

SOUTH AFRICA / JUDGMENT

Loate v S (A561/2015) [2017]

ZAGPPHC 132 (9 March 2017)

[2017] ZAGPPHC 132

COURT

North Gauteng High Court, Pretoria

BEFORE

S P Mothle, T Thobane

CASE / FILE NUMBER

A561/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

DATE:

9/3/2017

CASE

NUMBER: A581/2015

In

the matter between:

STEPHEN

STRIKE

LOATE

Appellant

and

THE

STATE

Respondent

JUDGMENT

MOTHLE J

1. On 22 September 2014, Appellant was tried in the Regional Court Oberholzer where on 21 May 2015 he was convicted on one count of fraud and acquitted on the other count of intimidation. He was sentenced to a R5,000.00 fine or 2 years imprisonment which was wholly suspended for 3 years on condition that he is not convicted of the same offence committed during the period of suspension.

2. On 12 June 2015, Appellant brought an application for leave to appeal his conviction which application was granted. He now comes before the Appeal Court of this division.
3. According to the charge sheet, Appellant's offence is described as follows:

"That the accused is guilty of the crime of fraud.

In that on or about 22 March 2011 and at or near Home Affairs, in the Regional Division of Gauteng, the accused to wit Stephen Strike Loate did unlawfully and falsely and with the intent to defraud and to prejudice or potential prejudice of Home Affairs give out and pretend to DHA1663 was correct whereas in truth and in fact when the accused gave out and pretended as aforesaid he knew that:

HE HAD INSTRUCTED FRED KOTWANE TO OBTAIN FINGERPRINTS OF AN UNKNOWN PERSON AND THAT MRS MASENA DID NOT DIE WITHIN THE DISTRICT OF OBERHOLZER BUT DIED IN LESOTHO."

4. The State called several witnesses, some of whom were Appellant's co-workers at the Department of Home Affairs. In essence the State's case is that Appellant. instructed one Fred Kotwane to fraudulently cause to be registered, the death of Appellant's grandmother, Mrs Masena.
5. The State's case rests mainly on the evidence of, Fred Kotwane ("Kotwane") who was a Section 204 witness[1] and who testified under a promise of indemnity from prosecution as follows:

5.1 He met Appellant when the latter had invited him to a meeting at Home Affairs together with other people. At the end of that meeting Appellant then requested him to register the death of his grandmother with the promise that he will pay him an unspecified amount of money after he has received proceeds from a policy, presumably on the life of the grandmother;

5.2 He then obtained the Home Affairs form known as DHA1663 which needs to be completed in order to register the death of a person. He obtained a fingerprint of a body from his funeral undertaker and took the form to the doctor who completed it.

According to the evidence by one of the State witnesses Venter, the form has to be completed by the doctor who had examined the corpse, the driver who transports the corpse from the hospital with his or her fingerprint on the form as well as a relative who can claim the identity of the deceased;

5.3 Kotwane then attended to Home Affairs where he met Mosala who testified that he sent him (Kotwane) back to complete the form on two occasions. There is a material contradiction between the version of Mosala and that of Kotwane. Mosala testified that Kotwane came twice to him and on each occasion he sent him back with a form that was not properly completed. Mosala further testified that Kotwane had money with him and wanted to buy the forms from him. Kotwane denied that he

had any money in his possession or intended to buy the forms from Mosala. However, he confirmed that he had to go back on the first

occasion because the form did not have the particulars of the deceased's relative;

5.4 Kotwane further testified that he went to the Appellant to complete the portion for the relative and submitted the form which was finally accepted and the information included on the data base of Home Affairs.

6. Of significance in his evidence, Kotwane testified that when he went to take the fingerprints of the corpse that was not the deceased, he was not acting under the instructions of Appellant. Further, when he went to see the doctor to complete the form

again he was not acting on instructions of the Appellant. All that Appellant had told him was to register the death of his grandmother.

There is dispute between the Appellant and Kotwane in regard to the allegation that Kotwane will be paid some money after the policy has paid out. Kotwane testified that Appellant never gave him any money.

7. From the evidence on the record, it appears that Kotwane, being under the impression that he was making money, took steps, acting on his own volition, to falsify information on the forms, thinking that he will be paid. This misrepresentation on the form, on his own testimony, was of his own doing. The one exception concerning the content of the form is that he testified that he obtained the address of the deceased from Appellant. He further testified that he did not see the corpse of Appellant's grandmother.

