IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: GRAHAMSTOWN

CASE NO. CA & R 9/2010

In the matter between:

JOHNSON SIBONDA LEPHOWANE **Appellant**

and

THE STATE **Respondent**

APPEAL JUDGMENT

GRIFFITHS, J.:

[1] The appellant was convicted by the Regional Court of contravening section 4 (1) (b) (iv) of the Prevention and

Combating of Corrupt Activities Act[1] and sentenced to seven years imprisonment, three of which were conditionally suspended. He was duly granted leave to appeal against his conviction.

[2] The appellant was a traffic officer, having served as such in different parts of the country. During 2002, he joined the Fort Beaufort or Nkonkobe Municipality in the same capacity under one Fiki who was the then Chief Traffic Officer of the Municipality. Fiki was suspended from that position early in 2005 amidst allegations that he was involved in corrupt activities and a disciplinary inquiry was duly convened to inquire into such allegations. The appellant was accordingly appointed to act in his stead as Chief Traffic Officer.

[3] During the same period that this occurred, the Special Investigating Unit ("SIU") from East London began investigating various Driving License Testing Centres ("DL TC") in the Eastern Cape, including that of the Nkonkobe municipality. One of the forensic investigators attached to this unit was a certain Tshuku who testified in this case to the effect that he had been approached by one Xhego, a driving school owner, with a request that the appellant meet with him regarding these investigations as the appellant did not want such investigations to continue. Tshuku

1 No. 12 of 2004

gave his telephone number to Xhego and was later contacted telephonically whilst in his office by a person purporting to be the appellant. He was asked by the appellant to meet in person. As he was suspicious, Tshuku consulted with his superiors and the SAPS after which he contacted the appellant and informed him that they could indeed meet on the 30th of June.

[4] On the appointed date, Tshuku was given a digital voice recorder by the SAPS and it was agreed that no money should change hands during the course of the pending meeting. The appellant requested that they meet at a private place. Tshuku accordingly suggested that they meet at Bonza damn, an apparently secluded area. He was introduced to the appellant (whom he had not met before) by Xhego who thereafter left the two of them alone. The appellant informed him that he had heard that Tshuku was investigating the appellant and further disclosed information relating to his having received bribe money from a certain boy and a woman. The appellant proceeded to say that he wanted these things to disappear and added that "*he will put his hands into the water and see what he comes up with*." Tshuku asked him what he meant by this and he stated that he would offer Tshuku some money in order for "*this to disappear*".

[5] Further discussions were held and it was ultimately agreed that Tshuku would do what was requested in return for payment of an amount of R 10,000. R 3,000 was handed over there and then with the promise of a further R 6,000 to be paid during the course of the then forthcoming weekend. They, including Xhego who had rejoined them, thereafter drove to a house in Amalinda in order to source further money which was allegedly owed by Xhego to the appellant. A further R1,000 was thereafter handed by the appellant to Tshuku whilst they were at this house in Amalinda. All this money was subsequently handed by Tshuku to the police officers.

[6] The appellant maintained that he was unable to attend the next meeting due to church commitments and payment of the outstanding amount was duly postponed to the following week. After the appellant had again phoned to arrange their second meeting, the police fitted a video recording device in Tshuku's vehicle. Tshuku thereafter again met the appellant and Xhego and once again they repaired to the seclusion of Bonza dam. Tshuku explained in detail how the appellant had appeared nervous, had not wanted to hand the sum of R6,000 in cash directly to Tshuku and how the appellant had suggested various strange stratagems in order to transfer the money to Tshuku. Tshuku further explained that at some point he thought that the appellant had perceived that

there was a recording device in the car which had prompted the appellant to say aloud "*Mr. Tshuku I am lending you the money, when are you going to return the money*?" Ultimately, the sum of R3,000 was handed by the appellant to Tshuku which he later also handed over to the police.

