

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

"REPORTABLE"

CASE NO: CC45/2015

In the matter between:

THE STATE

and

MOHAMMED SALEEM DAWJEE	Accused 1
TOWBARS CAPE CC	Accused 2
TOWBARS KING CC	Accused 3
ARNO HEINRICH LAMOER	Accused 4
DARIUS VAN DER ROSS	Accused 5
KOLINDHREN ("KOLLIN/COLLIN) GOVENDER	Accused 6

SENTENCE DELIVERED ON 10 MAY 2018

ALLIE, J:

1. The factors that courts are enjoined to take into consideration when imposing sentence are set out in **S v Zinn**¹ as "*... the crime, the offender and the interests of society.*"
2. In considering an appropriate sentence, the court must strive to attain the primary objectives of sentence which is, *inter alia* that of deterrence, rehabilitation, where possible and retribution.²

¹ 1969 (2) SA 537 (A) at 540 G

² R v Swanepoel 1945 AD 444 at 455; S v Rabie 1975 (4) SA 855 (A) at 862 A-B

3. Courts are further enjoined to temper their judicial discretion when sentencing, with an element of mercy. In **S v Rabie** ³ it was said that mercy: *"...has nothing in common with maudlin sympathy for the accused. While recognizing that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society"*
4. In determining sentence, the court has to take account of the accused's personal circumstances, the nature and circumstances of the offences and the consequences of the commission of the offences.
5. The court has to weigh up those circumstances and consequences to arrive at a sentence which fits the offences and the accused. That balancing exercise invariably lead to sentence being individualized for each accused.

The Personal Circumstances of Accused 1

6. The accused was born on 19 September 1965.
7. The accused didn't complete his formal education but left school when he was in grade 3. He received on the job training at each new employment. He used the skills he acquired in employment to build his businesses.

³ At 861 B

8. A year after his birth, his parents divorced and the accused remained in the care of his mother. Both his parents remarried but because of the separation, he lost contact with his biological father. The accused only rekindled his relationship with his biological father as an adult. After his father's death he took care of his stepmother who still lives with him.
9. The accused remained close to his biological mother and his half siblings born from his mother's new marriage. His sisters informed the probation officer that he has always been protective over his family and that they all are still very close. However, the accused and his stepfather were not very close. The accused informed the Probation Officer that he always felt like an outsider in his own home and that this motivated him to make a success of his life.
10. The accused has been married for 34 years, has three children from the marriage and an older son from a previous relationship who lives with him.
11. The accused believes that the case contributed to the breakdown of the marriages of two of his children.
12. The accused lives in a home built in an affluent area on two erven.
13. At the commencement of the case, the accused was the owner of two successful tow-bar businesses. Due to the nature of his charges and high legal costs, ownership of the juristic entities in which those businesses operated was

transferred to his son, Zameer Dawjee. The accused is now a paid employee of his son. He is a consultant in the business.

14. The Probation Officer reports that the accused and his family are not destitute and all their daily basic needs are met.
15. He was plagued with pain from an ulcer during the trial. He suffers from diabetes, kidney & bowel illness & anxiety.
16. As a successful businessman, the accused was known to be kind and generous. This is evident from donations and assistance to community churches, mosques, schools and community members alike.
17. In the evidence adduced in court which was subject to cross examination by the defence, he is described as a man that threatened, humiliated and placed undue demands on police officers some of who held a lower rank to those of his co-accused. He went so far as to bully some police officers into submission. To achieve that end, accused 1 often referred to his close relationship with his now co-accused and to the personal favours he performed for them. He went so far as to pertinently allege that he had the power to have police officers transferred. He also made reference to issues that ought not to be within the knowledge of a civilian but were in fact internal police matters, thereby demonstrating an intimate knowledge of the hierarchy and accountability structures of the police force and how it operates.

18. The Probation Officer reports that he does not view his relationship with his co-accused as wrong nor does he view his interactions with them as something that threatens the integrity of the police force.

19. The Probation Officer describes the consequences of the offences of which the accused is convicted as follows:

“Though his actions did not threaten the community or society directly it did make them more vulnerable. A favour for a favour system is seldom a challenge for an affluent individual. If such a system, hypothetically speaking, did exist in an institution like the Police Service, it would leave the most vulnerable, the poor, without any means to access the Police Services as they would not be in a position to adhere to 'a favour for a favour' system due to their financial standings. Furthermore this might force them to resort to illegal dealings that they would have to use to receive services from the Police.... The offences committed is of a serious nature and could have had far reaching effects beyond that which were described in this case. When deciding on an appropriate sentence it should be taken into account that the crime undermines the integrity and Ethical Code the Police Service is built on. It open the Police Service up to other criminal activities and to the bidding of other criminals and as such the community to more serious crime. “

20. The Probation Officer explains why she believes that the accused doesn't show true remorse thus:

“His failure to see how his actions has compromised the integrity of the Police Service makes it difficult for him to feel or show remorse. The accused only sees the negative effect his actions has had on him and his family and his co-accused. He deems the resistance of officials to abide by his will as a direct attack on him as a person and not as them working within the confines of the law. “

21. The Probation Officer explains why she believes that the accused poses a low risk of recidivism as follows:

“The accused enjoys the love and support of not just his family but also that of community members that has come to his aid in his time of need. The accused do not wish to expose his family to further trauma nor does he wish to lose all standing in his community. This shows that behavioural change is possible and that the risk of recidivism is low. In order to prevent further harm to his family and in order to restore his footing in the community he will have to abide by the laws

of this country. The love and respect of his family and the community is very important to the accused and this will be a great motivator to abstain from reoffending. “

22. The Probation Officer recommends a sentence as contemplated in Section 276 (1) (i) of the Criminal Procedure Act 51 of 1977 as a suitable sentence.

23. The accused was assessed by Ms Sentile for his suitability as a candidate for Correctional Supervision and found to be a suitable candidate. She reports that the accused was physically abused by his step-father as a child and he quickly learned that in order to avoid beatings, he had to give his step-father money. This is allegedly how he perceived he should earn the love of people. She also reported that he indicated that he had an agreement with his son when he gave the business to him that his son will be responsible for his living expenses and his debts.

24. Ms Sentile further reports that:

“The accused turned the business into a highly profitable business, employing approximately 30 people. However, when the case started against him media reports claimed that the accused was a druglord so the business took a severe knock. The various banking institutions closed the business banking accounts along with his personal accounts. Lines of credit which were vital for the business were also withdrawn.”

25. Ms Sentile reports that the accused’s daughter and her children rely on him for care and financial support. She is not working and completing her matric. His youngest son and his wife live with the accused. They too rely on the accused for care and financial support because they are not working. When the case started it was all over the media and no one wanted to be associated with him and his

family. The accused Informed Ms Sentile that if he received a community-based sentence, he would be able to perform community service. He also indicated that he is willing to comply with all the conditions of that sentence.

