IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

7/11/2014.

CASE NO: A825/2013

In the appeal between:

KGOTSO JOHANNES STAAT Appellant

and

THE STATE Respondent

WHICHEVER IS NOT APPLIC
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
7 Nov 2014
DATE SIGNATURE

JUDGMENT

ROSSOUW, AJ

[1] This is an appeal by the appellant against his conviction in the Regional Court, Mpumalanga Division, sitting in Middelburg on a charge of contravening section 9 of the Prevention and Combating of Corrupt Activities Act No 12 of 2004, read with sections 1 2 9 2 24, 25 and 26 (1)(a) of the said Act.

1.1 The appellant was convicted on the 21st May 2011 and sentenced to a period of 5 years imprisonment.

1.2 The trial court gave leave to appeal to appellant in terms of section 309 (B)(i)(a) of the Criminal Procedure Act, No 51 of 1977 upon an application, which followed immediately after conviction and

sentencing. The leave granted was to appeal against the conviction only

1.3 Appellant was granted bail pending final determination of this appeal which bail was paid.

[2] At the time of the commission of the offence appellant was a prosecutor employed by the NPA and as such a public official as contemplated in Act 12 of 2004.

[3] The appellant pleaded not guilty to the charge on which he was eventually convicted, as well as two further charges on which he was discharged. in terms of section 174 of the Criminal Procedure Act, at the end of the case for the state.

[4] I do not intend to dwell on the interpretation of section 9 of Act 12 of 2004 as it does not appear from the appellant's heads of argument that anything turns on it. I do however consider it necessary to refer to section 24 (2) of Act 12 of 2004, which provides for a presumption to the affect that: whenever a public official, whose duties include the prosecution of offenders, is charged with the offence involving the acceptance of a gratification arising from, inter alia, prosecution of any person for an alleged offence, it is not necessary to prove that the

accused person believed that the offence contemplated had been committed.

[5] It is also in my view necessary to refer to section 25 of Act 12 of 2004 which provides that it is not a defence available to a person charged to contend that he accepted the gratification without intending to perform or not to perform the Act in relation to which the gratification was given, accepted or offered.

[6] The reason for my referring to the above two provisions will become clear later on in this judgment in considering and evaluating the version put forward by the appellant at his trial.

[7] The charge on which appellant was convicted, alleged that on the 16th January 2009 at Hendrina Magistrates Court in the Regional Division of Mpumalanga, he unlawfully and intentionally received an amount of R1000-00 from Murunsheng Christina Mashiwane (hereafter referred to as "Christina") for the withdrawal of the criminal charge against Bheki Nkosi (hereafter referred to as "Bheki").

[8] Appellant pleaded not guilty and denied specifically that he received an amount of R1000-00 from Christina.

[9] After appellant's pleas had been recorded and during the proceedings in terms of section 115 of Act 51 of 1977, appellant, through his legal representative, made the following admissions which were formally recorded in terms of section 220, namely: one, he is a prosecutor employed by the National Director of Prosecutions, two, that on the 16th January 2009 he was posted at Hendrina Periodical Court as a prosecutor, and three, that on the said date he withdrew a charge of housebreaking against Bheki Nkosi. These admissions were duly confirmed by appellant.

[10] In the course of the same proceedings appellant, through his legal representative, gave an indication of the basis of his defence as follows: first, that the withdrawal of the charge was "on the merits of the case" and secondly, that there was "a withdrawal statement by the complainant filed in the docket which indicated that it was filed before the 16th January 2009 ". It was also stated, that appellant denied ever receiving any sum of money from Christina.

[11] 11.1 The first witness for the state was Christina, the mother of Bheki. She testified that she is employed by one Dr van der Merve, and had never attended school. Her son Bheki was arrested in November 2008 and charged with housebreaking and theft. He had been granted bail of R1000-00. She borrowed R500-00 from her employer and another

R500-00 from one Petrus Skosana for the bail. She knew the complainant in the housebreaking matter one Mr Simelane who lodged at the same address as the witness.