8. The charge sheet as stated above is that Appellant had instructed Kotwane to obtain false fingerprints from a corpse and submit such false information to the Department of Home Affairs. On the evidence of Kotwane, this charge was not proved. Kotwane, contrary to what is alleged in the charge sheet, testified that he falsified and misrepresented the fingerprint of the grandmother and completed the form with the doctor who had not seen the corpse. He effected this misrepresentation on his own, thinking that he will be paid. Nowhere is there any evidence that indicates that the Appellant had instructed Kotwane to falsify information or was privy to his

activities in manufacturing falsified information that is on the registration form.

9. Appellant's version is that upon being informed that his grandmother has died, he arranged with Kotwane to collect the corpse to store it until they would inform him as to the funeral arrangements. To this end, Kotwane came to the house to collect the corpse and he was given R500.00 for storage. Two days thereafter Appellant's uncle came and fetched the corpse as the family had decided that the funeral would be in Lesotho.

The deceased was, according to the Appellant, transported to Lesotho for burial.

10. The State's contention during the trial and even on appeal is that the Appellant fabricated the death of his grandmother and that there was no evidence of a body of his grandmother. This version is also contrary to what is contained in the charge sheet, namely, that according to the prosecution, Appellant's grandmother died in Lesotho. This allegation is stated as a fact in the charge sheet. This theory of the non-existence of a corpse appears to be based on the evidence of one Caiphus who testified for the State. Caiphus testified how there had been bad blood between him and Appellant relating to employment matters and that he investigated what he alleged to be fraudulent conduct on the part of Appellant including falsifying overtime records.
11. The Appeal Court is unable to understand why the Magistrate allowed the evidence concerning overtime records in Home Affairs to go on the record when it had absolutely nothing to do with the charge that Appellant was facing. Further, the record reflects that Caiphus made a startling allegation that because Appellant did not ask for leave on account of his grandmother's passing, implies that he was fabricating her death! He was biased against the Appellant in his testimony and based his evidence purely on what he heard other witnesses testify in Court. His evidence was based on the interpretation and conclusions he arrived at after hearing the evidence of others in Court. For example he concluded, even before the doctor testified, that the doctor had not seen the corpse of the deceased. When questioned whether he was with the doctor all the time to attest to this assertion, he started first being evasive and rude to Appellant's counsel, then referred the Court to the evidence of Kotwane, from which he drew inference to form that view.
12. During the hearing of this appeal, the Court asked the State counsel whether the police investigator took any means to enquire from the immigration authorities with reference to the records at the border of South Africa and Lesotho, whether the body of the deceased exited South Africa en route to Lesotho for burial at any time. This the police did not do. The failure to conduct this investigation weakens the State's allegation that there was no evidence of a corpse of the grandmother. In the charge sheet it is alleged that "Mrs Masena did not die in the district of Oberholtzer but died in Lesotho." There is no evidence to support this allegation of Mrs Masena's death in Lesotho.
13. What is fatal to the State's case is that one of the State witnesses, Mrs Venter, who was the owner of the funeral parlour where Kotwane was employed, conceded under cross examination that Kotwane might have stored the body at another funeral undertaker and not at her parlour where he was employed.
14. It seems to me that the Magistrate misdirected himself by concluding that there was sufficient evidence to convict the Appellant on the crime of fraud. On the contrary, the evidence of the State points at Kotwane as the person who fabricated documents to misrepresent

facts

and thereby defraud the Department of Home Affairs.

15. Kotwane's own evidence implicates him and exonerates the Appellant. On his own evidence, he fabricated the misrepresentation himself without any instructions from Appellant.
16. In my view, the State has failed to prove its case against Appellant beyond reasonable doubt. See in this regard *S v Shackell*[2] . In addition, there is nothing in the evidence of the state to gainsay the version of Appellant as not being reasonably possibly true.
17. If anything, the case was poorly investigated and the conviction seems to rest on the evidence of Caiphus who, by his own admission,

had an axe to grind with Appellant. The Magistrate should have found the Appellant not guilty and discharged him. There is therefore a basis for this Court to intervene.

18. In the premises I make the following order:

1. The conviction of Appellant on one count of fraud by the Magistrate Oberholzer is hereby set aside and substituted by the following:

“The accused is found not guilty and is discharged.”

S P MOTHLE

Judge of the high Court

Gauteng Division, Pretoria.

I concur

T THOBANE

Acting Judge of the High court

For Appellant: Adv. Riaan Gissing

Instructed by: Danie Van Zyl Attorneys

Cartetonville

For the State Adv. Amo J Rossouw

Instructed by: The Director of Public Prosecutions, Pretoria

[1] Section 204 of the. Criminal Procedure Act 51 of 1977, where would-be accused is requested by the State to testify against the other accused on promise of being discharged from prosecution If he/she testifies honestly and satisfactorily.

[2] 2001 (4) SA 1 (SCA) at 121 to 138 paragraph 30.

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