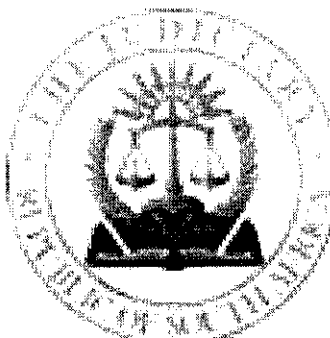




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A543/2010

14/2/2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ☒ YES/NO
(2) OF INTEREST TO OTHERS JUDGES: ☒ YES/NO
(3) REVISED ☒

13/2/2017

DATE

[Signature]
SIGNATURE

In the matter between:

NTOKOZO ALLISTER SEHLE SEGALO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

RANCHOD J:

[1] This is an appeal against both conviction and sentence with the leave of the trial court. The appellant was legally represented throughout the trial.

[2] The appellant was convicted in the Regional Court, Vereeniging, on 24 April 2006 in that he contravened the provisions of section 1(1)(b) read with

sections 2 and 3 of the Corruption Act 94 of 1992 (receiving a benefit). He was sentenced on the same day to five years' imprisonment.

[3] Also on the same day, the appellant applied for leave to appeal which was granted, as I said, on both conviction and sentence.

[4] The grounds for appeal advanced were that the trial court under emphasized discrepancies and contradictions on the part of the complainant's evidence and overemphasized the flaws in the appellant's evidence. It was submitted that the trial court also overemphasized the contradictions between the evidence of the witness Mbambo and the appellant whilst the court had expressed reservations about the value of Mbambo's evidence. Further, that nowhere in her statement made to the police did the complainant say that money was given to the appellant by her on any of the alleged three occasions. It was submitted that the court *a quo* ignored the contents of the complainant's statement and overemphasized her testimony in court.

[5] Insofar as sentence is concerned it was rather cryptically submitted that it was too harsh and induced a sense of shock.

[6] In the notice of appeal the appellant says:

'AD CONVICTION:

1. That the guilt of the Appellant was not proved beyond a reasonable doubt;
2. That there were improbabilities and/or contradictions in the case of the State;
3. That the trial court erred in rejecting the evidence of the Appellant;
4. That the trial court failed to properly evaluate the evidence of the State witnesses.

AD SENTENCE

1. That the trial court did not properly consider the cumulative effect of the factors in mitigation of sentence.'

[7] I should note two points before dealing with the merits of the appeal. First, that the appellant was admitted to bail, on conditions, on 24 April 2006 pending the appeal. Second, that on 15 February 2013 the appeal was postponed *sine die* for the trial record to be reconstructed. The entire evidence of the complainant and of several state witnesses was then reconstructed. Ms Van Wyk, who appears for the appellant on instructions of the Legal Aid Board in the appeal informed the court in her heads of argument that although the record has still not been properly re-constructed as it is rather difficult to read. Further, that it was her instructions from the appellant that the appeal may be finalised on the record as it now is. The State holds a similar view. We have perused the record and are satisfied that the appeal may indeed be finalised on the record as it is now.

[8] The key witness for the State was the complainant, Mrs Mkhwanazi whose testimony in essence was as follows. She had been arrested in 2002, in Port Nolloth (in the Norther Cape) for being in possession of R65 000.00 in fake currency. She was released on bail whereafter she returned to her residence in Orange Farm in Gauteng. She had to appear in court in Port Nolloth on 14 January 2003. Mrs Mkhwanazi did not have transport to return to Port Nolloth hence she went to the Police Station in Orange Farm to seek assistance. She met the appellant at the Police Station. He informed Mrs Mkhwanazi that he will be able¹ to assist her if she pays him R1 000. The appellant informed Mrs Mkhwanazi that he will report to Port Nolloth that he was unable to trace her. She paid the appellant R1 000. The appellant returned to Mrs Mkhwanazi during May 2003. She was informed that the appellant had received a warrant for her arrest. The appellant was in the company of other police officers. She was requested to make a further payment. Mrs Mkhwanazi was transported back home by the appellant and his colleague where her husband gave R500 and another R500 was borrowed from her neighbour Lettie. The money was handed over to that colleague. She was informed that the money was not enough as they (the police officers) were many. She was given three cell phone numbers written on a piece of paper on which the appellant had written his name as 'Sihle'. At some stage she phoned one of the numbers and informed the person that she had a

further R700. The appellant and two other police officers came to collect the R700. Mrs Mkhwanazi was informed that the money was still not enough. A further R2 000 was demanded. She sought advice from her brother who informed her to approach the police's Anti-Corruption Unit. Sergeant Kramer of the Anti-Corruption Unit assisted Mrs Mkhwanazi. Kramer arranged for a police trap. Mrs Mkhwanazi was handed R2 000 as well as a cell phone from which she made arrangements with the appellant to pay him the outstanding amount of R2 000. The appellant came to Mrs Mkhwanazi's house and collected the R2 000. He was wearing plain clothes and was in the company of another police officer who was wearing a uniform.

