pleaded guilty and was convicted and sentenced to five years imprisonment of which two years were suspended for five years on condition that he was not convicted of fraud or theft committed during the period of suspension. Saeed appealed against the sentence to the High Court, Cape Town. That court upheld the appeal and ordered the trial court to impose a sentence of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act
51 of 1977. The appeal before us is with the leave of this court.

[3] The State contends first that the order of the high court was not competent because it has fettered the sentencing discretion of the trial court in determining an appropriate sentence by requiring that correctional supervision be imposed.[1] Secondly, the State contends that there was no misdirection on the part of the trial court that entitled the court below to interfere with the sentence imposed by the regional court.

[4] As to the first issue, there is precedent for remitting a matter to a trial court to impose a particular sentence. In *S v R*[2] this court (per Kriegler JA), after a full discussion of correctional supervision as a sentencing option, set aside a sentence of imprisonment and remitted the matter to the trial court in order for it to impose correctional supervision under s 276(1)(h). At issue in that case, however, were the terms of the correctional supervision, something not in contention in this case. This court, in *S v R,* was not in a position to consider, let alone to impose, the appropriate terms of correctional

[1] See *S v Toms; S v Bruce* 1990 (20 SA 802 (A) at 806H-I where Smalberger JA expressed the 'cherished principle' that a court should have an unfettered discretion in relation to sentence such that there be balanced and fair sentencing.
[2] 1993 (1) SA 476 (A).

supervision for the accused since no evidence in this regard from a correctional officer had been given at the trial. Accordingly, having determined that correctional supervision was the appropriate sentence to be imposed, the court in *S v R* had no option but to refer the matter back for evidence.

[5] The matter before us now is not of the same ilk: the trial court did hear evidence from, and had the report of a correctional officer, and was in a position to evaluate that evidence, which it did. The proposed terms of the correctional supervision were fully set out in the report of the correctional officer. The trial court concluded, however, that the appropriate sentence in the circumstances of the case was one of direct imprisonment.

[6] It is not necessary to decide, however, whether the court below erred in remitting the matter to the trial court in order to impose a prescribed sentence in view of the conclusion to which I come about the other issue. Suffice it to say that in the circumstances of this case, where a sentence of correctional supervision had indeed been carefully considered by the trial court, it was not appropriate to remit the matter to impose the sentence which the court had already rejected as unsuitable.

[7] The second issue is whether the high court should have interfered at all with the sentence imposed by the regional court. The proposition that an appeal court may interfere with the trial court's sentencing discretion only where there has been a misdirection, or where the sentence is shockingly inappropriate, needs no authority. Counsel for Saeed could refer us to no misdirection. He argued rather that the trial court had not paid sufficient attention to the personal circumstances of Saeed and had placed too much weight on the interests of society and the need to send a deterrent message to the community. Thus, he argued, the trial court had not paid sufficient attention to the individualisation of sentence. That was the finding of the court below.

[8] The argument, and the court below's finding, is not borne out by the regional court's judgment on sentence. The regional magistrate discussed

Saeed' s personal circumstances in considerable detail and Saeed's counsel could point to none that had been overlooked. He took into account the fact that Saeed had shown contrition (by pleading guilty); that he had a wife and children; that he ran a business; and that he had offered to pay back what he had stolen from the fiscus. In the circumstances, said the learned regional magistrate, Saeed was a suitable candidate for correctional supervision. However, he considered that other factors weighed against a non-custodial sentence. The fraud had taken place over a lengthy period, and Saeed had enriched himself not out of need but from greed. He had breached the trust of the fiscus. By its nature the system of VAT collection is dependent on the trustworthiness of the VAT vendor. The state had led the evidence of the investigating officer who showed how difficult it is to keep track of frauds against the fiscus, and the serious economic impact that these have. And although Saeed had offered to make restitution, at the time of the trial none had been made. Any amounts paid subsequently (we were informed from the Bar that some payments have now been made) are not relevant to the sentence imposed by the trial court.

[9] In several recent cases courts have imposed custodial sentences for theft from employers because of the 'corrosive nature' that it has on society as a whole.[3] While these and other cases were considered by the court below, it nonetheless considered that insufficient attention had been given to the individualisation of punishment, and thus considered itself at large to interfere with the sentence imposed by the regional court.

[10] In my view, the court below erred in this regard. The regional magistrate, as I have said, gave very careful consideration to the personal circumstances of Saeed, and was conscious of the need to balance these with the seriousness of the offence, the breach of trust, and the impact of the many acts of fraud committed over a sustained period. The sentence was in

[3] Per Marais JA in *S v Sadler* 2000 (1) SACR 331 (SCA) paras 11- 13. See also *S v Sinden* 1995 (2) SACR 704 (A); *S v Erasmus* 1998 (2) SACR 466 (SE); *S v Lawrence* (unreported, case 357/04, SCA, delivered on 15 September 2005).

keeping with those recently imposed by this and other courts, and all sentencing options considered.

[11] There was no misdirection by the regional court. And it certainly could not be argued that the sentence imposed was shockingly inappropriate given that the amount misappropriated was considerable and custodial sentences for longer periods have been imposed for crimes arguably less serious. Accordingly the high court should not have interfered with the regional court's sentence. That sentence is in all the circumstances suitable, and should be reinstated.

[12] The appeal is upheld. The order of the court below is replaced with the following;

'The accused is sentenced to five years' imprisonment of which two years imprisonment are suspended for a period of five years on condition that he is not convicted for fraud or theft during the period of suspension.'

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C H Lewis

Judge of Appeal

Concur:

Mthiyane JA

Heher JA