11.2 The case had been postponed to 16th January 2009 and prior to this date she communicated with the complainant concerning the matter. She was told by him that he had caused the case to be withdrawn.

11.3 When the matter came before Court on the 16th January 2009, the appellant spoke to her during the adjournment after appellant had called her son Bheki to him and she accompanied her son. She pointed the appellant out in Court as the man she was referring to.

11.4 She testified that when appellant approached them he had a file with him and he told her and Bheki words to the effect that if they agreed he could finalise the case if they paid him R1000-00.

11.5 They had the bail receipt with them and gave it to him. He went into court and came back with it after he has put a stamp on it.

11.6 The money had been paid in by Sibongele, Bheki's girlfriend and the stamped receipt was given to her to get the repayment of the money. This all happened prior to the matter being called in court.

11.7 When Sibongile returned with the money she handed it to Christina and they counted the money, whereafter the money (R1000-00) was handed over to appellant by Christina. She testified that appellant waited with them for the return of Sibongele with the money.

11.8 All of this happened close to the cloakrooms (toilets) the locality which had been suggested by appellant, in order to prevent many people witnessing or seeing them.

11.9 Thereafter the court resumed. The appellant had said that Bheki's case would be called first after resumption of the court proceedings. They all entered the court. Bheki was called to the dock and he was told the case against him had been withdrawn. She then left and returned to her place of employment.

11.10 When she arrived home, Dr van der merwe her employer enquired form her what had happened to the case, since the agreement with her was that she would repay him when the case is finished.

11.11 She told Dr van der Merve what had happened whereupon he indicated that what had happened was not right and ought not to have happened.

11.12 She testified that Dr van der Merwe in her presence attempted to call the court in Middleburg but it was already late and after hours. This was on Friday. And on the Monday she accompanied Dr van der Merwe to Hendrina because he wanted his money. Arriving at Hendrina they spoke to a Captain Jurbert at the police station. A statement was taken from her.

11.13 On paying the R1000-00 to the appellant she expected to receive a receipt. She was under the impression that what happened at the court was in order, "Ons het gedink dit is hoe dit werk".

11.14 At a later stage she was summoned to attend an identification parade as she had indicated that she would be able to recognise appellant if she saw him again. She identified the accused. This was not put in issue by the defence.

11.15 She had not recovered the money from the appellant and is still indebted to both Dr van der Merve and Mr Skosana.

[12] 12.1 Under cross examination she said that she had spoken to the complainant before the 16th January 2009 and had known that the case was going to be dropped by the complainant. She expected the case to be dropped against her son on the 16th January 2009.

12.2 The appellant's version as put under cross examination is a complete denial, and in fact that the version given by Christina is a "concocted story" as a result of her inability to repay her employer.

12.3 Let me say at this point that considering the objective facts that the witness is a totally illiterate and unsophisticated person: money was in fact borrowed; the bail paid and the R1000-00 repaid by the clerk of the court, raises the question of what then happened to this money if it was not indeed paid to the appellant as testified to by the witness.

12.4 Considering the events that followed immediately after the event involving Dr van der Merwe and what followed thereafter on the Monday, in my view, fortifies the version testified to by the witness.

[13] 13.1 The next witness called was Bheki Nkosi. He was warned in terms of section 204 of the Criminal Procedure Act. He testified that on the morning of the 16th January 2009 at court and during tea break

he was called by appellant and amongst other things asked how much bail he had paid and also told that if he admits that he had committed the crime he could be arrested.

13 32 He testified that his mother, the previous witness, was present and he told appellant the money paid for bail was not his but that of his mother. He testified that the appellant spoke to his mother and asked for the bail receipt and he told her that he wanted the money and the case would be withdrawn. The bail bond was cashed and the money handed to appellant.

13 3 This witness also testified to the event relating to the identification parade and the fact that he identified the accused at the identification parade.

