REPORTABLE

CASE NO.: SA 47/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GERRY WILSON MUNYAMA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: MAINGA JA, STRYDOM AJA *et* CHOMBA AJA

Heard on: 21 October 2011

Delivered on: 9 December 2011

APPEAL JUDGMENT

MAINGA JA.:

[1] The appellant was convicted on two counts, count 1: (fraud) and count 2: (forgery) by van Niekerk J. The sentence imposed were as follows: in respect of count 1 (fraud) 10 years imprisonment of which 3 years were suspended for five

years on condition, first, that appellant should not be convicted of fraud or theft committed during the period of suspension, secondly, that appellant compensates the Namibian Broadcasting Corporation (NBC) in the amount of N$100,720.00 by 31 March 2011; in respect of count 2 (forgery), 3 years imprisonment which was ordered to run concurrently with the sentence on count 1.

[2] The appeal is before us with the leave of this Court against sentence imposed on the count of fraud only, the trial Judge having refused leave to appeal.

[3] The circumstances that led the appellant in the position he finds himself in arose in this way and I relate thereto in the broadest brush of strokes. The appellant was the Director-General of the NBC at the time he committed the offences. By means of a forged resolution of the NBC Board of Directors of 15 March 2005 which authorised him to open an account in the name of NBC at any banking institution of his choice, he approached Standard Bank during May 2005 and opened an account at that institution's Gustav Voights Centre with exclusive signing powers bestowed in him alone. He deposited N$345,995.99 therein being a N$25,000.00 donation from FNB Foundation which was to be utilised towards the costs of training staff at the NBC, the rest of the money which made up the N$345,995.99 was raised from the proceeds of the NBC shares which appellant was authorised to claim from the Old Mutual Company. He withdrew all the moneys and closed the account during August 2005. He was arrested on 29 November 2005 for the offences in question. While the Court below had no doubt that appellant used all the moneys withdrawn from the account for his own purposes, it notwithstanding, found the actual loss to NBC to be

in the amount of N$100,720.00. The remainder of N$245,275.99 from the N$345,995.99, the Court below found that the State failed to prove that amount beyond reasonable doubt to have been fraudulently made, as evidence led showed that appellant made out two cheques in the said amount to Khomas Engineering CC which amounts were allegedly owed by the NBC to the Close Corporation.

[4] Mr. Hinda, counsel for the appellant, made no attempt to down play the seriousness of the crime. In the ultimate paragraph of his heads of argument he proposed a sentence of six years, half suspended on the condition set by the Court below. That attitude on the part of the appellant makes common cause with the State's attitude that the circumstances of this case call for a custodial sentence. That being the case, what remains before us is whether the sentence of ten years under the circumstances is excessive to an extent that would entitle interference therewith.

[5] The approach to be adopted in an appeal such as this is encapsulated in the statement by Holmes JA in the South African case of *S v Rabie* 1975 (4) SA 855 (A) at 857D-F:

> "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –
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> (a) should be guided by the principle that punishment is
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> 'pre-eminently a matter for the discretion of the trial Court': and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised.

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".

[6] This traditional approach is trite in law and has been adopted, stated and restated in numerous decisions by the courts in Namibia. (*Cf S v Tjiho* 1991 NR 361 (HC) at 364F-H, 366A-B; *S v van Wyk* 1993 NR 426 (SC) at 447G – 448A; *S v Shikunga and Another* 1997 NR 156 (SC) at 173B-E; *S v Gaseb and Others* 2000 NR 139 (SC) at 167H-I; *S v Alexander* 2006 (1) NR 1 (SC) at 4D-5A-E.

[7] The Courts have by judicial precedents expounded on the test above and justified interference on appeal if a trial Court has committed a misdirection of fact or law which by its nature, degree or seriousness is such 'that it shows directly or inferentially that the Court did not exercise its discretion at all or exercised it improperly or unreasonably' (see: *S v Pillay* 1977 (4) SA 531 (A) at 535D-G; if a material irregularity has occurred in the proceedings (*S v Tjiho, supra,* at 336B); if the sentence is manifestly inappropriate given the gravity of the offence and induces a sense of shock (*S v Salzwedel and Others 2000* (1) SA 786 (SCA) at 790D-E); or a patent and disturbing disparity exists between the sentence that was imposed and the sentence that the Court of Appeal would have imposed had it been the Court of first instance (*S v Van Wyk, supra,* at 447I); *S v Petkar* 1988 (3) SA 571 (A) at 574C); if there has been an overemphasis of one of the triad of sentencing interests at the expense of another (*S v Zinn* 1969 (2) SA 537 (A) at 540F-G; and *S v Salzwedel and*

Others, supra at 790F; or if there has been such an excessive devotion to further a particular sentencing objective that others are obscured (*S v Maseko* 1982 (1) SA 99 (A) at 102F).

