

SOUTH AFRICA / JUDGMENT

Ramphelo v S (A03/2020) [2022] ZALMPPHC 47; 2022 (2) SACR 560 (LP) (1 September 2022) [2022] ZALMPPHC 47

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago, Naudé-Odendaal

CASE / FILE NUMBER

A03/2020

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
CASE NO: A03/2020
REPORTABLE: YES/NO
OF INTEREST TO THE
OTHER JUDGES: YES/NO
REVISED.

In

the matter between:

PORTIA
MOTSATSI RAMPHELO
APPELLANT
And
THE
STATE
RESPONDENT

JUDGEMENT**KGANYAGO J**

- [1] The appellant and her co-worker (accused 1) were charged and convicted of contravening the provisions of section 4(1) of the Prevention and Combating of Corrupt Activities Act[1] (PCCA) to wit corruption. It is alleged that the appellant and accused 1 whilst on duty as traffic officers received a gratification

of R150.00 from one Moleketsi Paul Mugai for their own benefit in an illegal and dishonest way. The respondent had relied on the doctrine of common purpose in charging the appellant and accused 1 jointly. The appellant and accused 1 were found guilty as charged. The appellant was sentenced to two years' direct imprisonment without the option of a fine whilst accused 1 was sentenced to four years' imprisonment of which two years was suspended for a period of four years'. The appellant is appealing against both conviction and sentence with the leave of the court a quo.

- [2] The appellant had pleaded not guilty to the charge during trial in the court a quo. The respondent had called four witnesses, whilst the appellant had closed her case without leading any evidence. The respondent's first witness was Timothy Seabi. He testified that he is a member of the South African Police Services (SAPS), and lieutenant colonel by rank. That during the beginning of 2017 their office received several complaints from the members of the community, officials from the Department of Transport, as well as officials from municipal offices that police officers as well as traffic officers posted along the different national, provincial and municipal roads within the Limpopo Province were demanding gratification from motorists who were found to have faults or contravened some rules and regulations of the road.
- [3] They decided to form an operation with the codename siyabangena in order to weed out that practice. His role in that operation was that of an operational manager. He was tasked to coordinate the operational team, as well as to arrange all the logistics which were needed when the operation was taking place. He had to arrange for vehicles, audio and video equipment, as well as money. That operation consisted of handlers, investigators and agents. In the matter that led to the arrest of the appellant, the investigating officer was captain Mungani, and the agent was Paul Mugai. Paul Mugai was an official from the Department of Roads and Traffic Management Centre stationed in Gauteng. His role in the operation was to go out and meet with the targets, communicate with them and only adhere to whatever demands made by the targets.

- [4] The witness further stated that on 13th December 2017 he was present when the appellant and accused 1 were arrested. The appellant and accused 1 were arrested at Tzaneen provincial traffic department. Before their arrest Paul was the one who identified the appellant and accused 1 as the people who had demanded gratification from him. The witness was cross examined by counsel for both the appellant and accused 1.
- [5] The second witness to testify for the respondent was Mashudu Felicity Mungani. She testified that she is a member of the SAPS and captain by rank. She was part of the operation siyabangena. Her role in that operation was that of an investigating officer. Her duties were to administer the dockets, collection of evidence, and giving tasks to agents.
- [6] That she is the one who had tasked Paul to go out and conduct a trap along the Tzaneen area. She had instructed Paul that if he was stopped by police officers or traffic officers for any transgression of the Road Traffic Act, and those officers demand something from him, he must just give them what they will be requesting. She gave Paul R500.00 which was State money, and also requested lieutenant colonel Seabi to search Paul to make sure that when he goes to do the operation, his own money does not mix with the money of the operation.
- [7] Paul went out to do the operation, and later came back to report to her that he had made a transaction along the R71 road in Tzaneen with two traffic officers. That he had paid the two officers R150.00. Thereafter Paul handed in his written statement and also a memory card. The memory card had been put into the gadget which was secretly recording Paul and the two officers when the transaction was concluded. The witness took the memory card, registered it in the SAP 13, and thereafter sealed it inside the forensic bag. She kept that evidence in her possession in a locked locker until the end of the operation. She was the only one who was keeping the keys for the locker, and was the only official who was having access to that locker.
- [8] At the end of the operation she handed the forensic bag to captain Selepe. Later she received a forensic bag from captain Selepe which contained the memory card, old forensic bag that she had previously sealed, and a DVD and CD. She kept the forensic bag. She was present when the appellant and accused 1 were arrested. The appellant and accused 1 were pointed out by Paul as the people who took gratification money from him. The money that was paid as gratification was never received back. The witness was cross examined.
- [9] The respondent called Petrus Selepe as its third witness. He testified that he is a member of the SAPS and captain by rank and is attached to the Directorate of Priority Crime Investigations under the Priority Management Centre in Polokwane. His duties entails attending crime scenes, the search and seizure of all digital data residence devices, acquisition and analysis of electronic data, the extraction of data from magnetic cards readers, the interrogation and extraction of data from mobile devices.

