Howells v S

[1999] JOL 4641 (C)

Case No:	A208 / 98
Judgment Date(s):	11 / 03 / 1999
Hearing Date(s):	12 / 02 / 1999
Marked as:	Reportable
Country:	South Africa
Jurisdiction:	High Court
Division:	Cape Provincial Division
Judge:	Van Heerden AJ
Bench:	Van Heerden AJ, Lategan J
Parties:	Dawn Andrea Howells (A); The State (R)
Appearance:	Adv FJ Murray, Steyl Vosloo (A); Adv JH Theron, State Attorney (R)
Categories:	Appeal – Action – Criminal – Procedural – Public
Function:	Confirms Legal Principle

Key Words

Criminal Procedure Act 51 of 1977, s276(1)(h) – Criminal Procedure Act 51 of 1977, s276(1)(i) – Criminal Procedure Act 51 of 1977, s276A(2) – Constitution of the Republic of South Africa Act 108 of 1996, s28(1)(b) – Constitution of the Republic of South Africa Act 108 of 1996, s28(2) – Criminal Procedure – Sentencing – Trial court discretion – Relevant factors – Weight to be attached – Appeal court – Grounds for interference – Material misdirection – Considerations – Crime – Offender – Interests of society – Minor children – Where offender primary care-giver

Mini Summary

Appeal against sentence of four years' imprisonment in terms of the Criminal Procedure Act 51 of 1977, s276(1)(i), plus a further two years' imprisonment conditionally suspended for five years, imposed on conviction for fraud. Held, the trial court has a wide discretion in deciding which factors should influence sentence, and the weight to be attached to each factor. A court of appeal may only interfere if the presiding officer committed a material misdirection and/or acted in a manner not befitting a judicial officer. It may conclude that the trial court has exercised its discretion in an improper or unreasonable manner when it is satisfied that as a result of a material misdirection, this discretion has not been exercised at all, or has been exercised unreasonably or improperly; and/or that the trial court could not reasonably have imposed the sentence imposed. The crime, the offender and society's interests must be considered. The interests of minor children must be borne in mind where the offender is the primary care-giver. A maximum sentence of five years' imprisonment may be imposed in terms of s276(1)(i) (read with s276A(2)), including any suspended imprisonment. The appeal against sentence is dismissed. The period of suspended imprisonment is reduced from

two years to one year. The rest of the sentence is confirmed. The registrar is to immediately ask the Department of Welfare and Population Development to take steps to ensure that the appellant's three children are properly cared for during her imprisonment, that they remain in contact with her during her imprisonment and see her on a frequent and regular basis insofar as prison regulations permit, and that everything reasonably possible is done to ensure reunification of appellant with them on her release, and the promotion of the interests of the family unit thereafter.

VAN HEERDEN AJ: The appellant was convicted in the Regional Court of fraud committed over the period May 1994 to July 1996. She was sentenced to four years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 ("the Act"), plus a further two years' imprisonment suspended for a period of five years on certain conditions. She appeals against her sentence.

The appellant pleaded guilty at the trial and a written statement was handed in on her behalf in terms of section 112(2) of the Act. In this statement, the appellant described in some detail how the fraud was committed. I quote the following from the plea statement handed into court as exhibit "A":

> "1. I understand the charge against me.
>
> 2. I plead guilty to the charge of fraud on the facts and circumstances as set out below.
>
> 3. I was appointed as a clerk with the company Ampaglass (Pty) Ltd.
>
> 4. Amongst other things, it was my duty to process orders placed by customers and to receive the monies paid by them.
>
> 5. While processing delivery notes, I intentionally completed certain documents incorrectly. It was done in a manner that the books of the company reflected a lesser amount than was actually paid by the customer. I then pocketed the difference.
>
> 6. In acting in aforesaid manner, I was able to steal an amount of ± R100 000,00. It is not possible to determine the exact amount. This was done over a period of approximately two years.
>
> 7. The monies were utilised to pay off debts which was (**sic**) in arrear and also to supplement my income in order to cover our monthly expenditures**.**
>
> 8. I know what I did was wrong. I also knew it during the time I committed the crime. I nevertheless proceeded with my fraudulent behaviour in the hope that I will (*sic*) not be caught."

