

SOUTH AFRICA / JUDGMENT

DPP Western Cape v Bongo

(990/2022) [2024] ZASCA 70; 2024 (2) SACR 183 (SCA) (6 May 2024)

[2024] ZASCA 70

COURT

Supreme Court of Appeal

BEFORE

Zondi, Mbatha, Gorven, Smith, Keightley

CASE / FILE NUMBER

990/2022

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FLYNOTES:

CRIMINAL – Corruption – Gratification –
Trial
court of erroneous view that specific sum of money required –
Accused discharged at close of State case –
Reservation of
questions of law in terms of section 319 of the Criminal Procedure
Act 51 of 1977 – Misdirection by trial court regarding
elements of crime and erroneous reliance on previous consistent
statement constitute
questions of law – Questions reserved
and determined in favour of State – Matter remitted to High
Court for trial
de novo – Prevention and Combating of
Corrupt Activities Act 12 of 2004.
THE SUPREME COURT OF
APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 990/2022

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS,

WESTERN CAPE

APPELLANT

and

BONGANI BONGO

RESPONDENT

Neutral citation: The DPP Western Cape v Bongo (990/2022)

[2024] ZASCA 70 (6 May 2024)

Coram: ZONDI, MBATHA and GORVEN JJA, SMITH and KEIGHTLEY AJJA

Heard: 6 March 2024

Delivered: 6 May 2024

Summary: Reservation of questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 – what constitutes a question of law – misdirection by trial court regarding the elements of the crime and erroneous reliance on a previous consistent statement constitute questions of law – questions reserved and determined in favour of the state – matter remitted to the high court for trial de novo.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Hlophe JP, sitting as court of first instance).

1. The state is hereby granted leave to appeal against the refusal by the trial court to reserve the questions of law for determination by this Court.
2. The questions of law mentioned in the state's founding affidavit are referred to this Court for consideration.
3. The third and sixth questions of law are determined in favour of the state.
4. The order of the trial court discharging the respondent in terms of s 174 of the Criminal Procedure Act 51 of 1977 at the close of the state case, is hereby set aside and the matter is remitted for trial de novo before a differently constituted court.

Smith AJA (Zondi, Mbatha and Gorven JJA and Keightley AJA):

Introduction

- [1] The appellant seeks leave to appeal against the order of the Western Cape Division of the High Court, Cape Town (the trial court), refusing the state's application to reserve questions of law for determination by this Court in terms of s 319 of the Criminal Procedure Act 51 of 1977 (the CPA). Those questions all relate to the trial court's decision to discharge the respondent at the close of the state's case in terms of s 174 of the CPA.
- [2] The respondent was arraigned in the trial court on one count and two alternative counts of corruption. In respect of the main count the state alleged that the respondent committed the crime of 'corrupt activities relating to public officers' in terms of s 4(1)(b) read with ss 1, 2, 24, 25, 26 (1)(a)(ii) and 26(3) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the PRECCA). And in respect of the two alternative counts, the state alleged that, based on the same factual averments, the respondent committed the offences of corruption and 'receiving or offering of an unauthorised gratification' mentioned in ss 3(b) and 10(b), respectively, of the PRECCA.
- [3] In terms of s 4(1)(b) any person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person:

'in order to act, personally or by influencing another person so to act in a manner–

(i) that amounts to the–

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the,

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to–

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not do anything,

is guilty of the offence of corrupt activities relating to public officers.'

- [4] Section 3(b) provides that any person who acts in the aforementioned proscribed manner is guilty of the offence of corruption, and in terms of s 10(b) a person who gives or offers an unauthorised gratification to a person who is a party to an employment relationship, in order to induce him or her to perform any act in relation to his or her employment

relationship, is guilty of the offence of receiving or offering an unauthorised gratification. The definition of 'gratification' in s 1 of the PRECCA purposely casts the net wide and includes, inter alia, money, whether in cash or otherwise; donations; loans; the avoidance of a loss or liability; and any valuable consideration or benefit of any kind.

