

SOUTH AFRICA / JUDGMENT

Rangaka and Another v S (A10/2016) [2017] ZAFSHC 59 (31 March 2017)

[2017] ZAFSHC 59

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue, Mene

CASE / FILE NUMBER

A10/2016

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IN

THE HIGH COURT OF SOUTH

AFRICA,

FREE

STATE DIVISION,

BLOEMFONTEIN

Case

No.: A10/2016

In

the matter between:

JUSTIN

RANGAKA 1st

Appellant

E

P

MOCHABA 2nd

Appellant

and

THE

STATE

Respondent

CORAM:

DAFFUE,

J et MENE, AJ

JUDGMENT

BY: MENE, AJ

HEARD ON: 20 February 2017

DELIVERED ON: 31 March 2017

[1] The appellants were convicted by the Bloemfontein Regional Court on a charge of corruption. They were sentenced to 6 years' imprisonment. The magistrate immediately granted them leave to appeal against both conviction and sentence and their bail was extended pending the appeal. When the appeal was heard on 20 February 2017 there was no appearance by or on behalf of the second appellant. The appeal of the second appellant was struck off the roll and an order was made that the second appellant should surrender himself to the clerk of the magistrates' court in Bloemfontein. Accordingly the only appeal that is before us is that of the first appellant.

[2] In this matter the charges against the appellants were triggered by a complaint that was lodged by one Mr. Jonker ("Jonker"). He was arrested on an unrelated charge of assault with intent to do grievous bodily harm. On his appearance in court on Monday 26 March 2007 his case was postponed for a week to 2 April 2007 and he was taken downstairs to the court holding cells where he waited with other prisoners to be taken to Grootvlei prison. The second appellant came to the court holding cells and Jonker asked him for advice regarding legal aid to assist him with the charge he was facing. The second appellant told him not to worry about getting a lawyer and that he should get R2500.00 and a plan would be made to make the charge go away. He gave the second appellant the cell phone number of his sister, Ms Evelyn Martin, so that the second appellant could liaise with her. He was subsequently taken to Grootvlei prison for further detention until his next appearance in court on 2 April 2007. Before the scheduled date of his next appearance in court he was called by the prison warders on Wednesday 28 March 2007 and informed that he had received bail. He was taken to court that day and to his surprise the charge against him was withdrawn in court. On his way out of court he met the second appellant who told him that they were waiting for an outstanding balance of R1500.00. He did not have money to pay, but promised to pay as soon as he gets the money.

At a stage he was introduced by second appellant to first appellant. Pressure was put on him over a period to pay the outstanding money. His friend advised him to report the matter to the Organized Crime Unit. He did as advised. The Organized Crime Unit arranged a trap after obtaining authorization from the office of the Director of Public Prosecutions. The trap led to the arrest of the appellants; hence the charge of corruption against them.

- [3] Evidence was led and oral arguments presented by both the State and the defence. In convicting the appellants the magistrate acknowledged the contradictions and discrepancies in the evidence tendered by the State. However, the magistrate was satisfied that the evidence that was led constituted proof beyond reasonable doubt that the appellants indeed committed an offence of corruption.
- [4] Before I consider the specific grounds on which the appeal is brought it is necessary to point out the following evidence which is uncontested (or not seriously disputed) and/or is corroborated by objective facts:
1. Jonker was arrested for assault with the intention to cause grievous bodily on Saturday 24 March 2007. He appeared in court on Monday 26 March 2007 and his case was postponed for 7 days. His next appearance in court was therefore the following Monday on 2 April 2007. He remained in custody. While waiting to appear in court on Monday 2 April 2007 he was requisitioned by the first appellant to appear in court on Wednesday 28 March 2007. The written requisition form duly signed by first appellant on 27 March 2007 clearly stated that Jonker's appearance at court was needed for a bail application. When he appeared in court on Wednesday 28 March 2007 the case against him was withdrawn and bail was not an issue at all. The front page of the docket reveals the decision to withdraw the case as there was no reasonable prospect of a successful prosecution. It is dated 27 March 2007 and contains first appellant's signature. First appellant testified that he decided to withdraw the case for such reason.
 2. The second appellant had a conversation with Jonker in the court holding cells and during their conversation the second appellant mentioned that a plan would be made in respect of the case of assault against Jonker.
 3. Jonker's sister, Ms Martin, was in court on his first appearance in court, i.e. when the case was postponed for 7 days. She also attended court on Tuesday 27 March 2007 and Wednesday 28 March 2007 when Jonker's case was eventually withdrawn. On Tuesday 27 March 2007 she was accompanied by her friend, Ms Dollina Emerald Felix.
 4. The first appellant confirmed that he withdrew the case against Jonker. He approached the prosecutor in the particular court, Mr. Mahala, who was seized with the assault case against Jonker, informing him of his decision to withdraw the case after his discussions with the investigating officer.
 5. After the case was withdrawn Mr. Mahala booked the assault docket back to the liaising officer at Batho Court so that it could be archived as the case had been withdrawn.
 6. On the day of appellants' arrest Jonker went to court and when he came out he made a sign, as arranged earlier with the arresting officer, Warrant Officer Jordaan "Jordaan") first appellant. that money had been paid to the

