

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A158/2017

DPP REF NUMBER: 10/2/5/1-(2017/212)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES /
~~NO~~.

(3) REVISED. ✓

DATE

SIGNATURE

22/2/2018


10 In the matter between

MOABELO PHUTI STANLEY

FIRST APPELLANT

NDAWONDE SIBUSISO FUNEKA

SECOND APPELLANT

AND

THE STATE

Accused

SUMMARY

- 20 **Criminal Appeal – and Procedure- Conviction based on the Prevention and Combating of Corrupt Activities Act 12 of 2004- Police officials – evidence of a single witness as contemplated in section 208 of the Criminal Procedure Act 51 of 1977 – cautionary approach – the standard of proof in criminal trials.**

JUDGMENT

MOSHIDI J:

INTRODUCTION

[1] This appeal turns essentially on the question whether the state succeeded to prove the guilt of the appellants beyond reasonable doubt in the trial.

10 [2] The appellants stood trial in the Johannesburg Regional Court on a charge of corruption.

The State based the charge on the provisions of section 4(1)(g)(ii)(99), read with sections 1,2,4(2),24,25,26(1)(a) of the Prevention and Combating of Corrupt Activities. Act 12 of 2004-Corruption: accepting a benefit. It was alleged that the appellants, being members of the South African Police Service, committed the offence at the Park Station Police Station, Johannesburg on the 30 January 2015.

20 In short it was alleged that the appellants unlawfully offered to accept any gratification, namely the cash amount of R3500-00 (three thousand, five hundred rand), or more, from Mr Omar Vusiki Cedric, a Malawian national (the complainant), in order to avert his arrest and detention.

[3] At their trial, the appellants, who were legally

represented, pleaded not guilty to the charge and proffered no plea explanations in terms of the provisions of section 115(1) of the Criminal Procedure Act 51 of 1977 (the Criminal Code). It is noteworthy that at the conclusion of the State case, the appellants launched an application for their discharge in terms of the provisions of section 174 of the Criminal Code (the discharge application). The application was refused for reasons that may become more relevant later below. In
10 spite of their plea, on 19 May 2016, the appellants were convicted as charged. Sentence was imposed later. The trial court declined a subsequent application for leave to appeal against the conviction. The present appeal before us is with leave granted by this High Court on petition.

[4] The following matters are common cause: on the day of the incident (30 January 2015), the complainant was at Park Station on his way to Malawi. He was about to
20 board a bus to Malawi. It was just after 06h00. His luggage consisted of bags containing amongst others, about five (5) old cell phones and a laptop. The complainant was approached by the appellants in full police uniform as well as a third female police officer. The police officers requested to search the

complainant's luggage there and then. The complainant refused to be searched in public and requested to be searched instead at the nearby Park Station Police Station. The police agreed. Once at the police station, the complainant's bags were searched by the appellants. In the bags, the cell phones and the laptop were found. The appellants suspected that these items may have been stolen. The complainant gave an explanation for the possession of the items. Despite the explanation, the complainant was threatened with arrest and detention.

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[5] In the process of rendering an explanation for how he came to be in possession of the items, the complainant telephoned Musa his friend (Musa) who had given him the cell phones to convey on his behalf to Malawi. The complainant, also spoke telephonically to his employer. The telephonic discussion in which appellant Number 2 who took part, occurred in the absence of the appellant Number 1. The female police officer took no part at all in this and nothing more needs to be said about her henceforth.

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[6] The complainant's brother, Allie Cedric Visiki (Allie) arrived at the Police Station where he joined the

complainant in the company of appellant Number 2.

Allie remained there until the complainant was eventually locked up in the cells.

[7] The most crucial and singular aspect of the complainant's evidence for consideration in this appeal is the following:

10 he alleged that on discovery of the above items in his presence, the appellants, after threatening him with arrest and detention, demanded money from him in order to secure his release. He specifically mentioned in evidence-in-chief that both appellants searched his bags. In the initial stages of his evidence-in-chief, the complainant made no mention of the specific amount demanded nor did he mention directly the word "bribery". It was only towards the end of his evidence-in-chief that he testified in the following terms:

20 "Your worship at that particular time accused two(2), he uttered and he said you need to make a plan, you need to give us some money because if we arrest you and you are locked in, you need about R3500.00 for bail and also it would cost you about R8000.00 for a lawyer. So you need to tell us how much you can give us in between R3500-00 and R8000-00. Otherwise it would cost you more". (See page 18 of record, lines 3 to 10).

The appellants testified and denied that they demanded money from the complainant. The complainant was the only witness called by the State on this crucial aspect.

Based on the above, the evidence of the complainant called for closer security and cautionary approach in order to determine firstly, whether the evidence complies with the, now somehow watered down, provisions of section 208 of Criminal Code. The latter section provides that “an accused may be convicted of any offence on the single evidence of any competent witness”. Secondly, the evidence must be assessed wholly in order to establish whether the guilt of the appellants at the trial was proved beyond reasonable doubt.