After the appellant was properly found guilty in the Court *a quo*, the state called two witnesses, namely Mr Martin Austin Baylis (a director of Ampaglass, based at its Goodwood office where the appellant was employed) and Mr Roy Wilson (the financial director of Ampaglass, based at its head office in Johannesburg). The magistrate then requested the compilation of a report by a correctional official, in terms of section 276A of the Act and postponed the hearing in order to enable such report to be compiled.

At the resumed hearing, two further witnesses gave evidence for the state. The first was Mr Gary Philip Howells, the divorced husband of the appellant. The second witness was Ms Cheryl Samuels, a social worker in the employ of the Department of Correctional Services. She handed in and confirmed the report compiled by her in terms of section 276A(1)(a) of the Act (exhibit "B"). In this report, Ms Samuels identified certain circumstances which could be regarded as favourable for a sentence of correctional supervision in terms of section 276(1)(h) of the Act, including appellant's work circumstances, possible support structures and the fact that appellant could in this way be ordered to pay compensation to the victim of her fraud. Despite these circumstances, Ms Samuels ended her report as follows:

> "Indien die erns van hierdie misdryf egter in ag geneem word, veral die feit dat geld hoofsaaklik vir dobbelary aangewend is, kan oorweging ook geskenk word aan korrektiewe toesig (artikel 276(1)(i), Wet 51/1977)."

At the hearing of the appeal against sentence on 12 February 1999, appellant's counsel, Mr Murray, applied for and was granted leave to place two affidavits on record, one deposed to by appellant herself and the other by Mr Arthur Henry Wood, a warrant officer (first class) in the South African Navy and the head of the division of the Navy in which appellant's divorced husband is employed.

Relevant facts to be gathered from the record and the documents to which I have referred may be summarised as follows. The appellant is 36 years of age and has three minor children, twin boys of six years of age and another son aged nine years. She was employed by Ampaglass (Pty) Limited from October 1990 until her dismissal in July 1996. She was very good at her work (described by Mr Baylis as "*extremely efficient*") and her employer trusted her totally. Her duties included dealing with customers, handling cash monies and writing out delivery notes. It was by the manipulation of these delivery notes that she managed to steal approximately R100 000,00 from her employer over a period of about two years, until her fraud was discovered by her employer in the middle of 1996. This discovery led to her dismissal from Ampaglass in July 1996. Appellant was divorced from her husband, Mr Gary Philip Howells on 1 April 1997. According to the evidence of Mr Howells, the marriage "had fallen apart and when I heard the truth about what she had got up to, I just could not trust her anymore". It was after his discovery of the appellant's fraud that Mr Howells instituted divorce proceedings against her. Appellant was awarded custody of the three minor children of the marriage and it would appear that Mr Howells has exercised fairly liberal access (including staying access) to the children since the divorce. It also appears that Mr Howells pays

maintenance to the appellant for the three minor children in the total sum of R900,00 per month.

Mr Howells admitted in the Court *a quo* that he is an alcoholic and that, during the course of his marriage to the appellant, he used to become aggressive while under the influence of alcohol and physically abused his wife. He also admitted that, in December 1996, while under the influence of alcohol, he had given his eldest son 'a hiding', which incident had resulted in the appellant approaching the police with a complaint of assault on the said child. Mr Howells had voluntarily admitted himself to Libertas Hospital for a period of three weeks for treatment for his drinking problem, which period of treatment had come to an end approximately one month prior to the resumed hearing in the Court *a quo* on 12 February 1998. In his evidence at the resumed hearing, Mr Howells was adamant that his drinking problem had been 'sorted out', that he was no longer drinking and that he was determined to "stay dry". It would, however, appear from the abovementioned affidavits deposed to by the appellant and by Mr Arthur Henry Wood that Mr Howells has certainly not managed to 'stay dry'; on the contrary, his drinking problem seems to have got considerably worse. On one occasion in March 1998, while the three minor children were staying with Mr Howells in his residence at the Wingfield Military Base, he was so drunk that he was unable to care for the children and Mr Wood had to make arrangements for the children to spend the night in the care of other people. Furthermore, after several incidents of being absent without leave from his duties as a naval chef, Mr Wood had to relieve him of such duties on 11 December 1998 because he was under the influence of alcohol. The following Monday Mr Howells did not report for duty and a warrant for his arrest was issued. He was arrested on 2 December 1998 and placed in the military detention barracks pending his appearance before a court marshall on various charges, all relating to either his drinking problem or his absence from duty without leave on various occasions.

