-

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No 739/10

In the matter between

J PILLAY **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *J Pillay v The State* (739/10) [2011] ZASCA 111 (1 June 2011)

Coram: NAVSA and SERITI JJA and PETSE AJA
Heard: 24 May 2011
Delivered: 1 June 2011

Summary: Sentence ─ Conviction on 34 counts of fraud ─ magistrates' court imposed sentence of five years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1077 ─ accused 32 year-old mother ─ first offender with six children ─ insufficient information before trial court to enable trial court to make a decision about a custodial sentence or its impact on children of the accused ─ matter remitted to trial court for sentence to be dealt with afresh.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Mokgohloa J and Hughes-Madondo AJ, sitting as court of appeal):

(a) The appeal is upheld and the order of the court below is set aside.

(b) The sentence imposed by the trial court is set aside and the matter is remitted to the trial court to impose sentence afresh after obtaining the material evidence affecting the children in accordance with what is set out in *S v The State, Centre for Child Law as Amicus Curiae* (CCT 63/10) [2011] ZACC 7 (29 March 2011), *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) and this judgment.

JUDGMENT

SERITI (NAVSA JA and PETSE AJA concurring):

[1] The appellant, Ms Julie Pillay, was arrested on 3 May 2007 and together with her co-accused, Mr Mnyamezele Mbhele (Mbhele), appeared on 15 July 2008 in the Durban Regional Court facing 34 charges of fraud related to the fraudulent transfer of monies from her employer's trust account. The appellant was duly convicted on a plea of guilty. She was released on bail pending finalisation of the proceedings. The appellant's co-accused pleaded not guilty and their trials were separated. She was released on bail pending the finalisation of the matter.

[2] On 11 December 2008 the appellant was sentenced to five years imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977[1] (the CPA). Her bail was withdrawn and on 12 December 2008 the Regional

1 Section 276(1)(i) provides for a sentence of imprisonment from which a person may be placed under correctional supervision at the discretion of the Commissioner of Correctional Services.

Court granted her leave to appeal against the sentence imposed to the High Court and her bail was reinstated.

[3] On 29 April 2010, the KwaZulu-Natal High Court (per Mokgohloa JA and Hughes-Madondo AJ) dismissed the appeal and confirmed the sentence imposed by the Regional Court. On 28 July 2010 the High Court granted her leave to appeal to this Court and her bail was extended pending the finalisation of the appeal.

[4] At the time of the conviction, the appellant who was 32 years old was employed by a firm of attorneys, Steenkamp Weakly Ngwane and Associates (SWN) as a conveyancing secretary and a paralegal. At the time of the commission of the offences the appellant had been employed by SWN for almost 18 months. She was regarded by her employers as very efficient and skilled. She headed a department at SWN and was studying towards a LLB degree. SWN had agreed to register the appellant's articles of clerkship to enable her to qualify as an attorney.

[5] From 14 December 2006 up to 26 April 2007 she fraudulently transferred, or caused to be transferred, from the trust account of her employers various sums of monies totalling R270 304,53. Count 34, as set out in the charge sheet, relates to her fraudulent transfer of an amount of R700 000 into the account of Mbhele. On the date of the transfer of those funds she accompanied Mbhele to the bank to assist him in accessing the R700 000. Before allowing Mbhele to access the said funds, the bank communicated with SWN to determine if the transfer was genuine. On being advised that the transfer was fraudulent, the transaction was halted and the appellant arrested.

[6] An annexure to the charge sheet, the correctness of which was unchallenged, indicates that on 12 March, 19 March, 23 March and 3 April 2007 various amounts totalling R70 556.07 were successfully transferred into the account of Mbhele, the former co-accused of the appellant. Before any transfer was made into the account of Mbhele 17 other amounts of money

were transferred into the accounts of a number of people and institutions. Between 14 December 2006 and 19 February 2007 six different amounts totalling R24 668.20 were transferred into the account of Mr M Mbuthuma, the father of the appellant's youngest child, with whom she apparently has an ongoing relationship. On 1 March, 8 March and 20 April 2007 various amounts totalling R35 900 were transferred into the account of Moolas Siza Hardware.

[7] In her statement to the trial court in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, appellant stated, inter alia, the following:

'4. The facts to which I plead guilty are as follows:

4.1. I was [the] person responsible for the control and transfer of funds to and from the banking account of the Complainant, and signed the relevant documents to effect the fraud,

4.2 I used my position of trust and authority to perpetuate the various offences of actual and potential fraud as contained in the charge sheet,

4.3 I did so by creating fictious invoices in the existing client files and used these invoices to draw cheques and effect electronic transfers,

4.4 I would then process a payment requisition which would be handed to the book-keeping department for payment,

4.5 The task of the book-keeper would be to ascertain if there were sufficient funds in the client's account to process the payment,

4.6 In all the matters there was always sufficient funds in the necessary client accounts to effect the payment,

4.7 If a cheque was to be drawn the book-keeping employee would have the cheque signed by a director and hand same to me,

4.8 I would then use an employee of the complainant to deposit the cheque into the account of MBHELE, or the account of my mother, or the account of Moola Siza Hardware, or the account of Houston Transport,

4.9 As with regard to the electronic funds transfer, the same procedure would be followed as with the cheques to be authorized, except that the book-keeper had the authority to transfer the funds, they would do so and transfer the funds to the nominate accounts that I would provide,

. . .

