THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 186/08

T P MATSABU Appellant

and

THE STATE Respondent

Neutral citation: *Matsabu v S* (186/08) [2008] ZASCA 149 (27 November 2008)

Coram: HEHER, COMBRINCK and CACHALIA JJA

Heard: 12 NOVEMBER 2008

Delivered: 27 NOVEMBER 2008

Corrected:

Summary: Criminal procedure – s 252A of Criminal Procedure Act 51 of 1977 – trap – admissibility of evidence.

ORDER

On appeal from: Full Court of the Free State Provincial Division, (Van der Merwe and Musi JJ sitting as court of appeal).

The appeal is dismissed.

JUDGMENT

HEHER JA (Combrinck and Cachalia JJA concurring):

[1] The appellant was employed by the Maqhaka Traffic Department as a law enforcement officer. On 18 December 2003 he was arrested during an anti-corruption operation conducted by a unit of the Free State Provincial Administration responsible for investigating fraud and corruption. He was charged with a contravention of s 1(1)(b) of the Corruption Act, 94 of 1992, the allegation being that on that day at or near the Viljoenskroon road in that district he accepted an amount of R300 as a bribe from a certain Inspector Wilbers as an inducement not to issue a traffic summons to her.

[2] The appellant pleaded not guilty at his trial in the magistrate's court. His legal representative placed on record, as matters not in dispute, that, on the day in question, the appellant had been one of a group of officers manning a speed trap;

that he stopped a vehicle driven by the complainant because of the excessive speed at which it was travelling; that the complainant asked him not to prosecute her but he refused and the complainant thereupon pushed an amount of R300 into the pocket of his trousers and drove off.

[3] At the trial the prosecution called the complainant to give evidence as well as three other witnesses who were involved in the setting of the corruption trap and the arrest of the appellant. The appellant testified in his own defence. He was convicted as charged and sentenced to two years imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977.

[4] An appeal to the Full Court of the Free State Provincial Division (Van der Merwe and H M Musi JJ) against his conviction was dismissed. That court granted leave to appeal to this Court.

[5] It will be unnecessary to discuss the evidence of the appellant or its merits *vis-à-vis* that of the complainant. His counsel conceded in argument that the appellant's version of events had rightly been disbelieved by the magistrate. Suffice it to say that the concession was well-considered. Counsel therefore approached the appeal on the assumption that the complainant's description of events was substantially accurate although, as he emphasised, she had admitted that her recollection was not necessarily full or flawless.

[6] It was common cause that the appellant had been ensnared in a trap used to detect, investigate or uncover the commission of an offence within the ambit of s 252A(1) of the Act.[1]

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1 For convenience in access to this and other references in this judgment I quote s 252A in full:

'**252A Authority to make use of traps and undercover operations and admissibility of evidence so obtained**

(1) Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the

[7] The thrust of the argument presented to us was that the complainant's own account demonstrated that her conduct had gone beyond the provision of an opportunity to commit the offence of corruption. This had two legal consequences: either the evidence obtained by the state in consequence of entrapping the appellant should have been ruled inadmissible at the trial – at least in the first stage, as s 252A(1) of the Act provides – or the use of and reliance on

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commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).

(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:

(a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general were adhered to;

(b) the nature of the offence under investigation, including—

(i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(ii) the prevalence of the offence in the area concerned; and

(iii) the seriousness of such offence;

(c) the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;

(d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;

(e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;

(f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;

(g) the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;

(h) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;

(i) whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;

(j) the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;

(k) any threats, implied or expressed, by the official or his or her agent against the accused;

(l) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;

(m) whether the official or his or her agent acted in good or bad faith; or

(n) any other factor which in the opinion of the court has a bearing on the question.

(3) *(a)* If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

(b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:

(i) The nature and seriousness of the offence, including—

(aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public the maintenance of public order or the national economy is seriously threatened thereby;

such evidence resulted in the appellant not receiving the fair trial which was his constitutional entitlement.

[8] Some point was made in the heads of argument about the magistrate's refusal to hold a trial-within-a-trial when his legal representative twice objected to the admissibility of the trap evidence and asked that admissibility be tried as a separated issue. During argument reliance on that ground was all but abandoned. Such uncertainty as remains should be dispersed. Our courts have long accepted that it is both desirable and necessary, to the end of achieving a fair trial, to try issues of the voluntariness of extra-curial statements or conduct of accused persons separate from the merits of the case: *R v Dunga* 1934 AD 223. When a

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(bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;

(cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or

(dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;

(ii) the extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to—

(aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;

(bb) the facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or

(cc) the prejudice to the accused resulting from any improper or unfair conduct;

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Constitution;

(iv) whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and

(v) any other factor which in the opinion of the court ought to be taken into account.