[9] Eleven witnesses testified for the State. The appellant initially closed his case without testifying nor did he call any witnesses. The trial court then called two witnesses whereafter the appellant was allowed to re-open his case. He then testified in his defence.

[10] The learned magistrate, in a detailed judgment, carefully analysed the evidence of all the witnesses including that of the appellant. He made certain credibility findings about some of the State witnesses and found certain discrepancies and contradictions in their evidence. The court *a quo* made a number of adverse findings regarding the evidence of the appellant as well.

[11] Appellant complains that the court misdirected itself in accepting the evidence of the complainant who was a single witness. The submission in the heads of argument, as I understand it is that she was not to be believed because in the Port Nolloth case against her, she had given a false address to the police. The submission cannot be sustained. If she did give a false address in that case, it does not mean that in the present case she is to be disbelieved. At most it can be said that her evidence must be considered with caution which the trial court was alive to as may be summarised from its careful analysis of the evidence of the complainant.

[12] Insofar as the furnishing of a false address is concerned the complainant explained that she was not asked for her address but that the

police obtained it from her passport which she had with her at the time. The address in the passport was that of her uncle.

[13] The complainant was subjected to lengthy cross-examination by able counsel for the appellant. There are, in my view, no material contradictions or inconsistencies in her evidence. She stood steadfast on the essential aspects of her evidence against the appellant.

[14] It appears that a substantial part of the criticism of the evidence of the witness for the State relates to the trap set up by the Anti-Corruption Unit. The learned magistrate was aware of and was critical of the manner in which the trap was handled, particularly with regard to the R2 000 used in the trap in that a proper search of the complainant and her belongings and of her brother was not done before the trap was put into operation. Neither was the complainant searched afterwards to determine whether she did not retain the money herself and had in fact given it to the appellant. In any event, the shortcomings in the conduct of the trap do not negate the compelling evidence that the appellant sought a bribe from the complainant which resulted in her giving him money on three separate occasions prior to the setting up of the trap.

[15] The correct approach to the evaluation of evidence in a criminal trial was enunciated by the Supreme Court of Appeal as follows in *S v Chabalala* 2003(1) SACR 134 (SCA) at paragraph 15:

'The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material

witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence....'

This salutary approach was also adopted in *S v Trainor 2003(1) SACR 35 (SCA)* para 9.

[16] The Supreme Court of Appeal set out the correct approach regarding proof, as follows in *S v Phallo & Others 1999(2) SACR 558 (SCA at 562 para 10)*:

'On the basis of this evidence it was argued that the State had, at best, proved its case on a balance of probabilities but not beyond reasonable doubt. Where does one draw a line between proof beyond reasonable doubt and proof on a balance of probabilities? In our law, the classic decision is that of Malan JA in *R v Mlambo 1957 (4) SA 727 (A)*. The learned Judge deals, at 737F-H, with an argument (popular at the Bar then) that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed, is consistent with his innocence. Malan JA rejected this approach, preferring to adhere to the approach which 'at one time found almost universal favour and which has served the purpose so successfully for generations' (at 738A). This approach was then formulated by the learned Judge as follows (at 738A - C):

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.'

[17] An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.'

Vide: S v Sauls and Others 1981 (3) SA 172 (A) at 182G - H;
 S v Rama 1966 (2) SA 395 (A) at 401;
 S v Ntsele 1998 (2) SACR 178 (SCA) at 182b-h.)

[18] As far as the credibility finding that is made in respect of a single witness, the Supreme Court of Appeal held as follows in *S v Pistorius 2014(2) SACR 315 (SCA) para 30*:

'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another 1948 (2) SA 677 (A)* at 706; *S v Kebana [2010] 1 All SA 310 (SCA) para 12*.' As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.'

The trial court had the advantage of observing the witnesses as they testified which the appeal court does not have.

[19] The following quote is at length from the English headnote in *S v Mafaladiso en Andere 2003(1) SACR 583 (HHA)*:

'The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective

recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.' (At 593e - 594h.)

[20] The trial court found, in my view correctly so, that there was no reason for the State witnesses to collude and falsely implicate the appellant. In assessing the complaint's credibility (and that of the appellant) the court *a quo* took into account that the incident happened a long time before the trial and that the contradictions per se did not mean the complainant was being dishonest.

