

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

APPEAL JUDGMENT

Case no: CA 34/2017

In the matter between:

HENDRICK MUSEWA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Musewa v S* (CA 34/2017) [2018] NAHCNLD 10 (08 February 2018)

Coram: TOMMASI J and JANUARY J

Heard: 14 November 2017

Delivered: 8 February 2018

Flynote: Appeal — Conviction — Contravening section 35(1) (a) of the Anti-Corruption Act, 2003 (Act 8 of 2003) – factual findings by learned magistrate correct — No misdirection on the factual finding that the appellant's version was not credible — No reason for appeal court to interfere with the conclusion arrived at by the learned magistrate — Appeal against conviction dismissed.

Summary: The appellant, a police officer employed as a court orderly, was given N\$150 by a member of the community which he accepted. According to the State the civilian sought the appellant's assistance with a fine and the appellant informed the civilian to return on the trial date and to bring N\$300 with him. The civilian enquired at the police station whether it was proper for the court orderly to request a payment of N\$300 from him. He was later called by a police officer to attend at the offices of the police detectives the morning of the trial. The civilian was given N\$150 to give to the appellant by the police. The appellant was arrested shortly after receiving the N\$150. The appellant does not deny receiving the money. His defense was that he took the money as he was under the impression that it came from someone who owed him N\$150. The learned magistrate rejected the version of the appellant and relied on the version of the State to convict the appellant of the offence he was charged with. This court found no misdirection by the learned magistrate on his factual findings and accordingly dismissed the appeal against conviction.

ORDER

The appeal against conviction is dismissed.

JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] The appellant was convicted of having contravened section 35(1)(a) of the Anti-Corruption Act, 2003 (Act 8 of 2003) and was sentenced to 6 months' imprisonment. He appeals against the conviction.

[2] The grounds of appeal are summarized by counsel for the appellant as follow:

The learned magistrate erred in law and/or in fact:

- (a) by not according proper weight to the evidence of the defense and consequently, rejecting the evidence of the defense.
- (b) by holding that the appellant is guilty of corruption despite there being no evidence as to why the money was given to appellant by the State;
- (c) by placing too much reliance on the contradiction regarding the amount of money he was expecting from Carolina.

[3] It is evident from these grounds that the appellant takes issue with the findings of fact by the learned magistrate. In *S v Hangue* 2016 (1) NR 258 (SC) Maritz JA (Shivute CJ and Chomba AJA concurring) at page 287 – 288 paragraph 60 – 61 has the following to say in respect of an appeal on a factual question: ‘Referring the court to the appeal guidelines enumerated by Davis AJA in *R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 705 – 706, he submitted that, where there had been no misdirection on facts by the trial judge, the presumption is that his conclusion is correct and that this court would only reverse it where it is convinced that it is wrong. This approach, cited with approval in this jurisdiction on numerous occasions, was more recently restated by the South African Supreme Court of Appeal in *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645e – f:

“Before considering the submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of 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.”

This approach is not intended to relieve this court from its obligation to carefully consider the evidence because, as a court of appeal, it has other advantages that the trial court does not have in considering the evidence’.

[4] The undisputed facts are that the appellant, a police officer deployed as a court orderly, was approached by a member of the public (Mr Tjindunda) on 25 September 2015 and given N\$150 which he placed in his pocket. The appellant walked off in the direction of the police station and Mr Tjindunda walked off in the direction of the court. At this point, the police officers who were monitoring this transaction, requested the

appellant to accompany them to their offices where the N\$150 was found on his person. He was arrested and charged with contravening section 35(1)(a) of the Anti-Corruption Act.

[5] According to the State the above events were preceded by a prior meeting between the parties. Mr Tjindunda testified that he was given a 'traffic fine' for driving without a license. He, in terms of this notice or fine, had to pay N\$1000 on or before 18 September 2015. On 18 September 2015 he went to court to seek assistance to have the due date extended as he did not have enough money to pay the fine. Mr Tjindunda approached the appellant at court and handed him the notice. The appellant, after perusing the notice, informed him to return on 25 September 2015 (the trial date). The appellant also informed him to bring N\$300 and he will show him where to go.

[6] Mr Tjindunda was not happy with this request to pay N\$300 and was not sure why he had to pay this amount of money. He made further inquiries at the police station about the payment of the N\$300. He was later called by the police and requested to come to the police station on 25 September 2015 before going to court. He was given N\$150 by the police to give to the appellant whilst they would observe the transaction.

