

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 24/2017.

In the matter between:

LEONARD KALUHONI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Kaluhoni v S* (CA 27/2017) [2017] NAHCNLD 109 (7 November 2017)

Coram: TOMMASI J and JANUARY J

Heard on: 17 AUGUST 2017

Delivered: 7 November 2017

Flynote: Appeal — Conviction — Standard of proof in criminal matters is proof beyond reasonable doubt— Learned Magistrate misdirected herself on the law when she determined that the State’s case was reasonably possibly true.

Factual dispute — Court determined that the nature and number of the contradictions and discrepancies of the main witness' testimony makes it unsafe to rely on — Goes to the heart of the defenses that witness was not at the scene — Held that the defenses was reasonably possible true and that the State had failed to prove its case beyond reasonable doubt.

Summary: The appellant was convicted of having contravened 35(1)(a) of the Anti-Corruption Act 8 of 2003 (corruptly accepting gratification). The State's version was that the appellant, a traffic officer, received N\$500 (R500 notes) from a civilian as gratification for not issuing a ticket for failure to wear a seatbelt. The accused denied having seen the person on that date and he denied having received money from him. The main witness was accompanied by his son at the time who was also a police officer. He was however alone at the time of the transaction. The main witness contradicted himself in respect of his movements and how he secured the funds to pay the N\$500 (R500). He was furthermore not corroborated by his son in respect to what transpired at the scene. The court held that these contradictions and discrepancies went to the heart of the defense that the witness was not at the scene that day and that it was material. It was reasonably possibly true that he was not at the scene given the fact his testimony and that of his son differed materially. The court held that the State had failed to prove its case beyond reasonable doubt.

ORDER

1. The appeal is upheld and the conviction and sentence are hereby set aside.

JUDGEMENT

Tommasi J (January J concurring)

[1] This is an appeal against conviction only. The appellant was convicted of having contravened section 35(1)(a) of the Anti-Corruption Act 8 of 2003 (corruptly accepting gratification).

[2] The State alleged that the appellant, a traffic officer, received N\$500 (R500 notes) from a civilian as gratification for not issuing a ticket to one Erastus Kapolo for failure to wear a seatbelt. The accused denied having seen Erastus Kapolo on that date and he denied having received money from him. The dispute was mainly factual.

[3] The appellant, in his grounds of appeal, takes issue with the learned magistrate's evaluation of the evidence and calls on the court to upset the findings of fact made by the learned magistrate. The basis for the criticism has been conveniently summarized by Mr Greyling, counsel for the appellant, as follow:

- ' (a) the learned magistrate erred in her conclusion of the credibility of the State witnesses;
- (b) The learned magistrate erred in the application of the onus;
- (c) The learned magistrate failed to make negative inferences in respect of witnesses which the state failed to call;
- (d) The learned magistrate erred in her conclusions in respect of the credibility of the defence witnesses.'

[4] Mr Tjiveze, counsel for the respondent, reminded the court that the learned magistrate, when evaluating the evidence, has numerous advantages the appellate court does not have. He further submitted in his heads of argument that the court *a quo* ruled the evidence of the State to be reasonably possibly true and carefully evaluated the evidence, not only applying its mind to the merits and demerits of the State's case and the Defense's case but also to the probabilities of the case. On the issue of the discrepancies and or contradictions in the State's case, he submitted that: it was not uncommon for witnesses to differ in minor aspects; that there can be various reasons explaining the phenomenon; and it does not necessarily mean that deliberate lies were told. He made reference to this court's approach to discrepancies between a witness's statement to the police and his *viva voce* evidence before court especially where explanations for the omissions exist. In response to the issue of the State's failure to call witnesses, he argued that there was no obligation on the State to call everyone who can possibly testify about a particular occurrence. He submitted that the State indeed proved its case beyond reasonable doubt and that the court *a quo* did not misdirect itself when it returned a verdict of guilty.

[5] It is not necessary to deal with all the issues raised. I shall first deal with the appellant's ground that the learned magistrate erred on the application of the onus. Mr Tjiveze indicated that the court omitted to use the words but applied the right test.

[6] The learned magistrate in her judgment summarized the testimonies of the State witnesses, the appellant and his witness Leonard Shilongo. Hereafter the learned magistrate states the following:

'Now the question to be decided by the court is whether the evidence presented so far by the State could be reasonable possible truth (sic) and whether the defence of the accused has a reasonable defence'.

