

SOUTH AFRICA / JUDGMENT

Nkosi v S (Appeal) (AR 368/21) [2023] ZAKZPHC 133 (3 November 2023)

[2023] ZAKZPHC 133**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi, Davis

CASE / FILE NUMBER

AR 368/21

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****DIVISION, PIETERMARITZBURG****Case****No: AR 368/21****In**

the matter between:

SIFISO

OWEN NKOSI

APPELLANT

and

THE

STATE

RESPONDENT

ORDER

Appeal

from: Regional Court, Ladysmith (Mr.H.B. Visagie sitting as a
court of first instance.)

1.

The appeal against conviction is upheld.

2.

The conviction and sentence on both Count 1 (charge of corruption)

and Count
2 (the charge of defeating the ends of justice) is set
aside.
APPEAL

JUDGMENT

Delivered on:

Mngadi J

- [1] The appellant with leave granted on petition appeals against conviction.
- [2] The appellant before the regional magistrate (H.B Visagie) stood charged with two crimes, namely, (count 1) Corruption c/s 4 (1) (a)
 - (i) (aa) read with ss 1, 2, 4 (2), 24, 25, 26 (1) (a) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 and Count 2 (Defeating or Obstructing the Administration of Justice).
- [3] The appellant who was legally represented throughout the trial pleaded not guilty to both charges. The learned regional magistrate after hearing evidence convicted the appellant as charged and sentenced the appellant as follows:

Count 1: Five (5) years imprisonment half of which suspended for five (5) years on condition that the accused is not convicted of any of the offences listed under section 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 and which is committed during the period the period of suspension. Count 2: One (1) year imprisonment, half of which is suspended for a period of five

- (5) years on condition that the accused is not convicted of defeating the ends of justice and which is committed during the period of suspension. In addition, the following order was made that in terms of s280 (2) of Act 51 of 1977, It is ordered that the sentence imposed on count 2 is to run concurrently with the sentence imposed on count 1.

No otherwise determination is made in terms of s103 (1) of the Firearms Control Act. 60 of 2000 (The accused is unfit to possess a firearm).

- [4] The basis of defence placed on record and confirmed by the appellant was of the denial of all the allegations, and in particular, that the appellant had any intent to commit a crime of corruption.
- [5] The state to prove the charges against the appellant adduced evidence from three witnesses, namely, Anthony Snothi Sibiya, Mduduzi Morgan Ndlovu and Rajesh Ishrapersadh Maharaj. For the defence, the appellant testified and called one witness, Patrick Jabulani Miya. The exhibits were "A" - Section 115 if Act 51 of 1977 statement"

- Written notice to appear in court (J534), "C"
- Copies of I.D of A.S Sibiya" - Copies of R100 notes, "E"
- Annexure to written notice, "F" - Transcript - disciplinary hearing, 'G" -Cell phone records, "H"-another

set cell phone records, "J"- Pre-sentencing report and "K"- Suitability Correctional Supervision.

[6] Antony Snothi Sibiya (Sibiya) testified as follows: He was employed to check fridges belonging to Coca Cola Company. On 18 July 2014 at 14h00 he was at Bergville. He stopped and parked the Bakkie partly blocking oncoming traffic to make enquiries of a location of a shop he wanted to visit. A police truck approached, and it stopped next to

his Bakkie, a police officer in uniform alighted and he came to him, He told him to park properly, and he did so. He came to him, and he asked for his driver's licence. That police officer was the appellant.

[7] Sibiya testified that he took out his driver's licence and he gave it to the appellant. The appellant took it, and he instructed him to follow them to the police station. The appellant in the police truck had an Indian colleague. They arrived at Bergville Police Station, and they went to an office. In the office he sat down, and the Indian police officer went and sat somewhere in the office. The appellant came to him, and he told him that his case was serious, he must try

and get something otherwise he would be in custody until Monday when he would go to court. He told the appellant that he did not have the money with him. The appellant asked him whether he could organise a friend who can organise money for him. The appellant told him that it was important to do that, and he went to the Indian police officer who was seated about seven (7) metres from them. The appellant came back to him. He asked the appellant for his banking account number to deposit to it the money, the appellant refused to give him the bank account number. The appellant said if there is someone who is willing to assist him with the money that person must deposit the money into Spar Supermarket.