26. Dr Czech, a psychiatrist who had a 2 hour consultation with the accused testified as follows.

26.1. Accused 1 had difficulty understanding why it is wrong to lend money to people in need who re-paid the loan and who are friends or relatives;

26.2. Accused 1 had previously assisted community members, police officers, churches, mosques and schools and he saw no wrong in assisting his co-accused;

26.3. Accused1 said that he experienced huge problems as a result of being prosecuted in this case such as: his bank accounts being closed and therefore financing was no longer possible;

26.4. Consequently, he couldn't trade effectively and he was forced to sell off properties, cars, movables and surrender policies and he became poor overnight;

26.5. The stress of standing trial and the negative publicity associated with it caused him to become extremely anxious;

26.6. He lost his appetite, his diabetes became uncontrolled and he had insomnia, which are all symptoms of Major Depression;

27. Accused 1 has been receiving psychotherapy for approximately 10 years to deal with his childhood trauma.

28. Dr Czech reported that accused 1 suffers from the following illnesses but he couldn't provide dates as to when the diagnosis was made nor could he say when treatment commenced. Accused 1 allegedly suffers from insulin dependant diabetes; hypercholestromia; chronic reflux oesophagitis and peptic ulcer disease.
29. He allegedly had surgery for cancer of his kidney, a "twisted bowel," an umbilical hernia and his back.
30. Dr Czech subsequently saw the report of Prof De Kock who treated accused 1 and he discovered that it was suspected cancer but it transpired that in fact it was a narrowing of the ureter.
31. According to Dr Czech accused 1 enjoyed the position of someone who had risen to success and had influence among very important people and his self-esteem would have been considerably enhanced by that.
32. The doctor reported that accused 1's set of values include generosity, and to an extent patronage which are regarded by him as appropriate and not at all criminal. The notion of a minor favour being offered in return by a functionary as illegal was not high in his thought processes at the time.
33. The doctor expressed the view that despite accused 1's personality traits including elements of philanthropy, self-interest and patronage, he was not likely

to re-offend because he is terrified by being prosecuted and the prospect of punishment.

34. Dr Czech failed to take account of the consequences of all the charges on which accused 1 was convicted and in particular he didn't consider the fact that accused 1 not only gave gratifications to his co-accused who he knew well but also offered and gave gratifications to other people who he hardly knew or didn't know at all.
35. Dr Czech didn't balance against accused 1's ostensible trait of having difficulty refusing requests for assistance, the fact that in some instances, accused 1 initiated the gratifications or offer thereof.
36. Dr Czech explained accused 1's propensity to overstate facts for example, when he said that he sold all his properties and that he had a serious illness, as hyperbole.
37. Clearly accused 1 knew that the doctor would prepare a report for the court and he couldn't have intend to overstate the facts but not expect it to be taken literally.
38. During cross examination Dr Czech conceded that accused 1 has the ability to recover remarkably from trauma and stress as evinced by the fact that despite his childhood, he was able to become a successful businessman.

39. Dr Czech's evidence concerning the extent to which accused 1 has genuine remorse, whether he accepts the impact of corruption as being devastating on person's other than himself and the likelihood of him re-offending is unhelpful, vague and fraught with unexplained inconsistencies.
40. Dr Czech's explanation for accused 1 having committed the offences with reference to accused 1's value system as well as those of the sector of society that the accused associates with, i.e. that he's self-esteem is enhanced by having influence over important people, is patronising.

The Personal Circumstances of Accused 4

41. He is a 57 year old widower with 2 adult daughters aged 25 and 26 as well as a step-daughter aged 33.
42. He assumed responsibility for the care of his daughters after their mother passed away.
43. His biological daughters both suffer from depression as a result of the case. One daughter temporarily discontinued her studies and the other became unemployed.
44. His family described him to the probation officer as a strong, dedicated person who always took the community's interest seriously. He was also a role model to others.

45. He achieved a distinguished career in the police service despite having had a poverty-stricken childhood and his father having passed away when he was 10 years old.
46. His former colleagues expressed to the probation officer his devotion to his career and the interests of the community.
47. The accused is involved in church activities.
48. He has no previous convictions.
49. Apart from taking medication for high blood pressure and kidney stones, the accused is healthy.
50. His contract was not renewed after he was investigated in this case and he retired from SAPS in November 2015. He receives an income from his pension fund.
51. He completed Grade 12. He also completed a National Diploma in Policing.
52. The probation officer describes his employment history as follows:

"Subsequent to the Secondary School education of the accused he commenced casual employment with his mother in a Grabouw apple factory in an attempt to support his younger siblings. The accused was a Grade 6 Mathematics Teacher at Worcester Junior School for a period of 1 year and also did casual employment as a waiter in a local hotel.

During the period of completing the Diploma in Policing at the Bishop Lavis Training College the accused was promoted to the rank of Warrant Officer at the Bishop Lavis Training College and was appointed as a Trainer and Instructor. In 1985 he was further promoted to Lieutenant at Atlantis SAPS. In 1986 the accused was appointed as Station Commander at Atlantis SAPS for a period of 4 years. In the year of 1991 the accused was promoted to the rank of Captain at Manenberg SAPS. He was further promoted in 1993 to the rank of Major and

transferred to the District Head Office in Athlone and also as Acting Commander at Langa SAPS. During this period the accused became the Commander of the Anti-Riot Unit. In 1994 he was transferred to Wynberg SAPS where he was the Superintendent for Visible Policing.

He was transferred to Cape Town Cluster Office and in 1995 he commenced his responsibility as Superintendent for Visible Policing in the Cape Town Cluster. During this period he was seconded by the Minister of Police "at the time" to deal with operations pertaining to Corruption in the Western Cape. Upon the PAGAD uprising the accused was further seconded to the NPA in 1996 when the Scorpions was established. He held the rank of Brigadier and in the same year he was appointed as Deputy Area Commissioner of the East Metropol. In the year 2000 the accused was appointed to take over the operation for the busses and taxi killings. He was further instructed to deal with the operations of Gang Violence and in 2001 he was appointed as Area Commissioner in the Bellville Cluster Unit. Between 2002 and 2010 the accused was the Divisional Commissioner for Operational Response Services. He was later appointed as the Provincial Commissioner in the Western Cape at the rank of Lieutenant General at the Green Point Provincial Office."

53. The probation officer explains why she believes that the accused doesn't take full responsibility for the offence as follows:

"The accused continues to assert that the transactions between him and Accused number 1, herein referred to as Mr Dawjee were licit. In light of this aspect it can therefore be assumed that the accused disputes full responsibility for the index offence.... According to the accused he did not participate in any corrupt activities. As stated to the Probation Officer the accused has been friends with Mr Dawjee for over 25 years as they also grew together. The accused indicated to the Probation Officer that when he commenced his employment at Manenberg SAPS their friendship continued. The accused denies extending any favours to Mr Dawjee in his capacity as a member of the South African Police Service. According to the accused he underwent some financial challenges and as a friend Mr Dawjee extended his help. The accused however paid the entire sum of money back to Mr Dawjee which he had borrowed from Mr Dawjee."

54. The probation officer recommends correctional supervision as a suitable sentence option.
55. He was assessed as being a suitable candidate for correctional supervision.

The Personal Circumstances of Accused 5

56. The accused was born on 6 September 1969 and is now 48 years old. He is a first offender.
57. He is now in his 4th marriage but he and his wife are currently separated because of the strain that the case caused on their relationship although his wife provides moral support for him.
58. He has children aged 26, 21 and 18 years respectively. His youngest is a daughter who intends to study at a tertiary institution.
59. The accused was reared in a poor but stable family environment.
60. The accused completed grade 12 and later he completed a Diploma in Public Administration.
61. His family was proud of him as he was the first one to pursue a career.
62. The accused was promoted in the SAPS within a short period because he was passionate about his work.
63. He was described by a former colleague as an excellent and proud police officer.
64. He fulfilled the function of role model and mentor within his extended family.
65. The accused was dependant on his pension fund after he resigned from SAPS but those funds have decreased. He has casual employment as a driver for a waste management company.