- [5] The state alleged in essence that on 10 October 2017 in Cape Town, the respondent wrongfully and intentionally, either directly or indirectly, offered to give gratification to Mr Mtuthuzeli John Vanara (Mr Vanara), the Senior Manager: Legal and Constitutional Services in the office of the Speaker of Parliament. The respondent allegedly intended the gratification to induce Mr Vanara to fake illness, take sick leave, or otherwise assist the respondent to delay or stop the inquiry conducted by the Parliamentary Portfolio Committee into the affairs of Eskom (the Inquiry).
- [6] The respondent pleaded not guilty to all charges and submitted a written plea explanation denying all the allegations against him. He also made various formal admissions in terms of s 220 of the CPA. These admissions related, inter alia, to Mr Vanara's official designation, his role in the Inquiry, that various telephone conversations between him and Mr Vanara regarding proposed meetings took place, and that he had met with Mr Vanara at the latter's office in the parliamentary buildings on 10 October 2017.
- [7] The state called several witnesses and after it had closed its case, the respondent applied for discharge in terms of s 174 of the CPA. The trial court, per Hlophe JP, delivered its judgment on 26 February 2021, granting the respondent's discharge.
- [8] On 16 March 2022, the state filed an application to reserve six questions of law in terms of s 319 of the CPA. The respondent opposed the application. The trial court heard the application on 5 September 2022 and dismissed it without giving any reasons. Reasons were only provided at the state's request the following day. On 5 October 2022, the state petitioned the President of this court for leave to appeal in terms of s 317(5), read with ss 316(11), 316(12) and 316(13) of the CPA. The respondent opposed the petition.
- [9] On 16 February 2023, this Court granted an order referring the application for leave to appeal for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. The parties were also given notice that they should be prepared to address the Court on the merits, if called upon to do so. Counsel have therefore presented legal argument in respect of both the application for leave to appeal against the refusal to reserve the questions of law and, if granted, the merits of the appeal itself.
- [10] The state now seeks an order in the following terms:
- (a) Granting it leave to appeal against the refusal of the trial court to reserve the questions of law;
 - (b) That the questions of law mentioned in the founding affidavit be reserved and referred to this Court for consideration; and

- (c) In the event of the reserved questions of law being resolved in favour of the state, that this Court orders that the appeal succeeds, the respondent's discharge is set aside, and the matter is remitted for trial de novo before a differently constituted court.

The proceedings before the trial court

- [11] The state called six witnesses, namely Mr Vanara; Mr Disang Mocumi, the secretary for the Portfolio Committee on Public Enterprises; Mr Masibulele Xaso, the Secretary to the National Assembly; Mr Modibedi Phindela, the Secretary to the National Council of Provinces; Ms Penelope Tyawa, the Acting Secretary to Parliament; and the investigating officer, Lieutenant Colonel Mokhoema.
- [12] Mr Vanara was appointed as evidence leader of the Inquiry on 1 January 2017. He testified that the respondent called him on several occasions on 4 October 2017 while he was on his way to meet with the then Acting Chairperson of Eskom, Mr Zethembe Khoza (Mr Khoza). That meeting had been scheduled for the following day in Johannesburg. On the first occasion, the respondent asked him whether he was at his office. Mr Vanara replied that he was on his way to Durban. He explained that for security reasons he did not provide information regarding his travel arrangements to third parties. The respondent then asked him if he had arranged to meet with Mr Khoza. He replied that he was still waiting for the meeting to be confirmed.
- [13] On the second occasion the respondent asked Mr Vanara for his flight details and suggested that they should meet at the Cape Town airport. Mr Vanara instead agreed to meet him the following Monday. The respondent called him again, to enquire whether Mr Vanara would be meeting Mr Khoza in Cape Town. Mr Vanara told him that the meeting would take place in Johannesburg.
- [14] While travelling with Mr Mocumi from the airport to his hotel, Mr Vanara asked the former whether he knew the respondent. Mr Mocumi said that he knew him as a member of parliament. Mr Vanara then told Mr Mocumi that the respondent seemed unusually interested in the proceedings of the Inquiry.
- [15] Mr Vanara said that the meeting scheduled for the following Monday did not materialise and he eventually only met the respondent at his office in the parliamentary buildings on 10 October 2017. It was at that meeting where, according to Mr Vanara, the events unfolded that resulted in the criminal charges against the respondent. He said that the respondent told him that he had been requested by Mr Khoza to ask Mr Vanara for assistance. Mr Vanara asked him what the nature of the assistance would be. The respondent replied that 'Eskom's people were worried about incriminating evidence against them and there would be police officials waiting to arrest them.' The respondent also told him that the Inquiry was Mr Pravin Gordhan's 'brainchild and that he was conflicted.' The respondent said furthermore that the Inquiry was also impacting on a number of other 'parallel' inquiries.

