

SOUTH AFRICA / JUDGMENT

Sothoane v S (A150/2020) [2021] ZAFSHC 62 (25 March 2021)

[2021] ZAFSHC 62

COURT

Free State High Court, Bloemfontein

BEFORE

Reinders, Opperman

CASE / FILE NUMBER

A150/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

No: A150/2020

In

the appeal between:

D

P

SOTHOANE

Appellant

and

THE

STATE

Respondent

CORAM:

REINDERS, J et OPPERMAN

J

JUDGEMENT

BY: REINDERS, J

HEARD ON: 25 JANUARY 2021

DELIVERED ON: 25 MARCH 2021

- [1] The appellant appeared in the Regional Court, Bloemfontein as accused number 2. He and accused number 1 was arraigned on two charges, firstly a charge of theft of “+ R52 000-00” and secondly a charge of defeating the ends of justice.
- [2] The charge sheet alleged as to the second count that the accused acted with common purpose. Both accused pleaded not guilty on both charges. At the conclusion of the trial, the appellant was convicted on both counts and sentenced to respectively six and two years’ imprisonment. Accused 1 was found not guilty.
- [3] The appellant unsuccessfully applied for leave to appeal against both convictions and sentences imposed. This court on petition granted leave to appeal against the convictions, but declined leave to appeal against the sentences.
- [4] At the commencement of the trial the appellant pleaded not guilty and made use of his right not to furnish any plea explanation.
- [5] The complainant, Mr Tiisetso Ramoruti, testified that approximately between 20h00 and 21h00 on 11 May 2018 he was a passenger in a motor vehicle travelling in Raymond Mhlaba Street in Bloemfontein. He was accompanied by the driver of the vehicle, Mr Realeboha Ramoruti (“Realeboha”), who is a family member to him, as well as two of Realeboha’s friends. He testified that they were on their way to Vereeniging as he intended purchasing a motor vehicle. He had R 52 000-00 in cash on him. Some of the cash he had put inside his jacket, some was inside his trouser whilst some was in a belt tied around his waist. As they were driving a police vehicle drove past them and stopped in front of their vehicle. Two policemen, dressed in their police uniform, alighted from the vehicle. Accused 1 (who was acquitted) had a “long” firearm with him whilst the appellant went to Realeboha and asked him where they were heading to. Realeboha informed him that they were on their way to Vereeniging. The appellant requested the driver’s license whereafter Realeboha indeed handed him a driver’s licence. Appellant studied the license and said that the driver’s licence did not belong to Realeboha. Appellant instructed Realeboha to get out of the motor vehicle. He could not hear what they were saying but the appellant then came to his side of the vehicle and told him to get out of the vehicle and raise his hands. Appellant searched his pockets and took out the money from his pockets. Some of the money was contained in a plastic bag. After taking the money appellant asked him where he got the money from and the complainant

told him that he was going to buy a car. According to the witness appellant asked “us” why do “we” carry such large amounts of money as they (the accused) had just received information of people who have been robbed. The appellant then put the money in his (appellant’s) trouser pocket. The witness testified that the money so taken from his pockets amounted to R22 000-00. Appellant was then handcuffed whilst the other accused were also searched. They were all taken to the police

station.

[6] The complainant testified that appellant informed him that they would count the money at the police station and that he was going to be charged for possession of a huge amount of money. The complainant apologized and stated that he did not know that he was not allowed to carry such a lot of money. Complainant stated that he wanted his money returned, but appellant indicated that he was getting upset and put all of them back in the police van. They drove off. Whilst driving one of the people in the van stated that the problem was that he (complainant) did not inform the police the exact amount of the money he had in his possession. He explained that he could not tell them as he still had some money with him. When the vehicle stopped, the appellant opened the van whereafter he and Realeboha spoke. Appellant told the complainant to get out of the van, searched him again and took the remainder of the money in the amount of R30 000-00. The complainant and the other gentlemen were then allowed to leave in their vehicle. They were given directions and the complainant attempted to obtain the names of the accused, but was only able to memorize the police vehicle’s registration number. Although complainant was upset about what had transpired, he decided

to still travel to Gauteng to see the place where he intended to buy the vehicle. The vehicle in which they travelled was already filled with fuel. He laid the complaint on the 14th of May having returned from the trip to Gauteng. Neither Realeboha nor the other two gentlemen in the vehicle knew that he had the R52 000-00 on him in cash.

[7] At the conclusion of the state case the prosecutor indicated that he was not calling any further witnesses and made the other three occupants of the vehicle as witnesses available to the defence. Both accused made use of the state’s offer and separate from their own testimony under oath, called Mr Realeboha Ramoruti to testify on their behalf.