Although the appellant and her husband may well have had certain financial difficulties during the two year period over which the fraud was committed, it does not seem that they were in dire financial straits. It would also appear that appellant herself contributed to the financial problems by gambling on a fairly regular basis, apparently as a way of escaping from her marital problems and the unpleasant situation in her home.

At the time of imposition of sentence by the Court *a quo*, the appellant was employed full time by Personnel Supply Services and had been working on a contract basis at Reader's Digest in Cape Town for over one year. Although her earnings and the maintenance received from her ex-husband were apparently sufficient to enable her to care for herself and her three children, she was not in a financial position to repay any of the money defrauded from her employer. According to the report prepared by Ms Samuels in terms of section 276A(1)(a) of the Act, appellant made no suggestions regarding repayment of this money.

Various grounds of appeal were noted and pursued in argument.

Mr Murray, who appeared for the appellant, argued that the regional magistrate had to a certain extent relied on the evidence and recommendation of Ms Samuels in imposing sentence; that the report prepared by Ms Samuels was unsatisfactory in that, by her own admission, certain aspects thereof had not been properly checked (despite her affidavit to the effect that her report "op gekontroleerde feite berus"); that Ms Samuels was a bad witness in several respects, *inter alia*, in that she appeared to place undue emphasis in both her report and her evidence on appellant's failure to make suggestions in respect of paying compensation to the complainant, regarding this as indicative of a lack of remorse on the part of appellant; and that the regional magistrate had therefore erred in following Ms Samuels' recommendation as to sentence.

Mr Murray further argued that a sentence in terms of section 276(1)(i) of the Act was not the most appropriate sentence in the circumstances of this case. In this regard, he contended that appellant was a productive person who could make a positive contribution in her work environment to the interests of the community as a whole. Moreover, appellant had already suffered to a considerable degree as a consequence of her criminal activity and would suffer further if, as appeared likely, her employer were to institute civil proceedings against her to recover compensation. Although appellant clearly was most to blame for the crime committed, her fraud had to some extent been rendered possible by her employer's inadequate control systems at the time. Appellant had also co-operated fully with her employer in the investigation following the discovery of her fraud and had pleaded guilty at the trial.

Finally, Mr Murray emphasised the interests of appellant's minor children and the fact that it appeared from the record and from the affidavits handed in at the hearing of the appeal that the appellant's ex-husband is not a suitable person to care for the children because of his alcoholism and the difficulties to which this has given rise. The maternal grandparents, although prepared to assist with the care of the children, both work on a full-time basis and live in Gansbaai where there are no English medium schools (the childrens' mother tongue is English). Imprisonment of the appellant would therefore be clearly detrimental to the interests of the three minor children.

It is trite law that the determination of sentence is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion both in deciding which factors should influence the court in determining an appropriate sentence, and in determining the weight to be attached to each factor taken into account (*S v Kibido* 1998 (2) SACR 213 (SCA) at 216g-h). A court of appeal may only interfere with the sentence imposed by the trial court if the presiding officer has committed a material misdirection and/or has acted in a manner not befitting a judicial officer (*S v B* 1996 (2) SACR 543 (C) at 550j–551a, referring to Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* 5ed (1993) at 802). It would appear that a Court of Appeal may legitimately conclude that the trial court has exercised its discretion in an improper or unreasonable manner when the Appeal Court is satisfied: a) that as a result of a material misdirection, the trial court has not exercised its discretion at all, or has exercised it in an unreasonable or improper manner; and/or b) that the trial court could not reasonably have imposed the sentence which it did impose (*S v Brand* 1998 (1) SACR 296 (C) at 303c-e,

referring to *S v Pillay* 1977 (4) SA 531 (A) at 535E–F and *S v Pieters* 1987 (3) SA 717 (A) at 734E).

