

SOUTH AFRICA / JUDGMENT

Maharajh and Others v S (AR552/2015) [2017] ZAKZPHC 67 (3 November 2017)

[2017] ZAKZPHC 67

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Seegobin, Poyo Dlwati

CASE / FILE NUMBER

AR552/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU

NATAL DIVISION, PIETERMARITZBURG

Case

No: AR552/2015

In

the matter between:

S.P

MAHARAJH FIRST

APPELLANT

ROSHAN

RAMESAR SECOND

APPELLANT

SOLOMON

SIKOBI THIRD

APPELLANT

and

THE

STATE RESPONDENT

Coram

: Seegobin et Poyo Dlwati JJ

Heard

: 05 September 2017

Delivered

: 03 November 2017

JUDGMENT

POYO DLWATI J:

[1] On 5 September 2017 we granted an order in the following terms:

- (1) The appeal is upheld.
- (2) The conviction and sentence of all the appellants are set aside.

We indicated at the time that the reasons for such an order would follow in due course. These are the reasons.

- [2] The three appellants, all policemen, were convicted of one count of extortion by the by the learned Regional Court Magistrate, Ms Fikeni, in Durban on 4 August 2015. They were sentenced to 3 years imprisonment in terms of section 276(1) (i) of the Criminal Procedure Act 51 of 1977 (the Act). With the leave of the court aquo, they appealed against their conviction and sentence.
- [3] The charge which the appellants faced at the commencement of the trial was that on 12 February 2013at or near the Engen garage on Marine Drive in Durban, KwaZulu Natal, the appellants unlawfully and intentionally induced or subjected to pressure or inspired fear in the mind of the complainant, Mr Anesh Balraj, by threatening to arrest him on a charge of business robbery and further refused to return his property and did then by means of the said threat or inducement or pressure obtain or attempt to obtain an advantage not due to themselves to wit the sum of R2500. The other two counts they faced were found to have been duplication of charges by the learned magistrate and they were thus acquitted on those counts by the learned magistrate.
- [4] In order to fully understand the issues raised in this appeal on behalf of the appellants it is necessary to summarise the evidence

upon which the appellants were convicted. It was the evidence before the court aquo that Mr Kidesh Ramjuttan (Mr Ramjuttan), who is the brother of Mr Anesh Balraj (Mr Balraj), the complainant, who is also the owner of the Engine garage on Marine Drive on the Bluff, Durban, was arrested on allegations of business robbery by the Wentworth police. The police officers involved in the arrest included the three appellants.

- [5] The background to that matter was that Mr Ramjuttan was owed a sum of R18000 for diesel purchased but not paid for by one Roland Sanjeev Preethraj (Mr Preethraj) of Cartmore Carriers. On failure by Mr Preethraj to pay Mr Ramjuttan, Mr Ramjuttan secured the services of his brother, Mr Balraj, to assist with the recovery of the debt from Mr Preethraj.
- [6] Mr Balraj, in turn, secured the services of Mr Malcom Rosskruge, a policeman, who allegedly moonlighted as a debt collector, to assist with the debt collection. After some conversation between Mr Rosskruge and Mr Preethraj, Mr Preethraj sent a rather tense

message to Mr Ramjuttan via his cellular phone using the short message service (sms). He stated that Mr Ramjuttan could pick up a trailer at his business premises as repayment for the debt or hold it as security until the debt was paid. Once the trailer was taken by Mr Ramjuttan, Mr Preethraj, who was unhappy with this arrangement, went and opened a charge of business robbery or intimidation at the Wentworth police station.