[8] The appellant testified that on the 11 May 2018 he was on duty. He held the rank of sergeant in the South African Police Services at the time, with 14 years’ service. He was accompanied by accused 1 and he received information of drugs being transported in Navalsig. They travelled in a police van and was on the lookout for a Volkswagen Golf motor vehicle. Initially they did stop a similar vehicle, but investigation indicated the vehicle not to be what they were looking for. As they were driving, they sighted a vehicle fitting the description and stopped the vehicle. He went to the driver whilst his co-accused stood guard. He asked the driver for his driver’s license but the driver could not locate it. He noticed the passengers consuming alcohol and asked them where they were headed to. He was told that they were

on their way to Gauteng. He informed them that he was not allowing them to be driven by someone who is not in possession of a driver's licence, and in particular whilst they were consuming alcohol. His impression was that they were in a hurry to go to Gauteng and he decided to search them and the vehicle. On searching the vehicle, he did find a driver's license but the driver indicated that it was not his. The driver informed him that the vehicle belonged to his girlfriend and appellant informed him to call her to come to Park Road police station so that he could hand over the vehicle and issue the driver with a summons, presumably for not being in possession of his driver's license. The other three passengers asked to be transported to the police station as it was late in the evening and no other transport was available. He also did not deem it appropriate to leave them there at that time especially taking into consideration their state of sobriety. On arriving at Park Road police station, he couldn't find the J532 spot fine book notwithstanding a search

at logistics and the commander's office. Having been unable to find the said book, he returned where Realeboha informed him that his lady friend was struggling to get transport to Park Road police station. His view was that he could not detain the driver for not being in possession of a license. At the time they received a further complaint of housebreaking in the suburb Universitas and, as they were still waiting for the owner of the vehicle to arrive, they drove with the mentioned gentlemen in the police van. On their return it appeared that the owner was still unavailable and her phone was on voice mail. He thereafter set them free. He never took any money from the complainant.

[9] The evidence of accused 1 supported the version of the appellant in material respects. The learned magistrate found that the state failed to prove beyond a reasonable doubt the guilt of accused 1 and acquitted him. As far as the appellant is concerned the court found that his version, in as far as it contradicts that of the complainant, is a blatant lie. In her reasoning the learned

magistrate found it to be an inescapable fact that Realeboha acted in collusion with appellant to steal the money of the complainant.

[10] In my view there was no evidence led that appellant and Realeboha acted in collusion as found. On the contrary, the record reveals that at the conclusion of the complainant's evidence, the court posed questions to the state witness:

"COURT: Do you know if he also laid charges?"

MR RAMORUTI: No Your Worship I do not know.

COURT: I am going now to ask a pertinent question, is Realeboha perhaps known to the two accuseds, do you know if he knows them or they are known to each other?

MR RAMORUTI: No Your Worship that I do not have information if he is known to them or what.

COURT: So according to you Realeboha did not even know how much you came with from Lesotho when you got to his place to go and buy the vehicle with, he never knew?

MR RAMORUTI: Yes that is true Your Worship.

COURT: I am trying to imagine why would he then in the statement say to the police you told him they dispossessed you of R25 000.00 whilst you had more than that, twice more than that amount?

MR RAMORUTI: I do not know where Realeboha got that from Your Worship, that R25 000.00 I do not know where he got it from.

COURT: And I am also wondering about his behaviour, you say he told you about Vereeniging but then he took you to Carletonville, these are two different places. Are you not wondering about this behaviour?

MR RAMORUTI: Yes Your Worship I started wondering, I was wondering by myself, I also heard that, well I was not satisfied, that is why I decided that no take me there to that place where he said I must go to buy a car.

COURT: What were you wondering about, after the incident before you went to Gauteng what were you wondering about, what was going on in your mind?

MR RAMORUTI: Yes I was wondering about this incident Your Worship, in the incident I saw a lot of things happening to me more than they were happening to these other people I was with.

COURT: You had a feeling it was like a setup?

MR RAMORUTI: Yes Your Worship I did have those thoughts because I was the only one who was handcuffed there.

COURT: Yes, I was asking now about the trip to Gauteng, then you went back and said actually that is what cropped up in your mind. I am also questioning, why having told you about Vereeniging, you live in Lesotho for Vereeniging and instead he takes you to Carletonville, do you know why or did you ever wonder why?

MR RAMORUTI: Yes I started wondering about that after I realised, after we headed back to Bloemfontein without arriving to that place where we were supposed to have gone to buy this car Your Worship.

COURT: Yes, I am also questioning his behaviour that after the said person at the mine gave you directions on a piece of paper you thought you were heading to that place at the car dealerships but then you on your own noticed that we are heading back to the south, you are coming back to Bloemfontein and you questioned him, why was he behaving like that, why did you have to ask him why does it look like we are going down and we are no longer going to where we supposed to be going, and he confirms that oh no I decided that we return back home because this petrol we will not make it, did you also wonder about that behaviour?

MR RAMORUTI: Yes Your Worship I did wonder that why is he doing that."

