Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CA15/2017

In the matter between:

FANPING WANG **1st Appellant**

L I LEI **2nd Appellant**

AND

THE STATE **Respondent**

CRIMINAL APPEAL

GURA J & KGOELE J

DATE OF HEARING : 17 NOVEMBER 2017

DATE OF JUDGMENT : 21 DECEMBER 2017

COUNSEL FOR APPELLANT : Adv. R Hellens SC

COUNSEL FOR RESPONDENT : Adv. Nontenjwa

JUDGMENT

KGOELE J:

[1] The appellants were charged with two Counts of corruption in the Regional Court held at Rustenburg. They pleaded guilty to the charges preferred against them, and submitted statements in terms of Section 112 of the Criminal Procedure Act 51 of 1977 (**CPA**) which were accepted by the State. They pleaded guilty on the basis of an intention in the form of *dolus eventualis* and the Trial Court found them guilty solely on their plea statements. The appellants were sentenced by the Trial Court as follows:-

First Appellant	-	Count 1	=	Ten (10) years imprisonment
		Count 2	=	Five (5) years imprisonment
Second Appellant	-	Count 1	=	Five (5) years imprisonment
		Count 2	=	Five (5) years imprisonment

The periods of imprisonment were ordered to run concurrently.

[2] Immediately after the sentences were passed, the appellants applied for leave to appeal the sentences imposed only. The Trial Court duly granted them leave to appeal their sentences. Subsequent to the granting of the leave to appeal the sentences, they were advised that the application for leave to appeal the conviction should also be brought (together with the application of condonation of the late filing of the appeal). The application for leave to appeal the conviction was then brought by the appellants and the Trial Court refused same. The appellants Petitioned this Court which Petition was also refused. This Appeal is on sentence only.

[3] A brief background of the events underpinning the charges that were brought against them as gathered from their plea statements can be succinctly summarized as follows:-The employer of the first appellant, Shanghai Xiang Mining Machinery Equipment Company Limited from Shanghai in the Republic of China, exhibited the machinery they sell at the International Mining and Machinery Exhibition in South Africa which was held between the 12th and 16th September 2016. The first appellant was amongst the delegation representing the company. The second appellant also accompanied the delegation as a freelance interpreter.

[4] Glencore employees in South Africa became interested in the machinery that the delegation was exhibiting. When the exhibition was over, some of the members of this delegation visited Rustenburg with the first and second appellants. By that time, one Patrick Magee (**Magee**) was already known to the first appellant. The first appellant invited him and his family for dinner at a restaurant on Sunday the 18th September 2016. In the course of socializing, the invitees were given gifts and included in the gifts were red envelopes with monetory donations to the value of 5000 US Dollars, which by then equaled to R70 019.00.

[5] After dinner, the second appellant spoke to Magee on behalf of the first appellant and his employer regarding the possibility that he could personally earn 5% commission per each machinery if the company could supply Glencore with the required machinery at a purchase price of 300 000 US Dollars. The commission was increased to 10% as Magee was not happy with the 5% offered. According to the

appellants, Magee was not the person to approve the purchase but they hoped he could influence the Glencore Management.

[6] On the 20th of September 2016, Magee was invited to their guesthouse where they stayed in South Africa and the purchasing of the machinery, including the commission payable, was further discussed and calculated. In addition, Magee was handed a credit card belonging to one Mr Gualin Wang (**Wang**). According to the appellants, they intentionally gave this visa credit card even though the deal was not yet done, for his personal benefit and *inter alia,* to cover his expenses when influencing Glencore to award the contract for the purchase of the required machinery.

[7] On the 23rd of September 2016, Magee invited them to meet him in Kempton Park to finalise the arrangements. After this meeting they were arrested.

[8] On these basic facts, the State charged the appellants with corruption:-

8.1 In relation to Count 1, with a potential total value of more than R12 million, on the basis that the giving of the red envelopes containing cash constituted an attempt to influence the awarding of a contract by Glencore to the first appellant's employer, Shanghai Xiang Mining Machinery Equipment ("**Shanghai Xiang**"); and

8.2 In relation to Count 2, through the offering of a gratification in the form of R300 000 cash or gift card, for the purpose of obtaining assistance with the awarding of a contract by Glencore to Shanghai Ciying in respect of certain magnetic separation machinery and equipment.

