

SOUTH AFRICA / JUDGMENT

Ncapai v Mrara (CA&R154/2018)

[2019] ZAECHGC 59 (16 April 2019)

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COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, M S Jolwana

CASE / FILE NUMBER

CA&R154/2018

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA & R 154/2018

In the matter between:

NOSICELO NCAPAI First

Appellant

MZUKISI MRARA Second

Appellant

and

THE STATE Respondent

APPEAL JUDGMENT

Bloem J.

- [1] The first appellant was convicted in the Commercial Crimes Court in Port Elizabeth on two counts of corruption in contravention of section 4(1)(a) of the Prevention and Combating of Corrupt Activities Act[1] (the PCCA Act) and the second appellant on three counts of corruption under the PCCA Act. Each appellant was sentenced on each count to 7 years' imprisonment of which 3 years' imprisonment was suspended for 5 years on condition that they not be found guilty of an offence, committed during the period of suspension, of which dishonesty was an element and in respect whereof they be sentenced to an unsuspended period of imprisonment without the option of a fine. The two sentences imposed on the first appellant were ordered to run concurrently, with the result that she was sentenced to an

effective term of imprisonment of 4 years. In respect of the second appellant, it was ordered that 2 of the 4 years' imprisonment be served concurrently with the sentences imposed on counts 1 and 2, with the result that he was sentenced to an effective term of imprisonment of 6 years. The magistrate refused the appellants' application for leave to appeal against convictions and sentences. It is with the leave of this court that they now appeal against the convictions and sentences.

- [2] The magistrate found that on 20 April 2015 and in Sutton Road, Port Elizabeth the appellants, both traffic officers employed by the Nelson Mandela Bay Municipality, unlawfully accepted a gratification of R350.00 for their own benefit from Mzwabantu Sam. The money was intended as a bribe to ensure that Mr Sam should not be issued with a traffic fine and that the due process of the law should not take its course. In respect of count two they were convicted of having received a bribe of R100.00 from Xola Mbatha on 20 April 2015 at Korsten, Port Elizabeth to ensure that he was issued with a traffic fine in a small amount instead of a big amount. In respect of count 3 the second appellant was convicted of having

received a bribe of R50.00 from Justice Manyena on 2 April 2015 on the road between Addo and Motherwell, Port Elizabeth to ensure that he was issued with a traffic fine in a small amount instead of a big amount.

- [3] Mr Sam testified that on 20 April 2015 he parked a truck of which he was the driver on the side of Sutton Road to offload drums. The appellants arrived on the scene and parked their vehicle (the traffic vehicle) behind the truck. The second appellant was the driver and the first appellant his passenger. The second appellant called him and asked for his driving licence. He went to his truck to collect his driving licence and went to the passenger side of the vehicle because he feared the traffic on the driver's side. The second appellant asked for his driving licence which he handed to her. She told him that she was going to issue him with a traffic fine[2] for R1 000.00 for parking on a red line. He simply stared at her while she repeated the threat of a fine. She then said that he must give her something if he did not want her to issue him with a fine. He made R200.00 available but she wanted more money. He made an additional R150.00 available. At her request he did not hand the money directly to her but dropped it inside the vehicle. She returned his driving licence. The appellants left the scene after the second appellant had told him to move the truck from where it had been parked. Having moved the truck he made a report to the manager of the business where he had offloaded the drums. The incident was reported to his employer and the police on the same day.

- [4] Mr Mbatha testified that on 20 April 2015 he was driving a taxi when he was pulled off the road by the appellants. He alighted and walked towards the traffic vehicle in which they were. The first appellant was the passenger and the second appellant the driver. He went to the passenger side. The first appellant asked him to get into the traffic vehicle. While he was sitting at the back she asked for his driving licence. He handed it to her. It transpired that the driving licence had expired on 22 January 2015. She asked if he had noticed that his public driving permit (PDP) had expired. He said that his PDP was at home. She asked him if

the taxi was roadworthy.