7. Jordaan made copies of the money to be used in the trap prior to the arrest of the first appellant. The R100 notes - R1 500.00 in total - were copied, five notes per copy and consequently there were three copies of the total number of notes. These copies were signed by Jonker immediately after they had been made. When the first appellant was arrested, the money found in his possession matched the copies of the R100 notes made earlier.
8. The first appellant admitted seeing one copy of the R100 notes after his arrest while he was in the police vehicle, but before he was taken to the police station.
9. The assault case docket was found by the police at the residence of the first appellant on the day of his arrest, to wit 26 April 2007. The first appellant indicated that the docket was at his place for decision-making.
- [5] The first leg of the appeal is based on the contradictions between the witnesses of the State. Mr. Khang on behalf of the first

appellant argued vigorously that such contradictions were material and that they cast serious doubt on the case of the State.

- [6] The court a quo dealt extensively with the contradictions in the evidence of the State witnesses. In respect of these contradictions the court a quo said the following:

"One must consider the fact that in these type of cases that stretch over a long period and where the witnesses are related and close, that witnesses do discuss events like this. It would be strange if they did not and there is in all probability have been a cross-pollination of events and of experiences and this pollination must have been weathered away and coloured in by cross-examination and testimony during the disciplinary hearings and later in court as well.

One can conclude this, but looking at the evidence in its totality one must take into account as well that when you evaluate witnesses that contradictions are to be, it's part of the administration of justice. Contradictions does not lead to the automatic rejection of a witness' evidence and one can look at Mkogle (sic) 1990 (1) SACR 95 A.

The teamed Nicholas H C wrote an article in the South African Law Journal volume 1, Part 1 in February 1985 and he said that, "most people, few people tell the whole truth. Many people will tell an untruth if they think that the suppression of the truth is more important than that the court should reach a correct decision."

- [7] After having dealt with the contradictions the court a quo found that the evidence tendered by the State implicated the appellants and that in this respect there is a consistent thread through the evidence of the State witnesses.
- [8] I agree with the finding of the court a quo. The fact that there are contradictions in the evidence of the witnesses does not necessarily mean their evidence is unreliable.

(See: Vilakazi v The State (636/2015) [2015] ZASCA 103 (10 June 2016) at para 18). Contradictions per se do not lead to the rejection of a witness' evidence. They may simply be indicative of an error. See: S v Mkohle 1990 1 SACR 95 (A) at 98F-G). One has to take the evidence in totality when evaluating it and consider the inherent probabilities. "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". See: S v Chabalala 2003 (1) SACR 134 (SCA) at para 15.

[9] "The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees." See the dictum quoted in S v Mbuli 2003 (1) SACR 97 (SCA) at page 110F-H.

[10] On the other hand an accused's version cannot be rejected merely because it is improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. In S v Shackell 2001 (2) SACR 185 (SCA) at para 30 the court said:

"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 be reasonably possibly true." See also: Olawale v The State

[2010] 1All SA 451 (SCA) at para 13.

[11] Jonker's version that he spoke to the second appellant while he was in the court holding cells and that the second appellant said to him that he (Jonker) should not worry, a plan would be made, is corroborated to an extent by Ms Martin who confirmed the call from

second appellant and the eventual handing over of the R1 000.00. The two appellants colluded to have the matter withdrawn on receipt of the money. I say so because subsequent to the conversation between Jonker and the second appellant, and before the next scheduled date of Jonker's appearance in court, Jonker was requisitioned by the first appellant to appear in court where his case was withdrawn.