66. The accused informed the probation officer that he lent an amount of R3324,60 from accused 1 which he didn't declare but which he paid back and he received a golf sponsorship from accused 1 which he declared.
67. The accused explained to the probation officer that he could foresee how the loans he received from accused 1 could lead to him granting accused 1 preferential treatment over other people.
68. The probation officer concludes that the accused is remorseful for having committed the offence. However she believes that he doesn't fully accept responsibility for the offence nor does he perceive the gravity of it. The probation officer expressed herself thus:
- " Even though the accused admits the current offence he still maintains that the money he received from accused No 1 was a loan between him and a person he perceived as his best friend. It is thus not clear to what extent the accused accepts responsibility for the offence. The accused stated that he is genuinely sorry for his involvement in the index offence. It is a concern that Mr Van Der Ross does not understand the gravity of the offence as it was committed by him whilst in Public Office."*
69. The accused does attend church.
70. The probation officer recommends correctional supervision and the accused was also assessed as being a suitable candidate.

The Personal Circumstances of Accused 6

71. He is 57 years old and his date of birth is 2 February 1961.

72. He is married for 37 years and has two adult children aged 32 and 30 respectively, who are financially independent.
73. The case had had a negative impact on the accused's children's reputation. A further result of the case is that the accused's finances have been depleted. His reputation as an upstanding police leader has also been detrimentally affected.
74. He has an 80 year old mother living in Durban who he visits from time to time.
75. After completing grade 12 he later completed a Diploma in Police Administration.
76. He was employed in the SAPS for 37 years having been promoted often. At the time of his arrest he held the position of Provincial Head Inspectorate Compliance.
77. The probation officer reports that his colleagues, friends, and family members, all described him as a person who has good values, work ethics, integrity and maintains a professional standard.
78. During his employment he played a pivotal role in the skills development of youth as part of crime prevention.
79. The probation officer reports on the accused's remorse as follows:
"He regrets his actions and is taking full responsibility for the offence. He claims that at the time of the offence he was not aware that he is committing corruption. He says that he had cooperated with the investigation and that he is relieved the matter will be concluded."

80. The probation officer said that she used the word regret and not remorse because she believed that the words have the same meaning. She explained that in Xhosa there is only one word used to describe both English words.
81. The accused is a first offender.
82. The accused is physically healthy and does not have any disabilities. In 1997 he was involved in a serious motor vehicle accident where he sustained severe injuries. He was hospitalized and kept in ICU for 39 days. His jaw was fractured, his knee and ankle were broken. His femur was broken and as a result his right leg is 1 cm shorter.
83. The probation officer said that the accused wanted to be able to visit his mother in Durban and didn't want his movement restricted hence he wasn't keen on correctional supervision as a sentence and she agreed with him, hence her recommendation.
84. The probation officer recommends a sentence of a fine coupled with a suspended sentence.
85. The assessment officer found this accused to be a suitable candidate for correctional supervision.

Nature and circumstances of the Offences

Accused 1

Count 3: Corruption

86. Accused 1 was convicted of having given accused 4 gratifications to the value of R67 329,50 during the period November 2011 to August 2013 in circumstances where accused 1 foresaw the possibility that those gratifications could cause accused 4 to give him preferential treatment when carrying out his duties or functions should accused 1 approach accused 4 for assistance.

Count 4: Corruption

87. Accused 1,2 and 3 were convicted of having given accused 5 gratifications to the value of R3324,60 during the period April 2012 to July 2013 in circumstances where he foresaw the possibility that those gratifications could cause accused 5 to give accused 1,2 & 3 preferential treatment in carrying out his duties/functions should they approach accused 5 for assistance with policing matters.

Count 5: Corruption

88. Accused 1, 2 and 3 were convicted of having given accused 6 gratifications to the value of R 24 601,44 during the period November 2011 to October 2013 in circumstances where accused 1,2 and 3 foresaw as a possibility that those gratifications could cause accused 6 to give accused 1,2 & 3 preferential treatment when carrying out his duties or functions should accused 1,2 & 3 ever approach accused 6 for assistance with policing matters.

Count 12: Corruption

89. Accused 1 was convicted of having offered Brigadier A Pillay preferential treatment at a BMW franchise in exchange for Brigadier Pillay procuring a speedy and successful investigation of accused 1's brother's home burglary and theft of goods, in circumstances where accused 1 foresaw the possibility that his offer would cause Brigadier Pillay to ensure that accused 1's brother receives preferential treatment from members of the SAPS in the course of the investigation of the home burglary and theft.

Count 13: Corruption

90. Accused 1 was convicted of having offered Colonel Hiranwanlal future sponsorships to SAPS in exchange for assistance in having accused 1's VW Polo vehicle released from the police's vehicle pound in Durban expeditiously, in circumstances where accused 1 foresaw the possibility that his offer would cause Colonel Hiranwanlal to accord accused 1 preferential treatment.

Count 14: Corruption

91. Accused 1 was convicted of having given General Matakata R1000,00 in circumstances where he foresaw the possibility that the payment could cause General Matakata to give him preferential treatment when exercising her duties/functions *inter alia*, in the investigation of this case.

Count 15: Corruption

92. Accused 1 was convicted of having given General Ntombela who was in Mpumalanga, tickets to the Cape Town Jazz Festival in 2013 in circumstances where accused 1 informed General Ntombela that he would have to provide accused 1 with transport should he be in Mpumalanga and accused 1 expected General Ntombela to give him preferential treatment should he require his assistance in policing matters.

Count 16: Fraud

93. Accused 1, 2 and 3 were convicted of fraud in the form of cover quoting in that accused 1 provided a police officer with quotations in the name of accused 2,3 and Shine the Way 307 CC for the supply and fit of tow bars to a police vehicle in circumstances where he failed to disclose that he was the sole member of all three close corporations whose quotes he provided and thereby created the impression that the quotations were generated in an arms-length manner.
94. Accused 1,2 and 3 were convicted on the grounds that the potential prejudice to the SAPS is that accused 1 held out that they were three independent juristic entities' quotations and in so doing, the SAPS were denied the opportunity to make the selection in circumstances where each entity would not know what the other's quotation was and consequently the SAPS would not have been able to test independently the true market value of the work to be performed. Accused 1,2 and 3 were convicted on the basis of *dolus directus*.

95. Accused 4's letter of good standing that he wrote for accused 1 and which is attached to his plea of guilty, contains a paragraph stating that accused 1 does business with the SAPS through proper procurement processes.
96. Although accused 1 to 3 have not been convicted on grounds of not having followed proper procurement processes, the acknowledged exceptionally close and loyal friendship between accused 4 who was the Provincial Commissioner and accused 1 who did business with the SAPS lends itself to a situation where accused 1 felt comfortable enough to perpetrate the fraud in the form of cover quoting.
97. Neither the SAPS nor any other state entity ought to be doing business with people who engage in fraudulent business transactions in the course of procuring the award of a contract from a state entity. The consequences of the fraud committed is that it had the potential to mislead the SAPS and to deny it the right to compare independent quotations. Fortunately, in this instance, the quotes were never used by the SAPS for the purpose of awarding a contract to accused 1.

Count 25: Defeating or obstructing the course of justice

98. Accused 1 was convicted on the basis of having directly intended to obstruct the course of justice by causing an employee who knew that he had given accused 4 gratifications, to falsely state in that letter that accused 1 had not given accused 4 any gratifications, in circumstances where accused 1 knew that the letter could

be used to counter allegations that his relationship with accused 4 was corrupt. The form of intent was *dolus directus*.

99. The purpose of having the letter drafted, signed and kept in a file is patently obvious. It was intended to be used as proof of accused 1's denial that he gave accused 4 any gratifications. The intention was to dissuade the SAPS from investigating accused 1 and accused 4. It is a direct attempt to steer the police off course. Although there is no evidence that the letter was used by accused 1 or accused 4, the fact that accused 1 persuaded his employee to do a letter of that nature while she knew its content to be false is in itself of grave concern. It speaks volumes about the lengths that accused 1 was prepared to go to in order to avoid being investigated and eventually prosecuted.