[8] Sibiya testified that when he asked the appellant how much he was required to pay, the appellant spoke to his Indian colleague. The appellant told the Indian colleague that since he was agreeing the Indian police officer must write false information in his docket, and the wrong information was written, a wrong name, Indrean Khumalo

a name given by the appellant and a wrong address. The appellant then gave him the docket and he asked the appellant how much he must pay. The appellant asked him whether he did not see the document where the amount of R1500.00 was written. He then went to organise the amount which should be at least R1000.00. The appellant then gave him his cell phone number and said after organising or withdrawing the money at the machine, he must call him, the cell number as recorded in his statement, is 0[...].

- [9] Sibiya testified that he then left, and he drove to where he resided. The docket that he mentioned he had it with him, it is the J534. When asked, he said he has seen the docket before, it is the one filled in by the appellant. He said what was in the document, the name, address, I.D. number are incorrect. The document contains as an admission of guilty R1500.00. His driver's licence remained with the appellant. The appellant was going to give it back to him after giving him the money he needed. He identified the money and a copy of his driver's licence handed in as exhibits.
- [10] Sibiya testified that he left for Ladysmith. In leaving Bergville he gave a lift to a person proceeding to Ladysmith, He showed the person he gave a lift where the incident took place. Whilst stopped there, a police vehicle approached. The appellant peeped at and asked him whether he was still organising some means. He then decided to drive back to Bergville. He told the person he had given a lift to alight. He then drove passed Bergville to Pietermaritzburg.
- [11] He first drove to Pietermaritzburg Police Station to lay a charge. After a few days police officer Ndlovu contacted him and told him that it will take time to organise money for transaction and that in the meantime he must ignore calls from the appellant. During the day, he had called the appellant who told him that since his driver's licence was in his possession even if he come with R500 it is fine. Ndlovu called him and told him they had the money for transaction and that if the appellant calls, they would be in a position to go. On Saturday the appellant called. He told him that he would come to Bergville at around 5 O'clock. He then met with Ndlovu who was with another police officer. They proceeded to Bergville. They stopped at a garage. They searched Sibiya, and they gave him R500 in (5x R100 notes) to give to the appellant. The appellant called him and wanted him to pay R500.00 so that he may give back to him his driver's licence. He met the appellant at a KFC outlet. He had arranged with

Ndlovu that he would raise the cap when the appellant takes the money. The appellant came at KFC, took out his driver's licence and gave it to him, He gave the appellant R500.00. He raised his cap. The appellant thanked him and walked away. Ndlovu approached and he arrested the appellant. They then proceeded to the police station.

- [12] Sibiya testified that the incorrect information was put in the document because he had admitted that he would pay the money. He was told at the police station not to sign with his exact signature. When the J534 document was completed at the Police Station the Indian police officer sat. The Indian police officer wrote what the appellant told him. He agreed to pay because the appellant threatened that if he did not pay, he will be kept in custody the entire weekend and until Monday when he would appear in court. The appellant only told him when he was leaving that he must pay an amount of R1000.00 but the money written in the document was R1500.00. If he did not ask, he would have known that the money to pay is R1500.00 written in the document a fine. He did not know where the Indian police officer got the incorrect information. He was told to sign with a wrong signature. He did not know what was written on the document. He knew that if someone is charged for a traffic matter, he

must pay a fine, but he did not know why he wrote Kin the space for a signature. He asked how much he was going to pay after he was given the document. He did not offer, he was given the document, he asked for his driver's licence form from the appellant. The appellant told him once he is done withdrawing the money, he must call him, and the appellant would come to him.

- [13] Sibiya testified that after he had left, he started calling the appellant. He did not recall the date. He called the appellant about his driver's licence. They then contacted each other. The appellant in one of the calls asked whether he would come to Bergville. When he left the police station the appellant said when he has got the money he must call him, he must not come back to the police station he (the appellant) would come to him. Nobody said to him once he has paid the money, he will take his driver's licence. When he was at the place where he was initially found with the person, he had given a lift, the appellant asked him whether he had organised something and he said he was still organising. He asked the person he gave a lift to Ladysmith to alight because he did not know where the police van that passed with the appellant had gone to, and he was afraid.
- [14] Sibiya testified that as indicated in his statement, the appellant was hoping that he would call him because he had his driver's licence, but the appellant said he must not come back but whenever he got the money, he must call him. He told the appellant to meet with him at KFC outlet because he was hungry. He denied that he offered the money to the appellant to thank him and for petrol. He did not commit any traffic violation. He did not protest his innocence since he was not given time to do so. The appellant told him the name to sign in the written notice to appear (J534). He stated that he went to withdraw money from an ATM at Bergville that is how he managed to get out of the police station, but he had no money. He told the police that he had received the money and had to go to the ATM to withdraw it.
- [15] Mduduzi Morgan Ndlovu (Ndlovu) testified as follows: He is a Captain in the South African Police Service. He received a complaint on 18 July 2014. He then arranged to consult and interview the complainant which he did. It transpired that the accused was not calling upon the complaint to pay the money which showed no urgency in the matter. Sibiya told him that he was scared to drive without a driver's licence. He then told Sibiya to phone the appellant and tell him that he needs his licence. The appellant advised Sibiya that he had no problem to give back the driver's licence provided the complainant paid R500.00 instead of R1000.00. On 16 August 2014 he set a trap with a Captain Nxumalo and Warrant officer Khuzwayo, having received the required authority. They drove to Bergville, they searched Sibiya and gave him five (5) R100 notes after taking their serial numbers. Sibiya was instructed to give a signal by taking off his cap once the transaction had taken place. Ndlovu testified that he could not see