- [7] It became apparent to the police during the arrest of Mr Ramjuttan that he had been assisted by his brother, Mr Balraj, who was well known to the Wentworth police, to secure the services of Mr Rosskruge who was instrumental in the taking of the trailer. Mr Balraj was called into the police station in order to explain his involvement in the matter and to also assist his brother.
- [8] There was a dispute as to whether it was a warning or a threat that was issued by the first and second appellants that if convicted for the crime of business robbery, Mr Balraj and Mr Ramjuttan could face a minimum sentence of 15 years imprisonment. It became evident that after this threat or warning was issued, both Mr Balraj and Mr Ramjuttan made statements to the police explaining how they got to be in possession of the trailer.
- [9] Furthermore, from their evidence, although contradicted, it was established that the police were interested in finding out any

wrongdoing by Mr Rosskruge, who, as I have said was also a policeman. It is for this reason, as was put to the state witnesses on behalf of the appellants, that a meeting was set up at Mr Balraj's garage in Marine Drive. According to the State, it is here that Mr Balraj negotiated and agreed to pay an amount of R2500 so that he wouldn't be arrested for business robbery and for his truck to be released by the police.

- [10] Two days later Mr Balraj opened a case of extortion against the three appellants. At the trial the state led the evidence of 5 witnesses whilst the first and second appellants testified in their defences. The third appellant did not testify. The learned magistrate convicted all three appellants and sentenced them as mentioned above.
- [11] Two issues arose in this appeal. The first was that because the learned magistrate failed to make an assessment of the evidence as a whole and was therefore unable to make factual findings, it was submitted that there was no rational basis for the conclusion she arrived at. The second issue was that the evidence tendered by the state did not support a conviction, in other words, the State failed to prove the guilt of the appellants.
- [12] In dealing with the first issue raised and the judgment of the learned magistrate, it is apposite to quote what Corbett CJ(as he was) said in his address to recently appointed judges in relation to writing a judgment (delivered on 21 July 1997) published in SALJ Vol 15, part 1(1998) at 116:'..... The true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it. And there is no better discipline for a judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are

present; whether inferences drawn from the evidence are properly drawn; whether the relevant principles of law are what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on'.

[13] A reading of the judgment herein indicates that there are no reasons furnished for the decision to convict the appellants in the learned magistrate's judgment. [1]As the Constitutional Court held in *Mphahlele v First National Bank of SA Ltd* 1999(2) SA 667 CC at para 12,

'There is no express constitutional provision that requires Judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters'.

This was also emphasised recently by Bosielo JA in *S v Mokela*[2] in which he says the following:

'.....Of even greater significance is that it is only fair to every accused person to know the reason why a court has taken a particular

decision, particularly where such a decision has adverse consequences for such an accused person.'

[14] The learned magistrate also failed to evaluate the evidence in the manner as set out in *S v Chabalala*. [3]Heher AJA had this to say about evaluation of evidence:

'the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, 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. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence'.

If the learned magistrate had exercised this approach, it would have been apparent to her that the state had failed to discharge the onus of proving the appellants' guilt beyond a reasonable doubt. I will demonstrate this later in his judgment.

[15] Furthermore, the learned magistrate failed to make any credibility or factual findings. She also failed to explain why she rejected the versions of the first and second appellants and favoured that of the state. As it was held in *Van Aswegen v De Clercq*, [4] '[i]n the absence of findings by the trial Judge on the merits of witnesses to crucial incidents a court of appeal is, of course, severely handicapped. In such instances, therefore, we are to decide the appeal on the record without regard to the findings. The appeal court must do its best on such material as it had before it.' (see *Van Awegen supra* at 882B)

[16] We also cannot proceed on the assumption that there was no misdirection or irregularity in the process of reaching the decision

that was reached by the learned magistrate or assume that she had cogent reasons for seemingly accepting the witnesses who implicated

the appellants. She ought to have had regard only to the question of the onus of proof once all the relevant evidence had been examined to see whether there was any doubt as to which version was acceptable.[5]

[17] I turn now to deal with the evidence before the court *aquo*. The state relied on the evidence of a single witness, Mr Balraj, to prove the threats made to him by the appellants and to prove that payment was demanded from him and made to the appellants. The court *aquo* was alive to this fact but surprisingly even though the learned magistrate mentioned that this evidence must be treated with caution,

she merely concluded by saying that it just ended with: 'caution should not be allowed to displace reason' (page 350 at line 18-20 of the appeal record). Nothing further was said about that. She therefore did not identify and analyse every feature of the complainant's evidence which may detract from the cogency of single evidence. She also did not weigh up the good qualities of his evidence against all the factors which may diminish his credibility.[6]

