**REPORTABLE**

A252/2010

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: A252/2010

DATE: 5 NOVEMBER 2010

In the matter between:

**SIPHIWO MZAMO** Appellant

and

**THE STATE** Respondent

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**J U D G M E N T**

**DAVIS, J**:

The appellant was a police inspector attached to the Parow Police Station in the Western Cape. He had been in employed for almost 17 years in the services of the South African Police Service. On 21 October 2008 he was charged in the Regional Court with a range of offences, including:

1. Defeating the administration of justice in that he unlawfully released suspects who were found in possession of stolen goods.

2. Corruption, in that he contravened provisions of the Combating of Corrupt Activities Act of 2004 and that he gave an amount of R1 000,00 to a colleague to influence the latter so that he would not say anything or report the release of the suspects who had been found in possession with stolen goods.

3. Corruption, in that he contravened the act (The Combating and Corrupt Activities Act), in that he offered to accept R50 000,00 from Sido Amaudo Adamo with the intended purpose that the appellant should not arrest Adamo for unlawfully bringing an amount of US Dollars 16 000,000 into South Africa.

4. Corruption in that he contravened certain provisions of the act, in that he gave a colleague an amount of R25 000,00 so that the colleague should not say anything about the incident relating to Adamo.

5. Fraud or theft by false pretences, in that he took the $16 000,00 from Adamo and pretended that he would keep it at the police station for future evidence, whereas he intended to keep it for his own benefit.

6. Defeating the ends of justice in that he unlawfully

released Adamo.

He pleaded guilty to all six counts and was convicted in terms of the plea and sentence as follows: Count 1, six months imprisonment. Count 2, 12 months imprisonment. Count 3, three years imprisonment. Count 4, two years imprisonment. Count 5, three years imprisonment. Count 6, six months imprisonment. In terms of section 280(2) of the Criminal Procedure Act 51 of 1977, the magistrate ordered that the sentences in respect of counts 1, 2, 3 and 6 should run concurrently with those imposed in terms of counts 4 and 5. As a result appellant was imprisoned for an effective five years. He now appeals against the sentence had been imposed.

It has been submitted on his behalf by Mr Stamper that the sentence was shockingly excessive. In this particular regard, reference was made to three reports placed before the Court from experts who are in agreement that a non-custodial sentence (in the form of correctional supervision) would be the appropriate sentence in the circumstances, given the nature of the crime, the offender and the interest of society at large. The most important report, in my view, was a psychological evaluation prepared by Mr Martin Yodaiken, a clinical psychologist who evaluated the appellant and emphasised in

particular that he had been an abused and a neglected child, exhibited a high degree of anxiety, as well as signs of clinical depression. Mr Yodaiken also emphasised the stabilising influence in his life being the South African Police Service, that is apart from his wife and further that the appellant had been desperately affected by virtue of the fact that the South African Police Service had failed to honour an agreement to send him to Sudan.

In summary Mr Yodaiken concluded as follows:

> "This crime, therefore, needs to be seen from a psychological point of view as a complex sequence of causality commencing with the vulnerabilities engendered in Mr Mzamo by his background experiences; the stabilisation of his life, in terms of his relationship with the South African Police Service; his relationship with his wife and the enormity of the impact on his personality and shift in meaning of his relationship with his superiors, resulting from the rejection of his deployment, all of which must be seen in the light of his emotional response when confronted by the opportunity to earn some money illicitly. It is unlikely, given Mr Mzamo's personality structure, that he would have masterminded the crime. In fact according to him it was the sergeant

who was on duty with him ... who suggested that they should take the money. While it is impossible to test the veracity of the submission, it would certainly be in keeping with Mr Mzamo's deferential personality to be influenced under the processes enumerated above by a subordinate."

Mr Yodaiken then made the following recommendation:

"A personality such as Mr Mzamo's, is unlikely to benefit from a custodial sentence. It is likely that he will become deferential to the prison and prison authorities and is likely to comply with any authority figure irrespective. Consequently he is unlikely to experience rehabilitation in prison and may, in fact, identify with a group of people likely to give him the most affirmation which in prison are the prisoners."

Ms Jaylene Germane, a social worker, came to a similar conclusion in a pre-sentence report which has been prepared for the benefit of the Court. Even though she had conceded in her report:

"It needs to be mentioned that the crime committed is serious and the government and community would expect

from the Court to execute a harsher sentence to the alleged perpetrators. The accused is a first offender and realised he must use his power as a police officer official to his own benefit."