Count 26: Fraud

100. Accused 1 was convicted on the basis of having wrongfully and unlawfully directly intended to defraud Alphera Financial Services by failing to comply with their terms and conditions to the effect that the vehicle had to be kept in accused 1's possession or under his control; that if the vehicle was lost/stolen, accused 1 would inform Alphera of that fact; that Alphera be informed if the address at which the vehicle is kept is changed.
101. Accused 1, was therefore convicted of having fraudulently misrepresented the true position concerning in whose possession and where the vehicle was going

to be kept and consequently acting to the potential prejudice of Alphera Financial Services. The form of intent was that of *dolus directus*.

102. Accused 1, a businessman who operated two large businesses and who had purchased and/or assisted others in the purchase of motor vehicles, clearly understood the essential terms upon which finance companies usually finance the purchase of motor vehicles that are paid in instalments. The terms and conditions of Alphera are not unique. The condition that the lawful possessor, namely, the credit receiver, must have the vehicle under his control or in his possession for the duration of the agreement was known to accused 1, hence he didn't notify Alphera when Petersen failed to pay him and failed to return the vehicle. I accept the submissions made on accused 1's behalf that he ultimately paid Alphera in full. That was what he was legally bound to do in terms of the agreement he had entered into with Alphera. Nonetheless, accused 1 operated in a manner where he did not place a high premium on truthfulness and honest dealings. In the event that the SAPS were unable to recover the vehicle, the fraud would have been to the actual prejudice of Alphera, hence the conviction is based on potential prejudice to Alphera.

Count 27: Defeating or obstructing the course of justice

103. Accused 1 was convicted of having directly intended to defeat the course of justice by withholding from the SAPS the true position concerning how the vehicle came to be in the Durban area and how it initially came to be in the

possession of one, Petersen. Accused 1 was convicted on this count on the basis of *dolus directus*.

104. Even the slightest bending of the truth is an untruth. When that misrepresentation is made to the SAPS on who the declarant of the statement relies for assistance, it can result in an undue preference being given to the case, which is what happened here. It served accused 1's interests well to omit certain salient aspects of his agreement with Petersen from the statement he made to the SAPS. That omission enabled accused 1 to have the SAPS Durban search for his vehicle while they were brought under the impression that the vehicle had been unlawfully removed from Cape Town to Durban whereas in truth it was removed lawfully to Durban with the full knowledge and consent of accused 1. Accused 5 admitted in his plea, to having unlawfully prioritised the investigation into the removal of the vehicle.

Accused 3

105. I was informed belatedly by accused 1's counsel that the close corporation that is accused 3 has been deregistered shortly before the conviction.

106. There is accordingly no merit in imposing sentence on accused 3.

Accused 4

107. Accused 4 was convicted of corruption on the grounds that he accepted the gratifications given to him by accused 1, 2 and 3 to the value of R R67 329,50 and he caused a letter to be drafted in which he declared that accused 1 was a

person of good standing and was not under investigation by the SAPS. His plea was tendered on the basis of *dolus eventualis* and in the absence of evidence to the contrary, it was accepted as such.

108. Accused 4 caused the letter of good standing to be drafted in circumstances where accused 1 was the subject of an inquiry and investigation.

Accused 5

109. Accused 5 was convicted of corruption on the basis that he accepted gratifications from accused 1,2 and 3 to the value of R 3324.60 and because accused 5 made the following interventions for accused 1:

109.1. He sent a certain Lieutenant to certify documents for accused 1 at Parow Arms;

109.2. He opened a case for use of a vehicle without the owner's consent for accused 1, he took accused's 1 statement and he gave instructions to officers under his command to expedite the investigation;

109.3. He personally and by directing officers under his command, gave accused 1 's complaints of service delivery, preferential treatment.

110. His plea was tendered on the basis of *dolus eventualis* and in the absence of evidence to the contrary, it was accepted as such.

111. Accused 5's attorney submitted that the interventions preceded the gratifications and were not covered by PRECCA. This submission was made in replying argument on the last day of argument.

112. The said submission was made despite accused 5 having pleaded guilty to corruption under PRECCA for interventions that were made before he received the gratifications.

113. On accused 5's behalf it was argued that because he received the gratifications on 11 May 2013, the court could only have regard to interventions that accused 5 made after 5 May 2013 and not to those made before he received the gratifications.

114. The argument goes that the plain, ordinary meaning of section 4(1) (b) of PRECCA, prohibits gratifications to public officers so that they will, in the future, act in a manner that is unlawful, as proscribed. The section provides that:

"4 Offences in respect of corrupt activities relating to public officers

(1) Any-

b) Person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person,

***In order to act**, personally or by influencing another person so to act, in a manner –*

(i) That amounts to the –

(aa) illegal, dishonest, and authorized, incomplete, or biased; or

(bb) misuse or selling of information or material required in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

- (cc) *the violation of a legal duty or a set of rules;*
- (iii) *designed to achieve an unjustified result; or*
- (iii) *that amounts to any other and authorized or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to public offices."*

115. The ordinary meaning of the word "in order to act..." has to take account of the context in which it is used in the section. Its function in the section is that of a purposive clause that complements the main clause. The subject of the purposive clause is dependent on and gleaned from the main clause. If one asks who must act, the answer will be obtained from the main clause. The words under consideration do not have a specific verb form as in a present, future or past verb form in that it is preceded by a preposition which makes it an infinitive without a verb tense. The verb occurs in the relevant phrase in an uninflected form.

116. On the argument presented on behalf of accused 1 and 5, the words include a present infinitive and future meaning. That limit sought to be placed on the phrase so as to exclude a past tense meaning makes no sense. If the phrase covers present tense and future tense, then an interpretation that includes past tense is equally grammatically feasible.

117. Counsel for accused 1 submitted that legislation is not meant to operate retroactively. That is a trite proposition and not one which I seek to challenge.

However, the issue raised is not the retroactive operation of PRECCA but rather whether the relevant phrase is meant to include interventions that precede gratifications. An interpretation which finds that it does include interventions made before gratifications is not a finding that the interventions must have predated the legislation itself.

118. The gratifications in the present case, provides rewards for past interventions, but were in addition, given to induce future actions. The accused have admitted foreseeing that they could induce future interventions. In this sense the gratifications that are given both as rewards for past interventions and to induce future interventions are criminalized. Gratifications given and received with both a retrospective and prospective intention are classic “*retainer*” gratifications. In those instances, it is unhelpful to isolate whether the intention is only retrospective or prospective, because the intention in retainer corruption classically, is always both.

119. When read in the context of the section as a whole, the phrase means that the provider of the gratification must have the intention to give the gratification **so that the receiver of the gratification may act** in a particular manner. It doesn't exclusively mean that the receiver must have already acted at the time when the gratification was made nor does it mean that gratification and the act must be contemporaneous, in the sense of attributing a present tense, nor does it mean

that the act must be made in the future. The phrase is broad enough to include present, past and future interventions.

120. Accused 5, in his plea, admits that during his employment with SAPS, he received many requests for assistance and complaints from different business forums, institutions, foreign communities and private individuals that required his personal attention. As a result of these engagements, he became familiar with Accused 1 and they became friends. He discovered that Accused 1 was always involved with the police in various helpful ways, especially through sponsorships and donations as well as other community upliftment projects. He always saw Accused 1 as a friend of the police.

121. This admission shows that the special treatment which Accused 5 accorded to Accused 1 prior to the petrol payments was motivated by Accused 1's generosity to the police in general.

