IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case number: A40/2024

In the matter between:

MOHLOKI MOFOKENG Appellant

and

THE STATE Respondent

Coram: Loubser J *et* Opperman J

Heard: 14 October 2024

Delivered: 7 November 2024. This judgment was handed down in open court and released to SAFLII. The date and time for hand-down is deemed to be 09h30 on 7 November 2024.

Summary: Appeal against the correctness of convictions in terms of the provisions of s 3 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 and reckless driving in terms of s 63 of the National Road Traffic Act 93 of 1996

ORDER

1. The convictions on counts 1 to 5 are confirmed.
2. The appeal is dismissed.

JUDGMENT

Loubser J *et* Opperman J

[1] This is an appeal against the conviction of the appellant in the Bloemfontein

Regional Court on four counts of corruption and one count of reckless driving. The appeal was heard with leave to appeal granted by two judges of this Division on petition. The conviction on the five counts is challenged on the grounds that the respondent had failed to prove its case beyond reasonable doubt, and that the version of the appellant had been reasonably and possibly true.

[2] It needs mentioning that the appellant was charged in the court *a quo* on four counts of corruption together with a co-accused, and they were both convicted on those counts. Both were sentenced to an effective term of four years' imprisonment, which sentence was later converted into a sentence of correctional supervision.[1] At the date of the hearing of this appeal, both had already served the full term of their sentences. On the fifth count, only the appellant was convicted of reckless driving and sentenced to twelve months imprisonment that was wholly suspended for five years.

[3] It needs further mentioning that, at the time of their conviction, the appellant and his co-accused were members of the South African Police Services, where they served as constables.

[4] In the first four counts, namely the counts of corruption, they were charged with contravening s 3(*a*)(i)(*aa*) and/or 3(*a*)(ii)(*bb*) and/or 3(*a*)(ii)(*cc*) read with s 1, 2, 24, 25 and 26(1)(*a*)(ii) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the Act). In count 1 it was alleged that on 17 June 2010 and at or near Ladybrand the appellant and his co-accused wrongfully and directly or indirectly demanded and/or solicited and/or asked for gratification in an unknown sum of money of more than R100.00 from Francois Petrus Fourie, for them to facilitate or to assist the said Mr. Fourie not to be detained in the police cells before his appearance in the Magistrate's Court of Bloemfontein.

[5] In count 2 it is alleged in the same vein that on 1 June 2010 and at or near

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[1] In addition to the correctional supervision sentence a further seven years imprisonment was imposed and suspended in its totality for a period of five years on condition that the appellant and his co-accused are not again convicted of the contravention of s 3 of the Act and which was committed within the period of suspension.

Bainsvlei, Bloemfontein, the appellant and his co-accused accepted six pieces of biltong from Daniel Wilhelmus Roodt for them not to arrest and charge the said Mr. Roodt for making a false statement. In count 3 it was alleged that they accepted gratification in the sum of R2 000.00 on 2 June 2010 at or near Bainsvlei from the same Mr. Roodt for not arresting and charging him for making a false statement. In count 4 they were charged with accepting R2 000.00 on 2 July 2010 from the same Mr. Roodt at or near Bainsvlei, Bloemfontein for not arresting and charging the said Mr. Roodt for making a false statement.

[6] In count 5 it was alleged that the appellant unlawfully and recklessly or negligently drove a Nissan motor vehicle with registration number DJL […] at or near Bainsvlei, Bloemfontein, on 2 July 2010.

[7] At the end of the case, the trial magistrate evaluated the evidence of the complainants extensively in his judgement on the merits of the matter. He concluded that the complainant, Fourie, had impressed him with the manner in which he presented his evidence, while the complainant, Roodt, had made an excellent impression on the court. The magistrate then accepted the evidence of the complainants and their supporting witnesses as the truth although the complainants were single witnesses to a large extent as far as the events were concerned.