13 4 Under cross examinations it transpired that the witness was quite adamant that the bail was cashed at the police station. The bail was initially or originally paid at the police station. In fact it was cashed by the clerk of court.

13 5 In the version put to Bheki Nkosi it is admitted that appellant signed the bail receipt and it is stated that it was handed to him to endorse by a policeman not by anyone else. And it is emphatically,

denied that any money had been given or handed over to the appellant.

13.6 The evidence of this witness aligns with that given by Christina in cardinal and material respects.

[14] 14.1 The third witness called for the prosecution was Dr Martinus van der Merwe. He is a Minister of Religion holding a doctorate in theology and is the employer of the first witness called for the prosecution. His evidence corroborated the first witness in material respects and he further proffered evidence which is in direct contradiction to what the defence put to the first witness namely, that she was dishing up a lie to the trial court because she could not or did not want to repay the loan.

[15] 15.1 Thereafter the final witness for the prosecution was called namely Winnie Sibongele Moepeng (herewith referred to as Sibongele) the one identified in the evidence as the girlfriend of Bheki Nkosi.

15.2 This witness at the time of the trial on the 30 June 2010 was 21 years of age and had achieved grade 10 at school. She testified that in 2008 she had to assist the first witness for the prosecution who had given her R1000-000 to go to Hendrina to post bail for her boyfriend,

Bheki Nkosi, the son of the first witness, who had been arrested on a housebreaking charge. She accepted the instruction and paid the bail at the police station. She identified her signature on the bail bond She knew of the discussion between Bheki Nkosi and the appellant in the housebreaking case and also that the complainant had agreed to withdraw the case on account of the fact that his goods had been returned to him

15.3 She testified in detail concerning the events of 16th January 2009 at court. Her evidence was that a discussion had occurred between Bheki Nkosi, his mother and appellant. She was asked to hand over the bail bond to Bheki who in turn handed it to appellant who entered the court and when he returned to Bheki, this document reflected a stamp on it Bheki handed it to the witness in the presence of Bheki's mother The latter instructed her to fetch the money. On her way to the police station she was stopped and told to go to one Dick She was asked to sign the bond at the back which she did and she was paid R1000-00 which she handed over to Bheki's mother Bheki's mother then handed the money to the appellant. This happened near the toilets The appellant then returned to the court. Bheki s case was called and the matter against him was withdrawn.

15.4 Under cross examination she admitted that she knew before the 16th January 2009 that the case against Bheki was going to be withdrawn

15.5 She accompanied Bheki on the morning in question to verify with the investigating officer that the case was going to be withdrawn and she knew that a statement by the complainant in the housebreaking, case had been filed.

15.6 She saw the appellant talking to Bheki and his mother. The bail receipt was handed to appellant outside and not in court. It was in the passage near the toilets. Bheki's mother counted the money before handing it to the appellant.

15.7 She attended the identification parade but at the outset had indicated that she would not be able to identify the appellant. At the parade she did not identify appellant.

[16] The court then called for certain information to be retrieved from the computers in Hendrina and what came out of this was that the pay out in respect of the bail bond occurred on the relevant date at 11h41am. This completed the case for the state.

[17] After close of the prosecution's case and after the second and third counts had been disposed of in terms of section 174 of the Criminal Procedure Act, the appellant was called to testify.

17.1 His testimony appears to have centred on what the usual procedures are and not so much as to what specifically happened on the 16th January 2009 at court. He was evasive in his answers and on more than one occasion reminded to reply to the questions and to confine himself to the relevant issues.

17.2 His evidence can best be described as a complete denial of the events testified to by the state witnesses.

17.3 It seems that almost in desperation the defence attorney had finally to resort to putting to him what the state witnesses had said, to which questions he kept on replying "that is not the truth", but failing completely, to say if it wasn't the truth, what his version to it is.