- [12] It can also not be disputed that Ms Martin went to court on Tuesday 27 March 2007 while Jonker was still in Grootvlei. Why would she go to court when she knew that the case was postponed to 2 April 2007? She was present when the case was postponed to 2 April 2007. The only plausible and probable explanation is that she was busy with the arrangements to let the case against Jonker go away. Soon after her visit in court on Tuesday Jonker appeared in court the following day. This did not happen in vacuum; it was as a result of the conversation that took place between Jonker and the second appellant while Jonker was in the court holding cells. This conversation culminated in the second appellant calling Ms Martin after Jonker had given the second appellant her cell phone number and an amount of R1000.00 being paid on that Tuesday. The money was paid over to second appellant after she had met first appellant and on his instruction. This happened in the presence of Ms Felix, the friend that accompanied Ms Martin.
- [13] Although the evidence of the State was not without blemish on the events that unfolded when the first appellant was arrested, there is evidence that stands out which proves its veracity. This evidence relates to the undisputed evidence that Jonker went to court on 26 April 2007 to carry out the trap that was authorized by the office of the Director of Public Prosecution. He had in his possession money (R1 500.00) that was outstanding in terms of the arrangements with the appellants. This money was supposed to be given to the first appellant. After handing the money to the first appellant and in accordance with what he was instructed to do by Jordaan, he raised his hand to show that indeed the money was given to the first applicant. When the police (Jordaan and Jacobs) pounced on the first appellant, money was found in his possession and this money matched the photocopied R100 notes. The version of the first appellant that Jordaan put the money in his pocket whereafter he took it out again is improbable and untrue. I say this for the following reasons: (i) when the first appellant was searched in his office, other people, including lawyers, were present. Some of them were called by the first appellant as his witnesses. However these witnesses gave evidence that they did not notice Jordaan putting money in the pocket of the first appellant; (ii) Jordaan had copies of the R100 notes with him although he could not find the third of the three copies in his vehicle immediately after arrest. Jordaan's version is confirmed by the first appellant who saw one copy of R100 notes while in the vehicle of Jordaan before they went to the police station. The first

appellant also confirmed that Jordaan was looking for the third copy that was apparently missing under the seats of the vehicle. The version of the first appellant that Jordaan only made copies of the money when he arrived at the police station is improbable and not reasonably possibly true, the reason being that he admitted seeing at least one copy before they went to the police station.

Even though the first appellant said in his evidence that Jordaan was busy making copies at the police station, he could not see what Jordaan was copying and Jordaan's explanation should be accepted as the truth; (iii) all three copies of the R100 notes were signed by Jonker before they proceeded to the court. It was impossible for Jonker to have signed the copies at the police station after the arrest of the first appellant as he had left after handing the money to the first appellant.

[14] The other evidence that stands out despite the inconsistencies and contradictions in the evidence of the state is the docket that was found at the residential place of the first appellant. This docket relates to the criminal case of assault that was opened against Jonker. The reason, which is quite improbable and not reasonably possibly true, that was given by the first appellant on why the docket was at his place, was that it was for decision-making. On the day of the arrest of the first appellant, the decision had long been taken by the first appellant to withdraw the case against Jonker and it was indeed withdrawn. The magistrate, whilst recognising the inconsistencies and contradictions in the versions of the State witnesses made the following finding at page 712:

"Accused 1 in his testimony said that it was a decision docket but that is not convincing because why would you keep a docket as a decision docket if you have already decided to withdraw it? There was, on the evidence before me there was no query raised by the complainant in this docket against Mr. Jonkers, nor did the investigating officer have a problem with it so why should it be kept with him to reconsider?"

When one considers this improbabilities then one must find Mr. Jonkers' evidence consistent, because he says, and it must be plausible but he said no the docket was kept by him because he threatened, "if you don't pay me it would be re-opened" and that is consistency throughout."

