REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 70/2016

In the matter between:

SAMUEL SAMWELE LIKANDO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Likando v The State* (CA 70/2016) [2016] NAHCMD 379 (02 December 2016)

Coram: LIEBENBERG J and USIKU J

Heard: **04 November 2016**

Delivered: **02 December 2016**

Flynote: Criminal Procedure – Appeal – Appeal against conviction and sentence on one count in contravention of s 38(b) of the Anti-Corruption Act, 2003 – In order to avoid arrest appellant solicited N$500 from complainant – Trial Court convicted on single evidence – Complainant found credible – Witnesses not called by the State – Witnesses not crucial to the State case –

State not obligated to call a witness whose testimony crucial to the defence case – No adverse inference drawn from such failure Court – Sentence – Aggravating factors – Police officer in position of trust – Misusing power of arrest to extort money from public – Custodial sentences the norm in cases of corruption – No basis for court to interfere with conviction and sentence – Appeal against conviction and sentence dismissed.

Summary: The accused was convicted on one count in contravention of s 38(b) of the Anti-Corruption Act 2003. On appeal against conviction the court found that it could not interfere with the credibility findings of the trial court, unless the court is convinced on adequate grounds that the trial court was wrong in the conclusion it had reached. It was alleged that the trial court erred by not making an adverse inference from the State's failure to call a witness. Witness was however not present during commission of offence and where that witness would have been crucial to the defence case, there is no duty on the prosecution to call the witness. The onus to call witnesses thought to advance the defence case is on the accused. Lastly, it was found that it is settled principle that the court may convict on the evidence of a single competent witness when satisfied that the truth has been established. On appeal against sentence it was argued on behalf of appellant that the sentence imposed by the trial court was shocking and that a fine was the appropriate sentence. Imposing a fine in this case might have created a wrong impression in that custodial sentences seem to be the norm that have been imposed by our courts on police officers guilty of corruption. Thus the sentence does not induce a sense of shock and there is no basis the court of appeal can interfere with the sentence imposed.

ORDER

The appeal against conviction and sentence is dismissed.

JUDGMENT

LIEBENBERG J (USIKU J concurring):

[1] On 16 March 2016 the appellant was convicted on one count in contravention of s 38(b) of the Anti-Corruption Act, 2003 (Act 8 of 2003) and sentenced to four years' imprisonment of which two years' being suspended on condition of good conduct. The offence convicted of involves an act during which the appellant unlawfully solicited and accepted the amount of N$500 in cash from the complainant at a police check point (road block) situated east of Windhoek. Dissatisfied with the outcome of the trial the appellant lodged an appeal against both his conviction and sentence.

Conviction

[2] The appeal against conviction is based on six grounds articulated in the appellant's notice of appeal, of which grounds three and four can safely be ignored as it fails to satisfy the requirement of being clear and specific. Ground three is couched in general terms and relates to the trial court having had no reason to reject the appellant's testimony while count four, respectfully, is nonsensical.

[3] The remaining grounds for consideration are the following: The trial court failed to exercise the necessary caution when evaluating the single evidence of the complainant, a certain Mr Gallert; the court erred when finding that the complainant had no reason to falsely implicate the appellant; the court in its evaluation of the evidence failed to take into account that the incident was only reported one day after the incident; and lastly, that the court failed to treat evidence about the identification parade with circumspection.

[4] For reasons none other than convenience, I will dispose of the last ground first. It is common cause that the appellant was on duty on the

relevant day and time when the appellant passed through the police check point situated near Kapp's Farm. During an identification parade conducted about one-and-a-half year later, the complainant positively identified the appellant as the person who solicited money from him. Complainant at the time was informed that he had to be arrested and locked up for allegedly committing the offence of driving under the influence of alcohol. By then, the identity of the appellant had already been established from information independently obtained by the investigating officer and, although it cannot be considered as corroboration for the complainant's evidence, the positive identification of the appellant does tend to show consistency in his version as having dealt with the appellant as alleged. There is no evidence on record that the complainant could otherwise have known that the appellant was on duty at the relevant time, or that he was the only traffic officer on duty at the check point that day.

