IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

Case no: SS 25/2009
JPV: 0157/2008

In the matter of:

THE STATE

and

JACOB SELLO SELEBI

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

3·9·2010
DATE SIGNATURE

Judgment on Sentence

Joffe J

1. The principles applicable in determining a fair, balanced and appropriate sentence have long been laid down. In S v Zinn 1969 (2) SA 537 (A) at 540 G it was held that "*What has to be considered is the triad consisting of the crime, the offender and the interests of society.*" In determining an appropriate sentence regard must be had inter alia to the main purposes of punishment. These purposes were described in R v Swanepoel 1945 AD 444 at 455 as deterrent, preventative, reformative and retributive. In S v Rabie 1975 (4) SA 855 (A) at 862 A-B reference was made to Gordon, Criminal Law of Scotland, (1967) at 50 where it was stated that "*The*

retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation... The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment".

2. In S v Khumalo and Others 1984 (3) SA 327 AD at 330 E it was held, with reference to R v Swanepoel supra that deterrence has been described as the "essential", "all important", "paramount" and "universally admitted" object of punishment. The Appellate Division, as the Supreme Court of Appeal was then known, proceeded to state in the Khumalo judgment, that the other purposes of punishment are accessory to deterrence. In this regard reference was made to R v Karg 1961 (1) SA 231 at 236 A-B where it was held while the deterrent effect of punishment has remained as important as ever, the retributive effect, whilst by no means absent from the modern approach to sentencing, has tended to yield ground to aspects of prevention and correction. It was however pointed out in the Karg judgment, as far as the retributive effect of punishment is concerned, that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.

3. In S v Skenjana 1985 (3) SA 51 (AD) at 54 I-55D, Nicholas JA stated that his view was that the public interest is not necessarily best served by the

imposition of very long periods of imprisonment, He added that "*So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of a sentence of 20 years over one of say 15 years may not be significant.*"

4. When determining an appropriate sentence there is, as was pointed out in S v Rabie supra at 861 B, a duty on the presiding judicial officer to approach the determination with a mindset of mercy or compassion or plain humanity. This *"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".* This is certainly not a new concept. Voet, vol.1, 57 stated in a note (Gane's translation, vol. 2. 72) "*It is true, as Cicero says in his work on Duties , Bk. 1, Ch. 25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is also true that it would be desirable that they who hold the office of Judges*

should be like the laws, which approach punishment not in a spirit of anger but in one of equity." As was stated in S v Rabie supra at 862 D, "*To sum up, with particular reference to the concept of mercy –(i) It is a balanced and humane state of thought. (ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence. (iii) It has nothing in common with maudlin sympathy for the accused. (iv) It recognizes that fair punishment may sometimes have to be robust. (v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger. (vi) The measure of the scope of mercy depends upon the circumstances of each case".*

5. The provisions of s 51(2)(a) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 have to be taken into account as well in the determination of an appropriate sentence. These provisions provide for the imposition of a minimum sentence of 15 years imprisonment in the event of a law enforcement officer being convicted of corruption involving amounts of more than R10000. The accused has been so convicted. The amount involved appears from the judgment that was delivered at the conclusion of the trial. It exceeds the sum of R10000 substantially. S 51 (3)(a) of the aforesaid act provides that if the court is satisfied that substantial and compelling circumstances which justify the imposition of a lesser sentence than the prescribed sentence, it shall enter those

circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

6. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in S v Malgas 2001 (2) SA 1222 SCA 1235 paragraph 25 as follows: *"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:*

A. 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).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify

a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."

7. In S v Price 2003 (2) SACR 551 (SCA) at 561 paragraph 30 the court pointed out that subsequent to the commencement of act 105 of 1997 it was no longer "*business as usual*" when sentence was imposed for the offences referred to in the legislation. It was noted that the legislature had provided a new "*benchmark*" against which the sentence to be imposed must be assessed. See also Director of Public Prosecutions, Transvaal v Venter 2009 (1) SACR 165 (SCA).

8. Counsel for the accused argued that there are substantial and compelling circumstances present which justify the imposition of a sentence of less than the prescribed minimum sentence. Counsel for the state argued that there are no such circumstances present and that an appropriate sentence, irrespective of the provisions of act 105 of 1997, would be in excess of the minimum sentence provided by that act. In regard to this latter submission it should be recalled that in S v Sparks and Another 1972 (3) SA 396 (AD) at 410G it was held that wrongdoers *"must not be visited with punishments to the point of being broken"*.

9. Before applying these principles in the determination of an appropriate sentence it is warranted and necessary that the accused's performance in the witness box be addressed. It is emphasized that these remarks are made at this stage without regard to the accused's conviction.

