THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 42/05

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

CAROLANE ELLEN OLIVIER Respondent

Coram: *Navsa, Conradie et Mlambo JJA*

Date of hearing: **20 May 2005**

Date of delivery: **30 November 2005**

Summary: Appeal by the Director of Public Prosecutions against too lenient a sentence imposed on appeal by a high court (substituting an apparently appropriate sentence by a regional magistrate) – s 310A(1) and s 316B(1) of the Criminal Procedure Act 51 of 1977 considered alongside provisions of s 20(1) read with s 21(1) of the Supreme Court Act 59 of 1959 – concluded, regrettably that this Court does not have jurisdiction.

JUDGMENT

NAVSA JA:

[1] 'To err is human; thus protection against error is necessary.'[1] In this appeal the question arises whether a judicial error can be corrected. An affirmative answer is one's instinctive response. As the discussion later in this judgment will show the answer in the circumstances of this case is different.

[2] This matter has had an unfortunate and protracted journey on its way to a hearing before this Court.

[3] During the period December 1998 to March 2000 the respondent, Carolane Ellen Olivier, stole amounts of money totalling R454 521-00, which monies were entrusted to her as an estate agent operating under the auspices of Remax Realty 100.

[4] On 9 October 2000, after pleading guilty in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA), the respondent was convicted of theft in the regional court in Pretoria on 13 December 2000 and sentenced to six years' imprisonment.

[1] Bassiouni (1993 280) 3 *Duke journal of Comparative and International Law* 235 286.

[5] The respondent appealed the sentence to the Pretoria High Court. On 14 March 2003 that court (Bosielo and Mojapelo JJ) set aside the sentence imposed by the regional court and substituted it with a sentence of six years' imprisonment, wholly suspended for a period of five years on the following conditions:

'(a) [That] appellant is not convicted of theft or fraud, or any offence involving dishonesty for which she is sentenced to imprisonment without the option of a fine, committed during the period of suspension.

(b) Further, that the appellant compensates the complainant fully in the amount of R454 521,00, together with interest at the current and applicable interest rate.

(c) The payment referred to in para (6) [the payment of R454 521-00 supra] shall occur in terms of the agreement reached between the appellant and the Estate Agent Board (*sic*), which is in existence at the present moment.'

In addition, that court imposed a fine of R200 000-00, to be paid within six months of the date of its order.

[6] On 3 April 2003 the appellant, the Director of Public Prosecutions (the DPP), filed a notice of application for leave to appeal. The DPP contended, inter alia, that the sentence was far too

lenient and shockingly inappropriate. According to the notice of appeal the court below failed to properly consider that the respondent had stolen trust money over a period of eighteen months and that the theft was motivated by greed rather than need. The DPP contended that the court below failed to appreciate the seriousness of the white collar offence in question. In his notice of appeal the DPP pointed out that the terms of the repayment order were unclear and that the fine imposed was not coupled with imprisonment as an alternative.

[7] On 11 December 2003 the court below, in considering the prosecution authority's application for leave to appeal, recognised that its compensation order was unclear, especially since there appeared to be a contradiction (concerning the payment of interest) between the order and the terms of the agreement alluded to. The court below was also of the view that it might have erred in not coupling the fine to a period of imprisonment as an alternative. In the result it granted leave to appeal against the sentence it imposed in substitution of the sentence by the regional court.

[8] Problems were encountered with the transcription of the record.

However, there also appears to have been a degree of laxity on the part of the prosecution authority. On 23 June 2004 the record was certified as being true and correct. Between 21 June and 5 July 2004 Mr Jan Ferreira, a deputy director of public prosecutions, who handled the prosecution of the appeal failed to give the matter urgent attention. He had to undergo an operation and was engaged in another appeal in the Pretoria High Court. From 6 July 2004 Ferreira made a number of attempts to get the registrar of the court below to despatch the record to this court. Finally, on 19 August 2004 a senior administrative official in the prosecuting authority's office managed to file the record in this court. The record was then lost in the office of the registrar of this court. On 28 October 2004 the prosecution authority was informed of this fact. Attempts to prepare a new transcript were hampered by a dispute between two divisions within the prosecution authority. During February 2005 the registrar of this court informed the prosecution authority that the delay in prosecuting the appeal had caused it to lapse. An application for reinstatement of the appeal and an application for condonation were required. This necessitated the filing of detailed affidavits setting out the events outlined above.