[9] The grounds of Appeal relied upon by the appellants were that the Trial Court erred by:-

- not balancing the personal circumstances of the appellants sufficiently against the seriousness of the offence and the interest of the society;
- not attaching more weight to the manner in which they grew up in their culture, traditions and beliefs which is to the effect that they thought were appropriate to use in their business in South Africa;
- not taking into consideration that the appellants received no personal gain from these crimes;
- holding that the appellants hold a high standard of life;
- failing to appreciate that the credit card was in fact worthless with the name of a Chinese man on the front to be used by Magee;
- failing to take into consideration the fact that contract value never had a realistic prospect of materializing;
- not taking in consideration the fact that the appellants showed remorse and offered to pay hefty fines;
- not considering a fine as an appropriate sentence;
- not taking into consideration that the offences were not pre-planned and pre-meditated;
- not taking into consideration that the appellants committed a less serious crime than the likes of **Shaik** cases the Trial Court referred to;
- not taking into consideration that the appellants were convicted based on an intention in the form of *dolus eventualis*.

[10] In as far as the moral blameworthiness of the appellants is concerned, Advocate Hellens SC representing the appellants submitted as his main argument that the evidence of the unlawful acts to which the sentences were to be determined rested primarily on the common cause fact that Magee had entrapped (without approval under Section 252A of the Criminal Procedure Act) the appellants at a dinner at which Magee's attendance was for the sole purpose of obtaining information on how far he would be able to push the representatives of his employer's business partner's competitors (being the appellants) in incriminating themselves.

[11] He submitted that in regard to the first count, the giving of envelopes amounted to the giving of tokens of hospitality and generosity in the pursuit of their tradition and culture called "Guanxi". He urged the Court to take into consideration that the money contained therein was taken from their personal allowances and divided so that all, even the unexpected visitors, would be able to feel welcomed. He maintained that the money covered even people who had no influence over any tender process. Therefore according to him, it was much like buying a round of drinks.

[12] In as far as the conviction in the second count is concerned, he argued that, the giving of a credit card is a tenuous involvement in the whole transaction and was given in circumstances of a corrupt relationship the extent of which was synthetic and unreal. According to him it was driven by Magee whose interest when he was speaking to a recording device, was rather illusionary than actual in bringing about a concrete transaction.

[13] He expanded on this proposition by submitting that with regard to the second count, the credit card worth R300 000-00 could never have been used by Magee as it had a different person's name on it. The arrangement was clumsy and ultimately could not produce the actual use of the money. It did not contribute anything material to the benefit or the intention behind the giver of the benefits.

[14] He urged this Court that in the case of both appellants, a finding that the appellants had committed an unlawful act in relation to the two counts of corruption must be seen in the correct context. Further that, the above submissions are made not to press an argument for an acquittal on Appeal, but to illustrate the substantially reduced moral blameworthiness connected to the commission of the offence, which justifies a sentence substantially less than the one imposed by the Trial Court.

[15] As far as the second appellant is concerned, he submitted that he acted as the interpreter. The *actus reus* that he was convicted of was not established on any of the facts that were admitted in the statements, both in respect to the first and second Count. This is, according to him, on account of the fact that it is not an offence to interpret, even if the subject matter of the interpretation is a corrupt exchange. The second appellant was therefore at the wrong place at the wrong time. Once again he re-emphasized the fact that the submission is made not to press an argument for a successful appeal on conviction, unless the Court in its discretion, and in the interest of justice chooses to do so, but to press the existence of the substantially reduced moral blameworthiness connected to a mere interpreter interpreting the goings-on of the first appellant.

[16] In respect of the appropriateness of the sentence, he submitted that the appellants pleaded guilty. Their statements show remorse for their conduct. They are persons far removed from their families who depend upon them for support. He recommended that the crimes in this matter deserved no more extensive punishment than a fine, and in addition to the consequence of their conviction, the appellants' expulsion from the country, including further travel limitations that would follow in, can be added. This is more so especially with the case of the second appellant.

[17] To amplify the submissions made in the above paragraph, the appellants' Counsel further indicated that the Court's misdirection continues along this theme where it states:-

> "*Both of you are from China and you came to South Africa for a specific purpose. A poor boy who stays in Luka or stays in Marikana or Boitekong who does not have capital or the money to corrupt those who award tenders or contracts will remain being poor for the rest of his life or will remain being a spectator while contracts and tenders are awarded to Chinese and South Africans who already filthy rich because they are able to corrupt those who award tenders and those who award contracts and all this is because, according to you, it is the practice in China to dish out red envelopes filled with cash notes. This cannot be allowed to be the practice in South Africa because that is pure corruption*".

[18] He maintained that it is difficult to discern a coherent line of reasoning or logic in these remarks because the appellants were petty employees, there is nothing to suggest that they are "filthy rich"

and deserving of the enmity inherent in this specious consideration. According to him, this epithet is not only unjudicial, but incorrect. However he argued, it apparently coloured the Court's mind throughout its reasoning. There was also no real transaction, it was all a figment of Mr Magee's creation for the purpose of the trap.