[8] The main thrust of the argument of Counsel for the appellant was that the Court below failed to live up to the principle of consistency in sentencing the appellant. To this end the Court's attention was drawn to several domestic and South African decisions of striking similarity in terms of the offence and roughly comparable personal circumstances. (*Cf. S v Skrywer* 2005 NR 289 (HC), a cashier at Lewis Stores who stole N$9,993.00 cash from the employer, on appeal the sentence of four years was reduced to two years, 1 year suspended for five years; *S v Carl Brune*, (HC), Case No. CC 01/2003 (unreported), accused defrauded the employer in the amount of N$446,814.47, a sentence of six years was imposed, half suspended; *S v Pieter Johan Myburgh* (SC), Case No. SA 21/2001 (unreported) two counts of fraud (6 and 7) involving an amount of N$500 000.00 were taken together for purposes of sentence and sentenced to five years imprisonment; *S v Goldman* 1990 (1) SACR 1 (A) appellant had received a harsher sentence compared to his co-accused no. 1, when they relatively had equal degrees of participation and moral blameworthiness and comparable personal circumstances, on appeal the sentence of twelve years was substituted in its instead to five years wholly suspended; *S v Boesak*, a former minister of the Dutch Reformed Mission Church in Bellville, President of the World Alliance of Reformed Churches (WARC) director and trustee of 'The Foundation for Peace and Justice' (FPJ) was convicted on three counts, counts 4 and 5 involving an

amount of $259,161.21 and count 31 involving an amount of R147,160.25 was sentenced to an effective three years imprisonment).

[9] To complete this catalogue of similar offences, counsel for the appellant referred to *S v Ganes* 2005 NR 472 (HC) a fraud case involving 13 charges with a potential prejudice to Telecom Namibia Limited (Telecom) in the amount of N$ 705,704.40 in which van Niekerk J was the presiding officer. The crimes were committed between 22 March and 14 December 2000. Accused was a procurement manager at Telecom. When the crime was detected, accused was arrested and released on bail; he later absconded to South Africa. He resisted extradition to Namibia and opposed sequestration instituted against him. Although his part of the fraudulent scheme amounted to N$111,359.62, Telecom recovered N$1,225,493.85 through the sequestration proceedings which is more than the total sum of the actual and potential losses incurred as a result of the 13 offences Ganes committed. Ganes was sentenced to N$100,000.00 or two years imprisonment plus a further eight years imprisonment of which six years were suspended.

[10] The trial Judge in her judgment refusing the leave to appeal distinguished this case from the *Ganes* matter on two grounds, first, that Ganes exhibited genuine remorse while the appellant did not; secondly, Ganes was a senior employee who acted under the influence of a more senior colleague, whereas the appellant was the most senior employee (Director-General) of the NBC.

[11] Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist (*S v Sadler* 2000 (1) SACR 331 (SCA) at 335f), for example, on the comparison between the *Ganes* case and this matter another Judge given the distinction made by van Niekerk J above would have found that in the *Ganes* matter the potential loss to Telecom was twice higher than in the current case, Ganes and his colleagues continued to loot Telecom until the crime was detected, that crime was perpetuated for a period threefold longer than in the current case, Ganes was a fugitive from the law who resisted extradition and sequestration of this estate with vigour, his ultimate co-operation with the police, the willingness to become a State witness and his eventual plea of guilty (which the Court below described as genuine remorse) was but disingenuity to curry favour with the Court, that theft of copper wires was a thriving industry at the time.

