

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

26/8/16
Not reportable

Not of interest to other Judges

CASE NO: A647/2015

In the matter between:

PETROS BYALELISA NKOSI

Appellant

and

THE STATE

Respondent

J U D G M E N T

SETHOLE, AJ

1. The appellant appeared in the Regional Court, Benoni on a charge of corruption by accepting a benefit, that is contravention of section 3(a) (i) (aa) act 12 of 2004, first alternative, fraud, second alternative, theft. The charge was that on the 30th January 2009 at Benoni Police Offices the accused accepted an amount of R 2000, 00 from Nicholas Mathe as a benefit for himself or another person, namely, to pay bail for Rose Nkosi.

The appellant pleaded not guilty on the main and alternative charges and denied the allegations against him.

2. The trial court found him guilty on the second alternative, namely, theft of an amount of R2 000, 00.

3. The evidence that was led by the state was that of the complainant, Warrant Officer Nicholas Mathe and Captain John Scholtz.

4. Briefly the facts are as follows: That on the 27th January 2009 the complainant had a telephone conversation where the appellant informed him that he was arresting his sister on a charge of fraud. The complainant went to Benoni SAPS to do some investigations regarding his sister's arrest.

5. On the 30th January 2009, the complainant and Captain John Scholtz went again to Benoni SAPS enquired from the appellant as to the amount of bail that would be fixed and an amount of R 2 000,00 was suggested by the appellant.

6. The complainant and Captain Scholtz went to withdraw R6 500, 00 at the ATM. An amount of R 2 000, 00 was handed to the appellant as bail for the complainant's sister in front of Captain Scholtz.

7. Later on the same day, the complainant phoned his sister to enquire as to what transpired at court. She informed him that there was no bail paid and she was released without appearing in court and already at home. Five days thereafter, the complainant enquired from the appellant of the bail money and the appellant told him not to worry. The complainant demanded his money back but the appellant kept on promising to refund him. Subsequent numerous demand by complainant, the appellant informed him that it was through his efforts that his sister was released without appearing and he could not understand why he demanded a refund. The complainant decided to lay a corruption charge against the appellant.

8. On cross-examination the complainant testified that on the 30th January 2009 he saw his sister at the holding cells at Benoni SAPS. It was put to the complainant that he went to the Benoni SAPS on the 29th January 2009 but he denied. He denied speaking to Lieutenant Colonel Khubyane about his sister's bail arrangement.

9. The accused testified in his defence and confirmed that he was amongst the police officers who arrested Rose Nkosi, the sister of complainant and that he was not the investigation officer in her case. That on the 30th January 2013, the complainant and captain Scholtz went to Benoni SAPS, where Mr Mphele, the investigating officer informed them that he is busy preparing for Rose Nkosi to go to court. Mphele told them to go to court where he will find them. The docket was taken to court and the prosecutor did not enrol the case and as a result Rose Nkosi had to be released without appearing in court. Mathe deny having received R 2 000, 00 from the complainant.

10. Lieutenant Colonel Khubayane testified that on the 29th January 2009, she was the commanding officer of the appellant and that, on that particular day she went to fetch Rose Nkosi from the holding cells in order for her to meet the complainant and Captain Scholtz. She warned the appellant and Mphele to avoid being bribed by the complainant and Captain Scholtz.

11. According to the complainant, they went to Benoni SAPS on the 30th January 2009 but according to captain Scholtz, they also went there on the 29th January 2009.

12. What is of concern is whether the complainant did in fact give the appellant bail money of R 2 000, 00. According to complainant's version as corroborated by captain Scholtz, they withdrew money from an ATM and gave it to the appellant to pay bail for complainant's sister. This is denied by the appellant.

13. In a criminal case it is not the duty of the accused to prove his innocence but is the duty of the state to prove the accused guilty beyond reasonable doubt. The question that this court has to ask itself is whether the state proved accused guilty beyond reasonable doubt.

14. **R versus Difford 1937 AD 370** it was said that if the accused gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but beyond any reasonable doubt it is false. If there is any possibility of accused's version being true, then he, the accused is entitled to an acquittal.

15. The trial court accepted the state's version and rejected that of the appellant. I do not agree with the trial court and I am of the view that there is doubt in the state's case for the following reasons:

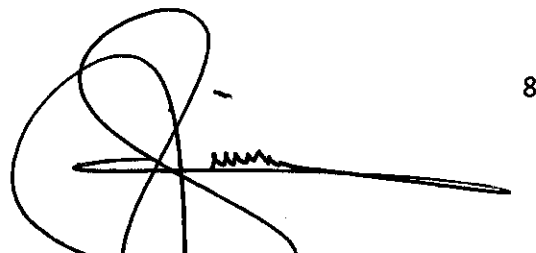
- 15.1. The complainant is a police officer who had 30 years' experience at the time of the trial. He is expected to know the procedure that is followed if a person is arrested and bail had to be arranged. Bail money is not paid to a police officer in the corridors of the courts.
- 15.2. Furthermore, that the complainant and the appellant did not meet before. It was for the first time on the 30th January 2009. I find it difficult to believe that indeed money was given to the appellant by the complainant on their first meeting. *See page 15 par 5 of the record.*
- 15.3. The complainant saw his sister on the morning of the 30th January 2009 at the police station and as a police officer who could easily identify himself to the court orderly, there was nothing that prevented him from giving the bail money to his sister in the holding cells for the purposes of paying bail, if indeed he was in a hurry.
- 15.4. If the complainant could go to Benoni SAPS on the 27th January 2009 and on the 29th January 2009, why was it difficult for him to wait and pay the bail money on the 30th January 2009 when his sister was supposed to be released. I find it hard to believe his explanation that they could not wait to pay for complainant's sister because they were in a hurry to conduct an operation.

16. The appellant does not have to prove his innocence meaning that even if he does not testify, it cannot be said he is guilty on an offence. In this matter the version of the appellant is a denial. The question is whether his version is reasonably possibly true. If indeed, he should be given the benefit of the doubt. I regard the version of the appellant as reasonably possibly true as it cannot be expected from a police officer of the complainant's calibre and experience to conduct himself in a manner he did in this case.

17. Regarding conviction I find that the state did not prove its case of theft beyond reasonable and as a result the appellant is hereby given the benefit of the doubt.


18. As a result I propose the following order:

1. The appeal against conviction is upheld.



SETHOLE, EE
Acting Judge of the High Court

I agree and it is so orderd.



N.V KHUMALO
Judge of the High Court

Date of judgment:	26 August 2016
For the appellant:	Mr R.S Matlapeng
Instructed by:	Pretoria Justice Centre
For respondent:	Adv. A. Roos
Instructed by:	Director of Public Prosecutions, Pretoria