Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE DIVISION, KIMBERLEY]

CASE NO: CA & R 60/14

In the matter between:

KABELO SETLHOLO APPELLANT

AND

THE STATE RESPONDENT

Coram: Tlaletsi J *et* Phatshoane J

Date of hearing: 13 December 2016

Date of judgment: 03 March 2017

JUDGMENT: APPEAL AGAINST THE SENTENCE

Phatshoane J

[1] On 23 October 2013 the appellant was convicted on one count of corruption and one of fraud in the Regional Court, Kimberley, by Mr D J Schneider. On 16 January 2014 he was sentenced to 10 years imprisonment, three years of which were suspended for a period of five years on certain conditions. The two counts were taken together for purposes of the sentence.

[2] The appellant had approached this Court to appeal his conviction and sentence with leave of the Court *a quo*. On 19 June 2015 we handed down the judgment dismissing the appeal against his conviction. We did not entertain the appeal against the sentence for reasons captured as follows in para 43 of our judgment:

"The heads of argument filed by the parties included submissions on sentence. It would appear that this was done under the mistaken understanding that leave to appeal against the sentence had been granted. However, when the judgment of the Court *a quo* on the application for leave to appeal was later made available to this Court, at our request, it revealed that the appellant was refused leave to appeal against his sentence. No attempt was made thereafter by the appellant to obtain leave to appeal against his sentence with the result that the appeal on the sentence is not before us."

[3] On 11 July 2016 the appellant filed a petition with the Judge President of this Division averring therein that the Regional Magistrate had in fact granted leave to appeal against the sentence as well. He attached to his petition a letter from the Magistrate dated 09 June 2016 which reads in part:

"5. Die Staatsadvokaat, adv Barnard en Adv Schreuder [for the appellant] het my op 'n stadium in kamers genader, en my van die situasie ingelig. Ek is versoek om indien moontlik, op 'n spoedeisende basis die rede vir my beslissing te verkaf.

6. Angesien die hele ookonde reeds by die Hoër Hof was, het ek my handgeskrewe hof-notas op die saak getrek, en daarvolgens my redes vir die toestaan van die aansoek om verlof tot appel ten opsigte was die meriete op skrif gestel. Ek het ewenees volgens die inligting uit my handgeskrewe notas die afleiding gemaak dat ek die aansoek om verlof tot appel teen die vonnis afgewys het, en dit so op my redes aangedui.

Ek is op ‘n latere stadium deur Adv Schreuder ingelig dat daardie mening foutief was, en dat ek inderdaad die aansoek om verlof tot appel teen die vonnis toegestaan het. Die advokaat het ‘n afskrif van die Streekhof saak-notule (wat toe nie meer by die Landroshof beskikbaar was nie), aan my aangetoon wat daarop dui dat die aansoek t.o.v die vonnis inderdaad toegestaan was. Ek het hierna die appelregister nagegaan, en dit was inderdaad daar aangedui dat die aansoek om verlof tot appel ook ten opsigte van die vonnis toegestaan was.

7. Ek wil dus graag hiermee die regstelling doen, en naamlik bevestig dat die aansoek om verlof tot appel ook teen die vonnis toegestaan was.

8. Ek wil graag my verskoning aanbied vir die *bona fide* fout wat ingesluip het.”

[4] On the basis of the aforesaid letter we heard the arguments in respect of the appeal against the sentence on 13 December 2016. It is apposite to mention that on 10 September 2015 Erasmus AJ made an order, by agreement between the parties, in terms of which the appellant was admitted to bail pending this appeal.

[5] Just to recap: On 28 February 2007 the appellant and his allies misrepresented to Mr Marthinus Bredenkamp, the complainant, that they were executing a lawful police operation and that he had committed and was being arrested for an offence relating to dealing in uncut diamonds while they knew that their so-called police operation was a sham and that the complainant had not committed any offence. It did not end there. They offered the complainant his liberty and that a police docket, for the engineered offence, would be handed over to him in exchange of an amount of R50 000.00.

[6] What follows in a nutshell is how the commission of the crime unfolded. The complainant accompanied Mr Jack Mvubu, accused No 3, to a certain house in Club 2000, a township near Kimberley, where he was shown what appeared to be diamonds on a saucer. At that moment certain aggressive people with 9 mm pistols stormed the house. One of them, who was not in possession of a pistol, was wearing South African Police Service (SAPS) uniform. He had a name "Modise" embossed on his name tag. The aggressive men assaulted those who were in the company of the appellant and threw the latter on the bench, took his cellular phone, and the R200.00 he had in his possession. The man in the police uniform announced that the value of the precious stones found at the scene was R1.3 million and that the sentence to be imposed would be determined on that basis. He threatened the complainant with an arrest unless he made a plan. The complainant made an offer of R5 000.00 which was rejected and R50 000.00 was demanded from him. The "Captain" went on to inform the complainant that the docket had not yet been opened and that he should secure the amount demanded.