[15] The finding by the magistrate cannot be faulted. It is consistent with the evidence that was tendered. It is indeed so that Jonker throughout his evidence said he was pressured and threatened that if he did not pay, the case would be re-opened against him. It is probable that the first appellant managed to get hold of the docket so that he could put pressure on and threaten Jonker. This is the docket that was sent to archives by the prosecutor, Mr Mohala, who was seized with it after the first appellant had approached him to withdraw the case. We were implored by Mr. Khang to reject the evidence of the State witnesses due to the contradictions in their evidence. I am unable to agree with him and I do not see that as a proper basis for the rejection of the State evidence. It is unthinkable that Jonker, a free man, would accuse his saviour, the first appellant, of corrupt activities in a situation where he decided to withdraw the case against him for lack of prospects of a successful prosecution. The established facts which stand out, in my view, make out an overwhelming case against the first appellant beyond any reasonable doubt. On the other hand the version of the first appellant is riddled with inherent improbabilities and stands to be rejected .

- [16] I now turn to the second leg on which this appeal is based. This relates to a trap which does not comply with the provisions of s 252A of the Criminal Procedure Act 51 of 1977 and therefore unlawful. In oral argument Mr. Khang, on behalf of the first appellant, contended that there were discrepancies in the document that gave authority to the police to conduct a trap. These discrepancies relate to the document not stating the person who was supposed to be trapped; the target was not described; the provisions of the Act were not followed; and that the police acted outside the authority that was given to them.
- [17] At the outset I must point out that the document which is the subject matter of the complaint regarding a trap does not form part of the record. Despite the parties being requested to provide it after oral arguments were heard, they failed to do so. However my view is that despite this document, this point can still be determined in its absence. Firstly, I must raise a concern that the first appellant did not raise this point at the beginning of the trial so that it could be determined in a trial within a trial. The representative of the first appellant did not ask the magistrate to make a ruling on it. Even though Jordaan was cross examined on it, at no stage was the magistrate asked to make a ruling on it.
- [18] Be that as it may, it is proper for me to deal with it as it has been raised. I must say that I did not understand Mr. Khang contending that the evidence that was led in respect of the trap violated the rights of the first appellant; neither did I understand him to say it rendered the trial unfair. Mr. Khang did not even say which aspects of the evidence relating to the trap should be excluded save for the discrepancies that has been mentioned above. I must indicate that it would be preposterous to exclude the whole evidence of witnesses who testified with regard to the issue relating to the trap.
- [19] A trap is defined in *S v Malinga and Others* 1963 (1) SA 692 (A) as 'a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words he creates the occasion for someone else to commit the offence.'
- [20] The authority to make use of traps and the admissibility so obtained is governed by s 252A of the Criminal Procedure Act, 51 of 1977. Section 252A(1) states that any law enforcement officer, official of the State or any other person authorized thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3). Subsection 3 provides as follows:

"(a) If a court in any criminal proceedings finds that in setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

- (b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:
 - (i) The nature and seriousness of the offence, including - (aa) Whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or national economy is seriously threatened thereby;
 - (bb) Whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;
 - (cc) Whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or
 - (dd) Whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;
 - (ii) The extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to -
 - (aa) The deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;
 - (bb) The facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or
 - (cc) The prejudice to the accused resulting from any improper or unfair conduct;
 - (iii) The nature and seriousness of any infringement of any fundamental right contained in the Constitution;
 - (iv) Whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and
 - (v) Any other factor which in the opinion of the court ought to be taken into account."

[21] The first point taken by the first appellant is that the authority that has been given by the DPP does not mention the name of the person who was supposed to be trapped and his description was not given. It was not disputed that a trap was authorized by the OPP. This brings into the picture the provisions of s 252A(4) which provides that an Attorney- General (now the OPP) may issue general or specific guidelines regarding the provision and control

of traps and undercover operations. My understanding of the said provision is that general or specific guidelines should be issued. In my view the section does not say the precise or specific details of the person to be trapped or his description should be given. The OPP can give general guidelines as is the case in *casu*. Even if the specific details or description of the target was required to be provided in the authorization, this is not fatal to the trap that was carried out. The evidence shows that Jonker who was the trap knew the people who he was dealing with. It was not expected of him to give the money to any other person than the first appellant. This is the authority that was given to him.