[7] The appellant had subsequently phoned Tshuku to apologize for being suspicious and had promised to bring the balance of the money on the following day. On the next day the appellant had again contacted Tshuku to repeat his offer to pay the balance but there was no subsequent contact from him. The appellant was arrested during March, 2006.

[8] The two recording devices used during the course of these meetings had apparently not functioned as desired and thus the meetings were neither recorded on the digital voice recorder nor the video recorder.

[9] Xhego also testified for the state and, to a large extent, corroborated the evidence of the appellant. He was duly warned as an accomplice witness pursuant to the provisions of section 204 of the Criminal Procedure Act[2] and confessed during the course of his evidence to the fact that he had been involved in an elaborate scam

2 No. 51 of 1977

in terms of which he took people, in particular illiterate persons, to the Nkonkobe municipality where they were able to fraudulently purchase their licenses without undergoing the prescribed driving test. He testified that he had been approached by the appellant in order to arrange a meeting with the investigators and that he had gone along with this in order to protect his interests, namely the scam referred to above which he was conducting in cahoots with the appellant.

[10] Certain policemen also testified and largely corroborated Tshuku. They confirmed that neither of the recording devices had produced the desired results, in the case of the digital recorder because it was not apparently switched on by Tshuku and in the case of the video recorder, because it was too dark. Although the money was duly handed in as an exhibit, it was subsequently seized by a particular police official as constituting proceeds of crime. The given reason as to why the appellant was not arrested for a period of some eight months after these events was that this was in accordance with a decision not to do so forthwith as to do so may have prejudiced the ongoing investigations in this regard at the Nkonkobe municipality.

[11] The appellant testified in his defence. He confirmed that he

had participated in the meetings with Tshuku at the dam (as facilitated by Xhego) but that he had arranged the meetings with the purpose of discussing the investigations and in particular the investigation regarding those officers under his jurisdiction. According to him, the meetings had taken place with Tshuku and the two of them had, indeed, discussed the investigation as it pertained to his subordinates. He however denied that money had exchanged hands at these meetings or that he had entered into any form of corrupt dealing with Tshuku. He did confirm that after the first meeting they had gone to Xhego's residence and claimed that Xhego had borrowed the sum of R3,000 from him during the course of the second meeting. He also maintained that he had received telephone calls and text messages from Xhego in an attempt to extort money from him in relation to these charges. It was his evidence that both Tshuku and Xhego had conspired to fabricate this case against him.

[12] Mr. Price, who appeared before us for the appellant, submitted that the learned magistrate had in effect disavowed the appellant his right to an acquittal on the basis that his version was reasonably possibly true. He contended that the magistrate could never have realistically found, on this evidence, that the probabilities favoured the state case and that, at most, the

probabilities were even entitling the appellant to an acquittal. This was so, he submitted, particularly in view of the fact that the magistrate did not question the demeanor of the appellant, or manner in which he had testified. The main thrust of Mr. Price's argument was that the magistrate had lost sight of the fact that, in his submission, there was no investigation being conducted or pending into the activities of the appellant himself and, ergo, it was highly improbable that the appellant would approach Tshuku in the circumstances with a request for nonexistent evidence to be destroyed or that a nonexistent investigation be abandoned. In essence, Mr. Price submitted that the appellant's case was to the effect that this entire affair had been falsely devised by Xhego whose motive in this regard was to remove the appellant as Acting Chief Traffic Officer because the appellant would not cooperate with Xhego in the fraudulent licensing scheme, and to reinstate Fiko, who would. He thus submitted that the appellant's case was that Xhego had set Tshuku up to act as his instrument in removing the appellant from office.

[13] Mr. Price also submitted that the learned magistrate incorrectly dismissed an application brought by the appellant during the course of the proceedings to introduce similar fact evidence based on certain newspaper articles which had been

published during the course of the trial. This refusal by the magistrate, so he contended, amounted to a contravention of the appellant's right to a fair trial.

[14] Mr. Engelbrecht, who appeared for the state, supported the conviction and the supporting reasoning of the magistrate. He also submitted that the magistrate's refusal of the aforementioned application was correct.

