THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 370/2016

In the matter between:

LEBOGANG PHILLIPS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Phillips v The State* (370/2016) [2016] ZASCA 187 (1 December 2016)

Coram: Leach, Tshiqi, Zondi JJA and Schoeman and Schippers AJJA

Heard: 11 November 2016

Delivered: 1 December 2016

Summary: The Prevention and Combating of Corrupt Activities Act 12 of 2004 does not limit the penal discretion of the sentencing court: sentence of a fine not appropriate for a public officer convicted of contravening s 4(1)*(a)*(i)*(aa)* of the Act: failure by the trial court to have regard to all relevant considerations constitutes a misdirection warranting interference with the sentence imposed.

ORDER

On appeal from Gauteng Division of the High Court, Pretoria (Kubushi J and Masango AJ, sitting as a court of appeal).

1 The appeal against sentence succeeds. The sentence imposed by the trial court is set aside and substituted with the following:

'The accused is sentenced to four years' imprisonment, ante-dated to 20 June 2012.'

JUDGMENT

Zondi JA (Leach, Tshiqi JJA and Schoeman and Schippers AJJA concurring):

[1] The appellant, a constable in the South African Police Service, was convicted in the regional court, Pretoria of soliciting and accepting a bribe of R900 in contravention of s 4(1)*(a)*(i)*(aa)* read with ss 1, 2, 4(2), 24, 25 and 26(1)*(a)* of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 (the Act). He was sentenced to seven years' imprisonment, two years of which were conditionally suspended for five years. The appellant unsuccessfully appealed against this sentence to the Gauteng Division (Kubushi J and Masango AJ). This appeal against sentence only is with special leave of this Court.

[2] On 16 July 2010 at about 01h00 near Hatfield Square, Pretoria the appellant arrested one John Carlisle (the complainant), a student at the University of Pretoria for allegedly drinking in public. The complainant was placed in the back of a police van and driven about 200 metres to the Brooklyn Police Station. There he was left locked in the back of the police van for a while before the appellant came to him and demanded payment of

R2000 in cash which the appellant said was a fine the complainant had to pay in order to avoid going to jail.

[3] The complainant informed the appellant that he did not have such an amount on him and said that he could raise only R1200. The appellant then took the complainant to the nearest ATM to withdraw cash, but the complainant was only able to withdraw R900 in cash. The appellant accepted the R900 from the complainant and released him. Thereafter the appellant conveyed the complainant to his girlfriend's residence. Later that day the complainant, feeling aggrieved by the appellant's conduct, opened a case of bribery against the appellant at the Brooklyn Police Station. The appellant was arrested and subsequently charged with corruption.

[4] The trial court accepted the version of the complainant that he indeed did not consume alcohol in public and that the charge against him was unfounded, and convicted the appellant. It appeared that the appellant was a first offender in relation to the offence of corruption, was 35 years old at the time and had had nine years' flawless service in the South African Police Service. He is married and has three children. As a result of the conviction he lost his employment. It appeared further that the appellant admitted to the correctional supervision officer during the interview to have committed the offence. The trial court found that the appellant's personal circumstances in the light of the gravity of the offence did not constitute mitigating factors. The court below endorsed the findings of the trial court and dismissed the appeal against sentence.

[5] It is trite that a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, assess the appropriateness of the sentence as if it were the trial court and then alter the sentence arrived at by that court, simply because it disagrees with it. To do so, would be to usurp the sentencing discretion of the trial court. But where material misdirection has been demonstrated, an appellate court is not only entitled, but is duty-bound to consider the question of sentence afresh to avoid an injustice.

[6] At the hearing of the appeal it was submitted by the appellant that s 26(1)*(a)*(ii) of the Act, unlike s 3 of the repealed Corruption Act 94 of 1992 (Corruption Act), limits the trial court's sentencing discretion by prescribing as a first option a fine and a second one, imprisonment. The effect of that limitation, argued the appellant, is that the sentencing court should consider first imposing a fine rather than direct imprisonment. He argued that under the old Corruption Act, the sentencing court enjoyed a wide penal discretion and for that reason it is unhelpful to rely on cases such *S v Mahlangu & another* [2011] ZASCA 64; 2011 (2) SACR 164 (SCA) which were considered under the Corruption Act.