122. This Court dealt in the judgment on conviction with all the interventions in favour of Accused 1. The evidence regarding accused 5's acts or omissions which amount to interventions are discussed in the following paragraphs of the judgment:

122.1. **Para [22]**-where Hansraj said that accused 5 told her that she called the meeting whereas she called a meeting with him and not with accused 1 and accused 5 at that stage was content with accused 1 being present in the meeting. Where accused 5 allowed accused 1 to speak abusively

and in a threatening manner to Vlok and only at the end of the meeting after Hansraj told accused 1 that he can't behave that way, did accused 5 follow suit and tell accused 1 that it was wrong to behave like that and he should leave;

122.2. **Para [25]**-Where accused 5 called a meeting ostensibly with business people in the area and it turned out to be a meeting at accused 1's business premises with accused 1 being the only business person present and accused 5 allowed accused 1 to question Hansraj about his perceived lack of sufficient police patrols around his business premises and he allowed accused 1 to suggest that certain police members must be transferred from their posts;

122.3. **Para [27] & [28]** - where accused 5 requested that Brigadier Hansraj, the station commissioner must personally attend to an alleged burglary at the premises of accused 1 whereas lower rank officers would normally have attended;

122.4. **Para [60]**- where Vlok said that accused 5 initially sat by and allowed accused 1 to speak to him abusively;

123. The court addressed the consequences of the interventions, as described by Brigadier Hansraj, in the following paragraphs:

123.1. **Para [31]** - It bothered Brigadier Hansraj, due to her encounters with some of the interventions, that Accused 1 expected preferential treatment and that he had influence in and knowledge of police affairs;

- 123.2. **Para [32]** – Brigadier Hansraj did not feel comfortable raising her concerns with Accused 4 or 5, who were her superior officers because of her perception that Accused 1 had a cosy relationship with them and it subsequently transpired by their own admission, that they indeed had a close relationship with one another;
- 123.3. **Para [34]** – Brigadier Hansraj registered her inquiry docket against all the accused, including Accused 5, although she didn't mention the names of accused 4 and 5 at that stage. She complained of Accused 1's expectations of preferential treatment from all of the accused, including Accused 5.
124. The court at **paragraph [107]** evaluated the evidence and concluded that it sketched a milieu in which Accused 1 had more knowledge than others of the SAPS and that he sought to utilize that knowledge and his friendships and relationships with the other accused to obtain preferential treatment.
125. At **paragraph [137]** the court found that Accused 1 to 3 gave and accused 4 to 6, received the gratifications, therefore accused 4 to 6 foresaw that they or others under their influence, would provide preferential treatment to Accused 1 to 3 and that Accused 1 foresaw that members of the SAPS would do his bidding.
126. At **paragraph [203]** the court found further that the evidence *"...made out a case for accused 1 to 6 to meet concerning corrupt activities and the influence peddling that accompanied that offence."*

127. It is clear that the court found that all the acts of intervention, whether or not they occurred before or after the gratifications were given or received, were relevant in concluding that the gratifications were given and received corruptly and with the requisite intent, as the court found they were.

128. Since the court has found that all the acts of intervention are relevant to the convictions, it follows that they are relevant to sentence, irrespective of when they occurred.

Accused 6

129. He was convicted of corruption on the grounds that he received from accused 1,2, and 3 gratifications to the value of R24 601,44 and because he made the following interventions for accused 1:

129.1. He expressed his willingness to go after hours to an address in Gugulethu to check on a vehicle allegedly used in the burglary and theft at the apartment of accused 1's brother, in the event that the cluster commander of Milnerton didn't have anyone available to do so;

129.2. He introduced accused 1 to Warrant Officer Knoetzen in his office so that the Warrant Officer could assist accused 1 's daughter with an appeal concerning an application for a firearm licence;

129.3. He asked accused 1 if he had spare tickets for the Cape Town Jazz festival for a Lieutenant General in Mpumalanga which tickets accused 1 then gave to the Lieutenant General;

- 129.4. He introduced accused 1 to Captain Hendricks so that the latter could assist accused 1 with an application to temporarily possess a firearm;
- 129.5. He requested Constable De Jager to hand over a Norinco Pistol to accused 1 in terms of an application to temporarily possess a firearm;
- 129.6. He arranged an appointment for a Mr Ross, an associate of accused 1, with a designated police officer who deals with firearms to assist him with an application for a fire arm licence;
- 129.7. He asked Warrant Officer Knoetzen to make printouts of accused 1 and his wife's fire-arm registrations to see whether accused 1 would qualify for another fire-arm;
- 129.8. He called the detective commander at Phoenix SAPS in KZN province to assist accused 1 with obtaining clearance and handing over to accused 1 his Polo Vehicle which was recovered and kept in police custody at the time.
130. His plea was tendered on the basis of *dolus eventualis* and in the absence of evidence to the contrary, it was accepted as such.
131. When a senior police officer refers a friend/relative to a junior officer for assistance ahead of other people requiring assistance, that referral carries with it, the implication that the junior officer must render the assistance. The referral is not devoid of influence and power.

Nature of the offence of corruption

132. Accused 4, 5 and 6's knowledge and understanding of the offence of corruption in general, ought to have been sufficiently detailed because each of them held senior leadership positions in the SAPS at the time when they committed the offences.
133. In the case of accused 4 he held the most senior leadership position in the SAPS in the province, namely that of Provincial Commissioner of Police.
134. In the case of accused 5, he was the cluster commander of the Bellville Cluster at the time.
135. Accused 6 was the Station Commissioner at Parow Police Station.
136. In addition, there have been several high - profile corruption cases which were widely publicised, two of which are cited as authorities herein. The case of the former National Commissioner of Police, namely *S v Selebi* would have come to the attention of police officers in leadership positions. The accused in the Selebi case publicly opted for an explanation of an alleged corruptor being his friend. Despite that explanation, he was convicted.
137. Accused 4, 5 and 6 have among them approximately 80 years service in the SAPS. It beggars belief that none of them thought that receiving financial assistance from accused 1 and then according him favours or preferential treatment in their capacity as police officers, constituted corruption. Accused 4

and 6 informed their respective probation officers that they didn't believe that they were committing corruption. In the case of accused 4 and 6, they allegedly believed that they were merely accepting financial support from a relative or longstanding friend.

138. It is inconceivable, that senior members of the police force would not have realised that they were committing corruption.

139. The factors that would most likely have driven accused 4 to 6 to commit corruption ought to have been identified and addressed by the accused. When any individual finds himself/herself in a situation where he/she needs to accept gratifications, then it is either attributable to greed, living beyond one's means or a catastrophic event which caused that person not to be able to balance his/her budget. In this case the court has simply not been told by the accused why they deemed it necessary to accept those gratifications.

140. Nor did the accused take the court into their confidence concerning why they deemed it prudent to make the interventions they have acknowledged, to and on behalf of accused 1.

141. It is incomprehensible that accused 4 to 6, all of who were reared in humble socio-economic conditions, who succeeded in acquiring further education and skills and were able to forge admirable career paths for themselves, would place their careers, reputation, standing and liberty in jeopardy.

142. The evidence on record which the defence thoroughly challenged during cross examination sketches a picture of accused 1 openly and brazenly boasting to several police officers that he has a close relationship with accused 4 and 5, how he could have lower rank police officers chastised and even punished by accused 4 and/or 5.

143. Accused 1 levelled a threat of that nature against Colonel Vlok in the presence of Accused 5. Accused 1 had no qualms about throwing his weight around in the presence of accused 5.