His response was that it was still registered in the name of the previous owner and that its licence had expired. She referred

to a Mercedes Benz vehicle that had just left the scene. She said to him that their superior, who was in that vehicle, had seen that he had earlier stopped where he should not have, to offload a passenger. She indicated to him that she had to issue him with a traffic fine otherwise her supervisor would question why a traffic fine had not been issued to him. She said that she would issue a fine of only R100.00 because he left his PDP at home, but for that he should “give her a drink”. He knew that it meant that he should part with money. He took a R50.00 note from his pocket and reached out to her. She refused to take the money and said to him to put it on the seat. She said that R50.00 was too little because they were two traffic officers and asked for another R50.00. The first appellant then issued a traffic fine of R500.00 to Mr Mbatha for having driven the taxi with an expired driving licence. However, if he could produce a valid driving licence at the relevant traffic office, the fine would be only R100.00. He was not fined for having driven the taxi with a PDP which had expired on 22 December 2011, for having stopped the taxi where he should not have or for driving an unroadworthy vehicle. He was allowed to drive off in an unroadworthy vehicle.

[5] Mr Manyena testified that on 2 April 2015 he was driving a vehicle between Wells Estate and Motherwell, Port Elizabeth when he was stopped by traffic officers at what he believed was a road block. He stopped at the side of the road. The second appellant asked for his driving licence. Having looked at his licence the second appellant inspected his vehicle, remarked that it was unroadworthy and requested him to follow him to the traffic vehicle where the second appellant informed him that the vehicle licence had expired and that the tyres were smooth. Mr Manyena furthermore

testified that the second appellant said that he was going to issue a fine to him, but that it would be for a small amount if he could make a plan. He did not understand what plan he was expected to make until the second appellant said that he must give him money. He said that he did not have money. At that stage the second appellant was sitting in the driver’s seat and Mr Manyena in the front passenger seat. When the second appellant started writing in a book Mr Manyena said that he had R50.00. The second appellant said that he was going to issue only a small fine in respect of the expired licence. Mr Manyena took R50.00 from his pocket. The second appellant said that he should not hand it to him but put it on the driver’s seat as soon as he had left the traffic vehicle. After the second appellant had handed the traffic fine to him he left the traffic vehicle. Mr Manyena put the R50.00 on the driver’s seat. He then also left the traffic vehicle. He was adamant that he had contact only with the second appellant.

[6] The first appellant testified that she commenced her duties as a traffic officer at six o’clock on the morning of 20 April

2015. In one street in Sidwell, Port Elizabeth she and the second appellant came across a truck which was obstructing the traffic. They ultimately established that Mr Sam was the truck driver. She testified that he went to the passenger side of the traffic officer's vehicle. The second appellant drew his attention to the fact that he was parked on a red line and that he should collect his driving licence. He went to the truck to collect his licence. He returned to the traffic vehicle with the licence and handed it to the second appellant with whom he was conversing albeit that he was standing next to the front passenger door of the traffic vehicle near the first appellant. Mr Sam said that he did not know that he was not, by law, allowed to park the truck there. The first appellant testified that at no stage did she speak to Mr Sam. He conversed only with the second appellant. There was no discussion between the three of them regarding payment to be made by Mr Sam. After Mr Sam had agreed to remove the truck there was an emergency call over the radio which

necessitated every traffic officer in the vicinity to rush to the assistance of a colleague in need of such assistance. They left the scene in a hurry.

[7] Later that day the Assistant Superintendent from their office, one Linda, called to inform the first appellant that a report had been made to their office that she and the second appellant "took money from a truck [driver] in Sutton Road, [amounting to] ... R350.00 ..." and that they should return the money. She denied knowledge of such an incident. When they arrived at their office later that day they were not asked about the money that they were alleged to have taken from a truck driver. Although

the appellants saw Mr Sam in Sutton Road on 20 April 2015, it was only a year thereafter that they were arrested on this and the other charges.

[8] The first appellant testified that she could not remember the incident with Mr Mbatha and that she did not know him. She heard about it for the first time when she was arrested on 15 April

2016. She testified that the usual fine for driving a motor vehicle without a valid driving licence or with an expired driving licence is R500.00 but that the fine could be reduced to R100.00 if a valid driving licence is subsequently produced at the relevant traffic office.

