



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: A225/2018

In the matter between:

BONTLE MONENYANE

Appellant

and

THE STATE

Respondent

CORAM: CHESIWE, J *et* OPPERMAN, J

HEARD ON: 11 FEBRUARY 2019

JUDGMENT BY: CHESIWE, J

DELIVERED ON: 30 MAY 2019

SUMMARY: Appeal – Conviction and Sentence - Corruption: Accepting a Benefit

JUDGEMENT

- [1] The Appellant was prosecuted before the Botshabelo Magistrate Court on a charge of corruption in terms of section 4(1)(a)(i)(aa) read with Sections 1, 2, 4(2), 24, 23, 26(1)(a) of the Prevention

and Combating of Corrupt Activities Act, Act 12 of 2004. She pleaded not guilty. She was convicted and sentenced to five (5) years imprisonment.

- [2] The trial court denied an application for leave to appeal. The Appellant, by way of petition to the Judge President of this Honourable Court, was granted leave to appeal against conviction and sentence.
- [3] The Appellant was legally represented by Mr Mxaka at the trial court.
- [4] The Appellant's appeal is based on the following grounds:
"That the trial court erred in finding that the State proved its case of corruption against the Appellant beyond reasonable doubt; that the State witnesses materially contradicted themselves in respect of the evidence of the complainant; that the main complainant was not present when the alleged offence was committed."
- [5] It was noted in the transcribed record¹ that the Appellant's legal representative made an application in terms of section 174 of the Criminal Procedure Act 51 of 1977. The trial court dismissed the application on the grounds that there is a *prima facie* case against the Appellant.²
- [6] The background on this matter is briefly that on the 11th of July 2014, the Appellant as well as the SAPS were involved in an operation between the South African and Lesotho border, for

¹ Application in terms of section 174 of the Criminal Procedure Act 51 of 1977.

² Page 17-20 of the record.

checking of stolen motor vehicles. Due to this operation, the complainant, Samuel Ntsweu was arrested on 11 July 2014 for theft of a motor vehicle. He was taken to Heidedal Police Station. On the 14th of July 2014 near Botshabelo the Appellant, being a public officer (SAPS), indirectly or directly accepted an amount of R2500.00 from a certain person Kananelo for her own benefit, in order to release the complainant from custody. The Appellant informed the complainant that if he paid an amount of R2500.00, the case against him will disappear. The complainant made arrangements with the Appellant that he will speak to his wife to get the R2500.00. However, on 15 July 2014, he was released on bail of R2500.00 and the case was withdrawn against him.

- [7] The first State witness, Lydia Ntsweu (spouse to the complainant) testified that the Appellant contacted her for an amount of R2500.00 but she did not have the money. She arranged with a Kananelo Nkosi (Nkosi) to hand over the money to the Appellant. Nkosi confirmed to her that he gave the money to the Appellant. However, she was not present when the money was handed over to the Appellant. The third State witness, Kananelo Nkosi testified that he indeed gave the Appellant the amount of R2500.00 in front of the Standard Bank in Thaba Nchu.
- [8] The Legal Representative on behalf of the Appellant, during oral argument, submitted that the State's case was not proven beyond reasonable doubt. He submitted that it was clear that the State witnesses materially contradicted each other. The witnesses did not corroborate each other and that there was doubt on their

credibility. And that the appeal against conviction and sentence must therefore be dismissed.

[9] Counsel on behalf of the Respondent submitted that the State at the trial court did not obtain the statement of the Lesotho Police officer who was with the Appellant when the complainant was transported to Heidedal, nor did the State obtain the corroborative phone record of the Appellant, Lydia Ntsweu and Kananelo, as well as the Automatic Vehicle Location³ (AVL) report of the vehicle that the Appellant allegedly transported Kananelo with from Thaba-Nchu to Botshabelo. Counsel therefore conceded that the conviction and sentence imposed by the trial court is not supported and that the appeal on conviction and sentence be upheld.

[10] According to Kananelo's testimony the R2500.00 was to be used for bail. Though Kananelo could not recall a lot of things such as whether he gave the Appellant R100 or R200 notes,⁴ nor could he remember whether the Appellant drove in a white Toyota Hilux bakkie. On being question about the money he paid over whether it was for the bribe, he stated as follows:⁵

"Prosecutor: So you were told that was bail money?

Omdat ek gesê was dat ek moet vinnig die geld bymekaar maak, dit is nou wat in my gedagte opgekom het dat in ander woorde daardie geld sal gebruik word om borg te betaal namens Mnr Ntsweu te betaal."

³ A tracking system that is used to locate and determine the geographic location of a vehicle.

⁴ Page 16 lines 11 – 12 of the record.

⁵ Page 13, Line 20.

[11] It was noted on the transcribed record⁶ that the complainant was not present, neither part of the transaction of the handover of the money, this is noted in the following evidence of the State witnesses:

“Prosecutor: Now sir, did you see when Kananelo handed money to accused person?

Hof: Wie is Kananelo?

Prosecutor: It is the third State witness, your Worship.

He will be called.

Ek was in die selle gewees want ek het hom nie gesien nie.

And further page 12, line 10.

“Sir in short, you did not give accused money with your hand?

Ja.

And you do not know whether Kananelo gave the accused the money because you were not there?

Ek was nie daar nie.”

[12] It is trite that the onus rest on the State to prove its case beyond reasonable doubt and the Appellant is expected to give a version which is reasonable possibly true and if she has done so, she is entitled to an acquittal.

[13] From the State witnesses’ testimony it is indeed such that the alleged amount paid to the Appellant was either for the bribe or for the bail. The witnesses could not with certainty confirm for what was the money nor could they corroborate each other’s versions.

[14] As correctly stated by Counsel on behalf of the Appellant that the State could have corroborated its evidence by obtaining the

⁶ Modupi testimony, Page 8, line 16.

phone records of the State witnesses, that of the Appellant and the Lesotho Police officer who was allegedly present when the complainant was escorted to Heidedal Police Station; this in order to corroborate the version of the complainant. The complainant was not present when the money exchange hands between the Appellant and Kananelo. The State did not prove if the money was even handed over to the Appellant, neither is there proof that the money was used to settle for bail. In **S v Radebe**,⁷ Swartz J stated as follows: “Die staatsaak moet, met inagneming van die sterkhede en die swakhede daarvan saam met die verdedigingsaak en die sterkte en swakhede in die weegskaal gegooi word.”

[15] It is trite that for the Respondent to prove the conviction of commission of the offence, the State must submit sufficient evidence to prove that an offence indeed occurred or was committed. Indeed, as correctly stated by Counsel on behalf of the Appellant, that the Respondent failed to adduce evidence that the Appellant committed the offence. The Respondent in this instance conceded that the State at the trial court did not prove its case beyond reasonable doubt.

[16] In **S v Chabalala**,⁸ the court said: “The correct approach is to weigh up all the elements which points towards the guilt of the accused against those which are indicative of his innocence, taking proper account of the inherent strengths and weakness, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

⁷ 1991 (2) SASV 166 (T) at 182.

⁸ 2003 (1) SACR 134 (SCA) at 139 I – J.

- [17] It is trite that a case cannot be proved on a balance of probabilities when a criminal offence is alleged. A case has to be proven beyond reasonable doubt. The State bears the onus to prove the guilt of an accused person beyond reasonable doubt.
- [18] It is trite that an appeal court will only tamper with the trial court's findings if it is shown that the findings made by the trial court were clearly wrong. It was submitted by Counsel on behalf of the Appellant that the trial court committed misdirection of fact. Furthermore, when consideration is paid to all inconsistencies and improbabilities, there is reasonable doubt to the correctness of the credibility findings made by the trial court. I am satisfied that none of the elements of corruption were present, and neither did the State prove beyond reasonable doubt the corruption charge against the Appellant. In my view the State, at the trial court, did not prove its case beyond reasonable doubt. Furthermore, the trial court incorrectly found the Appellant to be an untruthful witness and incorrectly rejected her version as false beyond reasonable doubt.
- [19] I agree with the submission by the Appellant that the magistrate failed to consider all relevant evidence in determining whether a crime has been committed. It is clear that failure to consider all evidence resulted in the wrong verdict. In the result the Appellant ought to have been acquitted.
- [20] In my view the trial court incorrectly convicted the Appellant. Therefore there is no reason not to tamper with the trial court's

findings on the conviction. Thus the conviction against the Appellant ought to be set aside.

[21] In respect of the appeal against sentence, this issue becomes moot when the conviction is set aside, therefore it will not be necessary to address it as the conviction against the Appellant is set aside.

[22] I accordingly order as follows.

1. The appeal against conviction succeed.
2. The conviction and sentence of the trial court is set aside.

S. CHESIWE, J

I concur.

M. OPPERMAN, J

On behalf of Appellant: W. Van Der Berg
Instructed by:
Van Der Berg Attorneys
BLOEMFONTEIN

On behalf of Respondent: Adv. K.E. Lesie-Shale
Instructed by:
Director: Public Prosecutions
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