

SOUTH AFRICA / JUDGMENT

Mamba v Naledi (A245/2018) [2020] ZAGPPHC 819 (8 July 2020)

[2020] ZAGPPHC 819

COURT

North Gauteng High Court, Pretoria

BEFORE

A J Bam, J M Mogotsi

CASE / FILE NUMBER

A245/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: A245/2018

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

8/7/2020

In

the matter of:

SIPHO

THEMBANKOSI MAMBA

First

Appellant

KHOTSO

TSEOE NALEDI

Second

Appellant

JUDGMENT

BAM, J

1. On 28 September 2017 the two appellants were convicted in the Regional Court, Benoni, as follows:

Both accused were convicted on count 1, Contravention of section 5(b) of Act 140 of 1992 of the Drugs and Drug Trafficking Act -- Dealing in drugs;

Accused 2, in addition, was convicted of Count 2, Fraud, and Count 4, contravention of section 49(1) of the Immigration Amendment Act, No 13 of 2011.

On count 1 both appellants were sentenced to 5 years imprisonment.

On count 2 and 4 the second appellant was sentenced to respectively 2 years imprisonment on each count. It was ordered that the sentences on counts 2 and 4 be served concurrently with the sentence on count 1.

2. First appellant was granted leave by the trial court to appeal against only the sentence on count 1. Second appellant was granted leave by the trial court to appeal against both the convictions and sentences on all three counts.
3. It was common cause that on 15 June 2016, the two appellants and the former accused 3 (who was acquitted on count 1) were arrested at a garage at Benoni. They were occupants of a motor vehicle, en route from Swaziland. The first appellant was the driver. Inside the vehicle the police found 20 grams of dagga, hidden in a side panel of the driver's door.
4. The former accused 3, a female, who was acquitted, was also a passenger in the vehicle.
5. It was not in issue that second appellant was in possession of a passport issued in the name of another person, and that second appellant originated from Nigeria.
6. In respect of the drugs discovered in the vehicle, as mentioned, the main dispute was whether any of the three occupants were aware of the presence of the drugs.
7. First appellant explained that he borrowed the vehicle from a certain Dhlamini in Swaziland in order to drive to Benoni on a business venture, and that he was totally unaware of the presence of the drugs.
8. Second appellant's version was that he was a hitch hiker from Swaziland, and that he had occasion to be given a lift by the first appellant, whilst already inside the Republic of South Africa. He knew nothing about the drugs.

9. The former accused 3's version included that she and first appellant were involved in a relationship and that she accompanied first appellant from Swaziland to the RSA, whilst second appellant was already a passenger in the vehicle, and that she was not aware of the drugs in the vehicle.
10. The first appellant's version that he knew nothing about the drugs was rejected by the trial court. The court also found that the first appellant's version that he borrowed the vehicle from a certain

Dhlamini was rebutted by the admitted hearsay evidence of one J M Mdluli, the owner of the vehicle, who stated that the first appellant

borrowed the vehicle from him in Swaziland on that very same day, 15 September 2016. (WO Tsebane, the arresting officer denied that first appellant told him that he borrowed the vehicle from Dhlamini.) The magistrate's finding in this regard, namely that first appellant borrowed the vehicle from Mdluli is not relevant to second appellant's case, and is not in issue at all.

11. Second appellant found himself in a precarious position in that he was found inside a vehicle transporting drugs. He was therefore in the immediate vicinity of the drugs, invoking the presumption of

transporting of drugs provided for in section 1 of the Drugs and Drug Trafficking Act of 1992, he was presumed to have been in possession of the drugs and involved in the transmission thereof.

12. In his endeavours to explain his innocent presence in the vehicle, second appellant persisted with the version that he was a casual hitch hiker given a lift by first appellant, that he did not know first appellant, and that he was totally unaware of the of the drugs.
13. In considering whether second appellant's version is reasonably possibly true and whether it rebutted the presumption of possession, all relevant evidential matter has to be considered.
14. In this matter the question to be decided is whether the second appellant was truthful to the extent that his version may be reasonably possibly true. In considering this issue, it has to be taken into account that false evidence given by an accused does not per se mean that he is guilty of any crime. It is not uncommon that an innocent person may lie because he thinks that the truth may be unlikely to be sufficiently probable. It is however trite, if an accused gives completely false evidence, that his version will be discarded and the same adverse inferences may be drawn as if he had given no evidence at all. It also includes that if an accused lies about a relevant aspect or specific incident, the court may infer that there is something about it which he wishes to hide. See *5 v Rama* 1966(2) SA 395 A.
15. Although false evidence provides no new item of evidence, it may tend to weaken or destroy the value of evidence that person has already given.