[9] An ‘application for condonation’ in an unacceptable form accompanied by an inadequate affidavit attested to by an administrative clerk in the office of the prosecuting authority was served and filed in anticipation of the filing of the affidavits referred to in the preceding paragraph.

[10] On 10 February 2005 a proper application for reinstatement of the appeal and condonation with an affidavit by Ferreira explaining the background and the sequence of events referred to earlier was served and filed.

[11] The application was strenuously contested before us and at the outset it was agreed that we would hear the parties on the procedural aspects and on the merits, which it was accepted ought to be considered in deciding whether or not to reinstate the matter and to grant condonation.

[12] Subsequent to the hearing of this appeal the parties were requested in writing to consider, inter alia, s 316B of the CPA and ss 20 and 21 of the Supreme Court Act 59 of 1959 and to make

submissions on the question of whether this Court has jurisdiction to entertain the appeal. The essential question is whether the DPP has a statutory right to appeal the sentence in question from the high court, itself sitting as a court of appeal. We received written submissions from the parties.

[13] The Criminal Law Amendment Act, 107 of 1990 introduced ss 310A and 316B, which granted the DPP the right to appeal against sentences imposed by lower and superior courts.[2] Before that no such right existed.

[14] Section 310A(1) deals with an appeal by the DPP against a sentence imposed by a lower court:

'The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.'

[15] Section 316B(1) of the CPA deals with appeals against

[2] The change was prompted by what was considered to be outrageously lenient sentences imposed by a circuit court in a case concerning interracial violence and there were calls for the impeachment of the judge concerned. This enabled the legislature to overcome objections to extending the State's right of appeal in this manner – See the SA Law Reform Commission report *infra* at page 12.

sentence by the DPP to this Court:

'Subject to subsection (2), the attorney-general[3] may appeal to the Appellate Division against a sentence imposed upon an accused in a criminal case in a superior court.'

This subsection provides for appeals to this Court from a sentence imposed by a superior court. This does not mean a superior court sitting as a court of appeal. It clearly means a superior court sitting as a court of first instance.

[16] Sections 310 and 311 of the CPA, respectively, provide a limited right of appeal by the DPP from a lower court to the high court and from the high court sitting as a court of appeal to this Court on questions of law.

[17] Section 319 enables a prosecutor to apply for the reservation of a legal question arising from a trial in a superior court for consideration by this Court.

[18] There is no provision of the CPA which provides for an appeal by the DPP against an order by a high court substituting, as in this case, a sentence imposed by a magistrates' court.

[3] The attorney-general has been supplanted by the DPP.

[19] Of course the DPP has the right when an accused has appealed against his conviction and/or sentence to apply to the court of appeal to increase the sentence.[4]

[20] There is a useful discussion on the history of the right to appeal in South African criminal procedure in the South African Law Reform Commission's *THIRD INTERIM REPORT ON SIMPLIFICATION OF CRIMINAL PROCEDURE (The right of the Director of Public Prosecutions to appeal on questions of fact)*(November 2000).

[21] From the study of comparable jurisdictions contained in the report referred to in the preceding paragraph it appears that by and large, common law legal systems are loath to grant rights to the State to appeal convictions on the basis of factual errors and that the right of the State to appeal against sentence is limited.[5] In some instances one right of appeal against sentence is permitted. The motivation appears to be that on one occasion, at least, a higher court should scrutinise a sentence for error. The provisions of our

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[4] *S v Kellerman* 1997 (1) SACR 1 (A) at 3*c*-*e*.

[5] At page 18 of the Law Reform Commission's report the following appears under the heading *THE COMMON LAW POSITION*:
'The reasons for the traditionally restricted rights of the prosecutor to appeal lie in the common law with its repugnance to the idea that a man should be put in a situation analogous to double jeopardy (though, as will be seen below, it has been held that appeals by prosecutors do not in fact constitute double jeopardy).'