[19] In further criticizing the judgment and remarks made by the Trial Court, he submitted that the Trial Court held that this type of corruption is committed by people who live high standards of life. This is according to him, again, a gross generalization, not shown to be of application to the appellants. It then snatched facts, out of the air, that were not demonstrated before it:-

> "*Taking a flight from China to South Africa, from South Africa to China, negotiating about the contracts, staying in expensive hotels, giving each other and everyone money, paying for air tickets, etc, inviting the person to the hotel, paying for their dinner as well, giving a person a credit card which is worth R300 000-00 that is top life, high standard"*.

He insisted that save for the fact that a dinner was held at the expense of the appellants, at which the particular gifts were given, the "facts" enumerated by the Trial Court simply do not exist. The meeting at the hotel – Emperor's palace – was suggested by Magee, and in the background, the police.

[20] In as far as the balancing act the Trial Court embarked upon is concerned, he submitted that the Trial Court correctly observed that an appropriate sentence should serve the interests of society. He however added that the Trial Court erred by mentioning that

punishment should be severe in an attempt to send out an unequivocal message that corruption will not be tolerated. He argued that the Trial Court effectively used a mallet to squash a gnat. There are manifest differences between the facts in the **Shaik** matter the Trial Court referred to and the facts in *casu*. The Trial Court's reliance upon the cases cited in its judgment are misplaced in most instances as those cases had an actual corrupt consequence. That was not the case in *casu*.

[21] He lastly submitted that the Court correctly found that there were substantial and compelling circumstances not to impose the minimum sentence, but ought to have given adequate weight to those circumstances it did find substantial and compelling. The Court erred according to him in the exercise of its discretion by imposing a shockingly severe sentence. The appellants have been incarcerated since 23 September 2016, a period of longer than a year. The appellants accordingly pray that their sentence be set aside and substituted with one which is of imprisonment but which sentence is wholly suspended.

[22] Advocate Nontenjwa appearing on behalf of the respondent in his submissions supported the sentences imposed by the Trial Court. He submitted that the sentences imposed do not induce a sense of shock. Further that, by pleading guilty, the appellants did not necessarily show any sign of remorse. His reasoning for this proposition is that the appellants, although they pleaded guilty, maintained their version that giving out gifts is part of their culture. He maintained that this *per se* vitiates their feeling of being remorseful. In addition he submitted, that the appellants did not

have any ground to base their defense on and because the writing was on the wall, they had no choice but to plead guilty.

[23] In the case of **S v Malgas 2001 (1) SACR 469 SCA as 478 d-h** it was held that:-

> "A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. 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 which 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'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

[24] A thorough analysis of the record of proceedings clearly reveals that there was no misdirection on the part of the Trial Court. The judgment of the Trial Court is coherently clear and comprehensive inclusive of the reasons thereof. In fact, it covers all of the grounds that were raised in this Appeal.

[25] The Trial Court referred to some judgments in the Supreme Court of Appeal (**SCA**) where it was clearly indicated that the Courts and the Legislature regard this category of offences in a very serious light and that is why they attract minimum sentences. Not only is the offence of corruption very serious in nature, but it is an insidious crime which is difficult to detect and more difficult to eradicate, hence a method of trapping the perpetrators was legalized in South Africa.

[26] In as far as the submission that was raised by the appellant's Counsel which is to the effect that the Trial Court did not take into context the background facts of how these offences were concluded, including the fact that the offences were not going to materialize is concerned, I am of the view that this submission does not have merit at all. In the first place, the fact that the Trial Court did not specifically mention in the judgment that it took into context all of these facts into consideration does not necessarily mean that the Trial Court overlooked these facts. Secondly, the record reveals that all these facts were contained in the statements of the appellants which was handed in in terms of Section 112 which served before it. Of significance is the fact that in their statements, although they mentioned the fact that it is their tradition and culture to give out gifts in this fashion, they said the following:-

> *"I grew up in the belief that it is important to build friendships and that it is customary to hand over gifts and red envelopes. I did what I thought was expected of me <u>but overstepped the line</u>".* **[my Emphasis]**

[27] I fully agree with the proposition which was made by Counsel who represented the State during the proceedings before the Trial Court that "*Overstepping the line*" is an indication of the fact that what the first appellant was doing in *casu* was no longer in line with the normal process that he was used to, and this, according to his statement, he was aware of. He also, according to his statement, foresaw a possibility that it was wrong. All of these submissions were made before the Trial Court and before the sentencing stage. It cannot in my view be said that the Trial Court overlooked these facts.

