



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 930/2017

In the matter between:

MESHACK FAMANDA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Famanda v State* (930/2017) [2018] ZASCA 139 (28 September 2018)

Coram: Maya P and Van der Merwe JA and Nicholls AJA

Heard: 4 September 2018

Delivered: 28 September 2018

Summary: Appeal against refusal of petition for leave to appeal against sentence; trial court did not take into account the amount involved and whether the appellant was a law enforcement officer as defined; reasonable prospects of success on appeal against sentence.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Mokgoathleng J and Mosopa JA):

1 The appeal succeeds.

2 The order of court a quo is set aside and substituted with the following order:

‘The appellant is granted leave to appeal against the sentence imposed by the Regional Court, Johannesburg to the Gauteng Local Division of the High Court, Johannesburg.’

JUDGMENT

Nicholls AJA (Maya P, and Van Der Merwe JA concurring):

[1] This is an appeal against the refusal of a petition for leave to appeal by the Gauteng Local Division of the High Court, Johannesburg. The appellant, a prosecutor employed with the National Prosecuting Authority, was convicted of corruption in contravention of s 9(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004¹ (the PCCA Act), in the Johannesburg Magistrates Court on 30 November 2015. The appellant was sentenced to 10 years imprisonment.

[2] Leave to appeal against conviction and sentence was refused by the Magistrate’s Court. A petition for leave to appeal against conviction and sentence was refused by the

¹ **9. Offences in respect of corrupt activities relating to members of prosecuting authority.**

(1) Any –

(a) member of the prosecuting authority who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for benefit of himself or herself or for the benefit of any other person;

...

is guilty of the offence of corrupt activities relating to members of the prosecuting authority.

High Court. Special leave was subsequently granted by this court in respect of sentence only.

[3] It is well established that what is to be determined at this stage is not the appeal itself but whether the High Court should have granted the appellant leave to appeal.² What is appealed against is the refusal of the petition to the High Court and nothing else. It has been acknowledged that this is a cumbersome procedure. However, despite the court's inherent jurisdiction to regulate its own processes this court has held that it can only do so within the confines of statutory jurisdiction.³

[4] In determining whether the High Court erred in refusing the appellant leave to appeal on sentence, the only issue is whether there are reasonable prospects of success. What this entails has been set out in *S v Smith* 2012 (1) SACR 567 (SCA) para 7, and quoted with approval in subsequent cases:⁴

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.' (Footnote omitted).

[5] In this case the appellant, together with two policemen, was arraigned as a result of an undercover operation carried out at the Randburg Magistrate's Court. Numerous complaints had been received of corrupt activities involving magistrates, prosecutors and court orderlies in that court. This led to the police approaching the Director of Public

² *S v Khoasasa* 2003 (1) SACR 123 (SCA) paras 14, 19-22; *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA) para 4; *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) paras 2 and 3; *Dipholo v S* [2015] ZASCA 120 para 4; *S v Tonkin* 2014 (1) SACR 583 SCA (*Tonkin*) paras 6.

³ *Id Tonkin* para 6; *Van Wyk v S, Galela v S* 2015 (1) SACR 584 (SCA) para 20 – 21.

⁴ *Essop v S* [2016] ZASCA 114 (12 September 2016); *Maphapa v S* [2018] ZASCA 8 March 2018.

Prosecutions for the requisite authority to set up an undercover operation at the court in order to trap the officials involved.

[6] Pursuant thereto a police undercover agent was arrested on a fictitious charge and detained in the court cells at the Randburg Magistrate Court. He paid two policeman employed as court orderlies, accused 1 and 2 in the trial court, an amount of R800 to secure his release from custody. Thereafter, another police undercover agent, posing as the girlfriend of the arrestee, approached accused 1 at the court to get the charge quashed. She was referred to the appellant, accused 3 in the trial court, who was prosecuting the case. Upon payment of R3500 to accused 1, the charge was duly withdrawn. The 'girlfriend' video-taped the communication between herself and the policemen, and herself and the appellant. These were the salient facts leading to the conviction of the two policemen and the appellant in terms of the PCCA Act.

[7] The accused were all sentenced in terms of the minimum sentencing legislation. Section 51(2) of the Criminal law Amendment Act 105 of 1997 (the Act) provides for a minimum sentence of 15 years imprisonment, for a first offender, in respect of an offence referred to in Part II of Schedule 2. The relevant portion of the schedule provides that:

'Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or an offence in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004 –

- (a) involving amounts of more than R500 000,00;
- (b) Involving amounts of more than R100 000,00, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common conspiracy; or
- (c) If it is proved that the offence was committed by any law enforcement officer –
 - (i) involving amounts of more than R10 000,00; or
 - (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common conspiracy.'

[8] Accused 1 was sentenced to 15 years imprisonment. The appellant and accused 2 were each sentenced to 10 years imprisonment, the trial court having found substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum. Although not set out in so many words, it is clear that the trial court sentenced the appellant in terms of (c)(ii) above, namely on the basis that the appellant was a law enforcement officer who acted in furtherance of a common conspiracy with the two police officers. Paragraphs (a) and (b) were clearly not applicable to the appellant.