[9] Insofar as the first count is concerned, the second appellant testified that he stopped the traffic vehicle behind the truck because it was parked on a red line. He switched on the blue light and siren indicating that the truck driver should go to him. He also beckoned with his hands to the driver to approach him. Mr Sam went to the passenger side of the traffic vehicle. The second appellant told Mr Sam that he had parked on a red line and asked for his driving licence. Mr Sam told him that he did not realise that he had parked on a red line. The second appellant

looked at the red line and satisfied himself that it was fading. Mr Sam handed his driving licence to the first appellant who was sitting closer to him. An emergency message came over the radio which caused the driving licence to be returned to Mr Sam whereafter the appellants left him and

the truck where it was parked. On their way to the place where a colleague was said to be in need of assistance, they were told over the radio not to proceed to that place. The appellants continued patrolling. Shortly before they finished their shift the second appellant learned from the first appellant of an allegation that they had taken money from a truck driver along Sutton Road. He denied having taken money from Mr Sam.

[10] The second appellant testified that he had no knowledge of the incidents about which Mr Mbatha and Mr Manyena testified, although he acknowledged that he issued the fine to Mr Manyena. The fine of R300.00 was issued to Mr Manyena because the vehicle he was driving was unlicensed, but the fine could be reduced to R100.00 if a valid vehicle licence could subsequently be produced at the relevant traffic office.

[11] The magistrate convicted the appellants because he found that their versions were so improbable that it could not be reasonably possibly true. He found that it was improbable that each of the complainants, who were unknown to each other, would have testified about the same modus operandi used by the appellants when the complainants had to part with money, namely not to hand the money directly to any of them but to place it on the seat of the traffic vehicle. He found that the appellants were not credible witnesses who evaded questions and refused to make concessions where they clearly had to be made. On the contrary, Mr Sam, Mr Mbatha and Mr Manyena (the complainants), albeit single witnesses and accomplices, were found to be reliable witnesses.

[12] Mr Daubermann, the first appellant's attorney, and Mr Price, counsel for the second appellant, submitted that the acceptance

of the evidence of the complainants was irregular because the procedure adopted by the prosecutor and the magistrate was in each

instance irregular when the complainants were warned against answering questions which may incriminate themselves, in that they

did not comply with the provisions of section 204 of the Criminal Procedure Act.[3] That section deals with evidence given by a witness for the prosecution which might incriminate such a witness. It reads as follows:

“(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor—

- (a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness—
 - (i) that he is obliged to give evidence at the proceedings in question;
 - (ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;

(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him—

(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) the court shall cause such discharge to be entered on the record of the proceedings in question.

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.

(4)

(a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955)."

[13] The factual situation against which it was submitted that there was non-compliance with section 204 is quoted hereunder in respect of each complainant's evidence-in-chief. When Mr Sam testified about the first appellant's request for money, the record reflects:

"And then she said that you must give him something. Did she say what this something was? ---No.

What did you do? --- I gave her R200.

Now, let's stop there. You say you gave her R200.

Where did the money come from?

Court: Incriminating himself?

Prosecutor: Yes, Your Lordship.

Court: Must I warn him against it? Are you offering him anything?

Prosecutor: He is a Section 204 witness, Your Worship.

Court: He is not, if I did not warn him, he is not.

Prosecutor: The State regards him as such, my apologies, Your Worship. The witness understands it as such.

Mr Ahmed: We were never advised that he was a [section] 204 [witness], nor were we given a statement as a [section] 204 [witness].

Court: It is the prerogative of the State to make the decision whether they want to tender him immunity from Prosecution. And at this stage, it appears the fact?

Prosecutor: That is so, Your Worship.

Court: Sir, by offering, or paying on request a bribe, so to speak, is a criminal offence. By asking you to disclose what happened there, the State wants you now to incriminate yourself, and in return, offers not to prosecute you for the specific offence, should your, should I make the finding at the end of the trial. It is requested that you were satisfactory and honest in your response to the question posed, whereby you incriminate yourself, do you understand this? --- Yes, [Your Worship].

Duly warned.

Prosecutor: Thank you, Your Worship. Now sir, you said you gave her R200.00? --- Yes."

[14] When Mr Mbatha testified the relevant portion of the record reads as follows:

"Yes? --- I agreed on that, and then she said, in order for that to happen, I must give her a drink.

Did you have any drinks on you? --- No.