[7] Mr Tjindunda further testified that he met with the appellant at a stall selling food across the road from the magistrate's court. He recognized the appellant by his colour. He handed the appellant the N\$150 and the notice or fine. He informed the appellant that he was only able to give N\$150. The appellant accepted the N\$150 and agreed to help him. The appellant returned the notice and directed Mr Tjindunda to sit in court. The appellant never arrived but his fine was nevertheless extended by the court.

[8] The appellant denied that he had met Mr Tjindunda before 25 September 2015. According to him he was expecting payment from a friend, Caroline. She owed him N\$150. During his plea explanation he stated N\$200 but he testified during cross-examination that he made a mistake. According to him she called him early the morning of 25 September 2015 and undertook to bring the money to court where he was stationed. She also informed him that she might not be able to come in which case she would send somebody else to deliver the money to him at court. She did not say who

she would send. He left the court building and went to a stall where they sell food. He had a glass of *oshikundu*. After he drank the *oshikundu*, he faced the direction of the police station. An unknown man approached him and greeted him. The man took out N\$150 and gave it to him. As he received it as he was expecting payment in the same amount from Caroline. He wanted to ask the man where the money was coming from but the man turned and walked in the direction of the court. He decided to confirm with his friend Caroline later.

[9] Fifteen seconds here after he was requested by Sergeant Moshana to accompany them to their offices. When confronted with the money, the appellant said it was his money. He was shown copies of the money and agreed that the money in fact belonged to the State.

[10] Caroline testified and verified that she called the appellant that morning and undertook to bring N\$150 which she owed him to court. She heard the appellant was arrested when she brought him the money later that day.

[11] The learned magistrate, concluded that: the appellant appropriated the money he received for himself and had no intention to use it towards the payment of the fine; the appellant accepted N\$150 when he was waiting for N\$200 from Caroline; he had ample time to ascertain from the unknown person where the money was coming from; and his failure to do so led the learned magistrate to infer that the appellant knew what the money was meant for. The learned magistrate then applied the facts to the statutory provisions and concluded that the appellant wanted an inducement or a reward before assisting Mr Tjindunda which he was not entitled to. He accordingly convicted the appellant of having contravened s 35(1)(a) of the Anti-Corruption Act.

[12] The factual issue in dispute is whether there was a prior meeting between Mr Tjindunda and the appellant. According to Mr Tjindunda he met the appellant at court on 18 September 2015 and he recognized the appellant on 25 September at the food stall where he gave him the N\$150. Whether or not the court believes one or the other would depend on the findings the learned magistrate made in respect of the credibility of the two witnesses. It is evident that the learned magistrate did not find the appellant to be a

credible witness. It is the task of this court to determine whether the learned magistrate's misdirected himself on the factual findings in the manner complained of in the grounds of appeal.

[13] The state bears the burden to prove beyond reasonable doubt that the appellant is guilty of the offence. Section 35(1) stipulates as follow:

'An agent commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept from any person a gratification-

- (a) as an inducement to do or to omit doing anything;
- (b) as a reward for having done or having omitted to do anything, in relation to the affairs or business of the agent's principal.'

The State bears the burden to prove beyond reasonable doubt that there was a prior meeting during which the appellant corruptly solicited money from Mr Thjindunda and that he on the day in question, accepted this money as an inducement to do or to omit doing anything.

[14] Mr Uirab, counsel for the appellant, submitted it was not clear what the money was for. It appears that counsel was taking issue with the burden of the State to prove what the appellant was supposed to do or omit to do. The learned magistrate indeed found that this witness was not clear as to what the N\$300 was for. Mr Tjindunda testified that the following transpired on 18 September 2015:

'When he came out I approached him and then I was still having the traffic ticket, I showed the traffic ticket to the police officer. And the officer looked at this ticket and he said no fine, you can go back and come back on the 25th of September. And when you come back on the 25th you must bring along three hundred Namibian dollars (N\$300-00) so that I can show you where to go'. [my emphasis]

He would later testify that he was shocked by the request of the police officer. The truth of the matter is that this witness did not know what the officer wanted to do with the N\$300. This could only be answered by the conduct of the police officer once he was given the money.

[15] The next question is whether the learned magistrate was justified to infer that he had accepted the money as a reward to do or to omit to do something. Mr Uirab argued that there are a number of inferences to be drawn from the conduct of the appellant. The question is whether the inference sought to be drawn is consistent with the proven facts; and whether it is the only reasonable inference to be drawn from the proven facts.

[16] The appellant upon receiving the money, placed the money in pocket. That is a clear indication that he claimed the money as his own. The appellant did not deny that he claimed the money as his own. This fact is undisputed.

