IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A730/11

DATE: 13 November 2011

In the matter between:

MPANGELI MFANEKISO Appellant

and

THE STATE Respondent

JUDGMENT

MANTAME, AJ

This is an appeal against conviction that was handed down by Magistrate Lombard in the Bellville Regional Court on 2 June 2010. The appellant is represented by Mr Burgers and the respondent is represented by Ms van der Merwe, respectively.

It is common cause that appellant was arrested by a traffic officer on 10 January 2002 in Bellville for attempting to bribe a traffic officer with an amount of R40 whilst he wanted to issue a traffic fine for driving without a driver's license. At the time of his arrest the appellant was 24 years old. The appellant was released on bail of R500 on 14 January 2002 and the matter was postponed to 13 February 2002 for plea

and trial. On the said day, his bail was extended and he was warned to appear in court on 3 April 2002. He then failed to appear in court and a warrant of arrest was issued against him. His bail was later declared forfeited to the State. The appellant was later brought to court on 17 July 2009. The presiding magistrate did not hold a formal enquiry as to why the appellant failed to attend court. On the same day the appellant was admitted to bail of an amount of R800.

The matter was postponed on several occasions and was ultimately heard on 2 June 2010 when the appellant pleaded guilty in terms of Section 112 (2) of the Criminal Procedure Act 51 of 1977. At that stage appellant was 32 years old, married with two minor children. He was residing with his brother and both he and his wife were unemployed. He left school after standard 7 and he started working as a taxi driver.

Appellant was found guilty and no previous convictions were proved against him. The magistrate then sentenced him to 18 months direct imprisonment. Appellant was legally represented at all material times.

The appellant is now appealing against sentence on the basis that;

1) The court *a quo* misdirected itself by failing to attach proper or alternatively any weight to one or more or all of the mitigating factors;

2) The court *a quo* compounded it's misdirection by over emphasizing the seriousness of the crime and failed to consider other forms of punishment that would satisfy the sentencing triad. See S v Sparks 1972 (3) SA 410 (A) where it was held that punishment should fit the criminal as well as the crime, be fair to the State and to the accused and be blended with a measure of mercy.

3) Appellant argued further that it is not clear on record whether the appellant was pleading guilty to not having a license on his person or to driving without possessing a valid driver's license. The magistrate did not put this issue into perspective although he used that as an aggravating factor for sentencing;

4) The Court *a quo* failed to accord weight to appellant's personal circumstances as mitigating factors;

5) The Court *a quo* erred in not considering alternative sentencing options, other than direct imprisonment,

such as a sentence in terms of Section 276(1)(h) of Act 51 of 1977, by denying the defence the opportunity to obtain a correctional supervision report to determine if the appellant was a suitable candidate or not.

It is the appellant's argument that the court *a quo* failed to exercise its sentencing discretion properly and thereby imposed a sentence that was unduly harsh, given the circumstances of this particular case.

In turn, the State argued that sentencing is an opportunity granted to the trial court and therefore, that the court should be allowed the opportunity to exercise its discretion within reasonable bounds. Bribery is a corrupt and ugly offence which strikes cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration.

The State contended further that the appellant did not appear in Court for a period of seven years. The nature of the offence that he committed was so serious that the only appropriate sentence was direct imprisonment. Further there is no confusion in as far as the plea is concerned. It was clear that the appellant was driving without a valid driver's license and attempted to bribe the traffic officer when he wanted to issue a

traffic fine.

Finally Ms Van der Merwe argued that the court *a quo* was entirely correct in looking at the type of offence that the appellant was guilty of and that the appeal should be dismissed and this Court should uphold the sentence.

I agree with the respondent that the discretion to impose sentence belongs to the trial court. The principle was restated by Botha, JA in S v Peters 1987(3) SA 717(A) at 727F-H. The Appeal Court may not, and shall not interfere with the imposed sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably. For instance, if the trial court committed a misdirection of the nature and extent that was indicated in S v Pillay 1987 (4) SA 531(A) at 534H-535G it means the presiding officer did not exercise the discretion properly. In this case however, the magistrate misdirected himself in a number of material respects.

1) The court *a quo* sentenced the appellant on the basis that he had no valid license. That was not clearly established by the Magistrate and more notably the appellant was not charged with this offence which one could expect if this were the case;

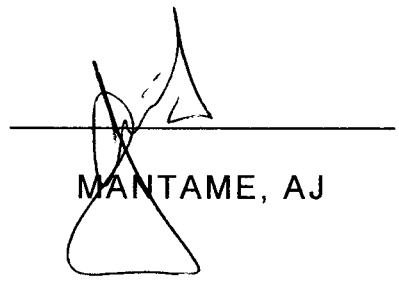
2) The appellant was treated as a whopping boy for what the magistrate perceived as general mayhem on the roads. The magistrate referred in this regard to there not being enough law enforcement officers on the road, and that there is lawlessness on the road by the drivers, further that bribery is a common occurrence on the road etcetera.

3) The magistrate refused to entertain the defence request for a correctional officer's report on the basis that such a sentence was inappropriate given the fact that the appellant's bail was already estreated to the State. This was, in my view, a premature finding.

In casu, the court *a quo* indeed over emphasized the crime itself. There is no indication on record that the magistrate gave appropriate weight to the personal circumstances of the accused and further the interest of society. In my view given the above material misdirection the sentence imposed by the magistrate falls to be set aside.

I take cognisance of the fact that the appellant has served all his prison sentence and he is currently on parole. Taking into account all the relevant factors I consider that the sentence of 18 months direct imprisonment be retained but be totally

suspended on appropriate conditions. In the result I would UPHOLD THE APPEAL AGAINST SENTENCE TO THE EXTENT OF ORDERING THAT THE SENTENCE OF 18 MONTHS IMPRISONMENT IS WHOLLY SUSPENDED FOR A PERIOD OF 5 (FIVE) YEARS ON CONDITION THAT THE APPELLANT DOES NOT COMMIT A CONTRAVENTION OF ACT 12 OF 2004 DURING THAT PERIOD FOR WHICH HE IS SENTENCED TO IMPRISONMENT WITHOUT THE OPTION OF A FINE.



MANTAME, AJ

I agree, and it is so ordered.

BOZALEK, J