[18] It is trite that the evidence of a single witness must be clear and satisfactory in all material respects. Furthermore, such evidence must be treated with caution. One of the safeguards in the exercise of caution is corroboration. As it was held in *S v Gentle*, [7] 'by corroboration is meant other evidence which supports the evidence of the complainant which renders the evidence of the accused less probable, on the issues in dispute'. The issues in dispute which needed corroboration in my view were the following:-

- (a) Whether the complainant was threatened with a minimum sentence of 15 years imprisonment;
- (b) Whether as a result of the above threat the appellants extorted money from the complainant for the release of the truck and whether that payment was made to the appellants.

[19] I will deal first with whether the complainant's evidence was clear and satisfactory and revert later on in the judgment on whether there was any corroboration of the complainant's evidence on the issues in dispute. In my view, the complainant was an appallingly bad

witness. His evidence ought to have been rejected as unreliable. He contradicted himself on numerous occasions. He contradicted himself on what he said at the trial with what he had said in the disciplinary hearing of the appellants held by the South African Police Services (SAPS).

[20] In court a quo, for instance, he testified that the first appellant told him that he would get 15 years for business robbery yet in the disciplinary

hearing he said that the first appellant mentioned to him that if convicted, he could face 15 years in jail. This is line with what his brother, Mr Ramjuten, testified to in his evidence in chief during the trial that the second appellant told him that he would get 15 years imprisonment if found guilty of business robbery. This, as put to the witnesses and testified to by the appellants, must have been the warning that they gave to the complainant and his brother when they were warning them of their constitutional rights before they questioned them on the business robbery charge.

[21] There is nothing improbable about this more so because it was conceded by Mr Balraj that the first appellant had suggested to him that his lawyer could be present during the interview as this was a serious charge. It is therefore improbable that the appellants, even though they suggested to the complainant that his lawyer could be present, would still threaten him with a sentence of 15 years imprisonment. It is highly probable that they advised him that because the offence was serious and that if convicted he could face 15 years imprisonment it was advisable for him to have his lawyer present. On this issue, as there are contradictions on the complainant's evidence and also nothing improbable about the appellants' version, the appellants ought to have received a benefit of the doubt.

[22] The complainant contradicted himself on whether the money was in respect of the business robbery and the possible 15 years

imprisonment or whether it was for the release of the truck. His evidence in this regard was that Major Ramdass had told him that they were free to go after they had given their statements about what had transpired (even though there was a contradiction on his part as to whether the statement was about what transpired or had to do with implicating Rosskruge). He accepted at some point and this was also the position at the disciplinary enquiry where he understood that this meant that he was free to go and was no longer facing 15 years imprisonment. His explanation about the payment being for the release of his truck is improbable and riddled with contradictions.

[23] I say this because whilst he maintained under cross-examination that initially the payment was for his brother and his truck to be released, at the disciplinary hearing he testified that after he signed the statement he was told that they were free to go. 'They', in this context was a reference to him, his brother and the driver. It was for this reason that his brother testified that after he signed his statement, he waited outside the police station as he was free to go. This must have also meant that they were free to go with the truck as it was part of the business robbery charge. If he was free to go, which he was, as Major Ramdass told him in

front of the appellants, then there was no need for any payment. If there was any doubt he ought to have checked with Major Ramdass, which he did not do and could not offer any cogent explanation as to why he did not do

so.