Now, sir, Your Worship, may the witness at this stage, be warned in terms of Section 204 of the Criminal Procedure Act?

Court: Yes sir, you are now expected to present evidence which might incriminate you in a criminal offence, similar to what the accused before Court is facing. The State wants you to answer to these questions. If you do so, then they will ask the Court to grant you indemnity from prosecution on this similar court, which is now being faced by the accused before Court. It is expected of you to freely and voluntarily respond to the questions posed at you, which might incriminate you. It might happen that indemnity might be given to you against prosecution. --- Understood, Your Worship.

Prosecutor: Thank you, Your Worship. Sir, you said she asked for a drink, and before you continue, what did the driver of the vehicle, what did he say? --- He did not say anything, he did not even look at my direction, he was looking to the opposite direction, outside the vehicle.”

[15] When Mr Manyena testified about the second appellant’s alleged demand for money, the relevant portion of the record reads as follows:

“He said if I can give him a little money, then he is going to give me a small fine. And again I said, I do not have money. But once he started writing out the ticket, I then said, I’ve got R50.

Court: I think we are approaching the stage where he is now incriminating himself, shall I warn him, or do you have any other suggestion?

Prosecutor: Yes. No, please do so, Your Worship.

Court: Sir, there is no reason for you to incriminate yourself, if you are being asked any questions which might lead to your prosecution if you respond to that, you need not answer those questions.

Prosecutor: Your Worship, the State will also ask the Court to warn the witness in terms of Section 204.

Court: Yes. In the instance where the State now offers you stay of prosecution, or indemnity against prosecution, you are requested to answer truthfully, and freely and voluntarily to the questions posed to you, even though it might incriminate you, and if the Court is satisfied at the end of procedures, that you did answer it in that fashion, the Court can grant you such indemnity. That is what the State offers you, against prosecution on the offence, count 3, which is faced by the accused 2 in this matter. Understood? --- Understood, Your Worship.

Prosecutor: Thank you, Your Worship. Now sir, you said, first you said you don’t have money, then he said that if you can give a little money, then that would be acceptable, and you said again, you don’t have money? But then he started writing on the book? --- Yes.”

[16] The submission was that the procedure adopted was irregular because in each case the warning was given after the complainant had already commenced with his evidence whereas the warning should have been given before the witness commenced testifying; the

prosecutor did not specify the offence in respect of which the complainant would be required to answer questions incriminating himself, as required by section 204(1); because the prosecutor did not specify the offence in respect of which the complainants may be asked questions which may incriminate themselves, the magistrate could not and did not comply with the provisions of section 204(1)(a); and the magistrate erroneously informed Mr Sam that the state offered “not to prosecute you for the specific offence” should it be found that he answered frankly and honestly all questions put to him. It was submitted that, because the above irregularities were so gross, they vitiated the proceedings.

- [17] In my view the submission has no substance and must be rejected. For purposes of this submission it will be assumed in favour of the appellants, without deciding, that the provisions of section 204(1) have not been complied with, as submitted. The non-compliance with the provisions of section 204 does not render the proceedings in which a witness who testifies on behalf of the prosecution irregular in respect of an accused. It is apparent from a reading of section 204 that the section was designed to protect a witness who testifies on behalf of the prosecution. The protection does not extend to the accused. At best for the submission made on behalf of the appellants, the assumed failure of the magistrate to comply with the provisions of section 204(1) may render the complainants’ evidence, to the extent that they incriminated themselves, inadmissible against them (the complainants) in subsequent proceedings against them.[4] The complainants’ evidence was accordingly admissible against the appellants. Its admission constituted an irregularity only insofar as it relates to the complainants in subsequent proceedings against the complainants. Such evidence will be inadmissible against the complainants in subsequent proceedings against them.
- [18] Even if it were to be found that the magistrate’s non-compliance with the provisions of section 204 constituted an irregularity, in my view such irregularity would not be so gross as to vitiate the entire proceedings. It would therefore not be in the interest of justice to, under those circumstances, set aside the proceedings. I now deal with whether or not the magistrate was correct in finding that the state proved its case against the appellants beyond a reasonable doubt.
- [19] The appellants were charged with and convicted of contravening the provisions of section 4(1) of the PCCA Act which deals with offences in respect of corrupt activities relating to public officers. Section 4(1) reads as follows:
- “Any-
- (a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