[8] In this respect, this court is mindful of the fact that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are visited by irregularity, or unless examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court had the advantage of seeing and hearing the witnesses and is, therefore, in the best position to determine where the truth lies.[2]

[9] Before we turn to the evidence presented on the different counts, we deem it necessary to make a few observations in respect of the Act in terms of which the

[2] *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 654E-F.

appellant and his co-accused were charged. It has been said that the Act 'unbundles' the crime of corruption by creating a general, broad and all-encompassing offence of corruption and then identifying and criminalising various corrupt activities. Thus, corruption can be described as an unbundled crime in that it is not embodied in a single definition. Rather, a general description of corruption is complemented by a wide range of specific forms of corruption. Of vital importance to the adjudication of this appeal is that the general offence of corruption in s 3 of the Act essentially corresponds to bribery. Section 3 identifies the agreement to corrupt as the offence. Actual payment or giving or receiving of gratification are not elements of the offence but can constitute proof that corruption had indeed taken place.[3]

[10] As mentioned earlier, the appeal is founded on the contention that the respondent has not succeeded in proving the guilt of the appellant beyond a reasonable doubt, and that the version of the appellant was reasonably and possibly true. We therefore need to evaluate the evidence as it appears from the transcribed record of the proceedings, and we do so count by count.

[11] <u>Count 1:</u> The complainant, Mr. Fourie, testified that he was held by the authorities at the Maseru border post on 17 June 2010 because of a warrant for his arrest that was issued in another case. The appellant and his co-accused then arrived to take him to Bloemfontein. They first took him to his place of residence in nearby Ladybrand so that he could collect his jacket. While at Ladybrand, they stopped at Ladybrand where he bought three packets of KFC and three Cokes, he told the court. On their way back to Bloemfontein, the appellant and his co-accused asked him whether he wanted to sleep in the cells that night, and he said no. They then said that they are prepared to help him, but then he must also help them. He realized that they were talking about bribe money, and he then offered them R100.00, which was the only money he had on his person. Their reaction was that he should speak like a man and not like a woman. Upon their arrival at Bloemfontein, they took his fingerprints and warned him to appear in court the next day, he testified. His brother also arrived at the police station, and he told his brother that they were talking about bribe money. His brother told him that he had no money at that point in time and that they should discuss the matter the following day at the court.

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[3] Kruger A, *Organised Crime and Proceeds of Crime Law in South Africa,* 3 ed, para 2.13.2 at 45.

[12] The appellant and his co-accused vehemently denied in the court *a quo* that there was any talk about bribe money, and they specifically denied that Mr. Fourie had bought them KFC and Cokes at Ladybrand. He only bought some for himself, they said. They also relied heavily on Mr. Fourie's evidence that, on their way back to Bloemfontein, they had advised him to contact his attorney, which was done with the assistance of his father-in-law. By doing so, the appellant and his co-accused hinted that the release of Mr. Fourie that night was because of the efforts of his attorney, and not because of any bribery negotiations between themselves and Mr. Fourie.

[13] Mr. Fourie further testified that he and his brother met the appellant and his co-accused again at the court the following day. There they called his brother and talked to him. Thereafter the appellant and his co-accused drove behind them to an auto teller machine at the Stadium Café, where his brother withdrew some cash and gave him an amount of R600.00. Before he could hand the money to the appellant and his co-accused, they suddenly disappeared.

[14] The brother of Mr. Fourie, Mr. Dawid Hermanus Fourie, was also called to testify, and he confirmed the version of Mr. Fourie in relation to the withdrawal of money at the Stadium Café. He testified that he had a conversation with the appellant and his co-accused at the court, and the co-accused asked him where the money was. No specific amount was mentioned. Thereafter he and Mr. Fourie went to Stadium Café where he withdrew R700.00 and gave R600.00 to Mr. Fourie. Meanwhile the appellant and his co-accused had stopped a distance away in a green Golf vehicle and waited. When Mr. Fourie emerged with the R600.00 to hand it over to them, they suddenly sped away in the vehicle. The witness attributed this to the fact that these events happened during the soccer world cup and there were a lot of policemen around. He also confirmed that the appellant and his co-accused had to be paid to avoid the detention of his brother on the night that he was arrested.