4.11 Jointly **MBHELE**, and I transferred a total **of R215 426.23** to the various accounts, and which account details and amounts are as per annexure to the charge

sheet,

4.12 As with regards to the allegation of potential fraud, I do admit that on the 02nd May 2007, I did transfer the sum of R700 000.00 from the banking account of the Complainant to the banking account of MBHELE;

4.12.1 In this regard, I used the same procedure as I would use with regards to electronic transfers and cheque requisitions.

4.12.2 On the 03rd May 2007, MBHELE insisted that I accompany him to the bank to assist him to draw a cheque in the sum of R285 000.00 in the name of Auto Car Sales, as he had intended to use these funds to purchase a motor vehicle, being a Toyota Quantum,

4.12.3 He further attempted to withdraw an amount of R10 000.00, in cash, from the proceeds that were in his banking account,

4.12.4 Due to the diligence of the staff of the Complainant's bank employees, no amount was paid out of the sum of R700 000.00 and the full amount was reversed into the banking account of the complainant. . . .'

[8] When she gave evidence in mitigation of sentence the appellant said the following:

'At the time of committing the offence I had a brief breakup with the father of my child during which time I got hooked up with my co-accused. After I broke up with him, which was after a two month period, he then started demanding monies from me and that is basically how the fraud started. After . . . [indistinct] amounts were deposited into his account, he then demanded larger amounts of money after which he threatened that he would burn down my mother's house. My mum's house is a thatch house which is in a rural area which after that I then . . . [indistinct] basically putting monies into a hardware account to build a house for my mum which is still partly incomplete.'

She stated further that at the time she transferred R700 000 into Mbhele's account her relationship with him had ended.

[9] Under cross-examination she testified that she was not going to benefit from the R700 000 she had transferred into the account of Mbhele. When asked why she had not informed SWN about being threatened by Mbhele she replied that she did not have the courage to do so. When asked why she had not reported the matter to the police, she said:

'The state of the police station in Harding is that it depends who you are for them to take action.'

When asked why she had not gone to the police station near SWN's offices, she replied: 'I did'nt consider that'.

[10] It is necessary to record that the amount of R270 304, 53, referred to in para 6, was never recovered by SWN. Their unsuccessful attempts to recover monies lost through sequestrating the appellant cost them an additional R100 000.

[11] Appellant's counsel submitted that the trial court over-emphasised the retribution and deterrence aspect of sentencing at the expense of appellant's circumstances. It was submitted that the magistrate had failed to consider the impact of incarceration on her dependent children and failed to consider as an alternative, a non-custodial sentence coupled with an order that the appellant repay in instalments the amounts defrauded. It was contended on behalf of the appellant that the magistrate had failed to appreciate that a custodial sentence would deprive the appellant's children of their primary source of financial and emotional support. It was submitted that they would be deprived of her day to day care and nurturing and they would be left in the care of an ageing and unwell grandmother.

[12] In *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) at 559a-c Sachs J, dealing with the need to consider the interests of children during sentencing proceedings of an accused who is a mother of minor children, said the following:

'Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for constitutional requirements necessitates a degree of change in judicial mindset. Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.'

[13] At page 560a-f of *S v M*, the following appears:

'(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

(b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

(c) If on the *Zinn*-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

(e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.'

[14] In *S v The State, Centre for Child Law as Amicus Curiae* (CCT 63/10) [2011] ZACC 7 (29 March 2011), the Constitutional Court was dealing with the sentencing of a young mother and the information required in order to arrive at an appropriate sentence. At para 64 the following was said:

'In *S v M*, information about the position of the young children and their care during their mother's incarceration was entirely lacking. Here, by contrast, an informative probation officer report dealing with the position of the children was available to the sentencing court, and carefully considered by the sentencing magistrate. A second report was later commissioned by the family and, after remittal to the trial court for inclusion in the record, evaluated together with the other evidence. Two reports were thus before the High Court and the Supreme Court of Appeal. Neither suggests that the fundamental needs or the basic interests of the children will be neglected if their mother is incarcerated.'

[15] The Constitutional Court went further and stated the following (para 65):

'After hearing argument, this Court obtained a further report from a curator. Nothing in the report of the curator suggests that the children will be inadequately cared for should their mother be incarcerated in accordance with the sentence imposed on her.