144. It is no coincidence that the offences occurred while accused 4 and 5 held positions of authority and power over officers that accused 1 threatened and harassed. Public power is not meant to be wielded for personal satisfaction or gain. It is a trust and responsibility bestowed upon the holder of that power which must be exercised responsibly, for the benefit of society as a whole and in accordance with the prescripts that define how that power is to be exercised.

145. In **R v Lavenstein**⁴ the court said the following concerning the exercise of public power:

“If the official has a discretion, what the law requires of an official is to exercise that discretion with sole regard to the public interest. That is his duty. That is the act that he has to do. When once he exercises his discretion with regard to the private interests of any individual, he is doing an act in conflict with his duty, and that, to my mind, is the only reasonable interpretation of the words of the statute...any other construction will have the extraordinary and ridiculous results I have mentioned, viz: that you can bribe officials to any extent as long as you can show that the actual thing they did was in the public interest...”

⁴ 1919 TPD 348 at 353; R v Patel 1944 AD 511 at 522

146. When the holders of public power engage in corruption, they not only impugn their own integrity. They also bring the standing of the office and position they hold into disrepute.
147. In an organisation such as the SAPS, the failure of senior leaders to remain ethical, scrupulous and honest, lowers the morale of lower ranking officers who serve under the command of such senior leaders. Rank and file police officers are often the coalface of the SAPS with who members of society interact. Society must have confidence in the integrity of the SAPS and they must be reassured that the morale of the SAPS is intact.
148. Accused 1 peddled influence in order to receive preferential treatment and favours. He used the SAPS as his own fiefdom. In so doing , he squandered and pre-occupied valuable and already stretched SAPS resources in petty squabbles, power - mongering meetings and to do his bidding generally. Accused 4,5 and 6 created a context in which accused 1 could do so by fostering a close relationship with accused 1 well knowing that accused 1 wasn't averse to requesting favours from them and using their close relationship to have other officers extend special treatment to him.
149. All too often corruptors or potential corruptors labour under the illusion that anything and anyone has a price and influence can be bought. That notion is inimical to not only the moral fabric of society but also the consolidation, protection and sustainability of hard-won freedoms enshrined in the Constitution.

150. Accused 1's psychiatrist's testimony is that accused 1 has a low level of education, he lived by a code of altruism where he gave charitably to the SAPS, churches mosques and the community as a whole and he therefore didn't consider his actions to be unlawful at the time.
151. An ordinary member of society knows that it is unlawful to do favours for the police and to expect favours in return, irrespective of whether the giving and receiving is contemporaneous and charitably driven or not.
152. Accused 1 not only expected his co-accused to assist him preferentially, he also expected other police officers of a lower rank and under the command of his co-accused to give him preferential treatment and to bend the rules as it were for him. A prime example of this can be found in the evidence of Wilson where accused 1 refused to accept that the store was a crime scene and he would have to wait for his goods. Instead, he demanded that it be given to him immediately because of who he was.
153. Contrary to the opinion of his psychiatrist, accused 1 wasn't merely expecting preferential treatment from his co-accused to who he had given gratifications, but he expected preferential treatment from all police members because he had given generously to the SAPS and to some of its members. If the court was to accept that in accused 1's mind it was a case of "*you scratch my back and I'll scratch yours*" then police services would be capable of being bought by individuals.

154. The policy of the SAPS to foster good relations with local business owners in order to improve service delivery, should contain sufficient checks and balances to ensure that the SAPS is not manipulated into becoming the personal service of a few at the expense of the majority.
155. Counsel for accused 1 to 3 and counsel for accused 6 impressed upon me the scenario where one socialises with members of the police force and when one's home is burgled, the first and natural reaction would be to call those officers that one socialises with. The crisp answer to that situation postulated is thus: one ought to know better than to compromise one's friends by expecting them to do favours and to act beyond the laid down procedures for reporting incidents of crime. To even postulate that situation as natural and normal is unacceptable because the ethical, moral and legal standard for interaction with law enforcement officers should be consistent and it should therefore be the same, irrespective of whether one socialises with them or not.
156. A policeman's legal and ethical lot is no more onerous than that of a judicial officer. No friend of a judicial officer could claim that it is natural and normal to expect preferential treatment because of that friendship any more than a friend of a police officer should.
157. While there are degrees of corruption in that the amounts involved in each instance may vary, the severity of the interventions may vary, the notion of corrupting and being corruptible when it involves corruptees who exercise public power and who hold positions of lawful authority, is untenable.

158. The defence argued that accused 1 requests were that his co-accused and the other officers to who he had given gratifications were merely expected to do their official duties and in so doing, they were not being asked to act unlawfully, therefore their interventions were not as severe as those in the Selebi case.

159. **Snyman** says the following concerning bribery for the performance of official duties:⁵

“(v) The fact that what X requested Y to do accorded with Y’s duties, and that X accordingly did not request Y to do something “improper”. In the common law this consideration afforded neither X nor Y a defence. The reason for this rule was that it was bribery even to “bribe an official to do her duty”. Thus, if X had given public prosecutor Y an amount of money in order to prosecute Z of some crime, but Y would in any event have prosecuted Z because she had the power to do so and also because there was sufficient evidence at her disposal of the commission of the crime by Z, both X and Y would have rendered themselves guilty of the crime. It is submitted that the same principle applies to the 2004 act.”

160. In **S v van der Westhuizen**,⁶ the court held as follows:

“It is a crime to bribe an official to do his duty ...and it is a crime for an official to accept money in return for doing his duty. As has been said, it is immaterial that the solicited action is in the public interest: it is contrary to the public interest to secure a public benefit by bribery.”

161. In **Ex Parte Tayob**,⁷ the court said the following:

“I do not think the learned Judge erred in describing the making of gifts to officials...as something done “to buy a more favourable disposition than that which would come into being on its own or perhaps is due without the presents”

162. In **S v Shaik & Others** ⁸, it was held that:

⁵ Snyman *Criminal Law* 6th Ed p 405

⁶ 1974 (4) SA 61 (C) at 63 E-F

⁷ 1990 (3) SA 715 (T) at 722 C-D

"The seriousness of the offence of corruption cannot be over emphasized. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe."

163. In **S v Selebi**⁹ it was said that:

"19. Corruption can be likened to a cancer. It operates insidiously destroying the moral fibre of the nation. When it is discovered the damage has already been done. Whilst the particular act of corruption may be excised, just as a malignancy may be removed in a surgical intervention, society is not what it was prior to the corrupt act. The roots of justice and integrity, so vital in a fair and democratic society, have been permanently scarred by the corrupt act. The moral fibre of society has to be re-built after the excision of the corruption."

20. Corruption by members of a police force can never be tolerated. It is the very antithesis of what a police force stands for. It precludes the police force from effectively carrying out its constitutional function. So much more so when it is the head of the police force that is corrupt."

164. I need only add, so much more when it is the head of the police force in the province and a cluster commander.

Evidence concerning statistics for corruption cases

165. The court called for evidence to be led concerning how many cases of corruption committed by government and police officials were reported nationally and in the Western Cape and how many resulted in convictions.

Mr Marius Basson of the NPA, Western Cape

⁸ 2007 (1) SACR 247 (SCA) at para 223

⁹ [2010] ZAGPJHC 58 at paras 19 to 20

166. He submitted an affidavit that was handed in with the consent of the defence. He produced statistics of reported cases, convictions and sentences imposed. The court did not however request statistics concerning the sentences imposed because sentence is ultimately the exercise of judicial discretion.

167. He listed convictions for corruption in the **Western Cape** courts for the calendar years 2014-2017 as well as for the first three months of 2018 , i.e. until March 2018.