[9] Most of the personal information regarding the appellant was gleaned from a pre-sentencing report. The appellant left school in 1997, completed a Diploma in Marketing at the Wits Technical School in 2001 and a Bachelor of Laws degree at the University of Johannesburg in 2007. He secured employment at the National Prosecuting Authority where he remained until after his arrest in 2011. Between the time of his arrest and his sentencing on 10 February 2016, he worked as an administrative clerk for a firm of attorneys at a reduced salary. He has a previous conviction for illegal possession of a firearm in 1997 for which he was given a suspended sentence.

[10] The trial court in finding that substantial and compelling circumstances were present, took into consideration that the appellant was a 37 year old father of two at the time of sentencing. He has two daughters, then aged 6 and 7 years old. Both children live with their respective mothers and are recipients of child grants. He nonetheless was said to have a good relationship with at least one of the children, whom he sees on weekends. The appellant provided financial support to both children whose mothers are unemployed. On this basis the trial court found that the appellant was the primary caregiver, providing both financial and emotional support to the children. I am unpersuaded that the appellant could be described as a primary caregiver in these circumstances.

[11] There can be no doubt that the trial court was deeply concerned, and quite correctly so, that the image of the National Prosecuting Authority had been tarnished

and the administration of justice had been brought into disrepute, by the appellant's actions. The crime induced a 'sense of revulsion' particularly because it had been committed in the court precinct which should be a symbol of justice. Instead the appellant made a mockery of the criminal justice system.

[12] As reprehensible as the appellant's conduct was, it cannot be ignored that the amount involved was R3500. Of this, it is unclear how much the appellant personally benefitted. I cannot agree with the view of the trial court that 'corruption is corruption' irrespective of the amount involved and it is the criminal intent that is punishable. Logic dictates that corruption involving millions of rand should be viewed in a more serious light than that involving a few thousand rand. That there are degrees of fraud and corruption, depending on the amounts involved, is a distinction acknowledged in the Act itself. In my view the appellant has a reasonable prospect of showing that the trial court misdirected itself in this regard or that the sentence was startlingly inappropriate.

[13] In addition no consideration was given to whether the appellant was a 'law enforcement officer' within the meaning of the Act. Section 51(8) of the Act provides:

'For the purposes of this section and Schedule 2, "law enforcement officer" includes –

- (a) a member of the National Intelligence Agency of South Africa or the South African Secret Service referred to in section 3 of the Intelligence Services Act, 2002 (Act No. 65 of 2002); and
- (b) a correctional official of the Department of Correctional Services or a person authorised under the Correctional Services Act, 1998 (Act No. 111 of 1998).'

[14] Law enforcement officer is a term imported from North America and there is very little reference to 'law enforcement officer' in South African statutes.⁵ In America it is

⁵ Section 252A(1) of the Criminal Procedure Act 51 of 1977 states that '[a]ny law enforcement officer, official of the State, or any other person authorised thereto for such a purpose . . . may make use of a trap'. Section 1 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 defines 'law enforcement officer' to mean any member of –

(a) the Police Service;

(b) the Defence Force, excluding a member of a visiting force;

(c) the Agency or Service;

(d) the Directorate; or

(e) any component referred to in paragraph (e) of the definition of "law enforcement agency".

'Agency', as found in (c) above, means agency as defined in s 1 of the Intelligence Services Act. The definition of service, as found in (c) was deleted. Paragraph (e) of the definition of law enforcement

defined as 'a government employee who is responsible for the prevention, investigation, apprehension or detention of individuals suspected or convicted of offences against the criminal laws, including an employee engaged in this activity who is transferred to a supervisory or administrative position, or serves as a probation or pre-trial officer'.⁶ The Collins English Dictionary describes a law enforcement officer as 'an official or employee who detects crime and who upholds the law, such a police officer, sheriff, customs official etc.'

[15] There can be little doubt that a law enforcement officer in terms of s 51(8) of the Act includes a police officer. 'Include' is generally used in the interpretation of statutes to expand the meaning of the words or phrases occurring in the preceding section. It is a phrase of extension and not of restrictive definition. However, 'include' is susceptible to another construction in the context of the statute which does not merely add to the words expressed, but may be equivalent to 'mean and include' in which instance it connotes an exhaustive explanation of the meaning which must be attached to these words or expressions.⁷ In other words depending on the context in which the word 'includes' is used, it may have vastly differing effects. Depending on context, it may mean to expand the preceding words in the phrase, or to define them exhaustively. There is a reasonable prospect that the appellant may show that a member of the prosecuting authority is not included in the definition of 'law enforcement officer' and accordingly no minimum sentence would be applicable.

[16] For the two reasons set out above I am of the view that there are reasonable prospects of success on appeal.

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

1 The appeal succeeds.

agency reads 'law enforcement agency means . . . any component of the prosecuting authority, designated by the National Director to specialise in the application of Chapter 6 of the Prevention of Organised Crime Act'.

⁶ KE Lioe *Armed Forces in Law Enforcement Operations – The German and European Perspective* (2011) at 168.

⁷ Stroud's Judicial Dictionary of Words and Phrases 7th edition volume 2.

2 The order of court a quo is set aside and substituted with the following order:

'The appellant is granted leave to appeal against the sentence imposed by the Regional Court, Johannesburg to the Gauteng Local Division of the High Court, Johannesburg.'

C H Nicholls
Acting Judge of Appeal

APPEARANCES:

For the Appellant:

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