10. Mr. Selebi from 2000 until 2008 you occupied the position of National Commissioner of the South African Police Service. You led the service that is constitutionally enjoined to secure and preserve law and order in our country, to fight crime in all its forms and to protect all who find themselves within the borders of our country. This is indeed a high and illustrious office. It is apparent from your address on 13 January 2000 at the handing over of command of the South African Police Service to you,

that you were aware of the high honor that had been bestowed on you. On that occasion you are reported to have said that it was indeed an honor for you to have received the command of the South African Police Service "*of all people of South Africa, for all people in South Africa*". Those under your command looked up to you with respect. They looked to you for guidance and direction. The citizens of this country likewise looked up to you in your exalted office. They sought leadership from you in the fight against the scourge of crime which the people of South Africa were experiencing.

11. It is in this context and the esteem in which the office that you occupied is held that reference must be made to your performance in the witness box during the trial. No point would be served in repeating that which has already been said in the judgment that was delivered at the conclusion of the trial in regard to your flagrant mendacity. Mr. Selebi you were an embarrassment in the witness box. Firstly, you were an embarrassment to the office you occupied. It is inconceivable that the person who occupied the office of National Commissioner of Police could have been such a stranger to the truth. Secondly, you must have been an embarrassment to those who appointed you. There can be no doubt that had they known the extent that you were prepared to depart from the truth when you thought it was necessary to do so, they would not have been appointed you to that office. Thirdly, you must have been an embarrassment to the members of the South African Police Service who you led. It is not possible to measure

the level of embarrassment of police men and women who are in the front line of the fight against crime, who daily put their lives on the line for their fellow citizens and whose credibility and truthfulness is relied upon by their fellow countrymen, when confronted by the reality that their former National Commissioner jettisons the truth when he thinks it will advance his case. These police men and women work in harsh conditions. They do so for the good of their fellow citizens. They deserve more than to be embarrassed in the manner already described. Fourthly, you must have been an embarrassment to all right thinking citizens of this country. They are entitled to expect so much more from the National Commissioner of Police. For a citizen of this country it is incomprehensible that the National Commissioner of Police would be found to be an unreliable witness. Whilst their may be debate and difference of opinion as to competence, effectiveness, suitability and ability, it cannot be doubted that all the people of South Africa would join in rejecting a National Commissioner of Police who is found to be an untruthful witness. Fifthly and finally Mr. Selebi, you were an embarrassment to this court. It is beyond understanding that, a person who occupied the high offices that you did, including that of National Commissioner of Police in which you must have come into contact with the courts, could have believed that any court would have accepted your mendacious and in some respects manufactured evidence. The fact that you must have thought that this

evidence would have been believed by this court is an embarrassment to this court in itself.

12. Reverting to the application of the principles set out above in the determination of an appropriate sentence reference must be had to the personal circumstances of the accused. In this regard it must be noted that the state proved two previous convictions against the accused. These convictions appear to be relics of our past. The most recent one occurred some 19 years ago. They are not relevant to the present proceedings and may be consigned to antiquity.

13. The accused lead the evidence of 6 witnesses in mitigation of sentence. They were Commissioner Alberts, a retired member of the South African Police Services, Dr Singh a former Deputy National Commissioner of Police, Mr Pahad, former Deputy Minister of Foreign Affairs, Ms Mphati, a former participant in the struggle for democracy in South Africa and a former South African ambassador to Switzerland, Mr Melatur, an employee of Interpol and Mr Ngidi, a former provincial commissioner of police. No point would be served in repeating their evidence. Counsel for the accused likewise did not refer to their evidence but made general submissions which are supported by their evidence. The state led no evidence in regard to sentence.

14. The personal circumstances relied upon by the accused's counsel were set out as follows in the accused's counsel's heads of argument: The accused is 60 years old and is married and the father of two adult sons. They are students and he maintains them. The accused was born in Johannesburg where he grew up and attended school. He matriculated at Orlando High School. The accused thereafter attended the University of the North where he qualified as a teacher. Whilst in exile, see infra, the accused received further training. The accused taught at a number of high schools in and out of South Africa. The last school at which he taught was the Solomon Mahlangu Freedom College in Tanzania. The accused became involved in politics at an early age as a member of the African National Congress and his first public position was that of secretary of what was then called the South African Students Organization. He was later elected as the head of the Youth League of the African National Congress. The accused was arrested by security police during 1975 due to his involvement in politics. He was detained under s 6 of the then Terrorism Act. He was subsequently arrested again in term of s 10 of the Terrorism Act and was detained without trial for a period of 10 months. Thereafter the accused went into exile where he remained until the release of former President Mandela where after he returned to South Africa. Whilst in exile, and during September 1985, the accused was elected as a member of the National Executive Committee of the African National Congress. He was the youngest person to be so elected. On the