(4) An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise.

(5) *(a)* An official or his or her agent who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence, shall not be criminally liable in respect of any act which constitutes an offence and which relates to the trap or undercover operation if it was performed in good faith.

(b) No prosecution for an offence contemplated in paragraph *(a)* shall be instituted against an official or his or her agent without the written authority of the attorney-general.

(6) If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence.

(7) The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute.'

ruling is made without hearing the defence evidence, the defence is entitled to withhold its further testimony where that could only be given on terms which may prejudice the trial of the merits: *ibid* at 227. See also *S v de Vries* 1989 (1) SA 228 (A) at 232G-234E, *S v Yengeni and others* (3) 1991 (1) SACR 387 (c) at 391b-392a, *Ntzweli v S* [2001] 2 All SA 184 (c) at 187f-189g. In general terms section 252A is also concerned with voluntariness of conduct as the measure of whether an accused's conduct is induced by the circumstances of or methods employed in the operation rather than resulting from his own desire to commit the offence. In principle I do not think that there is any material distinction between the accepted categories of cases where the separation of admissibility and merits is insisted upon and s 252A. Both enquiries seem to take account of and provide for the same inherent risks, such as discouraging an accused from speaking openly when the trial of the merits may be influenced if he does so and the likelihood that failure to deal with admissibility properly and promptly will leave an accused in limbo in relation to the vital questions of whether he needs to testify and the substance of the case that he has to answer. So also the prosecutor must know the limits of his case both for the purpose of leading further evidence and for cross-examination of the accused. For all these reasons the holding of a trial-within-a-trial will usually be appropriate to decide admissibility under s 252A.

[9] But, as counsel appreciated, s 252A(7) provides implied legislative sanction for a trial court to exercise a judicial discretion on whether to try admissibility as a separate issue. There is a recognition that there may be cases where the interest of the accused will not be prejudiced by either the making of a ruling without hearing evidence or, even, delaying a ruling until the conclusion of the case. In the present instance the appellant's legal representative, called upon at the trial to furnish the grounds on which he would challenge the admissibility of the trap evidence – as he was obliged by the first proviso to s 252A(6) to do –

limited himself solely to an alleged non-compliance with the instructions or guidelines issued by the Director of Public Prosecutions to the law enforcement authorities in the Free State. This, in effect reduced the scope of the enquiry to the matters referred to in s 252(2)(a), a very narrow factual question, about which Du Toit *et al*, Commentary on the Criminal Procedure Act, 24-134, remark that the sub-section (and ss (2)(b) and (c)) 'would seem to have no bearing on whether the conduct of the trap goes beyond providing an opportunity to commit an offence or not'. It is unnecessary to debate the broad justification for that doubt. What seems clear is that so limited an issue does not, prima facie, bear on the voluntariness of the appellant's commission of the offence. The issue was therefore one which, if left over for determination at the end of the case, was most unlikely to result in unfairness to the accused in the conduct of the trial. The magistrate's refusal to hold a compartmentalized hearing was therefore not a misdirection.

[10] It is true that the appellant's case as finally argued before the magistrate was not confined to ss (2)(a). Reliance was also placed on matters relevant to admissibility which are covered in ss (2)(d), (e), (f) and (e) in support of the submission that Wilbers's conduct went beyond the creating of an opportunity. Given that the onus rests on the state to establish admissibility and that it must presumably proceed to do so by reference to the grounds of objection voiced by the defence under ss (6), I have some doubt as to whether the magistrate was, as to admissibility, not initially confined to the stated ground alone, leaving any objections subsequently raised to be considered as reasons for refusing to allow evidence already tendered to stand, should he conclude, upon a consideration of the totality of such additional objections, that the evidence was obtained in an improper or unfair manner and that its admission would render the trial unfair or would otherwise be detrimental to the administration of justice (ss (3)).

[11] Be that as it may, the reliance by appellant's counsel both on non-compliance with the guidelines and on conduct said to fall within the other identified subsections of ss (2), must fail on the facts.