168. Convictions over the period of 4 years and 3 months are as follows:

- Government officials: 84 (46 of them were SAPS officials)
- Private persons: 86
- Total number of convictions: 170

169. For the period of 2014 to 2017 (excluding 3 months of 2018) the national statistics are as follows:

- 2014 33
- 2015 26
- 2016 37
- 2017 63

Most of the convictions relate to offences committed in terms of PRECCA.

Adv J Schutte of the NPA head office

170. He provided national statistics for corruption committed by government officials for the government's financial years 2013 to 2017.

171. Convictions of government employees for corruption, nationally for the period 2013 to 2017, is 693.

172. There is an increasing trend, made up as follows:

• 2013/14	121
• 2014/15	130
• 2015/16	218
• <u>2016/17</u>	<u>224</u>
• TOTAL	693

Col P Bergh of the DPCI, SAPS, Western Cape

173. SAPS registered 47 investigations arising from complaints of corruption allegedly committed by SAPS officials in the Western Cape for the government's financial years 2014 to 2018.

174. The number of cases registered each year in the Western Cape by SAPS have not increased significantly.

175. Bergh didn't provide statistics of how many registered cases resulted in convictions.

M Seseko of the Independent Police Investigative Directorate (IPID)

176. Mr M Seseko, the head of investigations at IPID, testified as follows:

177. He produced statistics on all complaints IPID has received of corruption against SAPS officials in the whole of the South Africa for the five years from 2012/2013 to 2017/2018. Those were 17 complaints of corruption.

178. IPID statistics for corruption committed by SAPS officials is in addition to SAPS statistics. When that amount is added to the SAPS statistic of 47 for the four years from 2013/2014 – the total Western Cape incidence becomes 64, which excludes the SAPS statistic for 2012/2013.

179. The total incidence of IPID corruption complaints against SAPS officials for the whole of the country over the five years is 568.

180. Mr Sesoko described how difficult corruption investigations against SAPS officials are. He ascribed, the difficulty to, *inter alia*: many complainants being reluctant either to make complaints or to be identified and to testify. The majority of complaints (320 of the 569) are then categorized as “unknown”, as the perpetrators can’t be identified.

181. Despite those investigative difficulties, he defended his trend analysis which reflect that the incidence of complaints have increased over the five years.

The Purpose of Remorse as a Mitigating Factor

182. Demonstrations of actual remorse must be taken into account by a sentencing court because it represents an acknowledgement of the impact of the offence on the complainant, the accused and on society. It therefore augurs well for an accused person's prospects of meaningful rehabilitation.

183. Various indicators of remorse are present in this case. Those are as follows:

183.1 The change of plea from not guilty to guilty; and

183.2 Expressions of regret uttered to the probation officer and the social worker in the case of all the accused;

184. In **S v Matyityi** 2011 (1) SACR 40 (SCA) at para 13 the court said the following concerning remorse:

"[13] Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. ...There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather

than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."

Applicability of Prescribed Minimum Sentence Legislation

185. Accused 4 and 6 whose gratifications were R67 329,50 and R24601,44 respectively and who were police officers at the time of the offences would ordinarily have been subject to the application of section 52 (2) (a) (i) read with para (c) (i) of Part II of Schedule 2 of Act 105 of 1997 which prescribes a minimum sentence of 15 years imprisonment where the amount of gratifications exceed R10 000 for law-enforcement officials.

186. The indictment however contains the suggestion that the threshold for the applicability of the minimum sentence is gratifications to the value of R100 00. The indictment also contemplated that the minimum sentence applied because it was alleged that the accused acted in concert as a syndicate or enterprise. The state however led no evidence concerning the allegation of common purpose

and the accused were all acquitted on the counts relating to the Prevention of Organised Crime Act (POCA) .

187. During negotiations between the state and the defence for a change of plea from not guilty to guilty, the state overlooked the fact that the threshold for the minimum sentence was R10 000 and held the view that since the POCA charges would fall away, the minimum sentence would no longer apply once the plea had changed. The state accordingly informed accused 4, who was unrepresented at the time, in writing that if he changed his plea, the minimum sentence would not apply to him. Accused 4 submitted that he was induced to change his plea by that representation.

188. Most cases concerning whether a court ought to apply the minimum sentence concern situations where it would be unfair to do so because the accused was not adequately warned or not warned at all prior to his plea, that the minimum sentence applied.

189. **Khobane v S** ¹⁰ is one such case where the Supreme Court of Appeal held as follows:

“ [14] In *Makatu*, Lewis JA accepted the need to adopt an approach that was ‘neither absolute nor inflexible’. In *S v Ndlovu*; *S v Sibisi*, which was cited with approval by this court in *S v Mabuza & others*, it was said that:

‘[I]t will not be essential to inform [the accused person] that he is facing the possibility of a substantial prison sentence or a sentence which may be ‘materially prejudicial’ if he can reasonably be expected already to be aware of this.’

¹⁰ [2016] ZASCA 124 at [14]

A crucial question, if the charge sheet omits a reference to the Act, is whether the accused nevertheless had a fair trial if the sentence is determined in terms thereof. This was made clear in S v Ndlovu (para 12)."

'[w]here the State intends relying upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences'."

190. In the event that the court applies the prescribed minimum sentence, the argument advanced on behalf of accused 6 is that the court may suspend part of the minimum sentence despite the authority in **S v Seedat**¹¹ where it was held as follows:

[36] If it was the intention of the high court to invoke the provisions of s 297(4), it could do so, as it had already accepted that there were substantial and compelling circumstances that justified a deviation from the prescribed minimum sentence. However, in order for that sentence to be competent, the court would have to impose a sentence for a specific term of imprisonment. The court could then order that the operation of a part of that term of imprisonment be suspended for a specific period not exceeding five years on any condition, including compensation. This is not what the court did. It instead stated that 'the sentencing of the appellant is suspended for a period of five years on the following conditions. . .' In so doing, it did not impose a specific sentence or a specific term of imprisonment. Such a sentence is not competent in terms of s 297 and there is no provision in law permitting a court to so suspend the sentencing of an accused. The unintended consequence occasioned by the error committed by the high court was that there was no competent sentence imposed on the appellant.

[37] There is another reason why the sentence imposed by the high court cannot stand. Section 297(4) envisages that only a part of the sentence should be suspended and not the whole sentence. So, even if the court sought to impose a suspended sentence, it could not suspend the whole sentence. For all those reasons the high court thus committed an error on a question of law and the sentence it imposed stands to be set aside. It thus remains for this court to consider an appropriate sentence."

¹¹ 2017(1) SACR 141 (SCA) at [36] & [37]

191. It was submitted on behalf of accused 6 that Seedat's case is in conflict with the Hildebrand ¹² and Malgas ¹³ cases.

192. In Hildebrand the court held as follows concerning a sentencing court's exercise of its discretion when deviating from the prescribed minimum sentence:

"[8] Section 51 of the Act provides for the minimum sentences for certain specified offences. Once a court finds that the offence for which an accused has been convicted falls under offences specified by s 51 of the Act, then that court has no option but to impose the minimum sentence prescribed unless it can find substantial and compelling circumstances. However, once it is satisfied that there are substantial and compelling circumstances which justify the imposition of a sentence other than the one prescribed by the Act, it can impose any sentence which it regards as appropriate (s 51(3) of the Act). This is so because as this Court held in S v Malgas [2001] ZASCA 30; 2001 (2) SA 1222 (SCA) para 25A:

Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).'

[9] Section 51(5) of the Act reads:

'The operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).'