- [16] Mr Vanara testified that he was 'confused' as to what exactly was required of him and again asked the respondent how he could be of assistance. The respondent said that the Inquiry could not proceed in his [Mr Vanara's] absence and that he should therefore fake illness and take sick leave. Mr Vanara protested and told the respondent that the Inquiry was initiated by the politicians and that only they had the power to stop it.
- [17] The respondent then told Mr Vanara '[j]ust name the price and tell me how you would help stop the Inquiry. I will then go back to the Eskom people, tell them of your plan to stop the Inquiry and the price they would have to pay for your assistance. They will then give me the money and I will hand the money over to you.' Mr Vanara protested that his conscience would not allow him to acquiesce in such a scheme. He therefore told the respondent that the meeting was over, opened the door for him to leave and told him that there was nothing to consider.
- [18] Immediately after the meeting, Mr Vanara arranged to meet with Messrs Phindela and Xaso in Stellenbosch where they were attending a workshop. At that meeting he reported that the respondent had offered him a bribe to either delay or collapse the Inquiry. He subsequently also reported the incident to Ms Tyawa and submitted an affidavit setting out the details of his encounter with the respondent.
- [19] During cross-examination counsel for the respondent took Mr Vanara to task for his failure to report the incident to the police. He put to Mr Vanara that he was required to do so in terms of s 34(2) of the PRECCA and that his failure to comply with that provision constituted an offence.
- [20] Counsel for the respondent also criticised Mr Vanara for delaying the filing of his affidavit and for denying that he had known before October 2017 that the respondent was an advocate. According to instructions given to his counsel by the respondent, he and Mr Vanara had discussed a domestic dispute between the latter and his wife, which had resulted in criminal charges (which were later withdrawn) being preferred against Mr Vanara. Counsel also put to Mr Vanara that it was improbable that the respondent would have known about that incident if he had not been told by Mr Vanara. Mr Vanara, however, denied ever having discussed his domestic affairs with the respondent and was adamant that he did not know the respondent before 4 October 2017.
- [21] Counsel for the respondent further put to Mr Vanara that on 5 September 2018, and in an adjacent office occupied by one Ms Shihaam Lagkar, Mr Mocumi had allegedly said to Mr Vanara: 'Who does this Bongo think he is? He is a small boy and we will deal with that small boy'. That incident allegedly happened in the presence of Mr Vanara, one Ms Miller (Ms Lagkar's sister), and one Mr Desai. This assertion was presumably proffered to show that there had been a conspiracy to falsely implicate the respondent. Mr Vanara also denied this allegation.

- [22] Messrs Xaso and Phindela corroborated Mr Vanara's version regarding the report he made at the meeting of 10 October 2017. They confirmed that Mr Vanara had told them that he had been approached by the respondent with a request that he should feign illness to delay the inquiry in return for which he could name his price.
- [23] Ms Tyawa also confirmed that Mr Vanara had told her that he had been requested by the respondent to feign illness in order to delay or collapse the Inquiry. Although she did not initially mention during her evidence-in-chief or under cross-examination that Mr Vanara also said that the respondent had offered him a bribe to do so, during questioning by the trial court she confirmed that Mr Vanara had made such a report. When she was asked by the presiding judge to explain her failure to mention the bribe earlier, she said that it had slipped her mind because of the passage of time but that she did mention it in her statement to the police.
- [24] Although Mr Mocumi corroborated Mr Vanara's testimony regarding their discussion on their way from the airport, his evidence did not really take the matter any further. He testified mainly regarding the inquiry conducted by the Ethics Committee into allegations of impropriety against the respondent.
- [25] Lt. Col. Mokhoema testified that a criminal docket was registered on 22 November 2017 after the leader of the Democratic Party, Mr Steenhuisen, had raised the matter in parliament. He thereafter interviewed Mr Vanara who told him that the respondent had asked him to feign illness in order to collapse the Inquiry and that he could name his price. During the course of his testimony, a statement made by the respondent on 14 March 2018 (Exhibit F) for the purposes of the proceedings before the Parliamentary Ethics Committee, was handed in and referred to by counsel for the respondent.