Further on in the judgment the learned magistrate states the following;

'The evidence of the State could be reasonable possible truth, (sic) because the court relies on the evidence of Erastus Kapolo with evidence that was partly corroborated by his son, Gideon Kapolo. It could be reasonably true in the sense that an old man like

complainant Erastus Kapolo would not just fabricate a story to say the accused asked the money from him.'

In conclusion the learned magistrate remarks as follow:

'It is the opinion of this court and I am convinced that what the State put on record could be a reasonable possible truth (sic) and I find accused committed a crime and is guilty as charged'.

[7] It is trite that the legal standard of proof in criminal matters is proof beyond reasonable doubt. In *S v HN 2010 (2) NR 429 (HC)*, Liebenberg J states the following at page 458, paragraph 113:

'The question that must be answered is whether the State's case has been proved beyond reasonable doubt when measured against the accused's conflicting version or — putting it differently — is the accused's version reasonably possibly true even if the court does not believe him? Is there a reasonable possibility that it may be substantially true? (*S v Jaffer* 1988 (2) SA 84 (C); *S v Kubeka* 1982 (1) SA 534 (W).)'

[8] The test for the State's case is not whether it is reasonably possibly true but whether or not the State proved its case beyond reasonable doubt. The learned magistrate's conclusion is bad in law as it does not correctly state the nature of the onus which rests on the State. Mr Tjiveze's submission that the learned magistrate applied the correct test, is with respect, without any merit. The reasoning adopted by the learned magistrate's to arrive at the conclusion that the appellant is guilty, is wrong. If indeed the learned magistrate was of the opinion that the State only succeeded in proving that there is a reasonable possibility that their version of event was true, then she ought to have found the accused not guilty.

[9] This court may ignore the magistrate's conclusion given the misdirection on the law and is a large to make its own findings on the facts as it appears from the record bearing in mind those grounds raised on appeal.

[10] The main state witness, Erastus Kapolo, is the coordinator for the Swapo Office in the Oshana Region who, as part of his official duties, deals with traffic officers from time

to time. The age of this witness was not given but it can be gleaned from the judgment of the learned magistrate that he is an elderly person.

[11] He testified that, on the date in question, he was driving a white VVTI Toyota and his son, Gideon Kapolo was with him. The appellant stopped him and requested him to produce his license. After having done so, the appellant pulled him off the road and he parked his vehicle in the vicinity of the appellant's official vehicle. The appellant asked him if he knew he is liable to be fined N\$1000 for not wearing a seatbelt. The appellant then requested him to give him N\$500. He went to the car to fetch his wallet as he only had N\$50 in his pocket. He later indicated that he gave the appellant R500 in R100 notes. When he went to fetch the money in the car, he found his son standing near the car. He did not inform his son of the appellant's request for payment in the sum of N\$500.

[12] At the time he gave to money to the appellant his son accompanied him but the appellant chased his son away telling him that he should go back to the car. He was alone with the appellant when he handed him the money. He pulled out his wallet and he was holding it up. The appellant told him to bend down and he handed the appellant the South African Notes.

[13] This bothered him and he called Comrade Shakumu who did not respond. He hereafter called Mr Iyambo. He was advised that another officer will come to him and that he has to return to the scene. By this time they had already traveled in the direction of Game. When this officer arrived he pointed out the appellant as the officer to whom he had given the money.

[14] When asked by the State Prosecutor whether he informed his son, he confirmed that he told his son and his question was: "now dad if you have paid, where is the paper?"

[15] This witness testified in his chief examination that he had N\$1000. During cross-examination, when asked where he got the South African Rand, he replied that he did not have R1000 he only had R500. He explained that he drew N\$1000 from FNB (First National Bank), main branch and he exchanged N\$500 for R500. He later testified that he drove to Dodo Shop at Game Shopping Center where he exchanged the N\$500 for R500. This witness, when confronted with his statement to the police that he had N\$50

and R1000 on his person, testified that when he was stopped and asked for the money, he first went to First National Bank, Oshakati Main Branch where he withdrew N\$1000. He thereafter went to Dodo at Game Shopping Center and exchanged the N\$1000 for R1000. When asked why his version in court differs from the statement given to the police he denied that his versions differ. The court hereafter made the following remark: 'Mr Kapolo just be calm and patient and answer. Because from the beginning you said you went to the bank and withdrew N\$1000 you went again you changed five hundred Namibian Dollars to South African. You came back with five hundred Namibian Dollars and five hundred South African Dollars. (sic) So it is no longer like that but it is a thousand Namibian Dollars is that what you are saying?'