what took place between Sibiya and the appellant in the KFC outlet. The appellant when approached was searched and the marked R100 notes were found on him.

- [16] Rajesh Ishrapersadh Maharaj (Maharaj) testified. (He was warned in terms s204 of Act 51 of 1977 as an accomplice). He was stationed at Ladysmith and worked as a Warrant Officer with 27 years' service. On 18 July 2014 he was on duty under Bergville Police Station performing crime prevention duties. He accompanied the appellant transporting prisoners to Ladysmith prison. On their return about 10 km from Bergville he noticed an Opel Corsa parked facing oncoming traffic. The appellant who was driving stopped in front of the Opel Corsa. The appellant went to talk to the driver of the Opel Corsa. The appellant returned and told him that he asked the Opel Corsa driver to follow them to the police station to be charged for inconsiderate driving. They arrived at the police station, and he went to see the station commander with whom he spent about 20 minutes. He returned to where the appellant was with Sibiya, the Opel Corsa driver. He then told the appellant that he could assist him to fill in an annexure notice for an accused to appear in court. He asked Sibiya for his particulars, his name and surname. He then proceeded and warn Sibiya after he had signed as required. It is an annexure attached to J534; he did not read the particulars in J534. He then again went to the station commander. He returned and he saw the appellant taking the J534 and annexure to the charge office for registration and CAS system. The appellant told him that the driver left his licence on the table. He told the appellant to take the driver's licence and put it on the box in the charge office so that the driver can fetch it from there.
- [17] The registration of the J534 took about 15 to 20 minutes. He then went with the appellant to his home. They saw the Opel Corsa parked on the side of the road. The appellant spoke to the driver, and they drove away. Maharaj denied that he was present during a conversation requesting the driver of the Opel Corsa to pay or that he asked the driver questions and the appellant interpreted for him to write false information. He said Sibiya in that regard is lying. He stated that Sibiya gave him his name and signed. He would have followed a discussion between the appellant and Sibiya although it was in IsiZulu.
- [18] Sibiya was recalled, and he testified relating to the cell phone records. The cell phone records showed telephonic communication between Sibiya and the appellant. The appellant testified relating to what happened. He testified that Sibiya gave him the particulars that appear in the J534 notice. Sibiya said the driver's licence he left behind was not his driver's licence. He denied that he asked Sibiya for a bribe. When he gave Sibiya the driver's licence he had left behind, Sibiya gave him the money found on him by the police, thanking him. He denied that he told Maharaj to write false information in J534 or in the annexure to J534 and that he told Sibiya not to write his correct signature. The appellant admitted that in J534 he did not put the date for the person to appear in court and that the other details in J534 were given to him by Sibiya. Sibiya took out a driver's licence but said that was not his driver's licence, he had forgotten his driver's licence at home, which he accepted. He admitted that if the notice is not properly completed the case may be struck off the roll at court, and he also wrote 18 July 2014 as a date before which to pay a fine.

[19] The appellant as a witness called Patrick Jabulani Miya (Miya). Miya testified that on 18 July 2014 in the afternoon he was hitchhiking to Ladysmith in Bergville Sibiya driving in an Opel Cos stopped for him. He boarded the vehicle and sat in front with the driver. He Sibiya who was unknown to him, told him that police were giving him problems, and that he will show him where it occurred. Sibiya drove on and parked near a gate on the right-hand side of the road. He told him what happened in that sport earlier. Sibiya then took out his driver's licence and said the police issued him with a ticket which

he showed to him and that the particulars in the docket were different from those in the driver's licence. Nearby was a person wearing a green overall. Sibiya requested that Miya to whatever happens he would like him to be a witness.