[5] What appellant particularly complained of is the alleged prejudice suffered by him due to the delay in holding the identification parade, in that it compromised the reliability and credibility of the evidence. There is no substance in the contention and if prejudice were to have been suffered by anyone as a result of the delay, it would have been the complainant and not the appellant.

[6] Appellant was also dissatisfied with the fact that he was not afforded the opportunity to confirm 'in writing' that his rights were properly explained to him at the identification parade. Evidence was presented that his rights were duly explained to him and that he did not require the presence of a legal practitioner at the time. It was however conceded by Mr *Haraseb*, counsel for the appellant that, being a police officer himself, the appellant was well-aware of his right to legal representation during the parade. He therefore could not have suffered any prejudice as a result of the alleged irregularity committed during the explanation of rights.

[7] Had it been so important to the appellant to have his legal representative present during the identification parade, he would have protested the

procedure adopted by the officer in charge and insisted on his right to have a legal practitioner present being respected. This he failed to do without explaining why he did not stand up or refuse to take part in any identification parade without his lawyer. The belated complaint clearly has the making of an afterthought and for the aforesaid reasons, has no prospects of success on appeal.

[8] In the appellant's next ground of appeal it is alleged that the trial court failed to exercise the necessary caution when evaluating the single evidence of the complainant. It is trite that the court may convict on the evidence of a single competent witness. In *S v HN* 2010 (2) NR 429 (HC) at 443E-F the court in this regard stated the following:

> 'Evidence of the single witness need not be satisfactory in every respect as it may safely be relied upon even where it has some imperfections, provided that the court can find at the end of the day that, even though there are some shortcomings in the evidence of the single witness, the court is satisfied that the truth has been told.'

[9] The magistrate in the present matter remarked in the judgment that he observed the complainant as being straightforward, honest and forthcoming in all material aspects of his evidence. In its evaluation of the complainant's evidence the trial court was cognizant of the self-incriminating statements made by the complainant in that he had consumed alcohol earlier that day before the incident, and that he indeed gave money to the appellant. Corroboration was also found in the fact that the police was able to confirm the appellant's presence at the police check point on the relevant day and him having been the only traffic officer on duty at the check point when the complainant passed through.

[10] Counsel for the appellant, on the contrary, argued that the court gave insufficient weight to the appellant's version that the evidence of the complainant was concocted and instigated by his then girlfriend, Jessica, who was with him in the vehicle at the relevant time. Further, that the court erred

by not drawing any adverse inference from the State's failure to call Jessica as a witness.

[11] It is settled law that a court of appeal would not likely interfere with credibility findings of a trial court. In this instance the presiding magistrate had the advantage of seeing, hearing and appraising all the witnesses who testified on both sides and was therefore best positioned to come to the conclusions it did when accepting the complainant's evidence over appellant's denial of the allegations levelled against him. The complainant in particular made a good impression on the court who, on material aspects of his evidence, was 'straightforward, honest and forthcoming'. The trial court considered the evidence given at the trial and came to the conclusion that appellant was not a credible witness, thereby rejecting his version. The powers of a court of appeal to interfere with factual and credibility findings of a trial court are limited and in the absence of any misdirection in the trial court's conclusions as to the acceptance or rejection of a witness' evidence, it is presumed to be correct. For the appellant to succeed on appeal, he must therefore convince the court of appeal on adequate grounds that the trial court was wrong in the conclusion it had reached.

[12] It was argued on the appellant's behalf that the trial court should have exercised the necessary caution in its evaluation of the complainant's evidence which, in the process, was over-emphasised at the expense of other compelling factors. Criticism *inter alia* levelled against the trial court for its finding that the complainant's admission of him having consumed alcohol before the incident, and the handing over of money to the appellant in exchange for his freedom, were statements made against his self-interest (self-incriminating) and thus indicative of his honesty.