[28] The same applies to the issue regarding the credit card. In their statements they both say:-

> *"I now realize that the chances that Patrick Magee could use the credit card were remote"* **[my Emphasis added]**

These remarks totally flies against their initial averments in the same statements which were couched as follows:-

> *"We intentionally gave him this Visa Credit Card, for his personal benefit, inter-alia to cover his expenses when influencing Glencore to award the contract for the purchase of our magnetic separation machines"*

Of critical importance is the fact that there is nowhere in their statements wherein they indicate that when they gave him the credit card they were aware that he will not be able to use it.

[29] But of significance is the fact that the judgment of the Trial Court depicts that it was alive to all of these averments in their statements even before sentencing. The record reveals on page 117 of the

paginated record of Appeal that the practice of "Guanxi" was also taken into consideration for sentencing.

[30] The record of proceedings furthermore reveals that the fact that no loss was suffered, that they did not gain anything from this transaction as they were arrested before the finalization of the agreement, were all taken into consideration by the Trial Court.

[31] The Trial Court also dealt with the issue of sentencing *peregriniis*. It also referred to the relevant authorities which support the fact that they should not be treated differently from the *incolas*.

[32] The degree of participation by the second appellant was also, in my view, adequately considered by the Trial Court. In addition to this, the record of proceedings shows that the second appellant not only served as an interpreter, but at some instances, he went on and interacted with Mr Magee insofar as influencing him to accept gratification without even translating or interpreting anything from the first appellant. It should be mentioned that the issue of the 10% commission was agreed between Mr Magee and the second appellant without him having any form of interaction between himself (second appellant) and the first appellant. It was only at a later stage that this was brought to the attention of the first appellant who then agreed with the proposition.

[33] At Page 23 of the record of proceedings the second appellant says: "*I offered him 10% commission"*, he is not saying "*accused 1 is the one who offered him 10% commission*." He furthermore says:- "*I discussed this with accused, who accepted the 10% commission on the basis that the*

purchase price for the machine could not be less than 300 000 US Dollars." Therefore, this is a clear indication of the fact that the second appellant was not only an interpreter. He at some of the occasions acted beyond just being an interpreter. Again on page 22, in line 14, the following appears:-

> *"Patrick Magee was not happy with the 5% commission and I offered him 10% commission"*.

[34] If ever he was only playing the role of an interpreter, that activeness could not have taken place. The above shows participation in the form of "Common Purpose" with the first appellant which undoubtedly the Trial Court was alive to as seen from its considerate sentence it meted out to the second appellant.

[35] As far as the submission that the appellants were remorseful is concerned, I can do no better than to quote the case of **S v Matyityi [2010] ZASCA 127 at paragraph 13** wherein it was said:-

> "[13] Remorse was said to be manifested in him pleading guilty and apologizing, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointing-out made by him and his positive identification at an identification parade. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful

> and not simply feeling sorry for himself of herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in Court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his or her confidence. Until and unless that happens the genuineness of the contribution alleged to exist cannot be determined. After all, before a Court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia:- what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case".

[37] The submission that there is nothing to suggest that they are "filthy rich" cannot also assist the appellants. When a question was posed by this Court to the appellants' Counsel as to why the appellants offered to pay a fine of R700 000-00 or possibly more as the record indicates, their Counsel submitted that they were going to be helped by the firm they belonged to and relatives to raise this amount. Unfortunately this was a submission made by him from the bar which is not borne by the record of proceedings especially as far as the first appellant is concerned. Contrary to this, the record of proceedings reveals that the first appellant indicated that his only source of income is his personal savings and he could be able to pay this amount of money. As far as the second appellant is concerned, Advocate Hellens SC was correct in his submission that he will also be assisted by his employer and families, including friends, because the record of proceedings reveals that he also said this before the Trial Court. But sight should not be lost that he in addition indicated that:-

"*he has his personal savings and is also an entrepreneur, a proprietor of a local cafeteria in Hung and hold 15% shares in this local cafeteria in addition to the employment he had from a medical technology company in China.*"

He therefore does not only depend on his salary as an interpreter. At any rate, a fine is in my view and as correctly held by the Trial Court, not an appropriate sentence in the circumstances of this matter.

[38] In my view, the Trial Court evaluated all the facts that were put by both the appellants and the State before it properly and there is no sign of any misdirection on its part. The sentences imposed by the Trial Court are neither grossly or shockingly inappropriate in the circumstances of this matter.

[39] The following order is made:-

39.1 The Appeal by both appellants against sentence is dismissed.

A M KGOELE
JUDGE OF THE HIGH COURT

I agree

SAMKELO GURA
JUDGE OF THE HIGH COURT

ATTORNEYS

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