- [24] Mr Balraj conceded later that his brother was no longer detained but only the truck was impounded. In this aspect also his version ought to have been rejected outright as it was riddled with contradictions. He was unable to answer when it was put to him pertinently that the only reason the truck was still hitched to the trailer was because the driver told the first appellant that he did not have the tool to unhitch the trailer. The simple way of verifying this point would have been for the State to call the driver which it did not do. In my view, it is probable that because the trailer could not be unhitched, at that stage this was the reason why the trailer was not taken at the same time as when they left the police station.
- [25] With regard to the payment of R2500 Mr Balraj initially testified that they (him and the first appellant) came to an agreement that they would meet at his garage to discuss the release of the truck. As to why the discussion would be at the garage and not at the police station where the trailer was, was not explained. Whilst he later contradicted this to say that it was the first appellant who suggested or directed that they meet at the garage so that he could make a plan, the plan must have been about meeting Mr Rosskruge as put to the witnesses on behalf of the appellants. This was so because, and as he did not see any other reason why, he had no dealings with them after Major Ramdass told him that the charges were withdrawn. So, on the evidence it is not clear to me who suggested that they meet at the garage and for what purpose.
- [26] He contradicted himself on whether his brother knew about the R2500 payment because in his evidence during the trial he testified that his brother knew that he had to sort out the appellants and did not know how much was involved. Yet, at the disciplinary hearing, he testified that his brother told him to get the R2500 to release the truck. He later testified under cross examination during the trial that he did not know whether he told his brother about the R2500 on his way to the garage or the police told him, implying that his brother had knowledge of the R2500 payment.
- [27] Yet when his brother testified he said that all he knew was that something was going to be sorted out with Mr Balraj but he had no knowledge of what that was. It must have been accepted therefore that his brother had no knowledge of the R2500 payment or any payment for that matter. It is highly likely that his evidence in this regard is false because his evidence earlier was that when the appellants arrived at his garage, they still wanted him to pay R5000 and only after he told them that that was too much did they agree on R2500. So his brother would not have known at all about the payment of R2500 as it had not been discussed at the stage when he suggested he could have told his brother. In my view, he was trying very hard for his brother to corroborate him on this respect.

[28] Mr Balraj conceded that whilst the CCTV footage showed the cashier, Ms Mkhethi, handing over monies to Mr Saliman, there was however, no footage showing Mr Saliman handing over the money to him. He testified that this was due to the fact that there was no camera in the area where monies were handed to him. He referred to this area as 'a blind spot'. When asked why it was not visible on CCTV footage that he was carrying cash, his evidence was that that amount of money comfortably fitted his hand. However, he later conceded that that was also not visible on the CCTV footage.

[29] Mr Balraj further conceded that there was also no CCTV footage showing him handing over the money to the appellants. His response

was that his CCTV was designed to detect shoplifters and not to trap corrupt policemen. He denied that the appellants went to the garage after arrangements were made with him so that he could secure the attendance of Mr Rosskruge in order for the appellants to interview him. In my view, on all of these aspects, his evidence was far from clear, let alone satisfactory. It therefore fell short of meeting the requirements for the acceptance of evidence of a single witness.

[30] This brings me to the issue about corroboration. There was not a single thread of evidence that corroborated Mr Balraj's

evidence either on the threat about the likelihood of 15 years imprisonment or payment of R2500. In my view as his evidence fell

short of the requirements of being clear and satisfactory in all material respects, it ought to have been corroborated to safeguard

any conviction. In the absence of that corroboration, the appellants ought to have been discharged and acquitted as the state had failed to prove their guilt beyond a reasonable doubt. At the close of the State's case the learned magistrate refused an application in terms of S 174 of the Criminal Procedure Act S 1 of 1977 for their discharge. She stated that she would furnish her reasons for doing so at the end of the trial. At the end of the trial and during the judgment all she said was: 'I know that I am not supposed to be telling anyone reasons for refusing section 174. It is discretional. I will exercise that right too: (Page 344 at line 15-17). That was how she concluded that issue.

[31] In my view, even if she had a discretion, which I do not believe was the case, she ought to have given reasons for her refusal of the s174 application as per her undertaking to do so. This was yet another failure on her part. It was for these reasons that we took the view that the guilt of the appellant had not been established beyond a reasonable doubt and that they were in fact entitled to an acquittal.

