

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A812/2016
REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED
9/11/2017

SAMMY ARON MOFOMME

Appellant

and

THE STATE

Respondent

JUDGMENT

Bagwa J

[1] The appellant herein was arraigned before the Regional Magistrate's Court, Pretoria North on two counts of corruption and fraud. Count 1 also had seven alternative charges of corruption in relation to acceptance of a benefit.

[2] The appellant pleaded not guilty but was found guilty on both counts 1 and 2 on 31 October 2014.

[3] He was sentenced to eight years imprisonment on count 1 and six years imprisonment on count 2. The sentences were ordered to run concurrently resulting in an effective sentence of eight years imprisonment.

[4] The appellant petitioned this court for leave to appeal after leave was refused by the trial court. Leave was granted on petition for the appellant to appeal against sentence only and this is what brings the appellant before us today.

Point in Limine

[5] The appellant and the respondent have made reference to the fact that the record of proceedings is incomplete but they are in agreement that the issue is of no consequence in this appeal due to the fact that the trial court gave a comprehensive judgment regarding the merits and that the trial record in respect of sentence is complete. In line with the decision, therefore, in **S v Chabedi** 2005 (1) SACR 415 (SCA) I accept that the defects in the record are not so serious that a proper consideration of the appeal is not possible. Accordingly nothing more needs to be said in this regard.

Background

[6] The background facts to this appeal are briefly as follows. During December 2007, one Lieutenant Colonel Breedt (Breedt) received information while stationed at the Magistrate's Court, Pretoria North as a liaison officer that money was being offered to a person to arrange for an accused to be released on bail.

[7] Breedt applied for authorisation to conduct an entrapment in terms of section 252A of the Criminal Procedure Act 51 of 1977. Subsequent thereto, she arranged for entrapment money in the sum of R300.00 which was handed over to one Ziya Patel. She further arranged for a Constable Labuschagne to keep watch over Ziya Patel.

[8] Later, Lieutenant Colonel Breedt observed Ziya Patel, her brother and another witness coming out of the office of the appellant followed by the appellant. Ziya Patel reported that an amount of R400.00 had been handed over to the appellant. The appellant was searched but no money was found on him. Money was however discovered in the office of the appellant behind a steel cabinet. This in a nutshell is

the evidence that led to the appellant's conviction for corruption and fraud.

[9] The appellant conceded in his testimony that he had been appointed on 3 December 2007 as a public officer and that in that capacity he was not permitted to receive any money for services rendered in his official capacity.

[10] After his conviction no previous records were proven against the appellant.

[11] The personal circumstances of the appellant were outlined as follows: He was 32 years old at the time of sentence and he had passed grade 12 at school. He had three children aged 14, 9 and 4 at the time and he was maintaining the eldest two children paying an amount of R700.00 per month. He was employed by the Department of Justice from 1 December 2004 and as already alluded to he was a first offender. He earned an income of R3 000.00 per month post deductions.

Comparative Case Law

[12] The appellant makes reference to comparative case law including the case of **S v Philips** 2017 (1) SACR 373 (SCA) in which the appellant was a 35 year old constable who was a first offender, married with three children. He had received a sentence of 7 years of which 2 were suspended. On appeal his sentence was reduced to 4 years which was deemed an adequate deterrent to like-minded constables by the appeal court.

[13] The appellant makes further reference to **S v Shaik and Others** 2007 (1) SA 248 (SCA) where the accused was convicted in the High Court on three counts of corruption (count 1), fraud (count 2) and corruption (count 2) and sentenced to 15 years imprisonment in respect of counts 1 and 3 and 3 years in respect of count 2. The sentences were ordered to run concurrently. I comment further regarding this reference below.

[14] The appellant makes further reference to the case of **S v Villiers** 2016 (1) SACR 148 (SCA) where the appellant was convicted in a Regional Court of 31

counts of fraud and one count of contravening section 4 (b)(i) of the Prevention of Organised Crime Act of 1998 (the Act) involving an amount of R1, 4 million. She was sentenced to 8 years imprisonment of which 3 years were suspended.