[15] In arguing before us Mr. Price set much store by the case of S v Liebenberg[3]. In Liebenberg's case the accused had been convicted of rape and robbery despite the fact that the trial court had accepted that his alibi defence could not be rejected as false. The Supreme Court of Appeal found that, having made such a finding, the trial court was not entitled to reject such alibi on the basis that the prosecution had placed before the court strong evidence linking the appellant to the offences. In dealing with the matter, Jafta JA referred to the restatement of the test applicable to criminal trials to be found in S v Sithole[4] with approval as follows[5]:

"*There is only one test in a criminal case, and*

3 2005 (2) SACR 355 (SCA)
4 1991 (1) SACR 585 (W.)
5 At 590 g-i

> *that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken*." (My underlining)

[16] Mr. Price has strenuously argued, *inter alia*, that the magistrate misdirected himself in "*rejecting the evidence of the*

Appellant despite finding nothing inherently wrong with his evidence and despite not finding him to be a bad witness". In this regard, he has pointed to the magistrate's statement in his judgment that:

> "*The accused in court stuck to his version and did not really contradict himself apart from making the same mistake as Tshuku, namely to forget about those daily visits to the SIU offices after the 13 July 2005*."

[17] On a proper reading of the very full and well reasoned judgment of the magistrate it is clear that, after a full and critical analysis thereof, he rejected the evidence of the appellant on the basis that the appellant's version was so inherently improbable that it fell to be rejected as being false beyond doubt.

[18] In this regard, it is as well to bear in mind the proper approach to evaluating evidence in a criminal case of this nature. This has been variously stated but the following statements of the law in this regard are particularly apposite to the present matter. Malan JA in R v Mlambo[6] (approved in S v Phallo and Others[7])

6 1957 (4) SA 727 (A)
7 1999 (2) SACR 558 (SCA) at 738a - b

dealt with this as follows:

> *"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.*
>
> *An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.*" (My underlining)

(See also S v Sauls and Others[8]; S v Rama[9]; S v Ntsele[10]; S v Chabalala[11].)

[19] The following approach of Nugent AJA in S v Mbuli[12] is also instructive:

> "*It is trite that the State bears the onus of establishing the guilt of the appellant beyond a reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent. . . . (I)n whichever form the test is applied it must be satisfied upon a consideration of all the evidence Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond a reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true*.'

8 1981 (3) SA 172 (A) at 182g - h
9 1996 (2) SA 395 (A) at 401
10 1998 (2) SACR 178 (SCA) at 182b – h
11 2003 (1) SACR 134 (SCA) at 139, para 15
12 2003 (1) SACR 97 (SCA) at para 57

And later, in quoting Moshephi & Others v R[13]:

> "*Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees*.'

[20] The correct approach has also been set out in the case of S v Van der Meyden[14] at at 449f - 450b as follows:

> "*The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical*

13 LAC (1980 – 1984)
14 1999 (1) SACR 447 (W)

corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[21] In my view, the magistrate in this matter duly and correctly followed all the above-mentioned pre-scripts. He evaluated the evidence of all the witnesses thoroughly and with a critical eye. The manner in which he examined the evidence of the state witnesses was applied equally in his evaluation of the evidence of the appellant. He stated frankly that he could not find any material contradictions in the evidence of the appellant and did not comment directly on his demeaour. However, upon a reading his

summation and analysis of the appellant's evidence it becomes apparent that he found that the evidence of the appellant in a number of respects, and his overall version of the events, was so inherently improbable that it could safely be concluded that it was, without doubt, false. For example, he stated that during cross-examination by the prosecutor the appellant had "*no explanation for simple improbabilities in his version especially regarding his visits to East London, to the Bonza Bay dam and to Xhego's residence in Amalinda*."