[15] It speaks for itself that the complainant Fourie was not a single witness as far as the withdrawal of the money is concerned. As for the events that took place in the car on

the way back to Bloemfontein, he was indeed a single witness. In this respect, we find the following dictum by the Supreme Court of Appeal apposite in the present enquiry:

‘The question for determination is whether, in light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubt about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.’[4]

[16] Bearing this in mind, we are satisfied that the trial magistrate was correct in accepting the evidence of Mr. Fourie relating to what happened in the car on the road to Bloemfontein, although Mr. Fourie was a single witness here. His evidence in this respect was complimented by the evidence of what happened the following day at the auto teller, where his brother confirmed his evidence. The dispute that arose regarding the KFC and the fact that the R600.00 was never handed over to the appellant the following day, is of no consequence. It is clear that there was an ongoing attempt by the appellant and his co-accused to demand, solicit or ask for gratification from Mr. Fourie from the moment they were all in the car to the moment when they suddenly left the scene of Stadium Café the following day. That alone constituted the offence of corruption in contravention of s 3 of the Act. The conviction on count 1 therefore stands to be confirmed.

[17] Count 2: The complainant in this count is Mr. Daniel Wilhelmus Roodt. He testified that he had made two conflicting statements regarding the loss of his firearm. In the one he alleged that it was stolen from his vehicle which was parked at his house. In the other, he alleged that the vehicle was parked at Senwes when the theft took place.

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[4] Per Nugent JA in *Mbuli v The State* 2003 (1) SACR 97 (SCA) para 57.

[18] He further testified that, following this, the appellant and his co-accused came to visit him at his home on 1 June 2010. While he was sitting in the back of their car, they told him that he had told a lie as to where the firearm was stolen, and that he could get in trouble as a result. They asked him what he could offer. They also wanted to know about the sheep near the house. He told them that the sheep belonged to his father, and all he could offer was R1000.00 each as well as some biltong. He went back into the house where he fetched a few pieces of biltong, which he gave to the appellant and his co-accused. He testified that he offered the amount of R2 000.00 because they made him understand that they could help him with his trouble as far as his conflicting statements are concerned.

[19] Mr. Roodt further testified that they came back to his house the following day. They said that they came for the money, but he told them that he would have to make a loan in order to pay them. They also asked him whether he was a man or a woman. Furthermore, he told the court that during these talks, the appellant took his cellphone to see whether he was recording their conversation.

[20] Again, the appellant and his co-accused denied this evidence of Mr. Roodt in the court *a quo*. Although Mr. Roodt was a single witness as far as the negotiations between himself, the appellant and his co-accused were concerned, there was a measure of support for his evidence in the form of the testimony presented by his then-girlfriend, Ansomay Roodt. At the time of her testimony, she was already married to Mr. Roodt. She testified that on 1 June 2010, she saw two policemen arriving at the house of Mr. Roodt, and he went outside to speak with them in their car. He later came back into the house, took a few pieces of biltong out of the freezer and went back to the policemen, where he gave the biltong to them.

[21] The trial magistrate labelled both Mr. and Mrs. Roodt as good and reliable witnesses in his evaluation of their evidence. He accepted their evidence as the truth. As we have seen, this court is not at liberty to depart from the trial court's findings of fact and credibility, unless the record of evidence reveals that those findings are patently wrong. Since the record of evidence does not reveal anything of the sort, the magistrate's

observations must stand. The handing over of the biltong itself does not constitute the offence of corruption but serves as proof to a certain extent that corruption did take place. The corruption took place when the appellant and his co-accused solicited or asked for gratification in order for them to help the complainant with his trouble relating to the conflicting statements that he had made. In the premises, the conviction on this count also stands to be confirmed.