As regards the first ground referred to above, a failure by the trial court to take certain factors into account in determining an appropriate sentence, or an improper determination of the relative weight to be attached to such factors, does indeed constitute a misdirection, but "only when the dictates of justice carry clear conviction that an error has been committed in this regard" (per Olivier JA in *S v Kibido* (*supra*) at 216h-i). As regards the second ground referred to above, the question whether the trial court could reasonably have imposed the sentence concerned must be assessed by determining whether there is a striking difference between the length and/or nature of the sentence imposed by the trial court, and the sentence which the Court of Appeal, sitting as a court of first instance, would have imposed (*S v Brand* (*supra*) at 303g-h). What must be considered in determining an appropriate sentence is '*the triad consisting of the crime, the offender and the interests of society'* (per Rumpff J (as he then was) in *S v Zinn* 1969 (2) SA 537 (A) at 540G, repeatedly cited with approval in subsequent cases). As pointed out by Friedman J in *S v Banda and others* 1991 (2) SA 352 (B) at 355A–C:

> "The elements of the trial contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern."

I agree with Mr Murray that the report prepared by Ms Samuels in terms of section 276A(1)(a) of the Act was not satisfactory in all respects. In particular, Ms Samuels does indeed appear to have based her expressed doubts as to true remorse on the part of the appellant chiefly, if not exclusively, on the inability and perceived unwillingness of the appellant to repay the money stolen from her employer. The heavy emphasis placed by Ms Samuels on the aspect of compensation also appears from her evidence. I do not, however, agree that the regional magistrate attached undue weight to the report and the evidence of Ms Samuels in imposing sentence on the appellant. It appears from the record and from the magistrate's judgment on sentence that she did carefully consider the various sentencing options in the light of the circumstances of this case and that her decision to impose a sentence in terms of section 276(1)(i) of the Act, rather than in terms of section 276(1)(h) as requested by Mr Murray, was arrived at in an objective and independent manner.

I am also not convinced that the magistrate acted unreasonably or improperly in concluding that the seriousness of the crime and the interests of society warranted the

sentence ultimately imposed. The crime committed by the appellant was a very serious one, involving the betrayal of a position of trust by means of a systematic and calculated course of conduct continuing over a period of more than two years. The appellant is, moreover, not a first offender, having been previously convicted of fraud in November 1989. The fact that, in view of the sentence imposed, this previous conviction related to a less serious offence was properly taken into consideration by the magistrate.

In a number of recent cases, courts have taken judicial notice of the disturbing increase in the incidence of the type of white-collar crime committed by the appellant, namely fraud and theft committed by people in positions of trust, and have taken this into account in imposing sentence. See, for example, *S v Blank* 1995 (1) SACR 62 (A) at 79d-e, *S v Brand* (*supra*) at 306f-g, *S v Erasmus* 1998 (2) SACR 466 (SEC) at 472c-d. See also *S v Prinsloo* 1998 (2) SACR 669 (W) at 672b-e, where Leveson J expressed the view that

> "theft from an employer must be heavily penalised. The employer is entitled to expect unswerving honesty from the employee in return for the wages he pays and the benefits he gives him ... the employer is in a particularly vulnerable position in relation to employees who choose to deal dishonestly with the employer's assets. I consider it the duty of the courts whenever this sort of misdemeanour is detected to send out the message that such conduct will be severely punished."

The increase in fraud and theft committed by persons in a fiduciary position and the need to deter both the appellant and others from committing similar acts in future were factors adverted to by the magistrate in her judgment on sentence. I do not, however, consider that the magistrate attached undue weight to these considerations.

The appellant's personal circumstances and, in particular, the interests and needs of her minor children would undoubtedly best be served by a sentence of correctional supervision in terms of section 276(1)(h) of the Act. I have anxiously considered the effect on the minor children of the sentence imposed by the magistrate, bearing in mind the constitutional injunction that "a child's best interests are of paramount importance in every matter concerning the child", as also the constitutionally entrenched right of every child "to family care or parental care, or to appropriate alternative care when removed from the family environment" (sections 28(2) and 28(1)(b) of the Constitution of the Republic of South Africa Act 108 of 1996).

The "best interests of the child principle", which forms part of our common law as developed by the courts, is given international legal significance by the ratification by South Africa, on 16 June 1995, of the United Nations Convention on the Rights of the Child (1989), article 3(1) of which provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (see further in this regard Julia Sloth-Nielsen *Ratification of the*

United Nations Convention on the Rights of the Child: Some Implications for South African Law (1995) 11 *SAJHR* 401 at 408–409).