[12] The state proved in evidence the terms of an authority for the carrying out of trapping operations issued over the signature of a Deputy-Director of Public Prosecutions in the Free State. It was not possible to conclude that the operation in question fell within the terms of that authority, but, if it did, there were also substantial deviations from the apparent level of prima facie proof for which it called concerning the geographical location of the supposed offences and the identity of the suspects. However, as supposed by the learned authors, such deviations bore no apparent causal connection between the conduct of the trap and the commission of the offence. They were, in short, irrelevant to the case before the court.

[13] The grounds of unfairness said to arise from the matters referred to in ss (2) (d), (e), (f) and (g) can be disposed by considering the evidence of Wilbers.

[14] Wilbers testified that she was not a part of the crime investigation unit. She was brought in as an independent witness who would serve as the target of any corrupt practice. She was equipped with marked money and expressly warned not to solicit an offence by, for example, offering money of her own accord. When the appellant, who was manning a speed trap, stopped her vehicle, he asked whether she wanted to see the proof that she had driven through it at 150km per hour. Wilbers replied that she knew she had driven a bit fast and did not need to see the reading. She remained seated in her vehicle. The appellant asked, she said, if she knew what the fine was for travelling so fast. He was in possession of a book which he opened to show her the scale of fines and calculated her fine at R900.

As he was ostensibly busy writing the ticket Wilbers asked whether he was really going to fine her. His response was to ask what she wanted to do. He went on writing. At his request Wilbers produced her licence. She again asked if he intended to write out a traffic fine. Once more the appellant said he did, but 'what did I want to do about it?'. She answered that he knew better than she did. She asked whether she could pay the fine at once. The appellant enquired how much money she had with her. She took out her identity book, removed the bank notes from between its pages, counted them and told the appellant that she had only R300. He said that was alright. But before accepting the money he asked if she would go to the police and cause him trouble if he took it. Wilbers's response was that *she* would be in trouble ('my husband will murder me') if she went home with a ticket, so she would rather pay R300 now than R900 later.

[15] Wilbers gave the appellant the folded bank notes. He did not count them but immediately placed them under his note book. As he took the money he was standing with his back to two of his colleagues who were some 10 metres away. Seeing him apparently still writing Wilbers asked whether, despite receiving the money, the appellant intended to issue a ticket, to which he replied that he must appear to be writing so that his colleagues would not notice him take the money. He then said everything was in order and she could go. Before she drove away he asked a second time whether she would cause trouble for him. She replied 'No'. As she moved off she looked in her left external mirror and saw the appellant, who was walking away, push the money into his left trouser pocket.

[16] Was the acceptance of this evidence unfair to the appellant? Did the conduct of the trap have the effect of inducing the appellant to act in a manner that he would otherwise have not? Counsel submitted that both questions result in affirmative answers. Particularly marked (and reprehensible) he argued was her

repeated prompting of the appellant ('are you really going to issue a ticket to me') and the resort to grossly emotive consequences ('murder') if he should fail to assist her. I cannot agree. As the section contemplates, a trap may usefully be employed to set up a situation of which a corruptly-inclined official may take advantage. The provision of an attractive opportunity is the essence of a successful trap and the legislature recognises that fact in s 252A. It draws the line however at conduct which literally or figuratively lays a bait for the unsuspecting official by encouraging the commission of a crime. But the complainant's behaviour was essentially neutral. She did not tempt, entice or suggest any unlawful line of conduct. A tearful motorist pleading for mercy may provide generous opportunity for the unscrupulous official on the look-out for such occasion, but it has no logical or necessary connection with the criminal conduct (essentially the soliciting of a bribe) and cannot be used as an excuse under the section to avoid the consequences of his or her own fault. On the contrary, the evidence for the prosecution established that a traffic policeman in the position of the appellant has a discretion which he may invoke in appropriate cases (such as an apparently merited plea for mercy) not to proceed with the issuing of a fine without prejudicing his employment.

[17] As to whether there existed any suspicion that the appellant had committed any similar offence (ss 2(e)), there clearly was not. But that does not automatically mean that he was unfairly treated. The trap was not directed against the appellant personally but rather against whosoever happened to be manning the speed trap at the particular time. As the evidence of the complainant shows, the appellant was someone who was prepared to bend the rules if the opportunity presented itself and for that he has only himself to blame.

[18] The appeal is dismissed.

J A HEHER
JUDGE OF APPEAL

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