[32] In my view, the judgment of the learned magistrate falls far short of the minimum standards which can be reasonably expected of a magistrate in her position. A lot more be said about it but I choose not to. Instead I am of the view that it is in the interests of justice that this judgment be referred to the President of the Regional Court and the Magistrate's Commission with the copy of the trial court's judgment to enable the Commission to

consider this magistrate's fitness and competence for her to continue presiding over matters in the Regional court.

SEEGOBIN J

- [1] I have read the judgment prepared by my sister, Poyo Dlwati J, and whilst I agree fully with her reasons why the appeal in this matter had to succeed, I wish to refer to two further authorities which, in my view, are instructive insofar as the assessment of evidence in a criminal trial is concerned in order to decide ultimately whether the State has, on the evidence led by it, proved the guilt of an accused person beyond a reasonable doubt.
- [2] The first is the matter of *S v Shackwell*[8] in which Brand AJA set out succinctly the approach to be followed:

“Though I am not persuaded that every one of these suggested inherent probabilities can rightfully be describe as such I do not find it necessary to dwell on each of them in any detail. There is a more fundamental reason why I do not agree with this line of reasoning by the Court a quo. It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere

preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal

case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible

to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain

improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true.”

- [3] As the judgment of the learned magistrate in the present matter shows, in failing to closely assess and account for all the evidence (including that of the appellants) the learned magistrate failed to consider ultimately whether the versions of the appellants were reasonably possibly true. It would seem to me that the learned magistrate was content to simply rely on the evidence adduced by the State without considering the versions of the appellants at all. Had the learned magistrate taken the trouble to analyse all the evidence before her, she would have found that the versions of the appellants had a ring of truth about them. The learned magistrate's failure in this regard, in my view, constituted a serious misdirection on her part.

[4] The second is the matter of *S v Heslop* [9] which provides ample authority for the proposition that an appeal Court would be entitled to interfere with a trial Court's findings as to the weight to be attached to a witness's evidence and its ultimate conclusion based on those findings. In

particular this applies to the favourable credibility findings made by a trial court which are clearly not borne out by the witness's evidence on record.

[5] In the present matter, as already pointed out by my learned colleague, the complainant, Mr Balraj, was a particularly bad witness

– he was not only an evasive witness but his version was also riddled with inconsistencies and contradictions as pointed out by my colleague. The learned magistrate of course was quite oblivious to them. The same criticism could justifiably also attach to the evidence of his brother, Mr Ramjuttan.

[6] All in all, we considered that there were serious shortcomings not only in the State's case but also in the manner in which the learned magistrate chose to approach the evidence. The failure to analyse all the evidence before her resulted in a serious miscarriage of justice.

[7] Finally, I endorse my colleague's proposal that this judgment and that of the court a quo be referred to the President of the Regional Court and to the Magistrate's Commission so as to ensure that this type of injustice does not repeat itself in the future by the learned magistrate.

POYO DLWATI J

I agree

APPEARANCES

Date of Hearing : 05 September 2017

Date of Judgment : 03 November 2017

Counsel for Applicant : Mr A D Collingwood

Instructed by : Viren Singh Attorneys, Notaries & Conveyancers Inc c/o Singh Attorneys

Counsel Respondent : Mr Dunywa

Instructed by : Director of Public Prosecutions, Pietermaritzburg

[1] 1999(2) SA 667 (CC), para [12]

[2] 2012(1) SACR 431 SCA, para [12]

- [3] 2003(1) SACR 134 (SCA), para [15]
 - [4] 1960(4) SA 875 (A) at 881 H
 - [5] S v Frazenburg and Others 2004(1) SACR 182€ at 188 a-c
 - [6] 1971(3) SA 754(A)
 - [7] 2005(1) SACR 420 (SCA), para [18]
 - [8] 2001(2) SACR 185 (SCA)
 - [9] 2007 (1) SACR 461 SCA
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