[7] Section 4(1)*(a)*(i)*(aa)* which deals with offences in respect of corrupt activities relating to public officers is contained in Chapter 2, Part 2 of the Act. It reads:

'(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) . . .

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) . . .

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

. . .

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

[8] Section 26 deals with penalties. Subsection (1) provides as follows:

'(1) Any person who is convicted of an offence referred to in—

(a) Part 1, 2, 3 or 4, or section 18 of Chapter 2, is liable—

(i) . . .

(ii) in the case of a sentence to be imposed by a regional court, <u>to a fine or to imprisonment</u> for a period not exceeding 18 years; or' (My emphasis)

(iii) . . .

[9] The question is whether s 26(1)*(a)*(ii) has the effect contended for by the appellant. That question turns on a proper interpretation of the relevant section of the Act. The interpretative exercise must be conducted in accordance with the established approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] para 18, This exercise involves ascertaining the proper meaning and effect of the statutory language used, viewed in context and with reference to the apparent purpose to which it is directed, and having regard to the material known to the lawmaker.

[10] The Act repealed the Corruption Act and, with exception of s 34(2), came into operation on 27 April 2004. The purpose of the Act, among others, is '[T]o provide for the strengthening of measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities; . . .'. There is no doubt that corruption and corrupt activities undermine constitutional rights and further 'endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and credibility of governments. . .'.[2] Milton S*outh African Criminal Law and Procedure* Vol III Statutory Offences[3] states that the preamble to the Act specifically provides that part of the rationale for replacing the 1992 formulation of the offence of corruption with the 2004 version, is that it was deemed 'desirable to unbundle the crime of corruption, in terms of which, in addition to the creation of a general, broad and all-encompassing offence of corruption, various specific corrupt activities are criminalized.'

[11] In my view, having regard to the legislative history, context and the purpose of the Act, by enacting the Act the legislature did not intend to restrict the sentencing discretion of the trial court. On the contrary, the provision of the section makes it clear that the legislature intended that public officers who are convicted of corruption may be dealt with harshly. That objective could be frustrated if one were to read s 26(1) in a manner contended for by the

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[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).
[2] Long title of the Act.
[3] At D3 3-4.

appellant. It is clear that the provision of s 26 leaves the sentence in the hands of the sentencing court to impose either a fine or a period of imprisonment.

[12] It was further submitted by the appellant that the trial court misdirected itself by failing to consider other sentencing options, such as periodical imprisonment in terms of s 285 of the Criminal Procedure Act 51 of 1977 (the CPA) or a correctional supervision sentence in terms of s 276(i)(h). However, the trial court carefully considered other sentencing options and concluded that because of the seriousness of the crime and interests of society, direct imprisonment was an appropriate sentence. Based on the consideration of all the relevant facts, this conclusion cannot be faulted.

[13] In the case of *S v Narker & another* 1975 (1) SA 583 (A) Holmes JA (Muller JA and Corbett JA concurring) observed at 586B:

'1. Bribery is a corrupt and ugly offence striking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration. In general, courts view it with abhorrence; . . . see *R*. v *Chorle*, 1945 A. D. 487 at pp. 496 - 7; and *Limbada v Dwarika*, 1957 (3) SA 60 (N).'

[14] This Court in *S v Mahlangu* para 26 held:

'Corruption has plagued the moral fibre of our society to an extent that, to some, it is a way of life. There is a very loud outcry from all corners of society against corruption which nowadays seems fashionable. Some even go as far as stating that corruption is rendering the State dysfunctional. It is the courts that must implement the penalties imposed by the legislature. It is also the courts that must ensure that justice is not only done, but also seen to be done. The trial court considered all the aggravating and mitigating factors and came to the conclusion that an effective imprisonment of four years was appropriate. In the circumstances of this case, I agree.'

I fully agree with these sentiments.