[22] Count 3: We have already mentioned that on 2 June 2010, that is the day following the handing over of the biltong, the appellant and his co-accused returned to the house of Mr. Roodt. They told him they came for the money, and he said that he still had to get the money. Mr. Roodt testified that he borrowed R2 000.00 from his brother in order to pay them. The arrangement between himself, the appellant and his co-accused was that he would meet them at 17h00 that afternoon at the Arcadia Cash Store. The appellant and his co-accused arrived half an hour late at the store, and they instructed Mr. Roodt to get into the back of their vehicle, where he handed the money to the appellant, who counted it. After saying that they would talk again, the appellant and his co-accused departed. Mr. Roodt told the court that he received the money from his brother via his girlfriend at the time. He had told his girlfriend why he needed the money.

[23] As was the case in respect of count 2, Ansomay Roodt again gave corroborating evidence in respect of count 3. She testified that at the beginning of June 2010, Mr. Roodt phoned her to request that she fetch an amount of R2 000.00 from his brother and bring it to him. He mentioned to her that the money was for the issue with his revolver. She testified that she fetched the money from the brother and took it to Mr. Roodt. She phoned him later and he said that he had given the money to the police officials.

[24] We have already pointed out that we cannot depart from the trial court’s findings of fact and credibility as far as the evidence of Mr. and Mrs. Roodt is concerned. We, therefore, must conclude that the appellant and his co-accused contravened the provisions of s 3 of the Act on 2 June 2010 when they came to the house of Mr. Roodt where they demanded or asked for the payment of the R2 000.00. Upon such payment, they would take steps to help Mr. Roodt with the problem of his statements. These were

the terms of the agreement between the three of them. The actual handing over of the R2 000.00 served as proof of the commission of the crime of corruption by the appellant and his co-accused. Their conviction on this count must also stand.

[25] Count 4: This charge pertains to the incident that occurred on 2 July 2010. Here the appellant corruptly, and again in contravention of the applicable subsections in s 3 of the Act, as discussed above, and according to the charge sheet, elicited R2 000.00 from Daniel Wilhelmis Roodt. The prelude to the offence is the confession of Mr. Roodt to one Warrant Officer Fredericks. Mr. Roodt declared to him that he made a false statement to the police about a firearm that was licensed in his name. Mr. Roodt complained that the accused in the case *a quo* demanded money from him to have the case against him disappear, as he put it.

[26] Warrant Officer Fredericks, with 33 years' experience in the South African Police Service at that stage, investigated the allegation and found that the co-accused to the appellant was the investigating officer in the case against Mr. Roodt. Warrant Officer Fredericks, now a seasoned member of the Organised Crime Unit in the South African Police Service, immediately obtained a so-called s 252A – authorisation. R2 000.00 was obtained from the police and the notes recorded for later identification. Mr. Roodt proceeded to make the appointment and arrangements for the monies, already claimed by the appellant and his co-accused, to be handed over. The two accused were always in control of the situation. They indicated the amount, the time and place of the handing over of the monies. They, at some stage, changed the venue and the witnesses had to adapt to this.

[27] The evidence of Warrant Officer Fredericks explained in detail how the incident unfolded. His evidence was supported by, among others, Warrant Officers Boukes and Kruger. The witnesses gave a detailed depiction of the events; details so specific that the court had to accept the evidence. The bare denial of the accused as to the event and the version of them being innocent bystanders were correctly rejected by the court. The witnesses corroborated each other with veracity. They testified about their observations in the moment they experienced and any allegation of a conspiracy to falsely implicate

the accused cannot be accepted.

[28] Succinctly, according to the witnesses for the State that were involved in the operation, it was observed how Mr. Roodt alighted from his vehicle and got into the vehicle with the two suspects. Mr. Roodt then exited the vehicle and declared that the monies were handed over. The police officials involved were ordered to move towards the suspect vehicle. The suspects then started to drive away and they accelerated to a speed that caused the police vehicles to engage their blue lights. It was testified that the appellant and his co-accused clearly saw and realized that they were being pursuit by the police. A high-speed chase ensued. From what was observed by the witnesses, something was thrown out of the vehicle and since the money was nowhere to be found when the two accused were apprehended, the inference was drawn that it was the said money. The evidence adduced showed beyond any doubt that the crime of corruption as per count 4 was committed.