[7] The appellant, who had been present at the scene, and some of the assailants drove with the complainant to the First National Bank where the complainant managed to withdraw R10 000 and handed it over to the appellant. The balance of R40 000.00 would have to be paid later when the docket was delivered to the complainant.

[8] In the interim, the complainant reported the misdemeanour by the appellant and his accomplices to a certain Mr Dirk Crafford of the Bloemfontein Diamond and Gold Unit. Grafford and other police officers including the Kimberley Diamond and Gold Unit arranged a

further police operation the purpose of which was to arrest the appellant when collecting the balance of the unlawful proceeds from the complainant. On the date in respect of which the balance was to be paid out the appellant called the complainant several times enquiring about his whereabouts. As part of the operation the complainant had to signal the police when the appellant was in his vehicle during the exchange of the money and the docket. When he signalled the police they pounced on them at which point the appellant decamped. He was later arrested and an empty bogus docket confiscated by the police.

[9] The appellant passed grade 12 at school. Shortly thereafter he studied for an engineering Diploma but dropped out of College after two years of studying. He attended the Police College for a period of five months from September 2003 until in the beginning of 2004. He was a 27 year old police constable in 2007 when he committed the offences. It is recorded in the probation officer's report that he worked for SAPS for 10 years. He continued working as a policeman during his trial but lost his job following his conviction. He was a first offender. When he was sentenced on 16 January 2014 he had a 14 year old son for whom he contributed towards maintenance but was not his primary care-giver. The appellant resides with his mother who is frail and receiving a State pension. His father passed away in 2012. He has three elder siblings. He is described in the probation officer's report as a friendly person who relates well to his family and the community.

[10] Mr C. F. Van Heerden, for the appellant, argued that the sentence of 10 years imprisonment for the youthful offender was shockingly inappropriate. He contended that direct imprisonment is not the only suitable sentence to be meted out for the offences committed and that there are other sentencing options which could have been imposed by

the trial Magistrate. He further argued that a period of 10 years has lapsed since the commission of the offences and the appeal. In view of this, he contended, the appellant remained under a cloud with concomitant emotional stress, time spent in the Courts and on occasions in prison. He pointed out that the appellant spent two months in prison following his arrest and three weeks following his conviction. He argued that the appellant did not commit any serious offence or any related offences during the 10 year period and that makes him an ideal candidate for rehabilitation outside prison. He further submitted that the chances were slim that he would commit a similar offence.

[11] Mr Van Heerden argued that the term of imprisonment imposed in this case materially differed from the sentences imposed in other comparable cases. He relied on the following case law:

11.1 *S v Newyear* 1995 (1) SACR 626 (A), where a constable was convicted in a Regional Court of contravening s 2(a) of the Prevention of Corruption Act, 6 of 1958, and sentenced to seven years' imprisonment, of which two years were conditionally suspended. On appeal the sentence was reduced to four years' imprisonment of which two years were suspended.

11.2 *S v Mtsi* 1995 (2) SACR 206 (W), where the appellant was convicted in a Regional Court of corruption in contravention of s 1(b)(i) of the Corruption Act, 94 of 1992. The appellant, a Bank clerk, had divulged the account numbers of two customers of the Bank to an acquaintance who used the information to draw R36 000.00 from the accounts of those customers. The appellant received R3 500.00 in exchange for

the information. He was sentenced to four years' imprisonment of which two years were suspended on certain conditions. On appeal the Court set aside the sentence and replaced it with a sentence of four years' imprisonment suspended for five years on condition *inter alia* that she underwent correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act, 51 of 1977 (the CPA), for a period of three years during which she was placed under house arrest; that she was obliged to perform 16 hours of community service every month; and was obliged to undergo any programme which the Commissioner might determine for her rehabilitation.

In setting aside the sentence the Court reasoned that the appellant was genuinely remorseful about her crime. She was part of a close family circle, which deplored what she had done. She had a young child who required her attention and an old ill grandmother whom she assisted.