[16] In order to deal with the situation arising in the event of incarceration,

the Constitutional Court said the following (para 66):

'To mitigate the possibility of the children enduring hardship during their mother's absence, it seems to me that this Court should order the Department for Correctional Services to ensure that a social worker visits them regularly, and that he or she provides the Department with reports on their well-being during their mother's absence.'

In *S v Howells* 1999 (1) SACR 675 (C) the court resorted to a similar order to deal with the position of minor children after the incarceration of a mother.[2]

[17] At the time of sentencing in the present case, the trial court had two reports before it, one from a social worker employed by the Department of Social Development and another by a correctional services officer. Insofar as the children are concerned, the report by the social worker can at best be described as sparse. It records that she has six children, aged 18, 16, 12, 11, 8 and 4 respectively. It records that the appellant is currently living with Mbuthuma in a three-bedroom house at Umlazi and that she has a good relationship with him and receives moral support from him. Other than stating that the appellant has six dependent children and setting out the date she had her first child and that the relationship with the father of that child had broken down nothing further is said about the children.

[18] The report by the correctional services officer is two pages long. The only information therein concerning the children is that there are six of them.

[19] In her testimony in-chief the appellant was led wholly inadequately by her legal representative, who elicited minimal information. In examination in-chief she was asked more questions concerning her relationship with Mbhele and Mbuthuma than concerning the children. Her youngest child was mentioned in passing and no mention was made of any of the other children.

[20] The only useful information concerning the children was obtained during cross-examination by the prosecutor. Even then the information elicited was minimal. It appeared that the father of her eldest child, who is 18, had never paid any maintenance from the time that child was four years old. The father of three of her other children had made maintenance payments up until

2 683b-f.

the time of his death, shortly after her release on bail. The father of the remaining child had moved abroad and the appellant had no further contact with him. It appeared that the eldest child was in matric and had obtained a bursary in advance of university studies.

[21] The social worker, whose report is mentioned above, testified and some relevant information concerning the children was obtained from her. It appeared from her testimony that an investigation revealed that the children were living with their grandmother, the appellant's mother, in Harding. The social worker appeared uncertain about whether any of the children were living with Mbuthuma. That then was the full extent of the evidence concerning the children.

[22] After consideration of the evidence, the trial court said the following concerning the appellant and her children:

'She does have other children who are 16 and 18 and I do not seriously consider those for purposes of the determination that my duty calls me to do here regarding the best interests of the children of the accused that I am about to sentence. . . . Section 29(2) of the Constitution requires that a child's best interests held paramount importance in every matter concerning the child. . . . At least on the face of it, it would appear that the accused could possibly be a suitable candidate for direct imprisonment in light of the considerations that I have alluded to, but I have come to the conclusion that it would not be appropriate at least at this stage to send the accused to a direct term of or full term of imprisonment. But lest I send a wrong message to people in the position of the accused, I have seriously come to the conclusion that the accused must at least see the inside of gaol for a certain period of time.'

[23] In deciding an appropriate sentence, the regional court considered that the appellant had been in a position of trust with SWN. The court took into account that the crime was an extremely serious one. I interpose to state that before us counsel on her behalf rightly conceded that if the trial court had been considering these circumstances in respect of a mother who had no dependent children, a five-year sentence of imprisonment would have been appropriate.

[24] In order for a court to arrive at an informed decision concerning

sentence the information set out in the dicta from *S v M* and *S v S* referred to above, was required. A court having all that information before it might still decide, as was done in *S v S* and in *Jowell* that incarceration is called for. Even if it does so it might with the information at hand be able to fashion an order that will ensure the continued well-being of the children, albeit in trying circumstances. On the other hand, it might, having all that information at hand decide against incarceration. The point, though, is that the evidence upon which a proper decision is to be made has to be obtained and all the actors must play their part, including the appellant's legal representatives and the state, using such state resources as may be available to it. As far as sentencing is concerned a judicial officer is not required to be passive. In this regard see *S v Siebert* 1998 (1) SACR (A) 554 at 558g-559a.

[25] Having regard to the conclusions reached above, the interests of justice are best served by setting aside the sentence and remitting the matter to the magistrate in order that the exercise referred to above be embarked upon.

[26] The following order is made:

(a) The appeal is upheld and the order of the court below is set aside.

(b) The sentence imposed by the trial court is set aside and the matter is remitted to the trial court to impose sentence afresh after obtaining the material evidence affecting the children in accordance with what is set out in *S v The State, Centre for Child Law as Amicus Curiae* (CCT 63/10) [2011] ZACC 7 (29 March 2011), *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) and this judgment.

W L SERITI
JUDGE OF APPEAL

APPEARANCES

Counsel for Appellant	:	C P Hunt SC P Hunt
Instructed by	:	Neil Bowles Attorneys Pietermaritzburg

		Honey Attorneys Bloemfontein
Counsel for Respondent	:	R du Preez Director of Public Prosecutions Pietermaritzburg
		Director of Public Prosecutions Bloemfontein