[22] With regard to Mr. Price's argument that the entire case was initiated and planned by Xhego, the magistrate referred correctly to the fact that the appellant himself had not referred to this in his testimony. He proceeded to say that "*The possibility of such a plot or scheme is a totally wrong construction or interpretation of the available evidence. It is without basis or justification and is somewhat ludicrous*." In dealing with the evidence of the state witness Xhego in this regard, after stating that Xhego showed no animosity towards the appellant, the magistrate said that "*to suggest that this witness was involved in an unscrupulous plot to entrap an innocent man is plainly not true, and somewhat outrageous. It is therefore not surprising that none of these far-fetched and calculated steps to entrap the accused, and with which*

Xhego was confronted, were put to Tshuku.". It is clear from statements such as this, and other references in the judgment, that the magistrate, on an overall conspectus of the evidence and having stood back to look at the "whole mosaic", was of the view that the alleged conspiracy between Xhego and Tshuku was so patently improbable that it could never be accepted as being reasonably possibly true.

[23] In my view, the magistrate did not misdirect himself in this regard, or indeed in any of the respects raised by Mr. Price in his heads of argument and in argument before us. One of these further aspects was a refusal by the magistrate of the abovementioned application, brought fairly late in the day, to lead similar fact evidence which had as its purpose the undermining of Xhego's credibility. The evidence sought to be introduced consisted of newspaper articles which alleged that Xhego had provided information to the relevant newspaper which he later denied, or which had been proved to be false. I am satisfied that the magistrate properly disallowed the introduction of this evidence. Such evidence is admissible only in exceptional circumstances, if it is shown to be sufficiently relevant to warrant its reception, and if it is shown to have a relevance other than one solely based on character.[15]

15 Zeffert, Paizes and Skeen *The South African Law of Evidence 4th edition at page 52*; S v Wilmont

[24] Apart from the fact that such evidence, being as it was contained in newspaper reports, would have little or no probative value as such, newspaper articles could not be relied upon to test the credibility of a witness. It would appear that the sole purpose of introducing such evidence would have been in an attempt to undermine the character of Xhego. Even if it were to have been allowed, it could have served little or no purpose as the magistrate, correctly in my view, found that Xhego's evidence should be approached with caution not only because he was an accomplice who was warned as such, but because he had in any event confessed to clear acts of dishonesty in his dealings with the appellant relating to the fraudulent purchasing of false licenses for his driving school clients.

[25] Having found that the magistrate did not misdirect himself, the appeal can only succeed if we are satisfied that the magistrate was wrong in concluding that the evidence established the guilt of the appellant beyond a reasonable doubt. In doing so, due regard should be given to the fact that the magistrate had the decided advantage of observing the witnesses in court. Through having seen and heard them "*en veral om hulle reaksies onder kruisondervraging waar te neem, het die landdros 'n veel beter*

2002(2) SACR 145, para 36.

geleentheid gehad om wat waarskynlik en wat onwaarskynlik was vir daardie besondere persone te beoordeel."[16]

[26] The magistrate found that Tshuku was a very good witness. Although he was a single witness to many of the events, a matter which the magistrate was alive to and duly warned himself of in terms of the cautionary rule, the magistrate was impressed with him. In this regard the magistrate expressed himself thus:

> "*Tshuku was an impressive witness. Not only in the way he gave his evidence in the English language, but also his demeanour in the witness stand, was irreproachable. His answers to questions by the Prosecutor, as well as Mr. Price, were clear and to the point. Despite some rigorous and sharp cross examination by Mr. Price, he remained calm throughout. His testimony carried that proverbial and a distinct ring of truth.... Tshuku readily conceded that his evidence regarding smaller and somewhat peripheral matters could be wrong*."