[13] No argument was advanced as to how the magistrate misdirected himself when relying on these aspects of the complainant's evidence in his evaluation of the evidence and neither am I able to find any reason in law why that evidence had to be excluded. On the contrary, the conclusion reached by

the trial court in this regard has merit, because had the complainant concocted his evidence and made up a story that implicated the appellant as alleged by him, it would not have been necessary to incriminate himself in the process as he was at risk of being prosecuted. This is a fact the trial court was entitled to take into account in its assessment of the complainant's evidence and in the absence of any facts to the contrary, there is no merit in the contention. Appellant's assertion that the inference was drawn without proper consideration of the complainant's evidence in totality, is equally unmeritorious as the complainant did not contradict himself in any manner and was found to have been a credible witness. There is also nothing on record showing that the trial court should have come to a different conclusion as it did. Accordingly, there is no basis for the court of appeal to interfere.

[14] The next issue raised concerns the State's failure to call the witness Jessica Katjipuka who was in the complainant's company at the relevant time, plus the two police officers on duty at the check point. It is asserted that the trial court erred when it failed to draw a negative inference from such failure. It is common cause that none of these persons were present when the appellant took the complainant into an office on site where the alleged soliciting and exchange of money took place. It should be noted that the witness Jessica was not present at the hearing and was alleged to have been in Walvis Bay and planned on travelling abroad. Fact of the matter is that, according to the investigating officer, all attempts made to establish contact with her were unsuccessful. The relationship between her and the complainant by then had been terminated where after he had no further contact with her.

[15] From the afore-going it would appear that these witnesses would at most have been able to confirm the complainant's presence at the check point and possibly that he followed the appellant into the office. As such it would not have constituted corroboration of the offence itself. Neither could it in my view be argued that their evidence were likely to have contradicted the complainant's version simply because they were not witnesses to the incident. Accordingly, I am unable to come to the conclusion that the trial court should

have drawn an adverse inference from the State's failure to call these witnesses.

[16] What has become apparent in the trial is that Jessica would have been a significant witness to the defence, who heavily relied on the allegation that she is the one who was behind the appellant being prosecuted. It was alleged that she vowed to get back at the appellant for having terminated his relationship with her sister about two years ago. Whereas this formed the basis of appellant's defence, it seems surprising that upon learning that Jessica would not be called by the State, no attempts were made by the defence to secure the presence of the witness at court. In fear of the witness giving evidence unfavourable to the defence, and the party calling the witness not entitled to cross-examine its own witness, it was always open to the appellant to request the court to call the witness. This however, was not done which in itself raises the question as to why the witness was not considered important for the defence then, but now on appeal is labelled a crucial witness. If the evidence given by this person would have confirmed the appellant's assertion, then the duty was on him to call her, not the State. The alleged malice of Jessica was not disclosed beforehand and only came out during cross-examination of the complainant.

[17] The mere presence of Jessica in the complainant's vehicle at the relevant time and him having been in a romantic relationship with her, can hardly be described as confirmation of the appellant's assertion that she had a vendetta against him. Complainant did not deny her presence and neither that she had told him later that her sister in the past had been in a relationship with the appellant. Appellant's evidence on this score amounts to nothing more than an unsubstantiated suspicion.

[18] Accordingly, it had not been established that the trial court misdirected itself when not finding against the State for failing to call the witness Jessica, or that an adverse inference ought to have been drawn from such failure. This ground is therefore without any prospect of success.

[19] It was further contended that the trial court failed to take into account the delay in reporting the alleged incident immediately at any other police station on his way back to the city. Complainant's explanation for the delay was that he was at first uncertain whether he should report the incident and in the end decided to report it online with the Anti-Corruption Commission, which he did the next day. There has been no unreasonable delay in making the report the following day and a court should be slow to discredit a witness merely because of the time it took to lay a complaint. Though it is a factor to take into account the court will give due consideration to the reasons for the delay and consider its reasonableness against the totality of the evidence presented.

[20] In the present circumstances the explanation seems to be reasonable and, in my view, it would not have been proper for the trial court to have drawn an adverse inference from the complainant's conduct which should have impacted on his credibility. Accordingly, this ground is equally without merit.