[12] Although it is trite that sentences should be individualised, our Courts generally strive for uniformity of sentences in cases where there has been a more or less equal degree of participation in the same offence or offences by participants with roughly comparable personal circumstances. (*S v Goldman, supra,* at 3E). In *S v Strauss* 1990 NR 71, O'Linn J catalogued nineteen similar crimes of theft of rough and uncut diamonds and stated, "clearly indicates the approach of the courts in the past. The Court must obviously attach great weight to this catalogue, while at the same time balancing it against the principle of individualisation. One must look at which circumstances, personal or otherwise, can be taken as distinguishing factors… which would justify a sentence which is out of line with the cases to which the Court

has referred." The principle of consistency in sentencing has gained wide acceptance. Its significance lies in the fact that it strives to avert any wide divergence in the sentences imposed in similar cases and should thus appeal to any reasonable person's sense of fairness and justice. One advantage of consistency in sentencing is that it promotes legal certainty and consequently improves respect for the judicial system. (*S v Skrywer, supra;* SS Terblanche, *The Guide to Sentencing in South Africa*, 1999 at 139).

[13] However, there is a need to acknowledge that:

> "Imperfection inherent in criminal trials…means that persons similarly placed may not necessarily receive similar punishment. …What also needs to be acknowledged is that the possibility of error will be present in any system of justice and that there cannot be perfect equality as between accused persons in the conduct and outcome of criminal trials. We have to accept these differences in the ordinary criminal cases that come before the courts, even to the extent that some may go to gaol when other similarly placed may be acquitted or receive non-custodial sentences." (*S v Mwakwanyane and Another 1995* (2) SACR 1 (CC) par [54]).

[14] I thus make no firm conclusion that the Court below misdirected itself when it imposed a sentence which might appear to be out of line with other precedents on similar crimes. I shall assume in favour of the respondent that no such misdirection exist.

[15] I heed to the admonition that a Court of Appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that. At the same time,

it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So it is said that where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed, interference is justified. In such situations the trial court's discretion is regarded… as having been unreasonably exercised. (*S v Sadler, supra,* at 334I – 335A).

[16] Mr. Marondedze for the respondent submitted that the Court below did not commit a misdirection in sentencing the appellant and urged this Court not to interfere with the exercise of the Court below's discretion. That submission may be undoubtedly correct, but it is clear that

> "(t)he Court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence. (*S v Anderson* 1964 (3) SA 494 (AD) at 495G-H; *S v Salzwedel and Others* 2000 (1) SA 786 (SCA) at 790C-F).

[17] The hierarchical structure of our Courts is such that where such differences exists it is the view of the appellate Courts which must prevail. (*S v Sadler, supra,* at 335F).

[18] On considering the circumstances of the case and the person of the appellant, namely, the amount appellant enriched himself with when the bulk of the potential

loss was utilised to settle the debts of the NBC, the period from May to August 2005 within which he opened and closed the account on his own accord, appellant's fall from grace, the trauma and disruption it must have caused those near and dear to him, the order of the Court below that appellant compensates the NBC in the amount he took for himself (which amount has since been paid before this appeal was heard), we find a striking disparity between the sentence imposed by the Court below and the sentence which this Court would have imposed had it been sitting as the trial court. The sentence came as a shock to this Court and it has to be altered.

[19] It is unnecessary to repeat yet again what the Court below had said about crimes like fraud and corruption. It is sufficient to say that that Court was on point. They are serious crimes, the deleterious impact of which upon societies is too obvious to require elaboration. Dishonesty of the kind perpetuated by appellant for no other reason than self-enrichment, and entailed gross breaches of trust should be visited with vigorous punishment where necessary.

[20] It remains to substitute what I consider to have been the appropriate sentence. Both the appellant and the defence are *ad idem* that the circumstances of this case call for the imposition of a period of direct imprisonment. The quarrel of this Court and the Court below is the period of ten years, it is harsh under the circumstances, other, than that the sentence is in order. In substituting the sentence, I take into consideration that appellant had suffered in many ways, the factors which the Court below had documented in greater detail and the fact that the NBC has been compensated.

[21] In the result the appeal succeeds. It is ordered that the sentence of 10 years imprisonment is substituted therefore a period of 6 years of which 3 years is suspended on the same conditions imposed by the Court below. The sentence on count 2 to run concurrently with the sentence imposed on count 1. In terms of section 282 of the Criminal Procedure Act, 1977 (Act No 51 of 1977) the sentence is backdated to 30 September 2010.

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MAINGA JA

I agree.

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STRYDOM AJA

I agree.

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CHOMBA AJA

Counsel on behalf of the Appellant:	Mr. G.S. Hinda
Instructed by:	Isaacks & Benz Inc.
Counsel on behalf of the Respondent:	Mr. E.E. Marondedze
Instructed by:	Prosecutor-General