[15] Evidence had been presented to the trial court that her daughter was 11 and her son 8 at the time and that she was the children's primary caregiver. Her sentence was substituted with a sentence of 3 years imprisonment in terms of section 276 (1)(i) of the Act.

[16] The respondent opposes the appeal and submits that it ought not to be interfered with due to the seriousness of the crime charged and the fact that the legislation has intervened in that regard to prescribe a minimum sentence of 15 years where the amounts involved are more than R500 000.00 .

[17] The respondent submits that an aggravating feature of the offence is that the appellant was an official in the Department of Justice who was expected to act in an exemplary manner as a representative of justice itself. Instead he participated in conduct which is subversive to the interests of justice and that such conduct does not merit this court exercising its discretion in his favour.

[18] In the **Shaik** decision (**supra**) (255i to 255j) the SCA expressed itself as follows:

"The seriousness of the offence of corruption could not be overemphasised. It offended against the rule of law and the principles of good governance, lowered the moral tone of the nation, and it threatened the constitutional order. No fault could be found with the reasoning of the trial court that no substantial or compelling circumstances existed in relation to counts one and three that would justify the imposition of a sentence other than the prescribed minimum of 15 years imprisonment. [There was no appeal against the sentence imposed on count two.] In the result all the sentences imposed by the trial court stood. (Paragraphs [212] - [230] at 31li - 321b). Appeals against convictions and sentences dismissed."

[19] It is trite that comparative case law does not bind a Court of Appeal as every case is unique and each case should be judged on its own merits. This however, does not prevent a Court from considering the judgments in similar cases and utilising them for guidance.

[20] While it is true that the amount involved **in casu** is not a large amount, it bears noting that this is the kind of offence that silently erodes the moral fibre of the nation. Like a cancer its effect may not be perceived until it has totally destroyed the substratum of society. It is the kind of offence that calls for the retributive and deterrent aspects of punishment to be brought to bear, in sending the message to like-minded persons that it is simply not worth the can to travel down the corruption road no matter how large or minimal the ill- begotten gains.

[21] It bears equally noting that our society stands at a precipice where corruption seems to have penetrated every nook and cranny of society to a point where every aspect be it political, economic, social or constitutional is so eroded, so threatened as to bring down the whole edifice.

[22] The seriousness of the crime of corruption is such that, of the triad of the crime, the criminal and the interests of society, the latter looms the largest. Corrupt groupings and individuals ought to be left in no doubt that these tendencies shall not be condoned by the Courts. When our Courts, which symbolise justice are seen to promote crime in any manner or shape, then, society shall be left totally unprotected and it shall be open season for criminals and charlatans to turn it into what is colloquially referred to as a 'banana state'.

[23] The Department of Justice represents the State and its employees represent the department. In **Mohamed v President of RSA** 2001 (3) SA 893 CC the duty of government and its employees to observe the law was explained by the Constitutional Court as follows:

"[68] [S]outh Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that

*the State lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis. In *Olmstead et al v United States*:*

'In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself, it invites anarchy. '"

[24] This is the prism in which the crime of corruption ought to be viewed and which sentence in the present case ought to be weighed.

[25] The crime which the appellant committed is not an individual crime; it's a crime that has wide-ranging implications which undermines the hard-won constitutional democracy.

[26] It is this sense that I cannot but agree with the dictum in **Shaik (supra)** where it makes reference to corruption as a crime which *"threatened the constitutional order"*.

[27] Having considered the facts of this case I am not persuaded that this is a case in which this Court should interfere with the sentence handed down by the trial court.

[28] In the result I propose that the following order be made: The appeal against sentence is dismissed.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.

P. PHAHLANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on: 09 November 2017
Delivered on: 09 November 2017
For the Applicant: Advocate
Instructed by: Legal Aid
For the First Respondent: Advocate A. J. Fourie
Instructed by: The Director of Public Prosecutions, Pretoria

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