IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A437/2015

7/3/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE: 7/03/2016 SIGNATURE: [signature]

01-2-2016

In the matter between:-

ITUMELENG DAVID MASAKO Appellant

and

THE STATE Respondent

J U D G M E N T

Ismail J:

Background

[1] This is an appeal against both conviction and sentence from a decision of the trial court presiding at Pretoria North. The appellant was convicted of two counts of theft and sentenced to 18 months imprisonment on each count. The sentence imposed was suspended for 5 years on condition that the appellant is not convicted of an offence involving dishonesty committed during the period of suspension.

[2] The appellant was a public prosecutor, who prosecuted in the specialized criminal court dealing with negligent and reckless driving offences. The charges emanated in that the appellant, allegedly in a corrupt manner, received monies from two members of the public, on two separate occasions for admission of guilt fines. It was alleged that he controverted the amounts by reducing the admission of guilt fines on the face of the docket and appropriating the difference for himself. The difference being the original amount and the amount which he reduced.

[3] The appellant was charged with two separate counts of corruption and several alternative counts as well as two counts of fraud and two counts of theft.

[4] The appellant conduced his own defence, during the trial. Similarly he presented his own case before us on appeal. The Appellant has an LLB degree and he was two master degrees.

[5] He was given a discharge in respect on the corruption charges and the alternatives thereto, at the end of the prosecution's case, in terms of section 174 of the Criminal Procedure Act 51 of 1977 [the CPA].

[6] At the end of the trial he was convicted of the theft charge where Mr Mpho Malangeni was the complainant, which it is alleged occurred on the 12 September 2005 and the second theft charge where Mr Baloyi was the complainant

[7] Leave to appeal to this court was granted by the trial court in respect of both conviction and sentence.

[8] The record of the proceedings contains some 1283 folios. Many pages thereof relate to arguments pertaining firstly to a contempt of court proceeding, as the appellant failed to attend court on a certain day. Much of volume 1 of the transcript related to that issue. The record also contained diverse pages relating to an argument advanced when the application for a discharge at the end of the prosecution's case was sought. The same applies to the arguments which were advanced at the end of the evidence prior to the court delivering its judgment.

[9] I do not propose to deal with those aspects which the appellant was acquitted of in terms of the provisions of section 174, nor the application for contempt proceedings at the outset of the record. What needs to be mentioned is that the trial was characterised by cantankerous behaviour on the part of the appellant and he was warned several times by the magistrate that his behaviour was contemptuous of the court.

He insinuated that the Pretoria North Court was known for being racist and biased and for that reason his case was being heard in that forum. Reading through the record one notes that the magistrate's patience was clearly tested and that the presiding officer demonstrated great restraint and patience.

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The conviction

[10] I will now plunge into the two convictions relating to the theft charges which the appellant was convicted on.

[11] The theft charge where Mr Malangeni was the complainant, in summary, was as follows:

(i) Mr Malangeni was involved in a motor collision and he was summoned to appear in court. He was represented by The Legal Aid practitioner and through his attorney he agreed to pay an admission of guilt fine. [AOG]

(ii) according to Mr Malangeni he gave the appellant the sum of R1 500, 00 as payment for the AOG;

(iii) the appellant gave him a note which, appears on page 1089 of the record, wherein the details of the appellant were noted and the following was written by the appellant – *"finalised-paid R1 500"*;

(iv) Mr Malangeni left court labouring under the impression that he had paid this amount as an admission of guilt and that it was the end of the matter;

(v) Mr Andrew Lebese a court interpreter and the cousin of Mr Malangeni, who knew of the case of Mr Malangeni, enquired from the latter what transpired in his matter. Mr Malengeni told him that he paid AOG and showed Mr Lebese the note appearing on page 1089.

(vi) Mr Labese told his cousin that the note was not a receipt and that he would enquire about the matter. He contacted the appellant as well as the clerk of the court and discovered that an official receipt in the sum of R800, 00 was issued in respect of the matter.

(vii) this set the cat amongst the pidgeon's and it culminated in a complaint being laid against the appellant ;

(viii) the second count of theft pertains to the theft of money from Mr Happy Funya Baloyi [Baloyi]. According to Mr Baloyi he appeared in Pretoria court J on the 9 December 2005;

(ix) on that day he intended to pay an AOG fine and he spoke to the appellant. The appellant told him that the AOG would be for an amount of R1 500. The complainant told him that he only had R500 on him. The appellant told him to give him the money and he would postpone the matter. On the next appearance he should bring the balance.

(x) on the subsequent date of the hearing when Mr Baloyi appeared in court the magistrate enquired whether Mr Baloyi intended to pay an admission of guilt or whether he intended to plead not guilty;

(xi) on that day the prosecutor was not the appellant but another colleague, Mr Baloyi explained that he already paid the sum of R500 as AOG.

(xii) on the file an endorsement was made that the admission of guilt in the matter was set at R1 000,00;

(xiii) the magistrate stood the matter down and advised the prosecutor to take up the issue with his seniors;

[12] The summary appearing above, is in essence the prosecution's case against the appellant, relating to the charges against him.