[20] He testified that then a police van with two police officers approached and it stopped. One police officer asked what is happening there, was there a problem. Sibiya said no there was no problem. The police drove away. Sibiya asked for Miya's telephone number, and he said they must take a different route otherwise the police would stop him again. He told Sibiya that he cannot be his witness. Sibiya then said they must go back, and he would leave him where he picked him up. Miya refused and said he was proceeding to Ladysmith, and he got out of the vehicle. Sibiya drove away. Sibiya said he feared that the police would stop him again, they had issued him with a ticket with a high amount. He told Sibiya that he knew the police officer involved

Nkosi.

[21] The learned regional magistrate stated that it is common cause that the appellant omitted the court date and the full CAS number on the J534, and he also entered the date on which the offence was committed as the date by which the admission of guilt fine had to be paid. These facts founded the basis for a charge of defeating the ends of justice. In my view, the evidence not challenged clearly showed that at the time the J534 ticket fine is issued, the CAS number is not entered because it is not available. The omission of the court date and entering a date on which the admission of guilt fine has to paid

is wrong, but these facts on their own would not establish a crime of the defeating of the ends of justice. It does not defeat the prosecution of the crime, in my view, since the date on which the crime was committed, the crime and the particulars of the crime are stated as well as the correct registration number of the vehicle involved. Not to make possible for the offender to pay an admission of guilt fine on its own is not a crime of defeating the ends of justice. There was no evidence that the documents submitted by the appellant would not have resulted in a crime registered if no court date was stated and there was an incorrect date for the payment of an admission of guilt fine and the particulars of the vehicle driven by the offending driver were correctly recorded. It is difficult to find an intention to defeat the ends of justice by not indicating a court date and putting an incorrect date for the admission of guilt fine when the documents for the laying of the charge were completed and submitted for registration, in particular, in the absence of the evidence by the state of the significance of the omission. It is trite that the hearing

of an appeal against findings of fact is guided by the principle that in the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. See *S v Hadebe and others* 1998(1) SACR 422 (SCA) at 426b; *R v Dhlumayo and another* 1948

(2) SA 677) A).

- [22] The learned regional magistrate regarded Sibiya as an accomplice and a single witness on the count of corruption. He found the evidence of the appellant wanting in failing to request the drivers' licence of Sibiya and in failing to note that the driver's licence Sibiya produced it did not have the particulars Sibiya gave as his particulars.
- [23] The above concern by the regional magistrate is well founded. However, Sibiya testified that the wrong particulars appearing in the J534 fine ticket were written by Maharaj instructed by the appellant after he had agreed to pay. But Maharaj as a state witness testified that those particulars were written in J534 by the appellant furnished by Sibiya and Sibiya to him (Maharaj) for the annexure to J534 furnished the same particulars which he recorder in the annexure. As a result, the state did not prove who furnished the wrong particulars and for what purposes which results in the failure by the appellant to explain why he did not take the particulars from a driver's licence immaterial. The learned regional magistrate correctly found that the evidence of Sibiya in what happened when he was issued with the traffic ticket was contradictory and inconsistent with the evidence of Maharaj. Sibiya found to be a poor witness gave a version which was not corroborated relating to what happened at the police station.
- [24] Sibiya testified that wrong particulars were recorded in J534 because he had agreed to pay. When he asked how much he was required to pay, the appellant showed him the amount of the fine which was R1500.00. It means the wrong particulars were recorded before it was agreed how much Sibiya was agreeing to pay which does not make sense. Sibiya testified that he was given a traffic fine ticket with wrong particulars and allowed to go without any firm agreement of when, how and how much to pay which is unlikely even if he had left his driver's licence behind because he would simple be issued with another driver's licence.
- [25] Sibiya testified later under cross-examination that when he left the police station, he had told the appellant that the money has been forwarded to him and he is going to withdraw it from an ATM, but there is no evidence that he arranged with the appellant where to give the appellant the money. If this was the case, it is inexplicable that the appellant met with Sibiya later it was coincidental, and the appellant did not ask Sibiya for the money. If the appellant told Sibiya to pay him so that he would not face the law, why would he tell Sibiya the prescribed fine and say that is the amount he to be paid to him. The appellant in completing all the prescribed documents and submitting the documents for a case to be registered created a record with his signature, if not fully or properly completed, he was a responsible person to account, why would he do that if he was accepting a bribe for Sibiya not to be charged.