- [10] That on 7th March 2018 during the execution of his duties he received a service application from investigating officer captain Mungani requesting for the download of SD-memory card which was in a sealed forensic bag. He copied the data from that card and put them into a DVD. He had downloaded the memory card from his computer, and after that he gave the DVD to captain Mungani in a new sealed forensic bag. The contents of that DVD was in relation to traffic officers. The witness was cross examined.
- [11] The respondent's fourth witness was Paul Mugai. He testified that he is an investigator attached to the national anti-corruption unit which falls under the Road Traffic Management Corporation. That his duties entails overseeing and supervising all his subordinates on a daily basis, as well as curbing fraud and corruption.
- [12] He was part of the operation siyabangena which was conducted in Limpopo Province. In that operation he acted as an agent. In that operation the investigating officer was giving him tasks on a daily basis. He was trained on how to use audio and video recordings before he was involved in that operation. When they were trained, they were told not to entice the culprits, but that the offer must come from the culprits.
- [13] That on 31st May 2017 he was posted to work in the district of Tzaneen as part of the operation doing entrapments. Before he was posted to do duty on that date, the investigating officer Mungani read to him the rules and regulations of the operation. Thereafter colonel Seabi searched him to check whether he was not in possession of his own money. After he was searched, he was given R500.00 to be used for entrapment. A device which could not be easily identifiable was also planted on his body.
- [14] The task given to him was to disobey or transgress any traffic laws whilst driving on the road when he could be seen by the members of the SAPS or traffic officers. That should he be stopped and issued with a traffic fine, he was supposed to accept that. Further that should those officers demand gratification from him, he should pay that. He was given their official vehicle which was unmarked. He took the Tzaneen – Phalaborwa road. As he was driving on that road, he overtook another vehicle on the barrier line, and he was immediately stopped by a male traffic officer who was in full uniform (accused 1). Accused 1 had a name tag written Makhurupetsa, and was with the appellant who was sitting next to him. The appellant was also in full uniform, but he could not see her name tag.
- [15] The witness pulled off the road, switched on the device on his body. Accused 1 told the witness the reason why he was being stopped, and further that he was going to issue him with a traffic fine. By then the appellant was with another motorist. Accused 1 told the witness that he was going to issue him with a fine which will not be more than R1000.00. The witness pleaded with accused 1 not to issue him with a fine, but rather give him a warning.
- [16] As the witness was busy talking to accused 1, the appellant joined them in their conversation. On arrival of the appellant, the witness asked the appellant to talk to accused 1 not to issue him with a ticket. The appellant asked the witness why he was in a hurry, and the witness told the appellant that he was not in a hurry. The witness told the appellant that

he overtook a vehicle that had given him a right of way, and when he was in the process of overtaking, that vehicle saw traffic officers and went back to the road. That led to the witness overtaking that vehicle on the barrier line. That was the explanation which the witness had also given to accused 1.

- [17] The appellant stated that her book was almost full as a result of her issuing traffic fines to other motorists. Accused 1 handed in the witness driver's licence to the appellant, and asked the witness what he should do with him. When accused 1 asked the witness that question, the appellant was standing not more than two metres from them. The witness pleaded for mercy, and accused 1 told the witness to give him or them cool drink. The witness stated that his understanding of accused 1 asking for a cool drink was that he was seeking for a gratification. The witness told accused 1 that he was having R150.00 for petrol, and accused 1 told the witness that it was sufficient. The witness asked accused 1 whether he could hand over that money whilst other motorists were passing and accused 1 said that there was no problem.
- [18] The witness then handed over the R150.00 to accused 1. When the witness paid accused 1 R150.00, the appellant was still within the 2 metres range, and could see what was happening. After that the appellant told the witness that since he was going far, he can go, and she handed him his driver's licence back. Before the witness could drive off, accused 1 told him not to overtake on the barrier line. Both accused 1 and the appellant did not issue the witness with a traffic fine for the offence that they have stopped him for. That the R150.00 was paid from the R500.00 the witness was given by captain Mungani.
- [19] The witness drove away and on arrival at their offices he tested the recordings. After that on the same date of the incident, the witness handed the memory card to the investigating officer captain Mungani, and also made an affidavit to that effect. That prior to the incident the witness did not know accused 1 and the appellant.
- [20] The witness was cross examined and he conceded that he could not be seen on the video footage, as he was the one who was operating the device. The witness conceded that on the video footage the handing in of the money cannot be seen, but that voices could be heard when accused 1 accepted the money. The witness conceded that on the video footage the role that the appellant had played was not shown, but that he had talked to the appellant to talk to accused 1, and she asked him where he was rushing to. The witness stated that the appellant was an accomplice as the witness had handed his driver's licence to accused 1 who in turn handed it to the appellant.
- [21] That concluded the evidence of the respondent and it closed its case. Accused 1 and the appellant applied for a discharge in terms of section 174 of the Criminal Procure Act[2] (the Act) which application was refused. Thereafter both accused 1 and the appellant closed their case without leading any evidence.