[16] He was also confronted with the statement he made to the police wherein he indicated that the appellant instructed him to return to his vehicle and after two minutes the appellant returned to the vehicle and waved at him to return to the traffic officer's vehicle. It was on this occasion that he asked for money. He indicated that the version in his statement is correct. During his evidence-in-chief he was adamant that he was requested to pay the appellant before he went to the car to collect the money. He made no mention in his evidence in chief that he had left the scene to go elsewhere to collect the money.

[17] The witness further mentioned during cross-examination that on the second occasion the appellant handed him back his car keys because his license was hanging on the car keys. The impression is created that the appellant asked him for his license when he stopped and he drove around to bring his vehicle to where the appellant was. It is not clear how he drove to Dodo's Shop when his keys and license were in the possession of the appellant. His son also testified that the traffic officer took his license when he first approached the vehicle.

[18] During cross-examination, the witness elaborated on the discussion he had in the car with his son. His son was asking him what had happened. He told him that he asked the appellant for a receipt but the appellant just informed him that it was okay. His son stated that it was impossible. He testified that he afterwards dropped his son off at Evulukulu and he drove to the office of the Commissioner of Police to report the matter.

[19] The State called the son of the main witness, Gideon Kapolo. He is a police officer attached to the Training and Development Department and stationed at the training center in the Omaheke region. He confirmed that he was with his father on the material date.

[20] He recalled that his father had to turn to Game Complex. At the traffic light near Game Complex, a traffic officer stopped his father. He demanded to see his father's driving license and informed his father to pull off as he was not wearing a seatbelt at the time. His father parked the vehicle and went to the traffic officer. He remained in the car. According to him, his father took "some minutes" and then returned to the car. He asked his father what happened and his father informed him that he had only paid N\$500 for the seat belt. He asked him where his receipt was and his father informed him that he did not get a receipt. He told his father that justice was not done. His father indicated that he was not aware that he needed to be furnished with a receipt. His father requested him to write down the Pol number of the traffic officer's vehicle as they were driving off. His father called someone and they were advised to return to the scene. They were driving towards Oneshila. They returned and his father showed a police officer who took the money from him. Both of them went to the Police office and he gave a statement.

[21] He recalled that there were two traffic officers but the other traffic officer was standing a bit far from where his father was talking to the one to whom he had given the money. He did not see the exchange of money but he believed that he paid the money as his father's driver's license was returned to him.

[22] During cross-examination it transpired that the traffic officers asked for his father's license whilst he was still on the road and thereafter instructed him to pull over. He seemed to recall that the traffic vehicles were both Toyota vehicles. It was common cause that the appellant's duty vehicle was an Isuzu bakkie. His father, according to his testimony, did not return to the vehicle to pick up his wallet and neither did he leave the scene to go to FNB or Game Complex. He observed his father standing next to the traffic officer's vehicle and the discussion took more or less 5 minutes. This witness testified that although he got out of the vehicle he remained at the vehicle at all times. He furthermore did not confirm his father's testimony that he was told by the appellant to go back to the vehicle.

[23] He testified that they were standing at the car when the police officer arrived at the scene. Two police officers arrived at the scene and they were not in police uniform. According to him they both approached his father and the appellant. He did not agree with his father's testimony that he was dropped at Evulukulu. According to him they both went to the police station.

[24] The State called two officers, Warrant Officer Shangala and Sergeant Matongo Linyadile. Both officers were attached to the Internal Investigation Unit of the Namibian Police. Both testified that they were briefed by Warrant Officer Ndaoya of a report which she received and instructed them to collect the appellant from the scene and to bring him to the office. Warrant Officer Shangala drove the vehicle to the scene and parked it near the scene but at a distance. Both of them testified that Sergeant Linyadile went to meet with the complainant although Warrant Officer Shangala did not see the complainant. Sergeant Linyadile approached the appellant and Warrant Officer Shangala followed him. He was taken to the office and body searched. No South African notes were found in his possession. The vehicle he had used that day was also searched but no money was found in it. Warrant Officer Shangala took down the statement of Erastus Kapolo later the same afternoon. The testimony of both police officers that Warrant Officer Shangala was not present when they met Erastus, was contradicted by his son Gideon. He testified that both of them approached his father.