- (b) 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 to do anything,

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

[20] The essential elements of the general crime of corruption are the following: (a) the acceptance; (b) of a gratification (payment or some other benefit); (c) in order to act in a certain way (the inducement); (d) unlawfulness; and (e) intention.[5] This case is about whether the appellants accepted gratification in the form of money from the complainants in return for which no traffic fines would be issued or small traffic fines (that would have been issued had the gratification not been received) would be issued. What the state was required to prove was that the appellants accepted money from the complainants to enable them not to issue traffic fines or issue small fines to them. In the circumstances of this case, once it has been found that the state proved the acceptance of the money, there can be no doubt about the unlawfulness of that conduct and that the appellants had the requisite mens rea.

[21] The magistrate convicted the appellants on count 1 based on the evidence of Mr Sam. He took into account that Mr Sam was a single witness and an accomplice whose evidence should be approached with caution. He applied the relevant cautionary rules also in respect of the other two complainants. The magistrate found the appellants’ versions improbable. Mr Daubermann submitted that there was nothing improbable in the first appellant’s version. In my view the magistrate’s finding, that the appellants’ versions were improbable, cannot be faulted. Firstly, the appellants stopped behind the truck because it was parked on a red line. Mr Sam accordingly committed a traffic offence. Yet, he was not issued with a

fine. The appellants' explanation therefor was firstly, that Mr Sam gave a reasonable explanation to the second appellant for why he was parked in that position, namely that he did not see that it was a red line because the line was faded. When it was pointed out to him that the truck was parked on a red line Mr Sam, although he said that the red line was faded, accepted that he had committed a traffic violation. The appellants, who on their approach to the truck, could see that it was parked on a red line. The second explanation given for why Mr Sam was not issued with a fine was the alleged emergency call. The existence of such a call was not put to Mr Sam when he was cross-examined to enable him to confirm or deny that the first appellant received such a call. The state might also have wanted to call someone from the traffic department to confirm or deny such a call. It is improbable that the first appellant received such a call, especially if regard is had to the fact that on their way to the colleague who was allegedly in need of assistance, she conveniently received another call to advise that there was no longer an emergency.

- [22] Furthermore, the appellants' evidence as to Mr Sam's position when he spoke to the second appellant about the traffic offence is improbable. Mr Sam, for his own safety, stood next to the front passenger door when he produced his driving licence. The appellants' version in this regard is that the second appellant spoke to Mr Sam. It is in my view improbable that Mr Sam would have spoken to the second appellant when the first appellant was closer to him. Nothing prevented the first appellant from speaking to Mr Sam whose evidence was that he spoke to the first appellant who, according to him, had a book in her hand in "which she was going to write a fine". That evidence is more probable than the appellants'.
- [23] Furthermore, and relevant also to credibility, is the appellants' initial version that after Mr Sam had approached the traffic vehicle, he was told to collect his driving licence. He went to the truck to collect his driving licence whereafter he returned to the traffic vehicle. The first appellant was adamant in her evidence, supported by her new attorney, that that was the correct version. It was only when the video was thereafter watched that she conceded that, after the second appellant had beckoned to Mr Sam to take his driving licence to the traffic vehicle, he went from where he was to the truck, collected his licence and went to the traffic vehicle for the first and only time. When the second appellant testified he corrected the instructions which he gave to his former and new attorneys so that his evidence be in line with what was shown in the video. I agree with the magistrate that the appellants' initial version was intended to cast some doubt

on the reliability of Mr Sam's evidence, which was all along that he went to the traffic vehicle only once.

- [24] It is indeed improbable, as found by the magistrate, that each of the complainants would independently of each other testify that he was requested by the appellants not to hand the money to them directly but to put it on the seat of the traffic vehicle. That evidence was met by the appellants' bare denial of a request for a bribe. In the light of all the evidence, the appellants' reasons why Mr Sam was not issued with a fine and that he conversed with the second appellant when he stood closer to the first appellant are so improbable that they

cannot be reasonably possibly true. That is more so the case when regard is had to the above modus operandi. The magistrate was accordingly justified in finding that the state proved beyond a reasonable doubt that, upon a request by the first appellant, Mr Sam paid the sum of R350.00 to her to avoid being issued with a traffic fine. Her conviction on

count 1 should accordingly be confirmed.