[22] The appellant and accused 1 have been charged together in terms of the doctrine of common purpose. It is not in dispute that on the date of the incident the appellant was on official duties as a traffic officer. On that date the appellant was therefore doing her duties as a public officer. There are overwhelming evidence that Paul the agent, had paid accused 1 R150.00

in order for accused 1 not to issue Paul with a traffic fine. During the hearing of the appeal, counsel for the appellant had correctly

conceded that Paul had paid accused 1 R150.00. The issue to be determined is whether the respondent had succeeded in proving that

appellant acted in common purpose with accused 1.

[23] Section 4(1) of the PCCA provides as follows:

“(1) 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 amount 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) 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.”

[24] In S v Selebi[3] Mthiyane DP said:

“The essential elements of the general crime of corruption committed by the recipient 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. Although ‘unlawfulness’ is not expressly mentioned in the definition of the crime, commentators are of the view that it must nevertheless be read into it. It connotes that the act (in this case the acceptance of payment) should be unjustified as this is a requirement of every crime. In general, ‘unlawfulness’ means ‘contrary to the good morals or the legal convictions of society’. The same applies to ‘intention’. Therefore, it has to be considered even though it is not specifically mentioned.”

[25] In the case at hand the gratification was accepted by accused 1. Both accused 1 and the appellant had seen Paul transgressing a road traffic offence which they should have issued him with a spot fine ticket. Instead of issuing Paul with a spot fine, he was made to pay R150.00 in an unlawful way to accused 1 with the appellant seeing what was happening. The appellant was within 2 metres from Paul and accused 1. The first person to attend Paul after he was stopped was accused 1, whilst the appellant was still busy with another motorist. After the appellant finished attending that motorist, she joined accused 1 and Paul wherein Paul pleaded with the appellant to talk to accused 1 not to issue him with a ticket.

[26] The appellant was in possession of the book for issuing spot fine tickets. Accused 1 gave the appellant Paul’s driver’s licence and that is when the appellant said her book was almost full. It was not full but almost full. It is unfortunate both accused 1 and the appellant did not testify to admit or dispute whether accused 1 gave the appellant Paul’s driver’s licence. That version that accused 1 gave the appellant Paul’s driver’s licence

remained unchallenged. The only reasonable inference to be drawn was that Paul’s licence was given to the appellant for her to issue Paul with a spot fine ticket as she was the one in possession of the book for issuing spot fines. The appellant and accused 1 were now directly involved in dealing with the transgression committed by Paul.

[27] The negotiations of payment of gratification was between accused 1 and Paul. However, the appellant was in possession of Paul driver’s licence, and there was nothing preventing her from issuing Paul with a spot fine ticket since Paul had transgressed a road traffic offence. The appellant returned Paul’s driver’s licence after Paul had paid accused 1 a gratification of R150.00 without issuing Paul with a spot fine ticket. The appellant did not testify to explain the circumstances that prevented her from issuing the appellant with a spot ticket fine, and also why she returned Paul’s driver’s licence only after Paul had paid gratification to accused 1.

[28] In *S v Boesak*[4] Langa DP said:

“The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the

right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.”

[29] There are overwhelming evidence that the appellant was present at a distance of less than two metres when accused 1 demanded a gratification from Paul. At that distance the reasonable inference to be drawn is that the appellant could hear the conversation between accused 1 and Paul. The appellant was in possession of Paul’s driver’s licence and was aware that Paul has committed a traffic offence which a spot fine should be issued. The appellant was in possession of a spot fine book and was in a position to have issued Paul with the spot fine ticket, but did not do so. Instead she returned the driver’s licence back to Paul after payment of R150.00 gratification to accused 1 by Paul. All these point to an inference to be drawn that the appellant was working together with accused 1 in illegally demanding gratification from Paul. There were evidence calling for an answer from the appellant but she had failed to do so. The only inference to be drawn is that she did not have an answer for that.