[25] The appellant and his colleague, Leonard Shilongo, testified that they were regulating the traffic at the Game traffic light intersection when the appellant saw one Kulta. The appellant pulled him over as he wanted to obtain the telephone number of a mutual acquaintance who was working with Kulta. Kulta was driving a metallic grey Toyota single cab bakkie with a white canopy. Gideon Kapolo was with Kulta at the time. It must be noted that Gideon Kapolo denies knowing a person by the name of Kulta. Leonard Shilongo testified that he spoke to Gideon Kapolo that day as he knew him personally. Gideon Kapolo did not dispute that he knew the colleague of the appellant. The appellant and his witness denied having seen Erastus Kapolo that day. The appellant tendered his bad relationship with Warrant Officer Ndaoya as a possible reason for them to fabricating a case against him.

[26] Erastus Kapolo contradicted himself during his testimony in chief and during cross-examination in respect of the currency he had in his possession. He also contradicted his own testimony in chief in respect of his movements at the scene. Furthermore, his version of his movements at the scene is completely different from the version of his son. The record reflects detailed cross-examination in respect of the position of the respective vehicles and some discrepancies in this regard were also highlighted. Erastus's version that the appellant chased away his son was also not confirmed by Gideon. Their testimonies also differ in respect of where they had gone to afterwards. According to Erastus he went to the police station alone after having dropped Gideon at Evulukulu whereas Gideon testified that he accompanied his father to the Police station.

[27] The State bears the onus to prove the guilt of the appellant beyond reasonable doubt. The evidence should be considered in its totality inclusive of the appellant's evidence which forms part of the body of evidence which the court ought to evaluate in order to determine whether his defense is reasonably possibly true.

[28] Not every discrepancy is material and the court must have regard to the nature and reason thereof. It has been held in *S v Auala (No 1) 2008 (1) NR 223 (HC)* that:

'It is not uncommon that witnesses, when testifying, to differ from one another in minor respects, instead of relating identical versions to the court. There can be various reasons explaining this phenomenon and it does not necessarily mean that deliberate lies were told to the court. Contradictions per se do not lead to the rejection of a witness' evidence, as it may simply be indicative of an error.'

[29] The contradictions and discrepancies in the testimony of the main State witness and his son are material in view of the defense's version that Erastus was not on the scene that day. If these two witnesses' statements are so different then it is reasonably possibly true that they were not together at the time.

[30] It must be borne in mind that Erastus Kapolo was a single witness in respect of the transaction. It would also not be correct to refer to him as a complainant given his participation in what the State alleges to be an unlawful transaction. This court is not privy to the age of the complainant but his age may furthermore render his memory of events

unreliable. There is a need to treat his evidence with caution and it is in view hereof that the contradictions and discrepancies must be viewed. This court must be satisfied that, despite the contradictions and discrepancies, that the truth had been told.

[31] These contradictions and discrepancies go to the heart of the appellant's defense that the witness Erastus was not at the scene. Erastus' failure to give a consistent account of how he obtained the money impacts adversely on his credibility although he was not required to testify how he obtained the money. It is furthermore important that he was not corroborated by his son in material aspects which tends to strengthen the defense's allegation that Erastus Kapolo was not on the scene that day and it significantly weakens the State's case. The court must be satisfied that it is safe to rely on the evidence of this witness. No reasons for these discrepancies were placed on record by the witnesses.

[32] Given the number and nature of the contradictions and discrepancies it would not be safe for this court to rely on the evidence of the main witness, Erastus Kapolo. This witness cannot be said to have been a credible witness and the appellant's averment that he was not at the scene is reasonably possibly true. The State herein failed to prove their case beyond reasonable doubt.

[33] In the result the following order is made:

1. The appeal is upheld and the conviction and sentence are hereby set aside.

MA Tommasi

Judge

I agree

H C January

Judge

APPEARANCE:

FOR THE APPELLANT:

MR GREYLING
OF GREYLING & ASSOCIATES

FOR THE RESPONDENT:

MR TJIVEZE
OFFICE OF THE PROSECUTOR