[10] It should be clear that s 51(5) refers to 'a minimum sentence imposed in terms of this section'. Self-evidently, this section does not apply to sentences imposed after a finding that substantial and compelling circumstances exist, because such a sentence is not one imposed in terms of s 51. The sentence imposed by the regional magistrate accordingly did not fall within the restrictive provisions of s 51(5)."

193. I am not convinced that Seedat is in conflict with Hildebrand and Malgas. The former concerned a sentence which the magistrate sought to impose where no term of imprisonment was given and where the magistrate erroneously believed

¹² Hildebrand v The State [2015] ZASCA 174

¹³ S v Malgas 2001(1) SACR (SCA)

that he could not suspend part of the sentence which was in any event a deviation from the prescribed minimum sentence.

194. In Hildebrand and Malgas' cases, the court confirmed that a sentencing court's discretion is not eliminated by the prescribed minimum sentence once it is deviated from.

195. I accept counsel for accused 6 and the state's submission that should this court find that the prescribed minimum sentence applies and if the court finds substantial and compelling circumstances do exist to justify a deviation from that sentence, I would retain the discretion to impose any competent sentence that I consider to be appropriate.

196. In the case of accused 4, since the state mistakenly misrepresented the position concerning the applicability of the prescribed minimum sentence prior to him changing his plea, it would be substantively and substantially unfair to apply the prescribed minimum sentence and so I decline to do so.

197. The prescribed minimum sentence does not apply to accused 5 because the amount of gratifications that he received is less than R10 000.

198. Accused 6 fulfils the jurisdictional requirements for the prescribed minimum sentence because he was a law enforcement officer and he received gratifications in excess of R10 000.

199. I am however persuaded that the ordinary mitigating factors applicable to accused 6 weighed against the role he played and the nature of the offence constitute substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence.

Mitigating factors that could constitute substantial and compelling circumstances

200. In **S v Malgas** the court held as follows:

“ [25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –”

201. All the accused are first offenders, they have children that are either financially and/or emotionally dependant on them, they have all pleaded guilty, albeit after the trial had ensued for approximately 10 months on the basis of not guilty pleas and they showed varying degrees of remorse.

202. Defence counsel were at pains to describe the negative impact of the prosecution and trial upon the accused. Those consequences do not form part of the punishment meted out by the courts. The intention of the criminal justice system is not to punish an accused with the procedure followed in a trial before he/she is sentenced by a court, hence the accused's rights to a fair trial are Constitutionally protected.

203. The negative media attention, financial hardship occasioned by being prosecuted, the stress and anxiety endured by accused persons and their families are all part of consequences which flow to most accused persons. Those are not mitigating factors *per se* that courts are enjoined to take account of when deciding on an appropriate sentence.

204. Counsel for the defence implored me to have regard to the case of **S v M** where the Constitutional Court discussed that regard should be had to the best interests of the minor children of the accused who was their primary caregiver. The court held that although the best interests of the child are paramount, this did not mean that they are absolute, and they could be limited by balancing them against other rights in the Bill of Rights.

205. In this case none of the accused are primary caregivers although they do provide financial assistance to their adult children and in the case of accused 1, to a 17 year old relative.

206. Accused 1's counsel argued that accused 1 suffered the loss of ownership of his business which he had to give over to his son and he is now an employee in that business. The evidence is however that he is an employee and a consultant in the business. According to the correctional supervision suitability report, accused 1 decided to change the ownership of the business to his son because his son would be able to obtain credit . Although accused 1 appears to have lost nominal ownership of the business, he is still involved in the business. The business is able to provide for accused 1 and his family's living requirements. Accused 1 receives sufficient remuneration to cover his expenses and his daily needs in an amount of approximately R100 000 per month. He has been described by the probation officer as not being destitute. Accused 1 is resilient enough to have transferred his business interests to his son, while retaining beneficial use of the business.

207. There are indeed mitigating factors present in the personal circumstances of each of the accused but they have to be weighed against the aggravating factors.

208. The state also seeks the imposition of a sentence under section 276 (1)(h). The court is however not bound by any agreement that the state may have made with the accused.

209. The nature and circumstances in which the offences occurred however, do present aggravating factors because they were perpetrated by and in conjunction with law enforcement officers who are sufficiently knowledgeable about the unlawfulness of corruption and its consequences for the SAPS and the community it serves, when perpetrated by its members.

210. Not only did accused 4, 5 and 6 receive gratifications, but they also perpetrated acts or omissions of intervention for which they were convicted so that they could unfairly advantage their benefactor, accused 1 at the expense of the public they were meant to serve.

211. Accused 2, Towbars Cape CC was convicted on Counts 3 to 5. The value of the gratifications paid from the funds of accused 2 are in excess of R60 000. The imposition of a fine commensurate with that sum would be an appropriate sentence for accused 2.

212. In weighing the aggravating features of the commission of the offences as outlined herein, against the mitigating factors, I find that correctional supervision would not send out a sufficiently strong signal of deterrence and sanction nor would it facilitate the accused's recognition and acceptance of responsibility for the severity of their offences which have dire consequences. Taking account of the individual role that each accused played in the commission of his relevant offence or offences as well as the role they each played in facilitating the

offences committed by their co-accused, the impact that those offences had on other officers, the SAPS and society as a whole, the individual accused's personal circumstances and the positions they occupied at the time, I am of the view that the most appropriate sentence for each offence and for each accused is a term of imprisonment.

213. As stated previously, courts are enjoined to temper the sentence imposed with a measure of mercy. That mercy is demonstrated by the fact that this court will suspend a portion of the term of imprisonment imposed and order part of the sentences imposed to run concurrently.

IT IS ORDERED THAT:

The accused are sentenced as follows:

In respect of Accused 1: Mahomed Salim Dawjee

Count 3: Corruption

8 (eight) years direct imprisonment, 2 (two) years of which are suspended for a period of 5 (five) years on condition that the accused is not convicted of corruption committed during the period of suspension;

Count 4: Corruption

4 (four) years direct imprisonment;

Count 5: Corruption

6 (six) years direct imprisonment;

Count 12: Corruption

4 (four) years direct imprisonment;

Count 13: Corruption

4 (four) years direct imprisonment;

Count 14: Corruption

4 (four) years direct imprisonment;

Count 15: Corruption

4 (four) years direct imprisonment;

Count 16: Fraud

5 (five) years direct imprisonment;

Count 25: Defeating or obstructing the course of justice

3 (three) years direct imprisonment;

Count 26: Fraud

2 (two) years direct imprisonment;

Count 27: Defeating or obstructing the course of justice

3 (three) years direct imprisonment;

The sentence imposed on counts 4, 5, 12, 13, 14, 15, 16, 25, 26 and 27 will run concurrently with the sentence imposed on count 3.

In respect of Accused 2: TOWBARS CAPE CC

Counts 3 to 5:

A fine of R60 000 is imposed, of which R40 000 is suspended for a period of 5 (five) years provided that it is not convicted of corruption or defeating the ends of justice committed during the period of suspension.

In respect of accused 4: Arno Heinrich Lamoer

Count 7: Corruption

8 (eight) years direct imprisonment, 2 (two) years of which are suspended for a period of 5 (five) years on condition that the accused is not convicted of corruption committed during the period of suspension;

In respect of accused 5: Darius Joe Van der Ross

Count 8: Corruption

4 (four) years direct imprisonment, 2 (two) years of which are suspended for a period of 5 (five) years on condition that the accused is not convicted of corruption committed during the period of suspension.

In respect of Accused 6: Kolindhren Govender

Count 9: Corruption

6 (six) years direct imprisonment, 2 (two) years of which are suspended for a period of 5 (five) years on condition that the accused is not convicted of corruption committed during the period of suspension;

R. ALLIE