Findings by the trial court

- [26] In considering the application for the respondent's discharge at the close of the state's case in terms of s 174 of the CPA, the trial court subjected Mr Vanara's testimony to the cautionary scrutiny applicable to single witnesses. It found that his testimony was not credible in material respects, and being a single witness, the court was of the view that 'his evidence must be clear and satisfactory in all material respects.'
- [27] The following findings appear to have been critical to the trial court's rejection of Mr Vanara's evidence: (a) Mr Vanara had failed to report the incident to the police despite the statutory injunction for him to do so. The trial court reasoned that if he had believed that the respondent had committed the offence of corruption, he would have reported the incident to the police; (b) the respondent did not offer Mr Vanara a 'blank cheque' or a fixed amount and no arrangements were made for payment or to obtain Mr Vanara's banking details; (c) Mr Vanara admitted that he did not have the power to stop the Inquiry, and 'it then becomes difficult to accept a senseless and futile act of bribing someone to act beyond the scope of their power, as the truth'; (d) an affidavit made by the respondent in respect of the proceedings before the Parliamentary Ethics Committee (in respect of which he was found

not guilty) constituted a previous consistent statement which was consistent with the respondent's version regarding the nature of the discussions between him and Vanara; and (e) there were material contradictions between Mr Xaso's, Mr Phindela's and Ms Tyawa's testimonies regarding what Mr Vanara had reported to them. His testimony was therefore not corroborated by the other state witnesses.

- [28] The trial court consequently found that there was insufficient evidence on which a reasonable court, acting carefully, may convict, and that it would be wrong to refuse the s 174 application in the hope that the respondent would incriminate himself. It accordingly ordered the respondent's discharge.

Application for leave to appeal

- [29] In an application before the trial court for the reservation of issues in terms of s 319 of the CPA, that court is only required to decide whether the issues sought to be reserved are questions of law. When, however, an application for leave to appeal against a decision of the trial court refusing to reserve a question of law comes before this Court, it will only exercise its discretion in favour of the state if there is a reasonable prospect that a mistake of law was made. In addition, there must at least be a reasonable prospect that, if the mistake of law had not been made, the accused would have been convicted.'^[1]
- [30] The trial court, in refusing leave to appeal, was of the view that if its decision were to be set aside on appeal and remitted for trial de novo, the respondent would be entitled to raise a plea of autrefois acquit.^[2] That finding is with respect patently wrong and ignores the explicit provisions of ss 322(4) and 324 of the CPA. Section 322(4) provides that where a question of law has been reserved for consideration by an appeal court in the case of an acquittal and is decided in favour of the state, 'the court of appeal may order that such of the steps referred to in s 324 be taken as the court may direct.'
- [31] Section 324 of the CPA in turn provides that a court of appeal may order that 'proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: Provided that no judge or assessor before whom the original trial took place shall take part in such proceedings.'
- [32] In terms of s 322(1)(a) of the CPA, the court of appeal may, in the case of any reserved question of law, allow an appeal if it is of the view that the judgment of the trial court should be set aside on the ground of any wrong decision regarding the question of law. The court of appeal may in those circumstances remit the matter for trial de novo before another presiding officer without the issue of double jeopardy arising.^[3]
- [33] For the reasons discussed below, I am of the view that the trial court made several mistakes of law. I am also satisfied that there are reasonable prospects that the respondent would have been convicted of either the main or alternative charges mentioned in the indictment

if the mistakes of law had not been made. As I explain below, the evidence led by the state, at the very least, constituted prima facie evidence that the respondent had committed the crime of corruption. Mr Vanara's testimony established that the respondent had offered him gratification to induce him to commit a proscribed act, namely, to feign illness in order to delay or collapse a parliamentary committee inquiry. In my view, there are reasonable prospects that the evidence led by the state was evidence on which a reasonable court could convict the respondent.

[34] I am accordingly of the view that the state should be granted leave to appeal the trial court's refusal to reserve the questions of law mentioned in the state's founding affidavit. Those questions should therefore be reserved for consideration by this Court.

The legal principles

[35] The application for the reservation of the questions of law must be considered in the light of the following legal principles. Section 319 of the CPA provides that a High Court may, either of its own accord or on the application of the prosecution or the accused, reserve a question of law for consideration by the Supreme Court of Appeal. It is trite that the section does not allow the reservation

of an issue which is a question of fact. The question as to 'whether the proven facts in a particular case constitute the commission of a crime' is a question of law. But 'a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are.'^[4]

[36] The following requirements must be met before a question of law may be reserved: (a) the question must be framed accurately so that there is no doubt as to what the legal point is; (b) the facts upon which the point is based must be clearly set out; and (c) all of this must be clearly set out in the record.^[5] In addition, questions of law should not be reserved where they will have no practical effect on the acquittal of the accused.^[6]