16. It is a matter of logic that before any adverse finding can be made against an untruthful accused, it first has to be determined what the nature and extent of the false evidence was, and then whether it is

in some way relevant to the issue at hand. In this case, the awareness of the presence of the drugs in the vehicle, and the transportation thereof. Only once relevance has been determined, it can be considered to what extent any untruth told by the accused may contribute to the proof of guilt.

17. In the above regard the following evidence and inconsistencies seem to be relevant:

- (i) When the second appellant's plea explanation was recorded, his legal representative confirmed and relied on part of the first appellant's plea explanation. (See p9 of record). It was recorded as follows:

"Your worship, the accused (accused 2) will confirm the plea explanation of accused 1 as far as they relate to him in the sense he was given a lift by accused 1 and the rationale behind that..."

The relevant portion of First Appellant's explanation of plea in that respect, reads as follows (record p 7):

"Indeed he departed from Swaziland to South Africa on the 15th of September and he asked his girlfriend, accused 3, to accompany him. He also in the process, gave a lift to accused 2. They exited the kingdom of Swaziland and entered the Republic of South Africa through the Sicunusa or Bootkop border gate, en route to Piet Retief. On their way there they were stopped by police
"On arrival at Benoni ..."

It was evident that second appellant associated himself with the explanation of first appellant.

- (ii) The policeman, WO Tsebane, who searched the vehicle, testified that second appellant occupied the left front passenger seat. This was later confirmed by accused 3 when she testified. Second appellant's version, that he occupied the rear seat of the vehicle was emphatically denied by accused 3, who also testified that second appellant was already in the vehicle when she was picked up by first appellant in Swaziland. First appellant testified that second appellant was a hitch hiker, already in the RSA, when he picked him up. When first appellant was confronted with accused 3's version during cross examination that second appellant was already in the vehicle when she boarded the vehicle inside Swaziland, he merely said, without advancing any cogent reason, that she was lying. Why accused 3, the girlfriend of first appellant, would have lied in that regard went unexplained was totally improbable. The totality of the evidence proved that second appellant, at all relevant times, occupied the left front passenger seat.

- (iii) During cross examination of the WO Tsebane by second appellant's legal representative, with in respect of what transpired between second appellant and the policeman, with reference to second appellant's version, the question was recorded as follows (p36):

"Did he (second appellant) also mention to you that he is a friend to accused 1, who hitched a ride to come to this country of ours, so that he can see his other half?" (Answer) "That is incorrect."

(Although second appellant's later version was in conflict with the mentioned question, namely that he did not know first appellant, the only reasonable inference is that second appellant's instructions to his lawyer changed as the trial proceeded. Neither second appellant nor his legal representative attempted to address this conflicting version, and the both the prosecutor and the trial magistrate missed the point. The said words constitute an admission by second appellant and clearly meant that the two appellants were friends.

(iv) In the vehicle the two policemen, "coincidentally", discovered a screw driver which fitted to unscrew the side panels where the drugs were hidden.

(v) Although it did not constitute evidence against second appellant at the time during cross examination of WO Tsebane by accused 3's legal representative (before it was confirmed by accused 3 under oath), it was recorded that accused 3 would testify that the two appellants received directions per cell phone where to go. This was indeed confirmed under oath by accused 3. It was remarkable that second appellant, partly consistent with the evidence of accused 3, admitted that he received directions (from his girlfriend) on the cell phone (but that he then passed the phone to first appellant.)

(vi) Second appellant was in possession of a false passport. His

explanation how he came to be in possession of that passport, reflecting the name of one Khotso Naledi, (which passport was originally issued to a Lesotho citizen Linah Motelo Koglua), and why he, innocently, used it, is to say the least, strikingly and inherently improbable. It was correctly rejected by the trial court. The improbability that second appellant would have been hitchhiking whilst in possession of the false passport/identification, supplied to him by his soccer manager, is glaring. It is far more probable that second appellant would have travelled with, and be accompanied by a friend. It is also remarkable that second appellant, only when called to testify, elected to use his real Nigerian name, Okozie Eze (p135). It is further remarkable that second appellant lied to the policeman about his identity and attempted to mislead the policemen by pretending that he was from Lesotho.