[29] Count 5: The drama did not end there; the appellant was the driver of the vehicle that sped away after the transaction was concluded with the handing over of the money and he was convicted of contravening s 63(1)[5] of the National Road Traffic Act 93 of 1996. The charge against the appellant is that he unlawfully and recklessly or negligently drove a motor vehicle during the incident. It was never denied that the appellant was the driver of the vehicle. The evidence of the witnesses for the State is that as they endeavored to bring the vehicle driven by the appellant to a stop, the appellant would move to the right to cut them off. At an intersection, the appellant ran a stop sign at a high speed. The chase ended on a gravel road that made the circumstances even more perilous and the conduct of the appellant reckless. The police managed to bring the vehicle of the accused to a stop, and they were arrested. One witness testified that the roads were not conducive to this kind of driving and that it posed a danger to everybody

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[5] Section 63.
'Reckless or negligent driving. —
(1) No person shall drive a vehicle on a public road recklessly or negligently.
(2) Without restricting the ordinary meaning of the word "recklessly" any person who drives a vehicle in willful or wanton disregard for the safety of persons or property shall be deemed to drive that vehicle recklessly.
(3) In considering whether subsection (1) has been contravened, the court shall have regard to all the circumstances of the case, including, but without derogating from the generality of subsection (1) or (2), the nature, condition and use of the public road upon which the contravention is alleged to have been committed, the amount of traffic which at the relevant time was or which could reasonably have been expected to be upon that road, and the speed at and manner in which the vehicle was driven.'

on the roads. The same witness testified how she gestured to the accused to stop and how they saw them and realized the fact that they were being pursued. There is no doubt that the appellant drove the vehicle with willful and wanton disregard for the safety of persons or property and thus did so recklessly.

[30] A peripheral but real issue is the matter of the s 252A – operation. The court *a quo* did consider the legality of the trap. He regarded it with caution and with an eye on the constitutionality thereof. Important is the fact that the appellant and his colleague were the initiators of the incident; not the police or Mr. Roodt. The police were a mere reaction to the conduct of the perpetrators. The spelling error in the authority is of no consequence. Kruger[6] surmised the law aptly when he concluded the following with reference to case law and the development of s 252A of the Criminal Procedure Act 51 of 1977 in the post constitutional era:

'In *S v Makhanya and Another* 2002 (3) SA 201 (N) McCall J investigated the facts with reference to section 252A(3)(b) and found that the trap did not make the trial unfair (at 207D–209B). Section 252A does not create a defence but rather an evidential rule that allows for the exclusion of evidence in the discretion of the trial court. The evidence will be excluded when the police have gone beyond merely providing the accused with an opportunity to commit an offence and have induced the accused to commit offences they would otherwise not have committed (*S v Thinta and Another* 2006 (1) SACR 4 (EC) par [26]).'

[31] The trial court was correct to convict the appellant as it did, and the appeal must fail. In the result, the following order is made:

1. The convictions on counts 1 to 5 are confirmed.

2. The appeal is dismissed.

P. J. Loubser, J

[6] Kruger A, *Hiemstra's Criminal Procedure*, Chapter 24 Evidence, 252A 'Authority to make use of traps and undercover operations and admissibility of evidence so obtained', at 24-116 to 24-121. Last updated March 2024 - SI 17. LexisNexis.

M. Opperman, J

<u>Appearances</u>

On behalf of the appellant:	Adv. T. Diba BLOEMFONTEIN
On behalf of the respondent:	Adv. D. Pretorius
Instructed by:	The Office of the Director of Public Prosecutions: Free State Bloemfontein