[30] It is clear that there was a common understanding between the appellant and accused 1, as the appellant handed back the driver’s licence back to Paul after payment of R150.00. She did not bring it to the attention of accused 1 that what he was doing was wrong and she was not going to be part of it. Instead she told Paul that since he was going far he can go, and this proves that the appellant was in complicit with what accused 1 was doing. Paul was released to go as he had paid what the appellant and accused 1 were looking for.

[31] In *S v Thebus*[5] Moseneke J said:

“If the prosecution relies on common purpose, it must prove beyond reasonable doubt that each accused had the requisite mens rea

concerning the unlawful outcome at the time the offence was committed. That means he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself, reckless as to whether the result was to ensue.”

[32] The appellant was present at the scene, and could hear what the conversation was all about between accused 1 and Paul. She actively associated herself by taking Paul’s driver’s licence and failing to issue Paul with a spot fine ticket when she was in a position to do so. By giving Paul his driver’s licence back only after payment of the gratification, without issuing him with the spot fine ticket proves that the appellant and accused 1 were sharing the common purpose. The prosecution has therefore proved beyond reasonable doubt that accused 1 and the appellant were acting collectively and sharing common purpose. In my view, the appellant has been correctly convicted of the charge she was facing, and the appeal on

conviction stands to fail.

- [33] Turning to sentence, it is trite that sentencing is the prerogative of the trial court, and should not lightly be interfered with. An appeal in which the interference with sentence will be justified is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial court was wrong, but whether it exercised its discretion properly. (See *S v Romer*[6]).
- [34] In terms of section 26 of the PCCA a magistrate court is empowered to sentence the appellant to fine or imprisonment not exceeding five years' imprisonment. The court a quo took into consideration the appellant's personal circumstances, that she was a primary caregiver of her three minor children aged 12, 8 and 6, and also that the appellant is a single mother and a breadwinner. The court a quo dealt at length with section 28(1) and (2) of the Constitution relating to the minor children. The court a quo also dealt at length with recommendations of the probation officer and also why direct imprisonment was an appropriate sentence in this matter.
- [35] The appellant has been employed as a law enforcement officer, and as such has been entrusted in maintaining

law and order on the road in order to reduce the high rate of accidents that occurs on the roads a daily basis, which causes a huge burden to the State resources, and also that road users obey to the rules of the road. If the law enforcement officers are also involved in corrupt activities the war of reducing accidents on the roads, and also making road users to obey the rules of the road will never be won. The offence which the appellant had committed had elements of dishonesty, and as a law enforcement officer, that will not be measured by the value of the gratification given to them. Dishonesty remain dishonesty and value of gratification received will not make it less dishonest. A high degree of professionalism, morals and honesty is expected from the law enforcement officers. If they are left to do as the wish, the society at large will lose confidence in the officers who are supposed to protect road users from those who break traffic laws on a daily basis.

- [36] The court a quo had sentenced accused 1 to four years' imprisonment, whilst the appellant was sentenced to two years' imprisonment. That shows that the court a quo applied its mind properly in sentencing the appellant and accused 1, and there is no reason to fault it on that approach. The sentence

imposed on the appellant is appropriate to deter those who aspired to do what the appellant did. This court does not find any misdirection

on the part of the court a quo in sentencing the appellant. The sentence imposed on the appellant is also not disturbingly disproportionate with the offence committed by the appellant. The appeal on sentence also stands to fail.

[37] In the result I make the following order:

37.1 The appeal on both conviction and sentence is dismissed.

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION,

POLOKWANE

I AGREE

NAUDÉ - ODENDAAL J

APPEARANCES:

Counsel for the appellant : Adv UB Makuya

with Adv R Resenga

Instructed by

: B Shirinda Inc

Counsel for the respondent : Adv SV Ngobeni

Instructed by

: DPP Polokwane

Date heard

: 26th August 2022

Electronically circulated on : 1st September 2022

[1] 12 of 2004

[2] 51 of 1977

[3] 2012 (1) SACR 209 (SCA) at para 8

[4]

[2000] ZACC 25; 2001 (1) SA 912 (CC) at para 24

[5]

[2003] ZACC 12; 2003 (6) SA 505 (CC) at 532H-I

[6] 2011 (2) SACR 153 (SCA) at paras 22 and 23

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