[22] In respect of failure to follow the provisions of the Act, it is not clear which provisions of the Act were not followed by the police. The evidence before us does not show that the police or the trap went beyond providing an opportunity to the first appellant to commit crime. The commission of crime had already commenced when an amount of R1000.00 was paid on behalf of Jonker so that his criminal case could be made to go away. There was an outstanding amount of R1500.00 that Jonker was supposed to pay and this resulted in pressure being put to him. He was also threatened that if he did not pay the outstanding balance, the case would be re- opened. The police did not play an active role in the commission of offence. See: *S v Makhanya and Another* 2002 (3) SA 201 (N).

[23] The finding by the magistrate in respect of the trap is correct. The magistrate said the following on page 713 of the record:

"Then as far as the trap procedure is concerned I must just mention that neither parties had applied or required me to make a separate ruling in respect of the trap. Although Mr Jordaan was questioned about this, the jist of his evidence is that he did not plan this operation, it was, or did he not initiate it, it was initiated by, when Mr. Jonker came to see him but Mr. Jonker's evidence as I have said is that this incident when he was approached by the accused, so it's not something, it didn't start from the police side, it was already in motion from the accused, and therefore the evidence of the trap is admissible."

[24] As I pointed out in paragraph 16 above, I did not understand Mr. Khang as saying that certain portions of evidence tendered on behalf of the State should be excluded as they rendered the trial to be unfair. This would then dispose of the complaints that have been raised in respect of the trap. In the event that I misunderstood the argument of Mr. Khang and that in fact the evidence relating to trap should render the trial unfair or that the evidence was obtained improperly and therefore should be excluded, I proceed to deal with such aspect on the assumption that it was raised. In this respect the court is enjoined to consider subsection 252A(3) which is quoted above.

[25] In respect of the nature and seriousness of the offence, there is no doubt that corruption is a serious offence and rife in South Africa. In *S v Mahlangu* 2011 (2} SACR 164 at para 26 the Supreme Court of Appeal said the following: "Corruption has plagued the moral fibre of our society to an extent that, to some, it is a way of life. There is a very loud outcry from all comers of society against corruption which nowadays seems fashionable. Some even go as

far as stating that corruption is rendering the State dysfunctional". Bearing in mind the extent of the effect of the trap upon the interests and rights of the first appellant, there is no evidence and it was not suggested that the interests and rights of the first appellant were violated. In actual fact it was only the document that authorized the trap that was challenged. On the question as to whether the admission of the evidence would render the trial unfair, in breach of s 35(3) of the Constitution, this was not the case or the argument that was advanced by Mr. Khang on behalf of the first appellant. I must say this is not surprising considering the defence of the first appellant that he was not involved in the commission of corruption and that no trap money was found in his possession, save for the money put in his pocket by Jordaan. Should he have admitted that indeed trap money was found in his possession, this would have flown in the face

of his defence. On whether in the setting of the trap the means used was proportional to the seriousness of the offence, I have already said that the crime had already commenced and the only thing I believe the police wanted to do, was to catch the first appellant red-handed. In my view, it cannot be said that the setting of the trap was in any way out of proportion to the seriousness of the offence which first appellant was intent upon committing. Having said so, the admission of the evidence of the trapping at the trial of the first appellant did not render the trial unfair. It was also not detrimental to the administration of justice.

[26] In view of what I have discussed above, the first appellant fails on the second leg of his appeal.

[27] I turn now to the third leg of the appeal which relates to the sentence imposed on the first appellant. When sentencing the first appellant the magistrate took into account all the factors, which included the personal circumstances of the first appellant. There are no misdirections that were relied upon in support of the appeal against sentence and I do not see any. The sentence is also not so severe as to suggest that the magistrate failed to properly exercise his discretion. In my view there are no proper grounds upon which to interfere with the sentence. Therefore the appeal against the sentence should fail as well.

[28] In conclusion it is my view that the State has proven its case beyond reasonable doubt and that the sentence imposed is appropriate.

Therefore the appeal against conviction and sentence should be dismissed.

[29] Accordingly, the following orders are made:

1. The appeal against conviction and sentence is dismissed.
2. The conviction and sentence imposed by the court a quo are confirmed.

B.S. MENE, AJ

I concur.

J.P. DAFFUE, J

On behalf of first appellant: M. Khang

Instructed by:

Mphafi Khang Inc.

BLOEMFONTEIN

On behalf of the respondent: Adv. E. Liebenberg

Director of Public Prosecutions

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