Sentence

[21] Seven grounds of appeal against sentence are articulated in the notice of appeal which in summary amount to the following: That the trial court failed to give sufficient weight to the personal circumstances of the appellant and overemphasised the seriousness of the offence; has failed to strike a balance between the interests of the appellant and that of society; that deterrence as sentencing objective could only be achieved by imposing a custodial sentence, and that a fine ought to have been imposed; and lastly, that the sentence imposed is shocking.

[22] It is settled law that sentencing primarily lies within the discretion of the trial court and it is only in exceptional circumstances where the court on appeal will interfere with the sentence. This is a judicial discretion that must be exercised in accordance with judicial principles and only where the trial court fails to adhere thereto, would the court on appeal be entitled to interfere. The court in *S v Tjiho*[1] laid down the now well-known guidelines which would

[1] 1991 NR 361 (HC) at 364.

entitle the court of appeal to interfere with the sentence of the trial court, and there is no need to restate same. Suffice it to say that the trial court did not misdirect itself on the facts or on the application of the law and neither did any material irregularity occur during the sentence proceedings. What remains for consideration is whether the trial court failed to take into account material facts or unduly over-emphasised the importance of other facts. Also, whether the sentence startlingly inappropriate and induces a sense of shock.

[23] From a reading of the trial court's reasons on sentence it is evident that the court acknowledged the triad of factors relevant to sentence comprising the personal circumstances of the appellant, the crime and the interests of society. The personal circumstances of the appellant placed on record from the Bar were recognised and also that it had not been challenged by the State. It was common cause that the appellant was a first offender and was the sole breadwinner of his family. Regarding the latter, the court was mindful of the hardship caused to appellant's family but was of the opinion that he was the architect of his own downfall and his family's deprivation, one of the unfortunate consequences of crime. Though unfortunate that the trial court did not refer to or discuss the appellant's personal circumstances in any detail, it would be difficult on appeal to come to the conclusion that it did not weigh on the magistrate's mind at all. It has been said that no judgment can ever be 'perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered'. See: *S v De Beer*[2] quoting from *S v Pillay*[3] and *R v Dhlumayo and Others*[4]. The court's reference to the appellant's personal circumstances put on record, strongly suggests that it was given some consideration. Although the judgment may be criticised for failing to expressly discuss the appellant's personal circumstances and interests in any detail, it falls significantly short of constituting an irregularity, justifying interference on appeal.

[24] A factor held by the trial court to have been most aggravating is that the appellant, being a police officer, was in the position to effect an arrest and that

[2] 1990 NR 379 (HC) at 387.
[3] 1977(4) SA 531 (A) at 534H-535G.
[4] 1948(2) SA 677 (A) at 706.

he unlawfully abused this power as a tool to extort money from the complainant. His conduct defies the oath he took to uphold the rule of law and to serve and protect society. The offence is undoubtedly very serious and in the trial court's view even more so where the appellant abused the authority he had over the complainant for his personal gain. In these circumstances, it was said, the amount involved does not matter much. When considering the interests of society, the court was of the view that members of public cannot be held hostage by police officers acting like thugs who, through their actions, tarnish the image of the entire police force and not only themselves. It creates distrust within the community and the crime of corruption leaves a feeling of helplessness among its members. It is for that reason that society has a right to demand that persons in uniform who betray their trust, be dealt with in the most severe way possible. The court was further of the view that a deterrent sentence was called for, specifically and generally. The imposition of a fine was considered by the court *a quo* but in the end decided against it as it would negate the seriousness of the offence committed. In the trial court's opinion a custodial sentence in the circumstances of the case was justified.

[25] After due consideration to all the circumstances relevant to sentence I am unable to fault the learned magistrate's reasoning and the conclusion reached that a custodial sentence is called for. The court, in my view, was entitled to give more weight to the manner in which the appellant operated by virtually extracting money from the complainant in exchange for his freedom in circumstances where there was no legal basis to effect an arrest. He clearly exploited his victim's ignorance of the law to instil fear in order to enrich himself. These actions are not only deplorable, it is shocking and requires sanctioning in the strongest possible terms. No citizen should feel left at the mercy of an officer of the law, whatever the circumstances.