[15] In the present case the appellant's conduct was egregious. He manufactured a case against the complainant for the purposes of soliciting a bribe. The appellant used threats to inspire fear in the complainant's mind in order to induce the complainant to pay him R900. He abused his position as a

public officer and, as if this was not enough, he pleaded not guilty and advanced a defence which he knew was hopeless. He showed no remorse. The appellant violated the complainant's constitutional right[4] to freedom and security under s 12(1) and the right to have his inherent dignity respected and protected under s 10. In the circumstances, having regard to the serious nature of the offence, direct imprisonment was called for. There is also no merit in the appellant's submission that if the State had intended to argue for a heavy sentence it should have charged him with extortion which is more serious than corruption.

[16] It was further submitted by the appellant that an effective term of seven years' imprisonment is disproportionate to the crime, the personal circumstances of the appellant and the interests of society. In contending for a lesser sentence, counsel referred us to cases of *S v Newyear* 1995 (1) SACR 626 (A); *S v Mtsi* 1995 (2) SACR 206 (W); *S v Mogotsi* 1999 (1) SACR 604 (W). It is unnecessary to analyse these decisions, the facts of which are materially different to the present. Each case must be decided on its own relevant facts and circumstances. What these decisions do show, however, is that law enforcement officers who abuse their positions for corrupt benefits can expect little sympathy from the courts. After all, s 205(3) of the Constitution records that the objective of the police service is 'to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'. In order to ensure that these objectives are reached, it is necessary to deal firmly with police officials who are in breach of their obligations under this section, and to warn their colleagues that actions of the sort the appellant committed will not be tolerated.

[17] The issue therefore is whether it can be said that the trial court exercised its judicial discretion improperly or whether the sentence it imposed, is disturbingly inappropriate. In my view, the trial court placed undue emphasis on deterrence. It held that 'in this type of an offence that deterrence

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[4] *F v Minister of Safety and Security & others* [2011] ZACC 37; 2012 (1) SA 536 (CC).

must also be strongly considered and will come to the fore . . . because of the fact that . . . everyone must be made aware of the consequences of an offence . . .'.

[18] While that is no doubt true, for the reasons I have just mentioned, deterrence is indeed one of the objects and purpose of criminal punishment, the three other aspects of sentencing, namely prevention, rehabilitation and retribution are also important. Offenders should not be sacrificed on the altar of deterrence.

[19] As I have mentioned in para [4] of this judgment the appellant was 35 years old at the time of the commission of the offence concerned, and married with three children. The appellant has a National Diploma in Education (Commerce) which he obtained before he joined the South African Police Service. When these facts are looked at cumulatively, they serve to demonstrate that the appellant does have prospects of rehabilitation and correction, and becoming a useful member of society and a sentence to be imposed, must also be informed by these considerations.

[20] It is therefore clear that in the determination of what an appropriate sentence would be, the trial court misdirected itself by over-emphasizing the factor of deterrence and thereby failed to give adequate weight to all other relevant considerations. This is a factor which justifies this Court to interfere with the sentence. Furthermore the sentence of seven years' imprisonment, albeit two years of which was suspended, is unduly severe. In my view, I consider a sentence of four years' imprisonment to be appropriate, and would be an adequate deterrence to other police officers who may be tempted to supplement their income by corrupt activities. There is sufficient disparity between that sentence and the sentence imposed to oblige this Court to interfere.[5]

[5] *S v Berliner* 1967 (2) SA 193 (A) at 200E-H.

[21] Although the appellant is currently free on bail, the altered sentence should be ante-dated under s 282 of the Criminal Procedure Act 51 of 1977 to 20 June 2012, the date he was sentenced in the trial court, for him to enjoy the benefit of imprisonment already served.

[22] In the result, the following order will issue:

1 The appeal against sentence succeeds. The sentence imposed by the trial court is set aside and substituted with the following:

'The accused is sentenced to four years' imprisonment, ante-dated to 20 June 2012.'

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D H ZONDI

JUDGE OF APPEAL

APPEARANCES:

For appellant:	A B Booysen
	Instructed by:
	Du Toit Attorneys, Capital Park
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