CPA are to this effect. The problem in this appeal is that it is contended that the scrutinising court committed the error and the question is whether the scrutinising court can be scrutinised.

[22] In *Cox v Hakes* 1890 (AC) 15, the House of Lords and Privy Council dealt with the power of courts to review or control the proceedings of a tribunal that had discharged a person from custody under a writ of *habeas corpus*. Lord Herschell (at pp 527-528) described the position before the English Judicature Act came into operation. It was always open to an applicant for a writ of *habeas corpus*, if defeated in one court, to renew his application to another. No court was bound by the view taken by any other. A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he succeeded in convincing any of the tribunals competent to issue the writ he was entitled to be discharged, his right to his liberty could not afterwards be called in question. The 19th section of the Judicature Act provided (not unlike s 20(1) read with s 21(1) of our Supreme Court Act 51 of 1959, to which I shall

refer in due course):

'The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from *any* judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice.'

(Emphasis added).

That provision was restrictively interpreted so as not to interfere with established principle. At page 522 Lord Halsbury stated the following:

'It is the right of personal freedom in this country which is in debate; and I for one would be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may be arrived at by the last Court of Appeal.'

This is the underlying principle upon which the restriction of the State's right to appeal is founded.[6]

[6] The Canadian case, *Cullen v R* [1949] SCR 658, dealt with the right of appeal against an acquittal on a question of law. In a dissenting judgment, Rand J stated the following (at para 23): 'At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter and the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical powers of the community to a test which may mean the loss of his liberty or his life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy.'

[23] Section 20(1) of the Supreme Court Act 59 of 1959 provides:

'An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against *any judgment or order* of such a court given on appeal shall be heard by the appellate division or a full court as the case may be.'

Section 21(1) of the same Act states:

'In addition to any jurisdiction conferred upon it by this Act or any other law the appellate division shall, subject to the provisions of this section and any other law, have jurisdiction to hear and determine an appeal from *any decision* of the court of a provincial or local division.'

(Emphasis added).

It has been suggested that these provisions are in wide enough terms to enable this Court to hear the present appeal.

[24] Sections 20(1) and 21(1) of the Supreme Court Act predate the introduction of ss 310A and 316B. The latter sections granted rights of appeal to the DPP which it did not previously have. It is established here, and in other comparable jurisdictions, that the State's right to appeal against sentences and acquittals is limited and that statutes dealing with the State's right of appeal and dealing with appeals in general should be construed against the background, and in the context, of the fundamental principles referred to earlier in this

judgment. Sections 20(1) and 21(1) cannot be interpreted to offend against established principles. If the words ‘any judgment or order’ and ‘any decision’ were to be interpreted widely, it would mean that the State would have the right to appeal an acquittal on factual grounds, which it is accepted in our law is not permissible. See in this regard *S v Basson* 2005 (1) SA 171 (CC) para 43.

[25] In my view, in the absence of an empowering provision in the CPA, or in any other statute, which specifically grants this Court jurisdiction and which is consistent with the Constitution, this Court does not have jurisdiction to entertain the appeal. This is regrettable in that the State’s complaints about the leniency of the sentence appear to be justified. The misappropriation of trust monies in the amount of R454 521-00 to sustain a luxurious lifestyle is a serious offence, which on the face of it, was properly appreciated by the Magistrate who imposed a commensurate sentence. The respondent has the means to pay the fine and to replace the misappropriated monies. One is left with a sense of deep unease that she has escaped appropriate punishment. However, having regard to the conclusions reached earlier, the appropriate order, regrettably, is refusing the application for condonation and striking the appeal from

the roll. In respect of the failure to provide for imprisonment in the event of the fine not being paid s 287(2) of the CPA may be employed. Furthermore, in respect of the payment of compensation it has not been suggested that it will present a practical problem.

[26] The application for condonation is refused and the appeal is struck from the roll.

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M S NAVSA
JUDGE OF APPEAL

CONCUR:

CONRADIE JA
MLAMBO JA