[25] Mr Price submitted that, even on the acceptance of Mr Sam's evidence, the second appellant was wrongly convicted on count 1 because it was his evidence that, while the first appellant conversed with him, he "did not notice any action from [the second appellant], You Worship, because [he] was not concentrating on him". I disagree with that submission. Mr Sam's unchallenged evidence was that while he was standing outside the vehicle he could hear the first appellant talking to him because she was speaking clearly. On the acceptance of that evidence then the second appellant, who was sitting inside the confined space of the traffic vehicle with the first appellant, would in all probability have heard the conversation between the first appellant and Mr Sam. Mr Sam's further evidence in this regard was that the second appellant did nothing to stop the first appellant from requesting and accepting money from him. As a traffic officer, the second appellant had a legal duty to prevent the first appellant and Mr Sam from committing an offence. He was also under a legal duty to maintain law and order. His failure to act under those circumstances manifested his association with the offence which was being committed by the first appellant. He made common purpose with the first appellant's criminal conduct to benefit from it. He had the requisite mens rea to commit that offence and was accordingly also correctly convicted on count 1.

[26] The only evidence in respect of count 2 is the evidence given by Mr Mbatha because the appellants testified that they had no knowledge of their meeting with him because they issued traffic fines to many taxi drivers on that day. Mr Mbatha's evidence was that when he was inside the traffic vehicle, at the first appellant's request, she looked at his driving licence and requested a drink from him, a euphemism for money, to avoid being issued with a traffic fine of R500.00 for an expired driving licence. When he had parted with R100.00 she nevertheless issued him with a traffic fine of R500.00. However he did not have to pay the fine of R500.00 if he could subsequently produce his valid driving licence at the traffic office. If he could do so he would pay a fine of R100.00 only for failing to produce a valid driving licence when he was driving the taxi on 20 April 2015. In the absence of evidence to the contrary Mr Mbatha's evidence must be accepted, despite the fact that he was a single witness and an accomplice. His version that it was the first appellant, who conversed with him, is corroborated by the fact that a copy of the traffic fine showed that it was the first appellant who issued a traffic fine to him.

[27] Mr Price submitted that the second appellant was incorrectly convicted on count 2 because Mr Mbatha testified that he only dealt with the first appellant and that the second appellant did not say anything to or look at him or the first appellant. At that stage the appellants were sitting in the traffic vehicle with Mr Mbatha who testified that, when the first appellant

conversed with him, everyone in the vehicle could hear what was being said. That would have included the second appellant by virtue of the confined space in the traffic vehicle. The fact that the second appellant did not say anything or did not look at Mr Mbatha and the first appellant does not mean that he did not hear what was being said during the conversation between the first appellant and Mr Mbatha. That he seemed not interested in the conversation between the first appellant and Mr Mbatha was his way of creating the impression that he was not associated with the commission of the offence. The probabilities are that he listened to the conversation between them. Like in the case of Mr Sam, the second appellant was under a legal duty to act against the first appellant and Mr Mbatha. He associated himself with the offence which was being committed by the first appellant by failing to act.

[28] In *Musingadi and others v S*[6] some of the appellants purported to disassociate themselves from the killing of the deceased by refusing to be part of her poisoning but not from the robbery because they went off with the money taken during the robbery and shared it. Those appellants realised

that the robbery was developing into a murder which would have been facilitated by their own prior conduct in the robbery.

Comrie AJA found that by departing the scene and leaving a helpless deceased to her probable and actual fate, those appellants

acquiesced in the expansion of the common purpose unless they took steps effectively to disassociate themselves from that development.

In my view there was a duty on the second appellant to take steps to effectively disassociate himself from the offence which was being committed by the first appellant.