The impact of these constitutional and international legal provisions on the determination of appropriate sentences for convicted offenders, particularly in cases where the offender is the primary care-giver of minor children, has not yet been grappled with by our courts in any detail. The "best interests of the child" principle has, however, played an important role in other areas of the criminal justice system, such as the 1994 decision of the President to grant a special remission of sentence to certain categories of prisoners including 'all mothers in prison on 10 May 1994, with minor children under the age of 12 years'. The relevant Presidential Act was considered by the Constitutional Court in *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC) and upheld by a majority of the court as being in accordance with the provisions of the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993). Reference may also be made to the very recent decision of Cloete J in *S v Kika* 1998 (2) SACR 428 (W) where the learned judge referred to the provisions of section 28(1)(b) of the final Constitution in holding that

> "[a] judicial officer who imposes a sentence of imprisonment on an accused who is the custodian of a minor child must make appropriate enquiries with a view to issuing an order as contemplated in section 11(1) of the Child Care Act 74 of 1983" (at 430d-e).

In that case, the sentence imposed by the magistrate (on an accused convicted of assault with intent to commit grievous bodily harm) was set aside on review and the matter referred back to the magistrate for the purposes of sentence. If the sentence imposed would result in the imprisonment of the accused, the magistrate was directed

> "to conduct an enquiry with a view to determining whether an order in terms of section 11 of the Child Care Act should be made or otherwise to satisfy himself that proper provision is made for the welfare of the children of the accused" (at 431h-i).

On the facts placed before this Court, it would appear that there is a real risk that, should the appellant be imprisoned, her children will have to be taken into care. This is obviously highly regrettable and makes this Court reluctant to condemn appellant to imprisonment. But it is undoubtedly true that "detection, apprehension and punishment in the way of imprisonment are prospects which a person embarking on this sort of crime must always foresee" (*S v Prinsloo* 1998 (2) SACR 669 (W) at 672i).

In casu the magistrate considered that, because of the nature and magnitude of appellant's offence, the interests of society outweighed the interests of the appellant and her children. I am not satisfied that the magistrate misdirected herself in any way in this regard. The sentence imposed by the magistrate was in my view necessary to serve the interests of society and the element of deterrence needed to curb the increasing incidence of white

collar crime in this country (see in this regard *S v Erasmus* 1998 (2) SA 466 (SEC) at 473a-b and *S v Sinden* 1995 (2) SACR 704 (A) at 709b-c). This Court is nevertheless keenly aware of the need to protect the interests of the appellant's minor children and will in its order include provisions designed to achieve this end as best possible.

In one respect, however, the sentence imposed by the magistrate is irregular and will have to be amended by this Court, as conceded by Mr Theron, counsel for the state in this appeal. As indicated above, the magistrate sentenced the appellant to four years' imprisonment in terms of section 276(1)(i) of the Act, plus a further two years' imprisonment suspended for a period of five years on certain conditions. Section 276A(2) of the Act, read together with section 276(1)(i), makes it clear that the maximum period of imprisonment to which an accused may be sentenced in terms of the latter section is five (5) years. In *S v Slabbert* 1998 (1) SACR 646 (SCA), the Supreme Court of Appeal, held (correctly, it is submitted) that such maximum period of imprisonment is to be determined by including therein any suspended imprisonment imposed and that it is irregular to impose periods of both unsuspended and suspended imprisonment on the accused, when acting in terms of the said sections, which in aggregate exceed five years.

For the above reasons, I recommend that the following order be made:

1. The appeal against the sentence is dismissed.

2. The sentence imposed by the regional magistrate is amended by reducing the period of suspended imprisonment from two (2) years to one (1) year. The rest of the sentence imposed by the regional magistrate (including the conditions of suspension) is confirmed.

3. The registrar of this Court is requested immediately to approach the Department of Welfare and Population Development with the following request:

> "3.1 That the Department of Welfare and Population Development investigate the circumstances of appellant's three minor children without delay and take all appropriate steps to ensure that
>
> 3.1.1 the children are properly cared for in all respects during the appellant's period of imprisonment;
>
> 3.1.2 the children remain in contact with the appellant during her period of imprisonment and see her on a frequent and regular basis, insofar as prison regulations permit; and
>
> 3.1.3 everything reasonably possible is done to ensure the reunification of the appellant with her children on appellant's release from prison and the promotion of the interests of the family unit thereafter."

(Lategan J concurred in the judgment of Van Heerden AJ.)