[18] The objective facts in this case becomes of paramount importance in order to arrive at a decision, especially since the matter appears to turn in the final analysis on who is to be believed in regard to the alleged payment of the R1000-00 to the appellant.

18.1 The most important objective facts appear to be that a charge had been preferred against Bheki for housebreaking; he was arrested; bail of R1000-00 was fixed; the bail of R1000-00 was paid; the complainant filed a withdrawal statement; Christina had borrowed the bail money from her employer; Sibongele had paid the bail at the police station; on the 16th January 2009, the bail receipt had been signed by appellant and stamped; the money was withdrawn by Sibongele and handed to Christina; the charge against Bheki was withdrawn; Christina on the same afternoon of 16th January 2009 reported to her employer who immediately took steps; on the Monday a charge was laid and appellant arrested a few days later

18.2 The only unaccounted for fact is, what happened to the R1000-00?

18.3 The prosecution's case is that it was paid to appellant

18.4 The appellant's case is that he knows nothing and no money was paid to him. A flat denial.

[19] It is at this point that sections 24 and 25 of Act 12 of 2004 become important. They are important in the sense that it would be fatal for appellant to admit that he demanded or received the money before or

after withdrawing the charge and irrespective of whether such withdrawal was on the merits or that he thought he did not have a good case against Bheki, because he would still be guilty of contravening section 9 of Act 12 of 2004.

[20] The correct approach in matters such as this in my view demands that evidence not be looked at in isolation but in its totality. In doing so one is mindful of differences or what appears to be differences in the evidence of witnesses testifying on issues and glaring contradictions going beyond inconsequential differences on issues not of major importance.

[21] In casu much has been said inter alia, on matters such as where it happened and where the money was handed over. In my view it is clear that what the witnesses for the prosecution testified to in this regard related to a relatively localised area within the precinct of the Magistrate Court in Hendrina, near or close to the court and the toilets. And I am of the view that such differences as there may appear to be are not significant or material in the bigger picture of the events testified to.

[22] In casu we have the direct evidence of Christina; Bheki and Sibongele, supported by objective facts. Opposed to that we have a bare denial

by the appellant. The question that arises is whether the commission of the offence, the demand and receipt of the R1000-00 as gratification for withdrawal of the charge, can be said to have been proven, by drawing an inference on the totality of the evidence including appellant's bare denial, that he in fact demanded and received the R1000-00?

[23] In my view the dictum by the Honourable Mr Justice Holmes in S versus Nkombani and Another 1963(4) SA 877 (AD) at 893 F-H is apposite in a case such as the present where there is a bare denial by the defence. **It reads as follows**:

"Where it is sought to establish by inference the commission of an offence by an accused or his subjective state of mind, various considerations may have a bearing on the extent to which his failure to testify, or his giving a false alibi, can be taken into account against him... But a different situation arises where there is direct evidence of the commission of the offence. In such a case the failure to testify or the giving of a false alibi- whatever the reason therefore-ipso facto tends to strengthen the direct evidence, since there is no testimony to gainsay it and therefore less occasion or material for doubting'

[24] The learned Magistrate in the court aquo clearly indicated that the evidence of both Christina and Bheki had been treated with caution in light of the fact that they both played a part in the commission of the offence. He dealt with the evidence accordingly and correctly.

[25] The reasons given by the court *aquo* on the interpretation of the relevant section 9 of Act 12 of 2004 and the authorities relied on and quoted by him, for finding that no more is required than a demand and receipt of money to fall with the ambit of the relevant section, cannot be faulted.

[26] After a careful evaluation of all the evidence and applying the cautionary rules where applicable, the learned Magistrate held that the version of the state witnesses is so overwhelming that the version of appellant cannot be reasonably possibly true. This finding in my view cannot be faulted.

[27] In the result I am of the view that the appeal against the conviction ought to be dismissed and the conviction be confirmed.

D.P.J ROSSOUW
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA
7th Nov 2014

MENT

I agree. It is so ordered.

D S MOLEFE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA