

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

31 July 2024

DATE

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SIGNATURE

CASE NUMBER: A142/2010

DPP REF NUMBER: JAP 2010/0151

DATE OF HEARING: 3 JUNE 2024

In the matter of:

MDLALOSE, CLEMENT

MAIMELA, GRACIEN

BHUDU, MILES GOLDEN

Versus

THE STATE

1ST APPELLANT

2ND APPELLANT

3RD APPELLANT

RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 31 July 2024.

A. Introduction

1. The Appellants were arraigned in Wynberg Regional Court. This appeal relates only to the 3rd Appellant, who was Accused 5, in the trial court. For the purpose of this judgment, the 3rd Appellant will be referred to as “(the Appellant)”.
2. The Appellant is appealing against both conviction and sentence.
3. The Appellant was charged with a contravention of Section 115(b) of Act 111 of 1998 and an alternative to count 1, namely contravening Section 116 of Act 111 of 1998, in that on or upon 8 March 2005 and at or near Leeuwkop Prison or Sasol Garage in the Regional Division of Gauteng the Appellants did unlawfully conspire among themselves or unlawfully aided a prisoner Morldeche Accused 4 to escape from any place where h thee was to be kept in custody at Lindela Deportation Centre awaiting his deportation. The charge pertains to an escape from Lindela Deportation Centre.
4. The Appellant pleaded not guilty to all charges and did not give a plea explanation. He was convicted on 4 July 2008 on count one only, and on 8 September 2008, he was sentenced to 8 years imprisonment.
5. On the same day of the sentencing, the Appellant applied for leave to appeal against conviction and sentence. The Magistrate refused the Appellant's application.
6. The Appellant then petitioned the Gauteng Local Division of the High Court, Johannesburg and the leave to appeal both the conviction and sentence was granted on 9 October 2014.

Preliminary issues

B. Condonation

7. Both parties requested the Court to condone the late filing of the appeal. Having considered the reasons forwarded by all representative for the delay, we could not find any fault on their part and condonation was granted.

C. Non-Compliance (in respect of 1st and 2nd appellants)

8. The Respondent applied before this Court to have the appeal for the 1st and 2nd Appellants be struck off the roll due to non-compliance with Rule 8(1) of the Rules governing the conduct of proceedings of this Division. Both Appellants failed to file their heads of arguments. This Court struck off the appeal by the 1st and 2nd Appellants as prayed for by the Respondent.

D. Incomplete Record

9. As stated above, the appeal by the Appellant is against both the conviction and sentence. However, the Appellant's challenge was the incomplete record of the trial proceedings. The record forms the foundation of the appeal process, and the complete record is necessary for the administration of justice to succeed. An accused's constitutional right to a fair trial, including the right to appeal to a higher court, is sacrosanct.
10. Both parties addressed the Court regarding the challenges they experienced in reconstructing the record, considering that a substantial period has passed since the trial was finalized.
11. The initial appeal hearing did not proceed as the record of proceedings needed to be completed, and the reconstruction of the record proved problematic. Subsequently,

affidavits have been obtained, and court notes have been compared by all available parties. The presiding Magistrate ascribes the challenge of reconstructing the record to the delay between the conclusion of the trial and the period that she was approached for reconstruction.

12. The Appellant's counsel requested the Court to proceed with the appeal hearing, arguing that the record of proceedings had been reconstructed as far as possible and that it was in the interest of justice that the appeal should be heard.
13. The question now for determination is whether the absence of the missing portions of the record has the effect that the appeal could not be fairly determined.
14. In this matter, the parts alleged to be incomplete are the evidence of the first state witness, Elias Nameng; his evidence was interrupted on Page 127 during evidence in chief. The evidence then continues on Page 147, indicating that cross-examination had already commenced on a previous occasion. There is no transcription of Nameng's initial cross-examination. The proceedings transcribed on Pages 128 to 135 (although dated differently) transpired before those transcribed on Pages 103 to 127. Page 218 contains the transcription of the continuation of Johannes Mnisi's evidence. The initial evidence of Johannes Mnisi has yet to be transcribed. Page 58 (dated 20 July 2007) and Page 61 (dated 5 October 2007) of the record does not contain any further transcription regarding the proceedings. Pages 110 to 115 contain a so-called reconstruction of the evidence of Inspector Hall. It should be noted that the presiding Magistrate had already highlighted the incompleteness of the record on 06 February 2009 on Pages 594 to 595. However, steps have been taken to rectify the situation.
15. Having perused the record, this Court finds that the missing portions have no bearing on the adjudication of this appeal. The Magistrate adequately reconstructed the missing portions and the reconstruction was accepted as accurate. The record should be adequate for the court to properly consider the merits or demerits of the

appeal. This judgment is a testament to the fairness and thoroughness of our legal system, ensuring that justice is served.

16. However, it is essential to emphasize that a complete criminal trial record is of utmost importance as it serves as a detailed account of all proceedings and activities that transpired during the trial. The record includes essential information. Keeping and maintaining a complete trial record is crucial for several reasons. It ensures that all actions taken by the Court, legal counsels, and parties participating in the trial are accurately documented. For an appeal Court, a trial record provides the information needed to adjudicate the proceedings of the original trial and also enables the appeal court to assess whether any legal errors occurred that may have impacted the outcome of the case. Accurate trial records help safeguard the legal rights of all parties involved. Further, it enables the Appeal Court, to establish whether due process was followed and whether the fundamental rights of the accused, witnesses, and the prosecution were upheld during the trial.

17. The fact that the record needs to be completed does not automatically entitle the Appellant to have his conviction and sentence set aside. The test is whether or not the incomplete record makes it impossible to consider and adjudicate such an appeal.

18. In *S v Chabedi* 2005 (1) SACR 415 (SCA) at paras 5- 6, Brand JA said:

"On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of Appeal. If the record needs to be revised for adequately considering the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal, not that it must be a perfect record of everything said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record

is impossible (See, S v Collier 1976 (2) SA 378 (C) at 379 A-D and S v S 1995 (2) SACR 420 (T) at 423 b-f).

19. The question of whether defects in a record are so serious that a proper consideration of the appeal is not possible cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal
20. This Court concludes that the record is, for the proper consideration of the appeal on both the conviction and sentencing of the Appellant, adequate.

E. Background

21. The Respondent alleged that the Appellant contravened Section 115(b) of Act 111 of 1998 in that upon or about 8 March 2005 and near Leeuwkop Prison or Sasol Garage, the Regional Division of Gauteng, the appellants did unlawfully conspire among themselves or escape from any place where he was to be kept in custody at Lindela Deportation Centre (“Lindela”) awaiting his deportation.
22. Section 115 of Act 111 of 1998 deals with "Aiding Escapes." Section 115 (b) reads as follows:
- "Any person who assists a prisoner in escaping or attempting to escape from any prison or from any place where he or she may be in custody is guilty of an offense and liable on conviction to a fine or to imprisonment without the option of a fine or both."*
23. The Appellant was convicted of unlawfully conspiring with his co-accused and prisoner, Morcdenche Sabag (Accused no.4), to escape from Lindela Deportation Centre while awaiting his deportation.
24. It is common cause that on 8 May 2005, Morldeche Sabag and accused 4 in the main trial and for purpose of this judgment he will be referred to as (“accused 4”)

was being transported from Leeuwkop prison to Lindela deportation center for his deportation.

25. Accused 4 and the state witness, Elias Nameng, were transported by the 1st Appellant (Mdlalose) and the 2nd Appellant (Maimela). On route to Lindela deportation center, the vehicle transporting Accused 4 stopped at a petrol station.

26. The issue for determination is the involvement of the Appellant in the commission of an offence of aiding the prisoner Accused 4 to escape. It is trite that the State must prove its case beyond a reasonable doubt to secure a conviction. Further, it is noted that there is no onus upon the accused to convince the Court of the truth of his version, and the accused's version ought to be reasonably accurate. This Court will focus mainly on the relevant evidence directed to the Appellant.

F. Ground of Appeal

27. In summary, the basis of the appeal, as contended by the Appellant's representative, is that.

- a. The court *a quo* not only misdirected itself on the facts but should have given the Appellant the benefit of the doubt concerning his version.
- b. Further, it was contended that the charge was flawed and that the Court *a quo* misdirected itself in finding that the offense was proven beyond a reasonable doubt.
- c. The Court erred in rejecting the Appellant's version because the State relied on a single witness regarding the incident and selectively focused on facts that might support conviction.
- d. The Court *a quo* erred in finding that the State had proven the case against the Appellant beyond a reasonable doubt. He did not receive a fair trial because the Appellant was initially identified as a state witness, but after 18 months, he was arrested and charged without any explanation.

- e. Counsel for the Appellant contended that the Appellant provided all possible information about the incident to the police as early as March 2005 after the incident, which should have been without prejudice, as an accused has the right to remain silent and not give any information contrary to the position of a state witness.
- f. Further submitted that, the Appellant even appeared in Court as a state witness. Exhibit "SU" proves the same as it relates to a Subpoena of the Appellant in the Criminal case as well as exhibit 'N' the witness statement provided to the police by the Appellant on 10 March 2005.

28. The Respondent called three witnesses to prove its case against the Appellant. The first witness was Elias Nameng, who was said to be a convicted and sentenced prisoner at the Leeuwkop prison; he testified that he knew the Appellant and testified about the event that took place on 8 March 2005. He told the Court that he applied for permission to visit his child. Further told the Court that the Appellant on the day in question was driving a brown Nissan Sentra motor vehicle (page 23 line 20-25 of the record) and that the Appellant was present at the petrol garage at Sasol and overheard the Appellant telling Accused 4 that he was a free man and money in the sum of R800.00 was handed over by Accused 1 to Accused 2 and 3.
29. He told the Court that the Appellant was present when all these money exchanges took place, and the Appellant left after the handing over of the money. (Page 25, lines 7-9 and page 28, lines 20-25, and page 29, lines 1-3 of the record).
30. During cross-examination, he testified that the Appellant was the Head of the South African Prisoners Organization, further emphasizing that the Appellant was not corrupt and that the corruption he witnessed was amongst accused's 1, 2, 3, and 4.
31. The second witness who testified was Linderi, a security officer at the Lindela Center. This witness did not incriminate the Appellant. The third state witness was Johannes Musi, who also did not incriminate the Appellant.

32. Further evidence by the defense, in summary, was as follows: Accused 1 told the Court that he did not see the Appellant at all on the day in question. Accused 2 told the Court that the Appellant was at the petrol station and he saw him talking to Accused 4 through the window. He further told the Court that the Appellant did not conspire with him. (Page 127, lines 17-22 of the record). Similarly, Accused 3 did not incriminate the Appellant.
33. Accused 4 told the Court that he requested the Appellant to escort him because he was worried about his safety and for other reasons (page 16, lines 20-25).
34. The Appellant's version was that he was the President of the South African Prisoners Organization, and his organization tasked him with looking into the position of Accused 4. He knew Accused 4, who, in turn, told him that he would be released on a specific date. He then requested that he travel with his release team to ensure that everything went well because he feared for his safety. [Record pages 004-409, par. 498 lines].
35. Counsel for the Appellant's argument can be best summarized as follows: that the facts presented by the Respondent were not aligned with the charge that was put to the Appellant, contending that there was no attempt to escape and or actual escape from Lindela Deportation Centre, as on the Respondent's evidence, in that accused 4 was officially released by the Deportation Centre. Evidence before the Court shows that the Appellant never intended to commit any offense. He was merely attempting to ensure that Accused 4 was safely transported to Lindela. Accused 4 himself informed him that his life was at risk due to a threat relating to the role played by the investigating officer, Inspector Hall. The Appellant was convinced that a threat existed and that his assistance was required in the interest of justice. [Record 004-298 p. 385 lines 1-15 – confirmation by Accused 4]
36. At the meeting point at the Sasol garage, the Appellant was in possession of Accused 4's marriage certificate, as well as his passport and visa, which he assisted him in obtaining. The latter had to be presented at Lindela Deportation Centre. On

the date in question, the Appellant was also to hand those documents to Accused 4 as he was to be deported. The stop at the garage allowed them to converse.

37. Further arguing that it was never alleged by the State that anyone knew that there was to be a stop for petrol at that specific Sasol Garage. It could therefore not be premeditated; neither did the Appellant know that Accused 1 would only be following the vehicle that transported Accused 4.

38. She further contended that the Appellant did not exchange money with Accused 4; he merely gave him his documents. At that time, the Appellant informed Accused 4 that he had just received an urgent call from his office and asked if Accused 4 would be fine with Golan assisting him. Accused 4 informed him that he was fine with Golan accompanying them. They parted ways, and he then left. [Record 004-249 p. 336 lines 5-26] [Record 004-249 p. 336 lines 15-20]

G. Analysis

39. I now turn to deal with evidence presented before the Court. No evidence by the Respondent suggesting that the Appellant went along to Lindela deportation center, and such is corroborated by evidence led by the Respondent in that the Appellant did not go with accused 4, Golan, and others. It is then evident that the Appellant had no involvement in any attempt by Accused 4 to escape, and there is no evidence that the Appellant assisted in the escape. It also falls short of facts proving a conspiracy to escape.

40. The Respondent failed to illicit that Accused 4 escaped. At all times, the State's contention was that Accused 4 reached Lindela's deportation and was subsequently released. It is also evident that any planning or conspiring for an escape of Accused 4 by the appellant is improbable and was disproved by witnesses. It was not disputed that the Appellant, left the filing station upon receipt of an urgent call from his office.

41. None of the respondent's witnesses testified that the Appellant spoke about the escape or the plan to escape. It would have been totally improbable for him to execute the escape plan. No evidence on record suggests that the Appellant knew of any involvement of Accused 1, 2, 3, and 4 regarding the escape.
42. The Court *a quo* relied on a single witness regarding the incident, namely a convicted prisoner, Mr. Elias Nameng ("Mr. Nameng") who served a robbery sentence with aggravating services. The Court *a quo* should have displayed the necessary caution in considering the version of the single witness, Mr. Nameng. This is the same witness who later told the Court that he could not make up stories about the Appellant; on the day in question, he saw the appellant talking to them but did not hear what was said or what they were talking about. The Court found multiple inconsistencies in his evidence but continued to convict the Appellant.
43. Mr. Nameng alleged that Accused 4 arranged to be released somewhere on his way to Lindela. This was contradicted by the fact that the four accused were booked at Lindela. He was allegedly given R800 by Accused 1 to remain silent [Record p.142 par. 30] Mr. Nameng made a second statement in which he indicated that he was coerced to falsely incriminate the Appellant, and that Inspector Hall undertook to pay him an amount of R20 000-00.
44. On Mr. Nameng's version, Hall would have given him a special remission, although he denies having received any benefit. He appeared to be benefit-orientated, so his evidence is unreliable, and the remission offered affects his credibility.
45. The fact that the Appellant, according to Mr. Nameng, allegedly said at the petrol station, "Don't worry, Accused 4 was a free man", does not warrant an inference of guilt.
46. This Court finds no evidence with probative value linking the Appellant with the commission of the alleged offense.
47. The G 348 form shows that Accused 4 was received at Lindela Detention Centre on 8 March 2008 and not released on his way, as testified by Mr. Nameng. The

Respondent failed to call a reception officer at Lindela Detention Centre to confirm the circumstances in which Accused 4 was received and the logistics of his reception and departure.

48. During the trial, Accused 4 only later decided to plead guilty, which plea was not accepted. In his admissions, Accused 4 was adamant that he believed his life was at risk and he wanted to be deported; that is why he conveyed and pleaded his fears to the 3rd Appellant to escort him safely. He further confirmed that the Appellant left and played no role. He had no dealings with any of the money. He was merely present at the Petrol Garage, a formal engagement since he handed over the personal documents to Accused 4.
49. In terms of Section 115 of the Criminal Procedure Act of 51 of 1977, the content of a plea explanation of one accused can in no circumstances have any evidential value of the complicity of a co-accused. The Court yet again misdirected itself in allowing the evidence against the co-accused.
50. The Appellant was known to prison officials, always officially visiting Accused 4. He had benefited from visiting Accused 4 in his capacity as a Human Rights Officer. Usage of accused 4's car was a donation based on the support and service the Appellant offered the prisoners and Accused 4. The Appellant used the Sentra for everyday traveling as part of transportation for his weekly visits to the respective prisons as a Human Rights Officer. It is also not in dispute that Accused 4's brother-in-law gave the Appellant the brown Sentra.
51. During cross-examination, Mr. Nameng conceded that the Appellant was not corrupt. He further agreed that the Appellant was a Human Rights Officer at the prison and had previously assisted him in attending funerals.
52. It is also not in dispute that the Appellant is the President of the South African Prisons Organization for Human Rights, advocating human rights issues on behalf of the prisoner.
53. I am of a considered view that the Appellant gave clear and satisfactory evidence.

54. The Appellant, in his evidence, explained that he had many dealings with the 4th Accused in his professional capacity by the time of this incident in trying to assist him. He explained that the 4th Accused alleged that his rights had been infringed and that, as remarked, "a travesty of justice, " which involved the investigating officer, Inspector Hall. He had written letters to Serious Crimes and Violence units on behalf of Accused 4. He further wrote letters to the Head of the Area Provincial National and Minister of State and Security, the National Director of Public Prosecutions, and the Minister of Justice. He received a response from the Provincial Commissioner of the SAPS. The Appellant had a long professional history with the 4th Accused.
55. Inspector Hall was a single witness who assisted in investigating the matter by consulting witnesses, verifying facts, and consulting with suspects and material witnesses. At a glance, it seems irregular in the context of him being the cause of concern regarding the safe deportation of Accused 4. It is also peculiar that Inspector Hall was the Investigating Officer at the time and, after so many years, still involved himself in the matter, while deportation is a function of the Department of Correctional Services
56. It is not disputed that the Appellant derived no benefit for the vehicle donated to his organization to further his service and assist the prisoner community. The organization, as a non-profit organization, accepts various donations from individuals as well as companies.

- 57.Regarding the incident, the Appellant did not disguise himself following the vehicle in which Accused 4 was traveling. It was never testified to that it was not allowed. His belief based on the history of the infringements of the rights of the Accused led him to believe that Accused 4 claims that he was concerned about his safety, which prompted the Appellant to ensure that Accused 4 was safely transported to Lindela.
- 58.He did not derive any benefit from monies being exchanged. He did not accompany Accused 4, further to Lindela. Accused 4 admitted that he had arrangements with Accused 2 and 3, with the assistance of Accused 1.
- 59.No evidence beyond a reasonable doubt was lead, credibly stating the exact role of the Appellant. However, the suggestion of involvement could have been more conclusive in light of the discrepant versions. This history of the Appellant advocating Accused '4 case to all relevant departments is also a possible indicator that he was misled into first being a state witness in the case and then, surprisingly, at a later stage, was charged and also prosecuted.
60. Appellant was a thorn in the side of the Department of Correctional Services, the SAPS, and his position as an activist exposing injustices was a thorn in their sides which contributed as a possible catalyst for him being charged.
- 61.The Court a quo misdirected itself in not considering the inconsistencies as inconclusive and controversial, which needed caution in considering the weight attached to this matter. There is no onus on the Appellant, and if his version is reasonably possibly true, he is entitled to an acquittal, even if the Court subjectively disbelieved him.

62. It suffices to state that it is trite that in criminal matters, the onus rests on the State to prove its case beyond a reasonable doubt and not vice versa.

63. The Appellant had no duty to prove that his meeting with Accused 4 at the Sasol garage was part and parcel of a conspiracy to plan and execute an escape. Very early during the trial, the Appellant was candid with the Court and the investigators about how he knew accused 4, giving a depth of the relationship. He also candidly told the Court what happened on the day in question. It remains that the Respondent had to prove otherwise.

H. Conclusion

64. I find, therefore, that the trial court made an error of law going to the heart of the Appellant's defence. The conviction and sentence of the Appellant by the trial court cannot survive this error. The applicant's appeal succeeds, and his conviction and sentence must be set aside.

65. Given the available evidence, the Respondent failed to prove its case against the Appellant beyond reasonable doubt.

66. As a result, we make the following order:

66.1 The appeal in respect of Appellant 3 (Bhudu Miles Golden) succeeds.

66.2 The conviction and sentence of Appellant 3 (Bhudu Miles Golden) is set aside.



T BOKAKO
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

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D DOSIO
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant:

Adv. Henzen-Du Toit

Instructed by:

Legal Aid South Africa, Johannesburg.

For the State:

Adv. N J Xaba

Office of the Director of Public

Prosecution

Date of Hearing:

3 June 2024

Date of Judgment:

31 July 2024.