[26] It was argued on appeal that this is an instance where the court should have imposed a fine. I do not agree. The fact that a fine is provided for in the penalty provision does not mean that it must be imposed in all instances. It is trite that in serious offences it has become the norm to resort to custodial punishment even on first offenders, as the objectives of punishment in these

cases are usually deterrence and retribution. The message that has to come from the courts is that anyone who commits serious crime must know that these transgressions will be met with severe punishment. To impose a fine in instances of this nature might create the wrong impression, that the offence is not all that serious and makes it financially worth taking a chance.

[27] We were referred to a number of decisions and the sentences imposed therein of which three involve police or traffic officers. In *Maleagi Toy Gaseb v S*[5] where it was held that 'a policeman who commits a crime not only breaches the trust the community has placed in him, he attacks and undermines the foundations of organised society and thus deserves a sentence that serves as an example' to others. Crimes of dishonesty and corruption committed by persons in a position of trust who has been given power over others, deserve to be heavily penalised as the employer and society at large is entitled to expect unswerving honesty from those appointed to serve the interests of all, not their own.

[28] In *Simon Nakale Mukete v S*[6] the court of appeal held the view that the objectives of punishment cannot be attained in the circumstances of that case without the imposition of an effective term of imprisonment on a traffic officer convicted of extortion and who was given a fine, partly suspended. On appeal the fine was substituted with a sentence of two (2) years' imprisonment.

[29] In the matter of *Stanley Uri-Khob v S*[7] the appellant was a police officer convicted of contravening s 35(1)*(a)* of the Anti-Corruption Act 8 of 2003 and was sentenced to five (5) years' imprisonment of which two (2) years suspended.

[30] What these cases have in common is that the imposition of custodial sentences on police officers, making themselves guilty of corruption and dishonesty in the performance of their duty, has become the norm. The above cited cases clearly show that corruption by police officers is treated seriously

[5] Unreported judgment Case No. CA 33/1995 delivered on 06.05.1996 at p6.
[6] Unreported judgment Case No. CA 146/2003 delivered on 19.12.2005.
[7] Unreported judgment Case No. CA 94/2009 delivered on 30.07.2010.

by the courts and that the trend is nowhere near the imposition of a fine. It would be wrong for this court to ignore the 'guidelines on sentences and the general thread apparent from sentences in cases decided in recent years in regard to a particular offence'.[8] Regarding the uniformity of sentences the court stated thus:

'It is certainly true that Courts should aim for uniformity of sentence in regard to the same offence, equal or similar criminals or offenders and the same or similar facts and circumstances. Individualisation of sentences must be balanced by consistency, otherwise the community will not comprehend the principles applied and as a consequence the confidence of the public in the impartiality of Judges and the fairness of the trial will be undermined (see Du Toit Straf in Suid-Afrika at 118-24).'

[31] When applying these principles to the present facts there would be no justification to interfere with the sentence imposed by the trial court and although the sentence is rather on the harsh side, we do not find it startlingly inappropriate or that it induces a sense of shock. There is accordingly no basis for this court to interfere with the sentence imposed.

[32] In the result, the appeal against conviction and sentence is dismissed.

[33] Appellant was released on bail pending his appeal and had his bail extended until the date of delivery of judgment which is today. Although the appeal has been dismissed and the appellant must serve his sentence, a death certificate has been filed after the appeal was heard and according to which SAMUEL SAMWELE LIKANDO, Born 05.09.1963, being the appellant, died on 22.11.2016 due to DILATED CARDIONEOPATHY.

[34] The deposit made in respect of bail pending the appeal to be refunded to the depositor.

[8] 1991(1) SACR 25 (Nm).

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JC LIEBENBERG

JUDGE

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D USIKU

JUDGE

APPEARANCES

APPELLANT	K Haraseb Of Meltcalfe Attorneys, Windhoek.
RESPONDENT	J Eixab Of the Office of the Prosecutor-General, Windhoek.