



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: CA&R174/2021

In the matter between:

THOZAMA TAKANE

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

BESHE J:

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[1] The appellant, a public prosecutor who was practising as such at the Kariega Magistrates' Court, was convicted of one count of corruption and sentenced to eight (8) years imprisonment. He is now appealing against both the conviction and the sentence. Leave to do so having been granted by court *a quo*, being the Regional Court, Gqebera.

[2] The decision of the court *a quo* to convict the appellant is assailed mainly on the basis that the court erred by accepting the evidence of the state even though the state witnesses had contradicted each other. However, in argument before us, appellant's counsel conceded that the contradictions that were highlighted were not on material aspects. She conceded that they were not of such a nature that they warranted the rejection of the evidence that was adduced from the state witnesses, *in toto*. She conceded that the conviction was in order and therefore justified in this regard. This concession was

properly made in our view. Even though not listed as an issue to be decided in appellant's practice note, in the heads of argument, a submission is made that the court should have excluded the evidence obtained through the use of *Section 252 A of the Criminal Procedure Act*.¹ This on the basis that the process was used to create an opportunity for the appellant to commit an offence. Once again in this regard, correctly so in our view, a concession was made that in making this submission sight was lost of the fact that by the time the police officers entered the fight, the appellant had already agreed to accept gratification from **Mr Bokwe** in consideration for the withdrawal of the charge against him and his co-accused.

[3] The upshot of this is that the appeal against the conviction falls to be dismissed. This then leaves us with the appeal against sentence. The grounds upon which the sentence imposed by the trial court is assailed are *inter alia*:

That the court exercised its discretion improperly resulting in the sentence imposed being disturbingly inappropriate;

The court placed undue emphasis on deterrence and as such sacrificed the appellant on the altar of deterrence;

The court failed to give adequate weight to other relevant considerations such as his personal circumstances as well as the aspect of rehabilitation and thus sentenced the appellant to an unduly severe sentence.

[4] The circumstances that gave rise to the appellant's conviction and sentencing can briefly be summarised as follows:

The appellant was a public prosecutor at the Kariega Magistrates' Court during April 2018. A criminal case was enrolled against **Messrs Bokwe** and **Crosby** in the court where appellant was the prosecutor. On the 23 April 2018 he reached an agreement with **Bokwe** that he (appellant) will withdraw the

¹ Act 51 of 1977. This Section deals with the authority to make use of traps and undercover operations and admissibility of evidence so obtained.

charge against **Bokwe** and his co-accused in return for a gratification of R1 500.00. Indeed, the case against the two men was withdrawn on the 23 April 2018. Unbeknown to the appellant, **Mr Bokwe** reported the matter of his being expected to pay a sum of R1 500.00 by the appellant as a consideration or gratification for the withdrawal of the charges against him and his co-accused.

[5] The police set a sting operation in motion. This involved providing **Mr Bokwe** with marked notes he was to hand over to the appellant and a recording device. **Mr Bokwe** handed the R1 500.00 comprising of marked notes to the appellant on a side street not far from the court building on the 26 April 2018. The police officers also filmed appellant and **Mr Bokwe's** movements. After the handing over of the R1 500.00, appellant rushed back to court and placed the money under the lectern or podium from which he conducted prosecutions.

[6] The appellant was consequently convicted of contravening *Section 9 of Act 12 of 2004 - The Prevention and Combating of Corrupt Activities Act*, an offence referred to under Part 2 of the Act. *Section 26* of the abovementioned Act provides that “Any person who is convicted of an offence referred to in Part 1, 2, 3 or 4 or *Section 18 of Chapter 2* is liable –

(i)

(ii) *in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years.*

[7] It is trite that in regard to sentence an appeal court will only interfere if the trial court misdirected itself materially. See in this regard **S v Malgas**² where this principle was succinctly enunciated as follows:

“A court exercising appellate jurisdiction cannot, in the absence of a material misdirection by the trial court, approach on the question of sentence as if it were the trial court and then

² 2001 (1) SACR 469 SCA at 478 (d)–(f).

substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.”

The court also went on to say “However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence of the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or disturbingly inappropriate”. See also **S v Romer**³ in this regard, where another ground for interference with sentence on appeal was said to be that the sentence is such that no reasonable court would have imposed it.

[8] The court *a quo* was alive to the need for the sentence to strike a balance of factors to be considered in sentencing. Those being the crime, the offender and the needs of the society. As well as the need to blend the sentence with mercy. According to the Magistrate, mercy is a sign of compassion not weakness and is a means of addressing both the offender and the offence.

[9] There can be no doubt that the accused was convicted of a very serious offence. The effect of corruption in our society is amply described in two decided cases to which we were directed by appellant’s counsel *albeit* for the purpose of comparison between the sentences imposed in those cases *vis-a-vis* the facts that led to appellant’s conviction *in casu*. In **S v Kgantsi**⁴ where the Judge in sentencing the accused quoted at length from **S v Shaik & Others**⁵ regarding what was said about the seriousness of the crime of corruption. The following was stated in the **Shaik** matter:

“[222] The Constitutional Court in *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) (2001 (1) BCLR 77) at paragraph [4] said the following:

³ 2011 (2) SACR 153 at 159 [22].

⁴ [2007] JOL 20705 (W) at 117.

⁵ 2007 (1) SACR 247 SCA at 319 e–j.

‘Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.’

[223] The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe. In our view, the trial judge was correct not only in viewing the offence of corruption as serious, but also in describing it as follows:

‘It is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream.’

It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies. However, each case depends on its own facts and the personal circumstances and interests of the accused must always be balanced against the seriousness of the offence and societal interests in accordance with well-established sentencing principles.”

Likewise in *Phillips v S*⁶ the court quoted remarks that were made in *S v Mahlangu*⁷ with approval. This is what the court in *Mahlangu* stated:

“Corruption has plagued the moral fibre of our society to an extent that, to some, it is a way of life. There is a very loud outcry from all corners of society against corruption which nowadays seems fashionable. Some even go as far as stating that corruption is rendering the State dysfunctional. It is the courts that must implement the penalties imposed by the legislature. It is also the courts that must ensure that justice is not only done, but also seen to be done.”

⁶ [2016] JOL 37D1D SCA.

⁷ 2011 (2) SACR 164 SCA at 172 [26] f – g.

I cannot agree more with the sentiments expressed in these cases. In my view, the Magistrate in the court *a quo* gave due consideration to all the relevant considerations without overemphasising the seriousness of the offence or deterrence. He gave due regard to the purposes that a sentence should serve, which includes deterring those in appellant's position who are tempted to engage in corrupt activities.

[10] For all the reasons stated above, I am not persuaded that there is any basis to interfere with the sentence imposed in the court *a quo*. I am not persuaded that the sentence is vitiated by a misdirection resulting from the court *a quo* having exercised its discretion unreasonably. The sentence in my view is not disturbingly inappropriate.

[11] Accordingly, the appeal against both the conviction and sentence is dismissed.

N G BESHE
JUDGE OF THE HIGH COURT

RUGUNANAN J

I agree.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

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