The above questions suggested to the witness the possibility of a setup – something which he never testified about. At best it was conjecture or speculation which the court in judgment elevated to an inescapable fact. The evidence of the complainant was to the effect that Realeboha never knew that complainant had the cash on him. If that is so, it is difficult to imagine how Realeboho would collude with the police officer to steal money that he (Realeboha) did not know of. In my view the magistrate erred in this regard.

[11] The magistrate criticized the defence case in various respects about Realeboha's version when he testified on behalf of the defence and stated that his version in various respects had not been put to the complainant for his comments. In fact, the judgment highlights fifteen such details. I do not think that the critique is justified. The witness was only made available to the defence after closing of the state case. Before that the state still intended to call the witness. The record reflects shortly before the closing of the state case the following:

"PROSECUTOR: Your worship maybe I can just inform that Realeboha Ramoruti Your Worship is outside, he is busy reading his statement, he is the next witness that we intend to call in the matter."

[12] It was common cause that the complainant was a single witness. As such his evidence should pass the test for evidence of a single witness in terms of section 208 of the Criminal Procedure Act 51 of 1977. This test was recently reiterated in *S v Oosthuizen and Another* 2020

(1) SACR 561 (SCA) at 567 para [14] (with reference to the principles laid down in *S v Sauls and Others* 1981(3) SA 172 (A) at 180 e-f):

"[14] Before us, it was contended that the complainants did not pass the litmus test for the evidence of a single witness in terms of s 208 of the Criminal Procedure Act 51 of 1977 (the CPA) as laid down in R v Mokoena and succinctly set out in S v Sauls and Others:

'(T)he absence of the word "credible" is of no significance; the single witness must still be credible, but there are . . . "indefinite degrees in this character we call credibility". . . There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness . . . The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.' "

[13] It concerns me whether the state proved beyond a reasonable doubt that the complainant was in possession of R52 000-00 as he averred. Not a single witness corroborated this version. He was in the presence of three people all of whom have been apprehended by the appellant and his co-accused. None of them testified having seen the appellant searching the complainant and removing the money as alleged. Separate therefrom the complainant had no bank proof of the withdrawal of such an amount or any other documentation proving his possession of the aforesaid amount. His explanation that he saved the money was his say so. It appears to be improbable that he would carry such a large amount of cash on him whilst

not trusting the very driver who was to take him to Vereeniging. At some stage, assuming his version to be true, he would have had to hide the money even though at the time when he so hid it, he did not know of the other two passengers in the vehicle as he only became aware of their company once the driver had picked him up. A disturbing fact is that directly after the alleged theft he still prefers to travel to Gauteng to see what the place looks like where he was to buy the vehicle even though he did not have any more money to do so. Only three days later he filed a charge with the South African Police Service. Had it been true that his money was stolen as he averred, I would have expected of him to immediately lay a charge instead of travelling to Gauteng merely to view the place where he was to purchase the vehicle. It is noteworthy that the charge sheet avers the theft of approximately R52 000-00 whilst the complainant was sure of the amount. The evidence also does not reveal why the complainant, together with people he did not trust, found it appropriate to travel to Gauteng at that time of the night. The probabilities indicate that they would have arrived in Gauteng in the middle of the night to do business. In addition, Realeboha's evidence was to the effect that the purchase had not been finalized (a fact which complainant confirmed) but according to Realeboha he was under the impression that in the event of a purchase of a vehicle, it would be paid by electronic transfer.

The complainant did not know what the purchase price of the vehicle would be and estimated it at approximately R30 000-00. In those circumstances there was no need to carry R52 000-00. As mentioned, there is no evidence corroborating his version of being in possession of the amount as aforesaid. On a reading of his evidence, my impression was that the complainant was not a satisfactory witness in all respects and on the contrary rather evasive.

[14] I do not think that his evidence mustered the test of a single witness.

[15] The appellant's version needs not be believed and cannot be rejected solely on the basis that it is improbable. It is only when the court finds on credible evidence that his explanation is false beyond reasonable doubt that he can be convicted. Where his version is therefore reasonably possibly true, he is entitled to his acquittal. It was argued that his evidence that there was no J354 spot fine books at the Park Police Station should have been rejected outright. There was no evidence to contradict this version and even though one might reason that that is improbable, I suppose it is reasonably possibly true. In any event it does not matter that much as I am of the view that there was no credible evidence placed before court warranting the conviction of the accused.

[16] In my view the court should have acquitted the appellant.

[17] I therefore make the following orders:

1. The appeal is upheld.
2. The convictions and sentences are set aside and substituted with the following:

"Not guilty and discharged on both counts."

C. REINDERS, J

I concur

M. OPPERMAN, J

On behalf of the appellant: LM Mokhele

Instructed by:

L M Mokhele Attorneys Inc.

BLOEMFONTEIN

On behalf of the respondent: Adv A. M. Ferreira

Director: Public Prosecutions

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