A striking feature of these reports given their purpose, is the emphasis placed upon the offender and the detrimental effects of prison. That appears to me is now a relatively trite conclusion in the light of the criminal logical literature which indicates that prison very rarely, if ever, works to rehabilitate an offender. See the seminal study by Robert Martinson et al 1974 Public Interest. There is a more positive study on prisons and rehabilitation by Paul Gendreau and Robert Ross 1987 Justice Quarterly (Vol 4). In turn this needs to be read with the more caustious study by the University of Maryland's Department of Criminology and Criminal Justice: 'What works: What doesn't and what's promising' (1997). It is thus dangerous to labour under an optimistic misapprehension about the potential positive effect of prison. See S v Nkomo 2007(2) SACR 198 (SCA) at para 21 where an unqualified belief in rehabilitation in prison is expressed which is then employed, at least in part, to deviate from the prescribed minimum sentence.

The offender however is only one aspect which requires

consideration in assessing sentence. Were the offender to be the only consideration to be taken into account by the Court, the argument employed by Mr Yodaiken to the effect that prison will have a detrimental affect on the offender, could all too often be employed to justify that no term of imprisonment should be imposed.

There are other factors which need to be considered in the imposition of sentence. In my view, these factors were considered in the magistrate's decision to sentence the appellant to a direct term of imprisonment. These include the nature of the crime, the interests of society and, where relevant, the interests of the victim. The so-called triad, which is generally employed, does not always encapsulate all the considerations regarding the optimal sentence because it omits the victim from consideration. Very often it is the victim's interests that need to be taken into account with considerable care. That may be less the case here, but the interests of society and the nature of the offence are factors which weighed heavily with the magistrate and rightly so.

Would a non- carceral alternative be a better option in this case? Recently, a full bench of this Division, in a judgment prepared by Bozalek, J in S v GL 2010(2) SACR 488 (WCC) at para 36 said the following about an argument regarding a non-

custodial sentence of correction supervision. Given that the thrust of the argument before us was to similar effect, the passage is highly relevant:

> "I remain aware that a non-custodial sentence of correctional supervision, in terms of section 276(1)(a) is an appreciable, even a severe sentence... In assessing an appropriate sentence, it is necessary to have regard, not only to the main purposes of punishment, namely deterrence, prevention, reformation and retribution, but also to the individual concerned, the circumstances, the crime committed and society's interest, whilst at the same time blending sentence with a measure of mercy. No court of appeal can alter a sentence simply because it might have imposed a different sentence. In order to intervene, it must be found that the sentencing official failed to exercise his/her discretion properly through a misdirection or irregularity relating to all the facts or, alternatively, imposed a sentence so different to that which the court of appeal would have imposed, that it can be said that is disturbingly inappropriate or that a sense of shock is caused. Taking these principles and all the relevant circumstances into account, I am not persuaded that the sentence imposed by the magistrate, although substantial, is disturbingly inappropriate or evokes a

sense of shock."

The facts in GL are, of course, somewhat different to the present case, but do have some similarities in terms of the consequences of the argument advanced to us. In that case the accused was convicted of culpable homicide. As a result small children, at the time 14 months old twins, were left with only one parent, that is the convicted person. The question which then arose was whether, given the interests of the children and the fact that the parent in that case was a first offender, a sentence of a non-custodial nature should have been imposed, particularly bearing in mind the approach adopted by the Constitutional Court to these questions in S v M 2007(2) SACR 539 (CC). The full bench decided to the contrary.

In my view the facts of GL were far more appropriate, than is this case for the imposition of a non-custodial approach, given the devastating effect of a prison sentence on young children who, on the evidence, had bonded with their father and were now in a position where they would have no parent to look after them due to the lengthy prison sentence which had been imposed.

In the present case, some of these arguments resonated in the

submissions made by counsel on behalf of the appellant. But in this case, there is a wife and a mother who will care for the children and, in such circumstances, given the approach adopted by the Full Bench in S v GL, it is difficult to conclude that the magistrate's approach in this case constituted any form of misdirection.

I should, however, go further to say the following regarding the nature of the offence. Corruption is a blight on society. It distorts the allocation of precious public resources. It subverts delivery of essential services to the public, in particular to those most in need and, within the South African context generally, to those who are not merely historically but presently disadvantaged. It undermines key components of the State which are essential to the transformation of society. Viewed accordingly, acts of corruption by a public official, particularly a police officer, subverts the rule of law and thus imperils constitutional democracy. A corrupt police force guts the heart of the constitutional promise of democracy as enshrined within the Constitution.

These offences, not one, but six, must therefore be read in the most serious light. Given the nature of these crimes, it cannot, on any plausible basis, in my view, be said that the magistrate misdirected himself in preferring the custodial option to the

recommendations of Mr Yodaiken and Ms Germane. In my view, therefore, the appeal should be dismissed and the sentence should be confirmed.

CLOETE, AJ: I agree.

CLOETE, AJ

DAVIS, J: It is therefore so ordered.

DAVIS, J