(vii) The second appellant testified that he came to the RSA from Swaziland

to attend to the funeral of his girlfriend's mother/grandmother. When confronted by the prosecutor that this was never raised before in the trial, second appellant could not logically and sensibly explain why he did not tell the arresting police officer nor his legal representative about that. Second appellant also experienced problems to explain why his girlfriend did not arrive at the garage in Benoni where he was arrested.

(viii) The second appellant's witness, his girlfriend, Ms Nyatsikati, was called to substantiate his exculpatory version that on 15 September he was on his way to join her at Benoni, and that she gave the

driver, first appellant, directions. (She admitted during cross examination that she actually attended court on several occasions

whilst the trial was ongoing.) She did not explain why she did not meet second appellant at the directed location, or the garage where he was arrested. After the 15th September, the day of arrest, surprisingly, she only made contact with second appellant 5 days later when he called her from prison. Upon questions by the magistrate it transpired that the funeral wake mentioned by Ms Nyatsikati would have been close to the Swaziland border. Ms Nyatsikati could not explain why second appellant first had to come to Benoni before returning to the Mpumalanga Province with her to attend the funeral. It is inescapable to find that on the probabilities the directions received by the appellants, whether it came from Ms Nyatsikati or someone else, on the probabilities, had something to do with the drugs.

18. In conclusion the accepted evidence showed that second appellant was untruthful in respect of almost all the material and relevant issues related to the transportation of the drugs. It can be summarised as follows:
 - (i) He lied about the fact that he accompanied first appellant from Swaziland;
 - (ii) He lied about whether he knew first appellant;
 - (iii) He lied when he denied that he occupied the right front passenger seat in the vehicle;
 - (iv) He lied about whether he received directions on the cell phone and that he related it to the first appellant;
 - (v) He lied to the police about his identity and where he originated from;
 - (vi) He lied about the issue of the funeral he was supposed to attend.
19. The many untruths told by the second appellant about his presence in the vehicle, as mentioned above, are directly related to the unlawful possession of the drugs. He clearly had something to hide. In the circumstances it therefore justifies only one reasonable inference, namely that he did his utmost to distance himself from first appellant and the transportation of the drugs. The untruth about his identification added to the finding that he had a propensity to commit crimes.
20. Accordingly, the surrounding circumstances and the totality of the evidence, taking into account the false evidence of second appellant, justify the finding that second appellant was involved in the transportation of the drugs. Therefore, in my view, second appellant's denial of any knowledge and possession of the drugs was not reasonable possible true. He was accordingly correctly convicted on count 1.
21. Second appellant had no defence in respect of counts 2 and 4. There is no question that the second appellant was correctly convicted on those counts 2.
22. In respect of the sentences imposed, it is trite that sentencing falls within the discretion of the trial court, and that this court, on appeal, will only be justified to interfere when the trial court

committed an irregularity or when the sentences are strikingly and shockingly inappropriate.

23. The aggravating aspects in respect of dealing in drugs are numerous. It goes without saying that the detrimental effect of drugs on our community is devastating. It is often debated and is common knowledge. It is that well known that it would be a waste of time to enter into a lengthy discussion in that regard or, by repetition spell out all negative effects debated. It is a matter of great concern that drugs are imported from our neighbouring countries to be abused locally.

24. It seems that the trial court considered all relevant issues in respect of the sentence on count 1, and although it appears that the sentence of 5 year's imprisonment may be lenient, and that this court

may be of the opinion that a more severe sentence could have been imposed, this approach falls short from justification to interfere

with the trial court's discretion.

25. The sentences imposed by the trial court in respect of second appellant concerning counts 2 and 4 seems to be appropriate. There is no reason to interfere.

ORDER:

1. Second appellant's appeal against the convictions on counts 1, 2 and 4, is dismissed.
2. Both appellants' appeal against the sentence on count 1 is dismissed.
3. Second appellants appeal against the sentences on counts 2 and 4 is dismissed.

A J BAM

JUDGE OF THE HIGH COURT

I agree,

J M MOGOTSI

ACTING JUDGE OF THE HIGH COURT

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