[13] Several other witnesses gave evidence during the trial, however they were in the main personnel and colleagues of the appellant who were involved as a consequence of the reports which were made by the complainants against the appellant. Their evidence did not take the merits of the two complainants any further than to set out how the appellant was charged and persecuted.

[14] The cross examination of the various prosecutors was hostile and one of them was blatantly called a racist and others were even called incompetent.

The discharge Application

[15] The appellant submitted that he did not receive a fair trial as the magistrate did not apply the principles of a discharge properly in view of the Constitutional era. The magistrate applied the law on this aspect in terms of the pre Constitutional period by relying on *S v Shuping* 1983 (2) SA11(B).

The magistrate, he submitted, should have applied the law in terms of *S v Lubaxa* 2001 (2) SACR 703 at 707d-708b. The appellant submitted that he should have been discharged on all counts including the theft and fraud charges.

[16] I do not agree with the appellant's submission on this ground in view of the fact that the magistrate acquitted the appellant on the corruption charges and its alternative counts. The reasoning of the court *a quo* was that in the light of the evidence of Mr Malangeni and Mr Baloyi there was a prima facie case which called for a response.

[17] I am in agreement that the failure to grant a discharge on those counts did not equate to the appellant not receiving a fair trial. Credibility was considered by the court and the magistrate was of the view that the evidence at that stage was not so weak and brittle that no reliance could be attached thereto.

[18] The provision of section 174 stipulate that at the end of the prosecution's case the court *may* and not must, grant a discharge. This will clearly require an analysis of the evidence presented at that stage of the proceedings requiring a cognitive thought process in assessing the evidence *vis a vis* the charge(s) the accused is confronted with. In the final analysis, tc determine whether a reasonable court at that juncture could, in the absence of other evidence, convict.

[19] The appellant relied upon the following authorities dealing with the notion of a fair trial: *Key v Attorney General, Cape Provincial Division* 1996 (4) SA 187 (CC) and *S v Zuma* 1995 (2) SA 642 (CC). In so far as the failure to discharge the appellant on the remaining counts at the end of the state's case is concerned I do not believe that upon a cautious perusal of the record that the magistrate's refusal to grant a discharge on those

counts violated the appellant's right to a fair trial. - See *S v May* 2005 (2) SACA 331 (SCA)

[20] The right to a fair trial resurfaced again as the appellant submitted that the magistrate did not assist him as an unrepresented accused who conducted his own case as he should have. In the judgment at page 1000 of the record the magistrate stated: -

"one of the reasons he said the court did not explain his rights to him and that his rights were therefore breached. However, during the trial Mr Masako boasted that he has a master's degree in law and also a master's degree in music and he was busy with his second master's degree and that he can train prosecutors and magistrates because of his superior knowledge of the law."

This begs the question whether a magistrate should assist a person such as the accused, who has legal qualifications and who defended himself, in a criminal trial. In my view a person's qualifications, should not dictate whether assistance is to be rendered or should not disqualify an unrepresented accused from receiving assistance from the court. I am of the view that a court should intervene in the interests of justice. In *R v Herholdt* 1928 AD 265 at 277 the court stated that:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an

administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

The accused's attack on colleagues and the court

[21] The conduct and remarks which the appellant made about the court and some of his colleagues, to say the least, were improper and uncalled for. To simply brush it aside on the basis that those comments were made in the heat of the battle is unacceptable. Trials should be conducted in a dignified manner notwithstanding the system being as being adversarial

[22] He referred to the Pretoria North court as being well known for being racist, since a white magistrate period and the prosecutor was also white.

He also referred to his colleague, Mr Coetzer, as being anti-social and a racist :-

"I want to put it to you in clear and equal terms, you were anti-social. You do not socialise with people of black colour. Thabo was not even assisting you, because you Thabo was allocated to prosecutors in that court, not to Masaka, but you because of your racist tendencies you did not want to use him and Thabo will come and testify to that. Do not hide behind the truth. You are racist. That is basically it. You do not like black people like myself and it should be on record. You have never been friendly at any given time, and you were not I will also call other prosecutors I worked with in that court. They will come talk about it. You are friends with only white. I am not even, I will come to that yes. You are basically what I said and I repeat it, you are racist. In other words you have preferential treatment and you are a back stabber, because of your racist tendencies."

[23] The accused also stated:

"He is the one who is irregular, because if you are a prosecutor who is racist, then there will not be any objectiveness and partically. You will treat accused based on their colour and that is anti-norms and values."

Theft charge - Mr Malangeni was the complainant.

[24] The evidence of Mr Malangeni was that he on each occasion when he came to court he was accompanied by his sister. No statement was taken from the sister regarding the occurrence at court and more particularly about the money. Whether it was given to the appellant or not. She did not testify. Equally important is the fact that Mr Malengeni contradicted himself in respect of the money. Initially he stated he withdrew the money from the bank thereafter he stated he obtained it from friends and family. If the money was withdrawn from the bank or ATM, a receipt would have been sufficient proof of the amount in question. Where the money was obtained from is an important factor and yet he contradicted himself on this crucial point.