[37] The legal principles which underpin the consideration of an application for discharge in terms of s 174 of the CPA are as follows. The starting point is the section itself, which reads as follows:

'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused

committed the offence referred to in the charge or any other offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

[38] The phrase 'no evidence' has been interpreted by our courts in a long line of cases as involving the test whether there is evidence upon which a reasonable court, acting carefully, may convict.^[7] Although credibility of witnesses may be considered, it plays a very limited role at this stage of the proceedings. It is only in exceptional cases where the credibility of a witness has been so 'utterly destroyed' that no part of his or her material evidence can

possibly be believed. Before credibility can play a role at all a very high degree of untrustworthiness must therefore be shown.[8]

The questions of law sought to be reserved

[39] The state applies for the following questions of law to be reserved for consideration by this Court in terms of s 319 of the CPA:

- (a) Question 1: Whether the trial court applied the correct test and legal principles when assessing the credibility of witnesses in an application in terms of s 174 of the CPA.
- (b) Question 2: Whether the trial court correctly applied the elements of the offence of corruption when the court indicated that it had difficulty in accepting Vanara's evidence as he lacked the power to stop the enquiry.
- (c) Question 3: Whether the trial court correctly applied the elements of the offence of corruption when it found that the state had not proved the offence of corruption as a result of no arrangements having been made with Vanara for payment.
- (d) Question 4: Whether the trial court applied the legal principles relating to the evaluation of evidence correctly when drawing an adverse inference against the state for electing not to call a witness where the evidence relevant to the state's case was common cause and the witness was made available to the defence.
- (e) Question 5: Whether the trial court correctly applied the provisions of s 34 of the PRECCA, when it found that there had been a duty on Vanara to report the incident to the South African Police Service and/or the HAWKS in terms of s 34(1) of the PRECCA.
- (f) Question 6: Whether the trial court properly used what it found to be the respondent's previous consistent statement to accept that the uncontested version of respondent was credible and the state's version lacked credibility, for the purposes of the s 174 application.

[40] For reasons which will be clarified below, I choose not to deal with all of the questions posed by the state. Question 3 relates to the issue whether the trial court correctly applied the elements of the crime of corruption in evaluating whether Mr Vanara's evidence passed muster for the purposes of the s 174 enquiry. Question 6 raises the issue as to whether the trial court properly relied on the respondent's previous consistent statement as corroboration for the version put to the state witnesses during cross-examination. These questions manifestly raise issues of law, and if resolved in favour of the state, they may well be dispositive of the matter. They consequently warrant thorough consideration. I now turn to consider those questions, bearing in mind the aforementioned legal principles.

Question 3: Whether the trial court correctly applied the elements of the offence of corruption when it found that the state did not prove the offence of corruption as a result of no arrangements having been made with Vanara for payment.

[41] The trial court found that Mr Vanara had confirmed that neither the respondent, nor anybody else acting on his behalf, had asked him for his bank details, that there had been no offer of a specified amount or any arrangements to get the money to him, and there had not been any 'follow-up meetings' between them. Those findings must be understood in the context of the preceding paragraph of the judgment [para 23] where the trial court commented that '[the] difficulty with Mr Vanara's evidence is that having a discussion about delaying or collapsing a parliamentary process is not unlawful in terms of the Act. The Act is very clear that only when an offer of gratification is made in exchange for a prescribed act, i.e. the delay or collapse of the Inquiry Committee, in favour of Mr Vanara or any other person, only then it becomes a crime.'

[42] The state contends that the trial court has in effect found that since there had been no arrangements for the payment of a bribe, no offer was made to Mr Vanara to commit a proscribed act, and the crime of corruption had therefore not been committed. Counsel for the state argued that the trial court fundamentally misunderstood the applicable legal principles. He submitted that the crime of corruption is complete once an offer is made to an official to perform a proscribed act for gratification even though there was no agreement to perform and no quid pro quo had been paid or agreed upon. He relied in this regard on the finding by this Court in *S v Selebi* where the Court said that:

'Section 4, in my view, does not require an agreement between the corruptor and the corruptee, nor does it require a quid pro quo from the corruptee. It must be plainly understood that the conviction in this case on the evidence that established an agreement and the giving of a quid pro quo, is not the low water mark of the section.'

This finding is another material misdirection committed by the trial court, or so counsel for the state argued.