[27] That the magistrate did not rely solely on his observations of

16 S v S 1990 (1) SACR 5 (A) at page 12; See also: S v Leve 2011 (1) SACR 87 (ECG) at para 8

demeanour in this regard also appears clearly from his judgment. He proceeded to examine all the material aspects of Tshuku's evidence and weighed them as against the general probabilities. His analysis in this regard was thorough and in my view cannot be questioned. Of some importance in this regard is the fact that Tshuku did not know the appellant prior to the occurrence of these events and that he clearly had no axe to grind with him. He therefore had no motive to falsely implicate the appellant and, indeed, Mr. Price could not suggest one. If it were to be suggested that he, as a person investigating the municipality, had an interest in securing a conviction, one would have expected him to have picked on one or more of the persons already tagged as suspects, and not the appellant against whom the investigators apparently, at that stage, had no evidence.

[28] The magistrate correctly found in this regard that the evidence of this witness was strongly supported by the inherent probabilities and by the evidence of Xhego. Once again, he critically analyzed the evidence of Xhego and found that, despite his having confessed to dishonesty, he could rely on the evidence of Xhego which was corroborated in many material respects by that of Tshuku.

[29] Having read the evidence closely, I am satisfied that the magistrate was entirely correct in accepting the evidence of Xhego, as supported by Tshuku. From the record, it appears clearly that Xhego is an intelligent person who gave forthright and honest evidence and that he had no motive to falsely implicate the accused. Accordingly, an acceptance of the evidence of the appellant as being reasonably possibly true would necessitate a finding that Xhego, in collusion with Tshuku, fabricated all this evidence against the appellant. This would fly directly in the face of the probabilities, with which I have dealt earlier and which strongly favour the version of the State, and cannot explain why Tshuku, an independent investigator with absolutely no reason whatsoever to falsely implicate the appellant, would in fact do so.

[30] In addition, as expressed by the magistrate in his judgment, all the detail given by Tshuku during the course of his evidence clearly puts the lie to the version of the appellant. An example of this is the detailed discussion during the first meeting at the dam relating to the strange manner in which the money was to be handed over by the appellant and the detailed discussion relating to the bribes which the appellant told Tshuku he had accepted. This of course also explained why the appellant was approaching Tshuku, a person whom he believed might scratch too deep and

uncover these facts. There is also the detail given during the course of the second meeting when it appeared that the appellant had become suspicious on having noticed the recording device wiring in the vehicle. He apparently began to speak loudly about lending money to Tshuku and promptly exited the vehicle. This all fits hand in glove with the fact that the appellant only telephoned Tshuku once more after this event and thereafter did not contact him again. There is also all the detail relating to the recording devices, their failure to operate, the fact of the handing of the money to the policemen subsequent to each of these meetings, etc. All of this simply could not have been fabricated by Tshuku in order to mislead the court.

[31] Finally, Mr. Price's argument as to the alleged improbability of the appellant approaching Tshuku in circumstances where the appellant was not being directly investigated does not hold water when measured against the background evidence in this matter. Tshuku was carrying out a general investigation. On an acceptance of Tshuku's evidence, the appellant approached him and made it clear that he, the appellant, was uneasy and proceeded to relate events of bribery which explained his insecurity. It is certainly not improbable, had the appellant been involved in such bribery, that he would have approached Tshuku at an early stage before Tshuku

could scratch too deeply and unearth evidence against him. In other words, it seems highly probable in all these circumstances that the appellant felt insecure about his position and decided on a strategy of pre-emption by offering a bribe in turn to Tshuku.

[32] I am accordingly satisfied that the appellant was properly convicted and that the magistrate's decision in this regard was correct. In all these circumstances, I would propose that the appeal be dismissed.

_____

GRIFFITHS J
JUDGE OF THE HIGH COURT

VAN ZYL J. : I agree, and it is so ordered.

_____

JUDGE OF THE HIGH COURT

HEARD ON : 10 AUGUST 2011

DELIVERED ON : 27 OCTOBER 2011

CONSEL FOR APPELLANT : Mr Price

INSTRUCTED BY : Changefoot & Van Breda

COUNSEL FOR RESPONDENT : Mr Engelbrecht

INSTRUCTED BY : Director of Public

: Prosecutions