11.3 *S v Mogotsi* 1999 (1) SACR 604 (W), where a sentence of four years imprisonment two years of which were suspended for two years was imposed on a 30 year old traffic officer who was a first offender and had accepted R100.00 from a motorist in exchange for the “cancellation” of the summons. He then changed the motorist's registration number and the address details on the other copies of the summons in order to cover his tracks and ensure that the motorist could not be traced.

11.4 *S v Kasselman en 'n Ander* 1995 (1) SACR 429 (T), where two policemen were convicted in a Regional Court of theft and of obstructing the course of justice. These officers had received

R400 000 in cash from the police head office for use in a police trap. They simulated a robbery and laid a false charge of robbery. Subsequent to this, they returned R335 000 to the police. They were sentenced to five years' imprisonment in terms of the provisions of s 276(1)(i) of the CPA in respect of theft and two years' imprisonment suspended for three years in respect of obstructing the course of justice.

On appeal the Court set aside the sentences and ordered that the counts be taken together for purposes of the sentence. The appellants were each sentenced to three years' correctional supervision in terms of s 276(1)(h) of the CPA.

[12] Ms Jansen, for the State, also referred to several decisions on the approach to sentencing corrupt officials:

12.1 *S v Klaasen* 2015 JDR 0766 (ECG)[1], where a Court interpreter had solicited payment of R4000.00 from the complainant, who was charged with culpable homicide in the Regional Court, in exchange for stealing the original charge sheet in the case and thereby ensuring that the case against the complainant could not proceed. He was sentenced, for corruption, to imprisonment for 10 years of which five years were conditionally suspended.

12.2 *S v Mogale* 2010 JDR 1510 (GNP)[2], where a sentence of 15 years imprisonment was imposed on two police officers for corruption in that they received R2 000.00 cash which was not due to them in a corrupt way from a certain Mr M to change the chassis and engine number of his vehicle.

[1] Case No: CA&R 284/2013 handed down on 25 February 2015
[2] Case No: A1526/2004 delivered on 03 December 2010

12.3 *S v Mahlangu and Another* 2011 (2) SACR 164 (SCA), where a sentenced to six years' imprisonment, two years of which were conditionally suspended for a period of five years imposed on two police officers was confirmed on appeal. The appellants, who were investigating a homicide case, demanded R600 from the complainant, a security guard who had shot and killed a suspected robber, to 'withdraw' the case.

[13] It is axiomatic that the determination of an appropriate sentence is a matter that has to be determined on case by case basis. The merits and the circumstances of each and every case differ. The cases referred to by Mr Van Heerden are distinguishable. It is also remarkable that they were all decided prior to the promulgation of the Criminal Law Amendment Act, 105 of 1997 (the minimum sentence regime). The offences the appellant committed attracted a minimum sentence of 15 years imprisonment absent a finding on his substantial and compelling circumstances. Fortunately for the appellant the trial Magistrate did not take into account the applicability of the minimum sentence regime because he was of the view that it was not mentioned in the charge sheet nor was reference made thereto at the commencement of the trial. The Supreme Court of Appeal, recently in *Moses Tshoga v The State* (635/2016) 2016 ZASCA 205 handed down on 15 December 2016, held at para 22:

"[22]….(A) pronouncement that the Act had to be mentioned in the charge sheet or at the outset of the trial would be elevating form above substance. Every case must be approached on its own facts and it is only after a diligent examination of all the facts that it can be decided whether and accused had a fair trial or not."

[14] In ***S v Kibido 1998 (2) SACR 213 (SCA)*** at 216g-I Olivier JA enunciated the trite principle as follows when an appellate Court considers sentence on appeal:

> "Now, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account (see *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684A - B; *S v Pillay* 1977 (4) SA 531 (A) at 535A-B). A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (*S v Fazzie and Others* (supra) at 684B - C; *S v Pillay* (supra) at 535E).
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> Furthermore, a mere misdirection is not by itself sufficient to entitle a Court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably (see Trollip JA in S v Pillay (supra) at 535E - G)."