accused's return to South Africa he was appointed as the head of the Repatriation Programme of the African National Congress to assist in the return of exiles to South Africa. In 1994 the accused became a Member of Parliament in the first democratically elected government in South Africa. During 1995 the accused was appointed as the ambassador of South Africa to the United Nations in Geneva. He served in this position for four years. Whilst serving as such the accused was elected by 100 countries as the president of a diplomatic conference which was responsible for a convention to ban the use, stockpiling, production and transfer of anti-personnel mines. The accused was the only South African to be elected as the Chairman of the United Nations Human Rights Commission. He was so appointed for the 85th session of that Commission in August 1998. The accused received an award in August 1998 from the United Nations for outstanding commitment to defending the victims of human rights violations. At the special request by the then Secretary General of the United Nations, Mr Kofi Annan, the accused set up the Comprehensive Test Ban Treaty Organisation which still exists today. The accused was appointed Director General of Foreign Affairs in 1999 and National Commissioner of the South African Police Service in 2008. The accused was also elected as the head of Interpol.

15. At present the accused is in receipt of a monthly pension of R20 000 per month. He is the owner of an unencumbered dwelling which is valued at

approximately R3m. He is the owner of a motor vehicle and has investments of some R400 000. According to the accused's counsel the state has funded his defense in the present proceedings and may seek to recover the amount so expended from the accused. If this occurs the accused will be destroyed financially.

16. In addition it was apparent from the evidence led on behalf of the accused in mitigation of sentence that the accused played a role in the struggle which led to the freedom presently enjoyed by all South Africans and that he is held in high esteem in respect of his work in that regard. Furthermore, it is apparent from that evidence that the accused is held in high esteem by at least 3 former high ranking police officers for the work that he did whilst he occupied the office of National Commissioner of Police.

17. As to the crime, the accused's counsel accepted that corruption is a serious offence and that it is a scourge that must be eradicated. They accepted that the fact that the corruption was committed by the accused whilst he occupied the office of National Commissioner of Police was an aggravating factor. All this is correct.

18. In S v Shaik & Others 2007 (1) SACR 247 (SCA) it was held at paragraph 223 that "*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 haltered. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe." In South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC) the Constitutional Court held at 891 paragraph 4 that "*Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution ... If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."* In S v Yengeni 2006 (1) SACR 405 (T) at 427 b to c it was stated that "*To state that corruption and other crimes of dishonesty on the part of elected office-bearers and officials in the public service have become one of the most serious threats to our country's well being, is to state the obvious. Their incidence may well be charecterised as a pandemic that needs to be recognized as such and requires concerted and drastic efforts to combat it."*

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.

21. The accused was fully aware of the deleterious effect of corruption. In the address made by him on assuming office which has already been referred to, he stated that the focus on the current policing priorities would be maintained. This focus included *"Corruption – so that we can fight crime with clean hands;" In* the same address the accused committed himself to the code of conduct of the South African Police Service. Part of that code of conduct is to *"Work actively towards preventing any form of corruption and to bring the perpetrators thereof to justice."*

22. Counsel for the accused argued that in considering the crime it should be held that a very charismatic and persuasive Agliotti had befriended the

accused and handed him the money over a period of time so as to develop a relationship that would benefit him. It would be no injustice to Agliotti to find that he sought the accused out. The evidence clearly indicates this. It would be no injustice to Agliotti to find that the money and gift were given to the accused to develop a relationship that would benefit Agliotti. This however does not redound to the accused's advantage. The accused was an adult man. He had occupied high office. He was the National Commissioner of Police. He could have said no to Agliotti, just as would be expected of a police constable earning a fraction of what the accused earned.

23. It was further argued by the accused's counsel that although it has been held that Agliotti received a quid pro quo from the accused there is no suggestion of any prejudice that the South African Police Service, the country or any other entity or individual suffered as a result of the corruption. Reference is then made to the attendance by the accused of dinners, the making available of the UK report, the making available of the e-mail and the Bill Smith statement and the NIE report, all as being indicative of the absence of prejudice to the county or any other entity or individual. There is simply no merit to this submission. The fact that Agliotti could make the accused available to Rautenbach through Tidmarsh, to Kebble and Stratton and to Nassif, as described in the judgment at the conclusion of the trial, already tarnished the image of the South African

Police Service. The making available of the documents referred to above tends to destroy confidence in the South African Police Service. The revelation of the events that were found to have occurred, as set out in the judgment at the conclusion of the trial, caused substantial damage to the image of South African and the South African Police Services.