[21] There is sufficient evidence that on the date of the trap the appellant was at a funeral and later at the complainant's house where the trap was set up and a meeting was arranged between the complainant and the appellant. Thus the appellant corroborates the State's case. According to Kramer's evidence the complainant paid her a visit on the day of the trap. The complainant contacted someone in her presence and the complainant confirmed in her evidence that she went to Kramer and that she made a phone call to the appellant and that she made arrangements with the appellant to meet on that day at 13h00 as he was at a funeral.

[22] The complainant's brother Rosen's evidence on this point is that he was present when the phone call was made and that he knows about the fact that the person to whom complainant was speaking, mentioned a funeral.

[23] According to Superintendent Mokonyane the appellant was off duty on 29 May 2003. He was on rest days and they all attended a funeral that day including the appellant.

[24] According to Sergeant Kheswa, who was also on duty that day, he saw the appellant at the police station and they all attended a funeral and saw the appellant there.

[25] Insofar as the submission by appellant's counsel, during the application for leave to appeal is concerned, that the complainant had contradicted her written statement when testifying in court, it must be remembered that contradictions *per se* does not result in a conclusion that the evidence of the witness is to be rejected. In *S v Mahlangu and Another (CC70/2010) [2012] ZAGPJHC 114 (22 May 2012)* Horn J (with whom I respectfully agree) restated the principles relating to written statements by witnesses. The learned Judge held –

'In order to discredit a witness who made a previously inconsistent statement it must be shown that the deviation was material (*S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SE) at 437e; *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593e). Deviations which are

not material will not discredit the witness. Police statements and statements obtained from witnesses by the police, are notoriously lacking in detail, are inaccurate and often incomplete. A witness statement is in the main required to enable the prosecuting authority to determine whether a prosecution is called for, on what charge and to consider which witnesses to call on which issues. It would be absurd to expect a witness to say exactly in his statement what he will eventually say in court. There will have to be indications other than a mere lack of detail in the witness' statement to conclude that what the witness said in court was unsatisfactory or untruthful.

There is no law that compels a witness what to say and what not to say in his statement. The witness tells it as he sees it. He is not expected to relate in his statement what he saw in the minutest detail. Should a witness through a lapse of memory or any other valid reason omit some detail which later could become important, he should not as a matter of course be branded as being untruthful. Moreover the mere fact that a witness deviates in a material respect from what he said in his statement does not necessarily render all his evidence defective. The court will in the final analysis consider the evidence as a whole in order to determine in what respects the witness' evidence may be accepted and in what respects it should be rejected. Counsel who act on behalf of accused persons, are wont to pounce on any differences, no matter how insignificant, which may arise between an extra curial statement of a witness and the witness' testimony in court. (See *S v Govender and Others* 2006 (1) SACR 322 (E) from 326c, where Nepgen J gives an insightful discourse on this topic.)

The test is: were the differences material, always bearing in mind that a witness' testimony in court will almost without exception be more detailed than what the witness said in his written statement.'

[26] I turn then to the issue of the sentence imposed by the trial court.

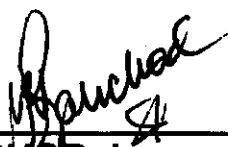
[27] The following factors were pleaded before the trial court in mitigation of sentence by the legal representative of the appellant:

- The State proved no previous convictions against the appellant;
- At the time of the imposition of sentence the appellant was 37 years old;
- He is married;
- He has 3 children with his wife;
- He has 4 other children outside his marriage;
- His eldest child was at the time 13, and the youngest 2 years;
- The appellant has been unemployed from the time of his suspension i.e., since June/July 2003;
- The house of the appellant had been repossessed;
- At the time the appellant was residing with his mother;
- His wife went to stay at her parental home;
- The children of the appellant, except for the youngest, resided with the appellant.

[28] In these circumstances it cannot be said that the sentence of five years' imprisonment was vitiated by any irregularity, or that it was excessive. The court took into account the prevalence of corruption within the police force. And I might add, corruption has become endemic in our society.

[29] I would make the following order:

1. The appeal in respect of both conviction and sentence is dismissed.
2. The appellant's bail is revoked and he is ordered to present himself to the Registrar of the High Court, Gauteng Division, Pretoria within 3 (three) days of the making of this order to commence serving his sentence.



RANCHOD J
JUDGE OF THE HIGH COURT

I AGREE



**NOBANDA AJ
ACTING JUDGE OF THE HIGH COURT**

Appearances:

Counsel on behalf of Appellant	: Adv. L.A van Wyk
Instructed by	: Legal Aid SA
Counsel on behalf of Respondent	: Adv. L Williams
Instructed by	: Director of Public Prosecutions, Pretoria
Date heard	: 5 September 2016
Date delivered	: 14 February 2017 2016