[8] I deal briefly with the first requirement for the cautionary approach to the evidence of a single witness. In Hiemstra’s Criminal Procedure (latest edition), paragraph 24.4, the following is stated: “The provision that one competent witness is sufficient stands here without further qualification. Nevertheless, as a cautionary measure, the courts have read more into it. This started with R.v Mokoena 1932 OPD 79 in which the court said that the provision should only be applied when the single witness is clear and satisfactory in every material respect, has no interest or prejudice, did

not contract him- or- herself, does not have previous convictions for dishonesty, had proper opportunity for observation and so on. But this statement should not be seen as an extension of section 208. The requirement remains that the court must be convinced beyond reasonable doubt. This depends on whether the court believes the witness; in its assessment such factors will normally be taken into account. Often the only witness is the complainant, who, in the nature of things has an interest contrary to that of the accused, or is prejudiced. But the witness's account can nevertheless certainly be sufficient to justify conviction depending on the circumstances.”(See also Rv Nhlapo 1953 1 PH H11 (A); S.v. Webber 1971(3) SA 754(A); and S.v Sauls and others 1981(3); SA172(A) et 180 E-G, for the proper approach to the evidence of a single witness.

[9] In regard to the second principle, it is trite that the court should assess and evaluate the evidence of both parties holistically and in a balanced manner, rather than by cross examining each in isolation, cf S.v Van Aswegen 2001 (2) SACR 97 (SCA) at 101 a-e where reference with approval is made to S.v Van der Meyden 1999 (1) SACR 447 (W). For purpose of the present appeal, I must add the third and trite principle, which is

the standard of proof. "The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent ---.

A Court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true— " See S.v Van der Meyden, *supra*, at 448 f-q. See also S.v Sithole 1999(1) SACR 585(W).

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[10] The above principles should be applied to the facts of the instant matter. Indeed, the essence of the grounds of appeal is that the court a quo was wrong in concluding that the evidence of the complainant, as a single witness on the crucial aspect of the matter, was satisfactory in all material aspects and in rejecting as not reasonably possibly true, the version of the appellants. These grounds were elaborated upon extensively during the application for the discharge of the appellants at the conclusion of the State case; at the end of the entire case; and during the application for leave to appeal. These grounds of appeal are all on

record, and require no repetition here.

[11] Briefly stated. Close scrutiny of the evidence in accordance with the principle sketched above, shows that the complainant's evidence should not have been relied upon by the court a quo. For starters, the complainant did not lay the charges when he should have. His employer did so. The alleged demand for money by the appellants was in rather vague terms. No specific amount was mentioned until the end of evidence-in-chief and cross examination. The complainant's version as to exactly which of the appellants were present and their respective roles when the alleged demand for money was made was difficult to follow. It appeared that only accused 2 (second appellant) was present. The specific amounts mentioned, namely R3500-00 and R8000-00 related to bail and legal fees, respectively. In cross-examination, the complainant was confronted with the contents of his witness statement, as contrasted with his oral evidence, regarding which appellant mentioned money. He retorted that it was only appellant 2, who did that. (See record page 42). In addition, the complainant tended to render extended answers in circumstances where it was unnecessary to do so. For this, he was warned during

cross- examination by the trial court, on several occasions. The list of the unsatisfactory features in the evidence of the complainant is not exhaustive.

The evidence show that the complainant's brother, Allie, was present at the Park Station Police Station until the complainant was led away to the cells. Allie also interacted with the appellants. He was not called by the State to testify. In closing argument, counsel for the appellants placed heavy reliance on this omission. It

10 was contended that Allie should have been called to provide possible corroboration to the complainant's version. In this regard, reference was made to case law such as S.v Msane 1977(4) SA758(N) at 759, and S.v Abrahams 1979(1) SA 203(A) at 207 B-H. There was considerable merit in the submission. For, in S.v B 1976(2) SA 54 (C)/ at 59B, It was said that: "Corroboration is independent evidence which confirms the testimony of a witness. Such confirmation may be either "in a material respect" or else on a point tending
20 to prove the guilt of the accused---".

[11] For all the above reasons, it is my finding that the evidence of the complainant above was not satisfactory in all material respects to secure a conviction. The court a quo ought to have regarded it insufficient to do so. I

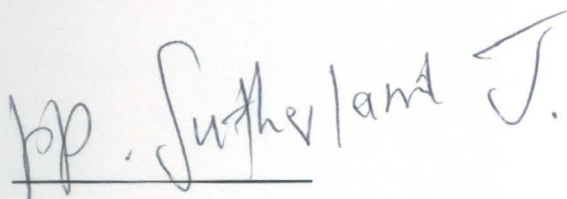
therefore conclude that the State failed to prove the guilt of the appellants beyond reasonable doubt as enshrined in the legal principle set out earlier in this judgement. The appeal must succeed as indicated in the order below:

ORDER

In the result the following order is made:

1. The appeal against the convictions succeeds.
- 10 2. The convictions and sentences imposed by the court a quo are set aside.

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I Concur,

Sutherland

Judge of the High Court of

South Africa, Gauteng Local Division

Johannesburg



DSS Moshidi

Judge of the High Court

of South Africa, Gauteng

Local Division Johannesburg

Counsel for the appellants – Mr. B Mzamo

Instructed by – Mzamo Attorneys

10 Counsel for the respondent – Ms PP Ranchhod

Instructed by – DPP, Johannesburg

Date of hearing – 22 February 2018

Date of Judgement – 22 February 2018