See also *S v Moswathupa* 2012 (1) SACR 259 (SCA) at para 4, *S v Sadler* 2000 (1) SACR 331 (A) at 334-335 para 8-9;*S v Rabie 1975 (4) SA 855 (A) at 857D – F*; *S v Malgas 2001 (1) SACR 469 (SCA)* at 478, para 12, *S v Sadler 2000 (1) SACR 331 (A)* at 334-335 para 8-9

[15] It is so that there has been a considerable delay in disposing of the appellant's trial including his appeal. However, most of the delays, during the trial, were occasioned by the appellant and his co-accused because on certain occasions their representatives had not been placed in funds; they changed legal representatives; they applied for legal aid; and the records had to be transcribed while the trial was running. In *S v Pennington and Another* 1997 (10) BCLR 1413 (CC)

the appellants had contended, *inter alia,* that their right to a fair trial had been infringed by delay in the hearing of the appeal. At 1425 para 39 the Court held:

"[39] …..Although delays in the hearing of an appeal might extend the period of anxiety which the appellants undergo before finality is reached, appellate delays are materially different to trial delays. To begin with there can be no question of prejudice, for the appeal is decided on the trial record, and the outcome of the appeal cannot be affected in any way by the delay. Moreover, where the appeal fails, as it did in the present case, the appellant's guilt, established at the trial, has been confirmed."

And at para 41 the Court proceeded to hold that:

"[41] Undue delay in the hearing of criminal appeals is obviously undesirable, particularly when the appellants are in custody. **It does not follow, however, that such delay constitutes an infringement of the constitutional right to a fair trial. That question can be left open, for even if it were to be regarded as an infringement of that or some other constitutional right, I am satisfied that it would not entitle the appellants to have their convictions set aside or their sentences reduced on appea**l." (My emphasis)

[16] The Magistrate had regard to the report of the probation officer which comprehensively sketched out the appellant's personal circumstances. As it turned out, in the probation officers report, mention is made that the appellant had a previous conviction for common assault the verdict of which was returned while his trial in this case was running. The Magistrate disregard this latter offence for purposes of the sentence he imposed. He recognised that the appellant was convicted of serious offences and remarked that this caused reputational damage to SAPS and it had been put in a bad light. He was of the view that a sentence he had to impose had to instil public confidence in SAPS with a deterrent effect on the offenders and potential offenders.

[17] The Magistrate held the view that the complainant did not approach the Court with clean hands and said that the complainant knew of the possibility of an illicit diamonds transaction in Galeshewe which lured him to drive there. Notwithstanding this, he was of the view that it did not make the appellant morally less blameworthy. After all, he reasoned, the appellant was a policeman who acted in cahoots with others to extort money from the complainant in an unlawful manner. He further noted that the appellant did not play open cards by revealing who his co-perpetrators were to the investigating officer. He also did not display any contrition for his actions.

[18] The Magistrate considered that there were various other sentencing options available but was of the view that the offence committed warranted direct imprisonment. As already alluded to, the Magistrate refrained from invoking the penal provisions set out in the minimum sentence regime. The appellant did not point to any material misdirection on the part of the Magistrate save to argue that the sentence was shockingly inappropriate and that there were other sentencing options that were available to impose. A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial Court and then substitute the sentence arrived at by it simply because it prefers it. [3]

[19] As the Court observed in *S v Mahlangu and Another* (supra)[4] corruption has plagued the moral fibre of our society to an extent that,

[3] *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) at 478*d* – *g.* The approach was reaffirmed in *Director of Public Prosecutions v Mngoma* 2010 (10 SACR 427 (SCA) at 431 para 11

[4] at 172 para 26

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.

[20] The fact that the appellant was a policeman when he committed the offences is aggravating. He was supposed to be vigilant and protect the community he served against the crime. There can be no doubt that the corrupt and fraudulent activities executed in this case were carefully planned. The appellant played a significant role in the execution of the bogus police operation and had ample opportunity to reconsider his actions. He was a gainfully employed public servant and there had been no need for him to engage in any fraudulent and corrupt activities.

[21] Against this backdrop, there is no merit in the argument that the Magistrate misdirected himself in concluding that the only sentence to be imposed was direct imprisonment. All things considered there is nothing evoking a sense of shock in the sentence imposed by the Magistrate requiring any interference on appeal. In any event, the sentence imposed is not out of kilter with the sentence that we would have imposed. It follows that the appeal against the sentence must fail. In the result the following order is made:

ORDER:

1. **The appeal is dismissed;**
2. **The sentence is confirmed;**
3. **The appellant must present himself to the clerk of the Regional Court, Kimberley, within 48 hours from date of this order to arrange for him to serve his sentence.**

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M.V. PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

I concur:

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L.P. TLALETSI

JUDGE

NORTHERN CAPE HIGH COURT

On behalf of the appellant	Adv C.F. Van Heerden
Instructed by	Hugo, Mathewson and Oosthuizen
On behalf of the State	Adv C.G Jansen
Instructed by	Director of Public Prosecutions