24. As far as the interests of society are concerned the accused appears to be the most senior official to have ever been convicted of corruption in South Africa. The seriousness of the offence has already been alluded to. Officials must know that corruption is not worth the effort. They must know that when their dishonest conduct is revealed they will be dealt with in a manner befitting their disregard of what is expected of them.

25. Counsel for the accused argued that the accused has already suffered. It is pointed out that his fall from high office to where he now finds himself is probably the greatest fall from grace in the history of South Africa. Whether it is the greatest fall from grace or not is not certain. Suffice it to say that the accused has fallen from high office. Counsel for the accused further pointed out that the accused suffered a loss of income and had to resign from Interpol with a concomitant loss of income. It is submitted by counsel that if the accused is required to repay the state in respect of the costs of his defense, he will be financially ruined. In addition a confiscation order has been made against the accused in respect of the value received

by him from Agliotti. It is argued that the accused and his family have suffered embarrassment, social disgrace and humiliation.

26. This may all be correct. It must however be measured against the accused's conduct. At no stage during the trial did the accused display any indication of remorse. Nor did he do so during the sentencing proceedings. But unfortunately for the accused it goes further than an absence of remorse. The accused lied and fabricated evidence in an endeavour to escape the consequences of his conduct. By so doing he eroded much of the sympathy that one could have had with him.

27. Regard being had to the purposes of punishment and that already said in regard thereto, in view of the accused's age and background and the fact that it is the former National Commissioner of Police that is being sent to prison, the preventative and reformative purposes of punishment, would not require a long period of imprisonment. Subject to what has been set out above, the sentence would have to contain an element of retribution. The sentence however would have to be of such a nature that the deterrent purpose of punishment is adequately catered for. The sentence that will be imposed at the conclusion of this judgment takes account of all of the aforegoing.

28. I have considered all the evidence carefully and have concluded that there are no substantial and compelling circumstances which justify the imposition of a lesser sentence than the prescribed minimum. Counsel for the state urged that a sentence in excess of the minimum sentence be imposed. I disagree. Regard being had to all the aforegoing I am satisfied that a sentence of 15 years imprisonment is an appropriate sentence in the present matter. A sentence of 15 years imprisonment is not disproportionate to the crime and the needs of society, so that an injustice would be done by imposing that sentence.

29. In the result the accused is sentenced to 15 years' imprisonment.

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DELETE WHICHEVER IS NOT APPLICABLE

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(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

3.8.2010
DATE

SIGNATURE

Ruling in terms of S 204(2) of the Criminal Procedure Act 51 of 1977

Joffe J

1. The state requested the court to explain to four state witnesses the provisions of s 204 of the Criminal Procedure Act ("the act"). The witnesses were Mr N G Agliotti, Ms D Muller, Mr M Flint and Mr S Sanders. The nature of the explanation given to each witness appears from the record and exhibits XX to XX3.

2. S 204(2) of the act provides that *"If a witness ... in the opinion of the court, answers frankly and honestly all questions put to him –*

(a) such witness shall, ... be discharged from prosecution for the offenses so specified; and

(b) the court shall cause such discharge to be entered on the record of the proceedings in question."

3. I am informed by leading counsel for the state that all the aforementioned witnesses were aware that the issue of s 204 and its application to them was to be considered yesterday. I was advised by counsel for the state that they had consulted with all the affected witnesses and that they had been requested to make submissions on their behalf. Counsel for the state made such submissions and counsel for the accused also made submissions in regard hereto.

4. The effect of s 204 of the act was considered in Mohamed v Attorney-General of Natal and Others (2) 1998 (1) SACR 73. At 82 f – h it was held: *"In my view, questions of onus and degree of proof have nothing to do with the enquiry, with which the learned magistrate was concerned ... The words 'in the opinion of the court' emphasises the subjective nature of the investigation envisaged in s 204(2). That the presiding officer holds a bona fide opinion which is not the result of any gross irregularity in the proceedings culminating in the formation of that opinion, is all that is necessary for the purposes of s 204(2)."*

5. In the judgment at the conclusion of the trial various credibility findings were made. Reasons were given for those findings. In the

light of those findings I am of the opinion that Ms Muller and Mr Sanders answered frankly and honestly all questions put to them. For the reasons given in the judgment at the conclusion of the trial I am not of the opinion that Mr Agliotti and Mr Flint answered all questions put to them frankly and honestly.

6. In the result Ms Muller is discharged from prosecution for the offences specified in exhibit XX1 and Mr Sanders is discharged from prosecution for the offences specified in exhibit XX3. Such discharge shall be entered on the record of these proceedings. No such order is made in respect of Mr Agliotti and Mr Flint.