[25] More significantly the appellant at the outset suggested that his assistant in court, Thabo, accompanied Mr Malangeni in order to pay the AOG fine. Thabo was not called by the prosecution nor was a statement ever taken from him. In this regard the question to be asked is whether the

accused version regarding how the money was paid was reasonably possibly true. See: *S v Mafiri* 2003 (2) SACR 121 SCA par [9]-[13].

[26] The prosecution, knowing what the accused version was, failed to call Thabo to testify. Instead the appellant called Thabo to testify on his behalf. No *onus* rested on the accused to call, Thabo, however he was compelled to call him.

In *S v Mcrae & another* [2014] ZASCA 37 at par [28] Wallis JA stated

'Where an appeal is being argued one expects the prosecutor to do so in an objective and fair manner and, if satisfied that the conviction is flawed, to draw the attention of the court, particularly where the flaw goes to the heart of the fairness."

In the appeal before us, Mr Wilsenach conceded that Thabo's evidence was vital, and I complement him on his candour and frankness. This begs the question why was this same approach not followed at the hearing. The failure to call or even worse to obtain a statement from Thabo was significant, and the appellant was compelled to call him.

[27] The magistrate alluded to the contradiction between the appellants' evidence and Mr Thabo Mabetoa's evidence. The following appears from the judgment at page1024 (lines 9-25)

'So it confirms the evidence of Mr Baloyi. Now Mr Masako put it to the witnesses, Malangeni, that Malangeni gave the money to Thabo, the paralegal who went to pay the admission of guilt but because of the fact that he was in a hurry and he could not wait and he was annoying Mr Masako, he gave him the

To whom it may concern (*sic*) and asked him " How much did you pay?" and he said R1 500.00 and he wrote his name and telephone number on it now, Mr Mabetoa, Thabo Mabetoa, he differs. He said he never received money from the accused person and went along to pay the admission of guilt. He just accompanied them there and then they paid the admission of guilt fine. And just took the charge sheet there so that the charge sheet does not get lost and then the two receipts, one goes to the accused who paid and the other one is attached to the charge sheet. So Mr Mabetoa repudiates Mr Masako's evidence of what Mr Masako said what happened. So the court is then satisfied that the defence case, in the light of all the evidence is not reasonably possibly true and it is rejected as false..."

The appellant's version was rejected because of the contradiction alluded to. Nothing is said about the lady who accompanied Mr Malangeni to court on each occasion; the contradiction about the money referred to above or why the state failed to call Mr Mabetoa.

Mr Malangeni was a single witness who testified for the prosecution when there were two other witnesses who could have either corroborated his version or gainsay it. Neither of the two persons were called by the prosecution to testify, nor were there any statements taken from them.

Theft Mr Baloyi the complainant.

[28] On this count the appellant was convicted for having received R500, 00 from Mr Baloyi. The details of the appellant appeared on the phone belonged to Baloyi.

[29] It was submitted that Mr Baloyi immediately upon the magistrate enquiring, in the court where he appeared, responded that he already paid R500.00. It was submitted that he responded spontaneously and that it was the truth. It was suggested that if he were lying he could just as well have said he paid a R1 000, 00 or R1 500,00.

[30] Mr Baloyi was a single witness and the explanation for having the telephone number of the appellant on his phone was due to the fact that his employer wanted a receipt. He went back to the appellant and that is when he got the number. If Baloyi said to the appellant my employer seeks a receipt for the R500, 00 it boggles the mind why the appellant would give him his telephone details instead of a note or receipt. This aspect of the evidence is dealt with on the record at page 343 (line 3-20)

[31] Mr Baloyi was a single witness and his evidence was disputed by the appellant. In view of the two mutually contradictory versions the court ought to have applied the law as set out in *S v Saban* 1992(1) SACR 199(A) f-h by examining the probabilities and bearing in mind that the *onus* was on the prosecution to prove its case beyond reasonable doubt.

[32] It needs to be mentioned that the fact that the appellant was charged with two separate counts of theft, one cannot thereby reason that the one incident 'corroborated' the other or that they are similar.

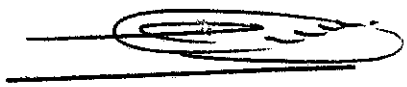
[33] On the second count one is dealing with the evidence of a single witness and the cautionary rule therefore applied. I am not convinced that the prosecution had established the accused guilt beyond reasonable doubt. There exist a strong suspicion that Mr Baloyi's story has a ring of truth, however a person cannot be found guilty on the premise of a mere suspicion, there has to be satisfactory evidence leading to such a finding.

[34] For the reasons stated above I will recommend that the appellant's convictions not be upheld as his version is reasonably possibly true on the count where Mr Malangeni was the complainant. On the charge where Mr Baloyi is the complainant, the state failed to prove its case beyond reasonable doubt.

[35] The appeal therefore succeeds. The conviction and sentence in respect of both counts are set aside.

M Ismail J

I agree



PD Moseamo AJ

APPEARANCES:

For the Appellant:	In person
For Respondent:	Adv. Wilsnach from the office of the DPP
Date of hearing:	1 February 2016
Date of judgment:	07 MARCH 2016