- [26] Maharaj, a state witness, testified that the appellant told him that Sibiya left behind his driver's licence and Maharaj said the appellant must place it on the 'lost and found' items box in Community Service Centre in the police station where lost and found items were kept. If appellant was keeping the driver's licence to force payment of a bribe, why would he make it known that Sibiya had left behind the driver's licence, and have it placed where such items are placed for collection.?
- [27] Sibiya fully implicated Maharaj, and Sibiya taking Miya a mere hiker, to where incident took place, telling him what happened, indicates he felt aggrieved to be issued with a traffic ticket and he wanted to do something about it. Sibiya parted with appellant when everything was in order, in that an agreement was reached, why was he so unsettled when he later met with the appellant and Maharaj, and then became hell bent to avoid them.
- [28] The learned regional magistrate found that the evidence of Sibiya was replete with inconsistencies, it was far from being clear and satisfactory in all material respect. There are no safeguards, in my view, that as evidence of an accomplice it could safely be relied upon. Sibiya was not a credible and reliable witness. The probabilities, in my view, are equally balanced, it results in a conclusion that the state bearing an onus to prove the guilt of an accused beyond reasonable doubt failed to do. The police well aware of the continuing interaction between Sibiya and the appellant but inexplicable decided not to have the interaction recorded which can justify and inference that such interaction would have shown Sibiya setting up the appellant as claimed by the appellant. The learned regional magistrate, in my view, did not give proper weight to the unsatisfactory features in the evidence of Sibiya which constitutes failure to approach the evidence with the required caution.
- [29] The charge of corruption alleges that 'during the period 18 July 2014 to 16 August 2014 the accused, being a public officer, directly or indirectly, unlawfully accepted/agreed/offered to accept any gratification, to wit R1 500-00 cash from any other person, to wit Anthony Snothi Sibiya, whether for the benefit of himself in order to act, personally so to act, in a manner that amounts to the illegal, dishonest, unauthorised, incomplete, or biased exercise, carrying out or performance of any powers, duties, or functions arising out of a constitutional, statutory, contractual or any other legal obligation, to wit retaining the driver's licence of Anthony Snothi Sibiya and demanding an amount of R500-00 from Anthony Snothi Sibiya for the return of his driver's licence and to avoid prosecution'. In other words, the appellant is alleged to have demanded to be paid R500 to

carry out his duty which was to the keeping of Sibiya's driver's licence and demanding payment of R500 to get it back. It is a strange charge in that there was no evidence that it was the official duty of the appellant to keep Sibiya's driver's licence and to demand payment to get it back. Conspicuously, there is no allegation that the appellant demanded and accepted a gratification for not laying a criminal charge, which it was his duty to do.

[30] The evidence, on the state's interpretation, shows that the recording of wrong particulars on J534 was part of causing Sibiya to escape the consequences of his conduct because he had agreed to pay and eventually paid R500.00 and the keeping the driver's license was to ensure compliance. What happened on 18 July 2014 was part of what happened on 16 August

2014. The charge of corruption could not be alleged and be proved without the evidence of what happened on 18 July 2014. Therefore, the second charge overlaps with the first charge. The duplication or unfair splitting of charges infringes the accused's constitutional right to a fair trial. It occurs when conduct constituting a single composite charge is charged as more than one charge. It seriously prejudices the accused in that it exposes him to multiple convictions and multiple sentences for a single criminal conduct. See *S v Mutawarira & another* 1973

(3) SA 901 (RA) at 905.

[31] The test is whether conviction in the second charge is based on the fact necessary to prove the first charge. In such situations the prosecution must determine which of the two offences should be charged or the prosecution can put one main charge and use the other as an alternative. The main charge is corruption. The facts alleged in the charge of defeating the ends of justice fall within the alleged corruption. The charge of defeating the ends of justice was not charged as an alternative as the charge of corruption and it is not a competent verdict to the charge of corruption, if it falls away and the appellant cannot be convicted of it even if the evidence proves it. In respect of it, the court as the accused pleaded to it,

must return of verdict of not guilty.

[32] The charge of corruption is fatally defective. Even if it was so, the evidence as analysed did not prove the charge beyond reasonable doubt. It is impossible on the evidence of Sibiya and that of Maharaj to determine beyond reasonable doubt what happened on 18 July 2014 at the police station.

[33] The appeal against conviction falls to succeed. It is proposed that it be ordered as follows:

1. The appeal against conviction is upheld

I agree.

DavisAJ

APPEARANCES

Case Number: AR 368/21 For the Appellant: Mr Hlatshwayo Instructed by: J.V. Mathonsi Attorneys SPRINGS For the Respondent: Mr Sokhela Instructed by: Deputy Director of Public Prosecutions PIETERMARITZBURG Date of Hearing: 27 October 2023 Date of Judgment: 03 November 2023

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