[43] Counsel for the respondent submitted that the trial court's comments should be understood in the context of its assessment of the probabilities that a bribe was offered in the absence of an agreed amount, no bank details having been provided, and there having been no follow-up meetings to discuss the offer. In the circumstances the trial court concluded that it was improbable that a bribe had been offered in the absence of those arrangements. The trial court was therefore merely making credibility findings and did not purport to make any findings regarding the elements of the offence or whether they had been proved by the state. He argued that no matter how flawed the trial court's reasoning might have been, it remains a factual enquiry and can hence not be regarded as a question of law that should be reserved for determination by this Court.

[44] In my view, those factual findings arose from a misconstruction of the elements of the offence. It will frame the enquiry if the following excerpts from Mr Vanara's transcribed testimony are set out followed by the way in which the court a quo dealt with it and other state evidence:

‘EXAMINATION BY MS DU TOIT-SMIT [continued]: Thank you, M’Lord. Advocate Vanara, before the adjournment we just started on your conversation that you had in your office with the accused. You may continue.

MR VANARA: ‘So when the accused made reference to assistance that the acting chairperson of the Eskom Board wanted from myself regarding the Public Enterprises oversight enquiry, I then asked the accused what ... the nature of the assistance that was required from myself. Then the accused responded that the people of Eskom were worried. They were worried about them being called or invited into the committee proceedings; enough incriminating evidence would be led against them; there would be police officials waiting to arrest them as they walked out of the committee proceedings. That is why they needed my assistance. I couldn’t figure it out again what ... this kind of assistance that was required of me.

I then again asked the accused what he meant by “assistance”. What is exactly that was required of me? And the accused then again responded to the same question, but differently this time. The accused then says the inquiry is Pravin Gordhan’s brainchild, and that he, Pravin Gordhan was conflicted. He further alluded to the – he said the inquiry was affecting a number of campaigns. I had been left confused, because I didn’t understand what then the relevance of the brainchild of the inquiry ... I was not understanding how the conflict of one of the members had anything to do with the Eskom people.

Then I asked the accused again what he meant by “assistance”, what is it that is required of me? I even offered a proposal in respect of the board members. I said, if in the board members’ view there was enough evidence incriminating them then the board must resign. Then I said I don’t know, I’m sorry, I can’t be of assistance. And the accused then said to me but the inquiry cannot proceed next week Tuesday and that I should help them – by “them”, I took it was reference to the Eskom people, people from Eskom – to stop the inquiry from proceeding. I then asked the accused why should I assist stopping the inquiry? Further, how does he propose that I stop the inquiry? He then did not answer the question of why.

I guess it was for the reasons that we had already discussed. He did respond to the “how” part. He then said I could fake illness and take sick leave the following week, which was when the inquiry would have started, because he said in my absence the committee will not proceed. I then said I am not going to assist with that plan.’

[45] There then ensued a discussion between Mr Vanara and the respondent regarding the political nature of the Inquiry. Mr Vanara said that the respondent had told him about his alternative plan, which was to petition the caucus of the ruling party to stop the Inquiry but that he [Mr Vanara] could still assist ‘to stop or at least delay the inquiry.’

[46] Mr Vanara’s testimony then continued as follows:

‘MR VANARA: I then said I am not going to be part of interfering in a political process. Mine was an insignificant role in this inquiry. And he differed. I remember him saying: Without ... or in your absence, the committee is dysfunctional.

COURT: Without the Evidence Leader.

MR VANARA: Yes. And I then said sorry, there is just no way that I could assist with what you are asking me to do. If, as politicians, you want to stop the inquiry, do it yourself. Then Mr Bongo says: Just name the price.

COURT: Just name the price. Yes?

MR VANARA: And tell me how you're going to assist them – which I took to be the people of Eskom – to stop the inquiry. I – meaning Bongo – would go to the Eskom people and tell them your plan of stopping the inquiry.

COURT: The plan?

MR VANARA: Yes, my plan, presumably if I accede to the proposal. He would then take the plan to the people of Eskom, and he would then tell them how much, or the price that I want to be paid for the assistance. He would then receive the money, and would then hand over the money to me.'

[47] It is manifest from the quoted excerpts that the element of gratification had been established, at least on Mr Vanara's version. The respondent had allegedly offered money to Mr Vanara, albeit in the form of 'a blank cheque', namely that he was asked to name his price. Mr Vanara had refused the offer of gratification and there were accordingly no arrangements for follow-up meetings.