[29] The second appellant testified that he was unable to recall the circumstances under which he issued a traffic fine of R300.00 to Mr Manyena for having driven an unlicensed vehicle. However that fine could be reduced to R100.00 if a valid vehicle licence was produced at the relevant traffic offices. He acknowledged only that he issued the traffic fine because it was written in his handwriting. Regarding Mr Manyena's evidence that he was not issued a traffic fine for the smooth tyres, the second appellant's evidence was that not every traffic violation results in a traffic fine being issued. A motorist could for instance be given a verbal warning. He denied that he was given R50.00 by Mr Manyena. According to him, it would not have made sense for him to accept a bribe of R50.00 when he issued Mr Manyena with a bigger traffic fine of R300.00. In my view the fact that second appellant issued a fine of R300.00 to Mr Manyena does not mean that he did not accept a bribe of R50.00. To hold otherwise would mean that, for an accused to be convicted of corruption there should be a correlation between the value of the gratification and the benefits due to the corruptee and corruptor respectively.

There is no basis in the PCCA Act for such a requirement. Section 4(1)(a) only requires a public officer, both of the appellants being public officers, to accept a gratification in order for him or her to act in a certain way. The quid pro quo for the payment received from the complainants was that no traffic fine was issued to Mr Sam and smaller (than would have been the case had the appellants not received gratification) traffic fines were issued to Mr Mbatha and Mr Manyena. What is of importance is that Mr Manyena could have been issued with a fine bigger than R300.00 for firstly, driving an unlicensed vehicle and secondly, driving a vehicle with smooth tyres. If he was able to produce a valid vehicle licence the effective traffic fine was R100.00. In my view the evidence, viewed in totality, shows that the state proved beyond reasonable doubt that the second appellant accepted R50.00 from Mr Manyena to ensure that he was issued with a lesser traffic fine than he should have been issued with. In the circumstances, the second appellant was correctly convicted on count 3.

[30] Regarding the appellants' sentence, the magistrate took into account that they were senior traffic officers employed by the aforesaid municipality for a lengthy period of time. He also considered that the first appellant was the primary caregiver of dependent children. The appellants were convicted of serious offences and that the community expect of them to enforce the law rather than to break the law. The appellants pounced on vulnerable road users who admittedly committed offences. Instead of issuing appropriate traffic fines to them, they requested and received bribes from them. Such conduct cannot be condoned.

[31] Sentencing falls primarily within the discretion of the trial court. A court of appeal will intervene only when there has been an irregularity that results in a failure of justice; the trial court misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. [7] In my view the appellants have failed to show any irregularity or an irregularity of the nature described above, that the magistrate misdirected himself to such an extent that his decision on sentence was vitiated or that the sentences were so disproportionate or shocking that no reasonable court could have imposed them. In my view, the sentences that the magistrate imposed do justice to the appellants' personal circumstances, the serious nature of the offences which they had committed and society's interests. There is accordingly no reason to interfere with the sentences which the magistrate had imposed on the appellants.

[32] In the result, the appeal against the appellants' convictions and sentences be and is hereby dismissed.

G H BLOEM

Judge of the High Court

Jolwana J,

I agree

M S JOLWANA

For the first appellant: Mr

P Daubermann of Peter Daubermann Attorneys, Port Elizabeth.

For the second appellant:

Adv T N Price SC, instructed by Zolile Ngqeza Attorneys, Port Elizabeth and Netteltons Attorneys, Grahamstown.

For the state:

Adv U de Klerk of the office of the Director of Public Prosecutions, Grahamstown.

Date of hearing:

30 January 2019.

Date of delivery of the judgment:

16 April 2019.

[1] Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

[2] The traffic fines referred to in this judgment are the notices issued to motorists in terms of section 56 of the Criminal Procedure

Act, 1977 (Act No. 51 of 1977).

[3] Criminal Procedure Act, 1977 (Act No. 51 of 1977).

[4] S v Lwane 1966 (2) SA 433 (A) at 440H-441A and Magmoed v Janse van Rensburg and others

[1992] ZASCA 208; 1993 (1) SA 777 (AD) at 820H-821B.

[5] Selebi v S

[2012] ZASCA 249; 2012 (1) SA 487 (SCA); 2012 (1) SACR 209 (SCA);

[2012] 1 All SA 332 (SCA) at para 8.

[6] Musingadi and others v S [2004] 4 All SA 274 (SCA); 2005 (1) SACR 395 (SCA).

[7] Bogaards v S

[2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) at para 41.

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