[48] There can, in my view, hardly be a more straightforward and unambiguous account of the unlawful offering of gratification to a public officer in order to induce him to perform a proscribed act. That the trial court was oblivious to this unequivocal and overt evidence of the commission of the crime of corruption can only be ascribed to its fundamentally erroneous understanding of the elements of that crime. This emerges from paras 22 and 23 of the judgment. At para 22 of the judgment, the trial court said that Mr Vanara confirmed that when Bongo made the gratification offer to him, 'there was no blank cheque offered or a fixed amount that was proposed. Mr Bongo or anyone else on his behalf never tried to make any arrangements for payment or obtaining Mr Vanara's bank details. After this incident, Mr Bongo never called Mr Vanara again or met up with him. There was no contact between Mr Vanara and Mr Bongo after 10 October 2017'.

[49] Those observations then led to the crucial finding at para 23 of the judgment, namely that:

'[T]he difficulty with Mr Vanara's evidence is that having a discussion about delaying or collapsing a parliamentary process is not unlawful in terms of the Act. The Act is very clear that only when an offer of gratification is made in exchange for a pr[o]scribed

act i.e. the delay or collapse of the Inquiry Committee in favour of Mr Vanara or any other person, only then does it become a crime.'

- [50] The trial court's reasoning in paras 22 and 23 of the judgment were thus clearly intended to underpin its finding that 'having a discussion about delaying or collapsing a parliamentary process is not unlawful.' This is what the trial court found to be 'the difficulty with Mr Vanara's evidence.' The findings regarding the absence of a 'blank cheque' or a fixed amount offered to Vanara and the absence of evidence that the respondent attempted to obtain Mr Vanara's bank details, were clearly intended to support the conclusion that, as a matter of law, no offer of gratification had been made to Mr Vanara.
- [51] This much is also evident from the trial court's comments when challenging Ms Tyawa regarding her failure to mention the bribe, as is demonstrated by the following excerpt from the record:

'COURT: I will tell you why this is important, ma'am. My understanding of the law is this. If Advocate Bongo or anyone else had approached the evidence leader to collapse the inquiry or to express his views that I don't like this inquiry, I wish it could go away, that's not a crime. That's not crime. He is merely expressing his views or his wish. It becomes a crime, however, when Advocate Bongo or anybody else offers a bribe. There's a huge difference between wishing the inquiry to go away for whatever reasons, right, which is not a crime and will never be a crime.

And going further than that and making a definite offer and say I want to pay you so much in order for you to end this inquiry.'

- [52] It is thus clear that the trial court was of the erroneous view that the respondent's request for Mr Vanara to collapse the inquiry could only constitute the crime of corruption if the latter had been offered a specific sum of money as gratification. Apart from it conflicting with established legal principles, that understanding was oblivious of the purposely wide definition accorded to 'gratification' in terms of s 1 of the PRECCA. In my view the finding is manifestly wrong.
- [53] Moreover, the trial court's error was not confined to an analysis of the evidence to determine whether the elements of the crime of corruption had been established – in which event it would have been an error of fact – but extended to an assessment of the evidence based on an erroneous understanding of the legal elements of the crimes with which the respondent had been charged. That finding was therefore a material misdirection by the trial court on a question of law and the question must consequently be decided in favour of the state.

Question 6: Whether the trial court properly used, what it found to be the respondent's previous consistent statement, to accept that the uncontested version of respondent was credible and the state's version lacked credibility, for the purposes of the s 174 application.

- [54] The trial court found that an affidavit made by the respondent in respect of the proceedings before the Parliamentary Ethics Committee was a previous consistent statement which establishes that: (a) the respondent and Mr Vanara had begun interacting on a collegial basis during February 2017; (b) as advocates they interacted on issues of mutual interests, particularly issues that may 'have a bearing on the execution of our duties in Parliament';

and (c) their meeting revolved around the issue of ‘possible legal dead-lock on the parallel establishment of the State Capture Inquiry by both parliament and the Executive Head.’ The trial court found that the statement is consistent with the respondent’s version regarding the nature of the discussions between him and Mr Vanara which had been put to the State witnesses.

[55] Counsel for the state argued that the finding by the trial court that the statement was a previous consistent statement which corroborates the respondent’s version and had probative value, was a material misdirection of law. He submitted that first, the statement was inconsistent, in material respects, with what had been put to State witnesses during cross-examination and could therefore not be regarded as a previous consistent statement. And second, even if it could be regarded as a previous consistent statement, the trial court committed a serious misdirection in attaching probative value to the statement since the respondent did not adduce any evidence under oath. Counsel for the respondent submitted that the trial court, although finding that the statement was a previous consistent statement, did not refer to it in order to admit it as a previous consistent statement but merely to demonstrate that it was not a previous inconsistent statement as contended for by the state.

[56] To my mind, the latter submission is at odds with the trial court’s unambiguous statements. At para 44 of the judgment, it made the following finding:

‘This is, with respect, a previous consistent statement. It is consistent with Mr Bongo’s version relating with the purpose of the lawyer to lawyer discussions that he had with Mr Vanara regarding the parallel processes of inquiry.’

[57] There can therefore be little doubt that the trial court had found corroboration in the statement for the version put to the state witnesses on the respondent’s behalf. The respondent did not adduce any evidence under oath and the trial court therefore committed a material misdirection by holding that the statement had probative value.

[58] This Court, in *S v Mkohle*[10], held that a witness’s previous consistent statement has no probative value except where it is alleged that his or her version is a recent fabrication. There has not been any suggestion of recent fabrication in this matter and the statement accordingly has no probative value. Even more importantly, it was not consistent with any other statement since the respondent did not adduce any evidence at the trial. It was simply a version put to the state witnesses. Even a previous consistent statement can only be consistent with actual evidence. After all, one would expect that what is put to opposing witnesses is consistent with other aspects which have been put. That has no bearing on the acceptability or otherwise of the ‘previous’ statement.

[59] Counsel for the state thus correctly submitted that the trial court committed a material misdirection by characterising the statement as a previous consistent statement and according it probative value. This question of law must therefore also be resolved in favour of the State.

Order

[60] In the light of my findings in respect of the abovementioned questions it is unnecessary to determine the remainder of the questions sought to be reserved. The other questions, particularly those that relate to whether the trial court correctly applied the cautionary rule applicable to the testimony of a single witness at the stage of the s 174 application and whether it had properly drawn an adverse inference from the fact that a state witness was not called, raise interesting legal questions that are best left for decision on another occasion.

[61] As I said earlier, if the mistakes of law had not been made, the trial court would have found that there was sufficient evidence upon which a court, acting reasonably, may have convicted the respondent of the main or alternative counts. I am therefore of the view that:

- (a) the third and sixth questions of law must be determined in favour of the state; (b) the respondent's discharge in terms of s 174 of the CPA must be set aside; and (c) the matter must be remitted for trial de novo before a differently constituted court.

[62] In the result the following order issues:

4. The order of the trial court discharging the respondent in terms of s 174 of the Criminal Procedure Act 51 of 1977, at the close of the state's case, is hereby set aside and the matter is remitted for trial de novo before a differently constituted court.

J E SMITH

ACTING JUDGE OF APPEAL

Appearances

For the appellant: C Webster SC with C Tsegarie and D Combrink

Instructed by: State Attorney, Cape Town

State Attorney, Bloemfontein.

For the respondent: MR Hellens SC

Instructed by: De Jager De Klerk Attorneys Inc, Cape Town

Honey Attorneys, Bloemfontein.

[1] S v Basson 2003 (2) SACR 373 (SCA) paras 10-11.

[2] The plea by an accused that he or she had previously been acquitted for the same offence and should therefore not be tried again.

[3] Director of Public Prosecutions, Transvaal v Mtshweni 2007 (2) SACR 217 (SCA), para 29.

- [4] *Magmoed v Janse Van Rensburg and Others*
- [1992] ZASCA 208; 1993 (1) SACR 67 (A) at 94 a-c.
- [5] *Director of Public Prosecutions, Western Cape v Schoeman and Another* 2020 (1) SACR 449 (SCA) para [39].
- [6] *Attorney General, Transvaal v Flats Milling Company (Pty) Limited and Others* 1958 (3) SA 360 (A) 373 to 374.
- [7] *S v Khanyapa* 1978 (1) SA 824 (A) at 838F; *S v Mpetha* 1983 (4) SA 262 (C) at 263H; *S v Agiotti* 2011 (2) SACR 437 (GSJ).
- [8] *S v Mpetha and Others* 1983 (4) 262 (C) at 263H.
- [9] *S v Selebi* 2012
- (1) SA 487 (SCA), para 97; See also: *South African Criminal Law and Procedure Vol 3 (Statutory Offences)* (2nd Edition); Milton and Cowling, at D3-D13.
- [10] *S v Mkohle* 1990 (1) SACR 95 (A) at 99d; See also: *S v Scott-Crossley* 2008
- (1) SACR 223 (SCA) para [17].

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