[17] The learned magistrate next considered whether he corruptly accepted it as gratification. This is where the version of the appellant and the State differ substantially. The learned magistrate accepted the version of Mr Tjindunda and rejected the version of the appellant.

[18] It should be noted that the definition of corruptly has been declared unconstitutional by the high court for being over-broad (*Lameck & another v President of the Republic of Namibia* 2012 (1) NR 255 (HC). In *S v Goabab & another* 2013 (3) NR 603 (SC) the court held that for purposes of that judgment it sufficed to hold that the word 'corruption', at its lowest threshold when used in the context of the public service, included the abuse of a public office or position (including the powers and resources associated with it) for personal gain. The synonyms of 'corruptly' included 'immorally, wickedly, dissolutely and dishonestly'.

[19] The complaint of the appellant is that the learned magistrate did not accord sufficient weight to his defence and made too much of the error he made during his plea explanation when he stated Carolina owed him N\$200.

[20] The learned magistrate's main criticism of the appellant's version was his failure to enquire where the money was coming from. The learned magistrate found it implausible that the appellant would accept money from a complete stranger without confirming the source. Moreover the learned magistrate did not believe the appellant when he said that he did not have time to enquire. He considered it unlikely that the appellant would accept N\$150 whereas he was expecting N\$200. It is quite evident

from the judgment of the learned magistrate that he did not find the version of the appellant to be credible or even plausible.

[21] In *S v Johannes* 2009 (2) NR 579 (HC) Muller J, at p 584 para 11, stated as follow:

'It is accepted that the correct approach in a criminal case is not to weigh up the version of the State witnesses against that of the accused and then to balance it and accept or reject one and not the other. This approach has been clearly enunciated by other courts in the past. It has often been stated that the consideration of the probabilities of a case in order to decide whether the accused's version is reasonably possibly true is permissible. This is done by looking at the probabilities of the case in order to determine whether the accused's version is reasonably possibly true. Only if the version of the accused is so improbable that it cannot be regarded as the truth is it inherently false and it falls to be rejected. It is also accepted that the test is not whether the court disbelieves the accused, but it will acquit him if there is any reasonable possibility that his evidence might be true. (*S v Jaffer* 1988 (2) SA 84 (C) at 88F - 89E; *S v Singh* 1975 (1) SA 227 (N); *S v Munyai* 1986 (4) SA 712 (V) at 716B; *S v Kubeka* 1982 (1) SA 534 (W) at 537F - H.)'

[22] According to the appellant he had an agreement with Caroline that she or someone else would deliver the money at the court where the appellant was stationed. In his plea explanation he stated that: 'She told him that she will bring the money at court where I am stationed, then she said at that time she was busy she will send someone.' During cross-examination he put it to the detective that: ...one lady by name of Carolina who owes me my money telephonically told me that today I will have your money. I will send someone to bring it at the court where you are stationed,... then I asked her why are you not coming yourself, she said no this time I am busy and I said okay I will wait.' He testified that '... Carolina telling me that she has the money that she owes me, she will come give me at the court where I am stationed. Now that material time I was a court orderly then she further said that she might not make it to come herself, she might send someone to come and deliver it at the court where I am stationed.' Carolina was called and her version was as follow: 'The day I got the money I called him, told him that I was not in a position to come to where you are (is) working, but I will send someone'.

[23] The appellant's version in respect of what transpired between him and the unknown man in his plea explanation is as follows: '... one unknown man approached me, greeted me then he took N\$150 he gave it to me. Thereafter I asked him where does the money coming from, he just gave it to me he went because we were in a hurry.' During cross-examination of Detective Moshana he put the following version to him: '...on my way to the station I met an unknown person ... He took out the money he gave it to me, I took the money, from where is the money coming from, giving me (his) back, a u-turn he went, then I was in a hurry to go to the station. My aim (was) to go to the station to go and get the J5 that used to be used at the court roll here at court.' He testified as follow: '...one unknown man to me by that material time approached me, we met, greeted me he took out N\$150 he gave it to me. As I received that N\$150, but I wanted to ask him where is the money from, then he turned, he made a u-turn to face the direction of the court.'

[24] There are discrepancies and inconsistencies in material parts of his explanation. Did Caroline inform him that she might send someone or she will send someone? It is furthermore not clear whether he had asked where the money was from but the man ignored him and just walked away or he wanted to ask but the man turned his back on him without giving him a chance to ask. Furthermore the reason the appellant advanced for not bothering to find out whether the money was from Caroline was not consistent. It is not clear whether the man walked away or the appellant had to return to his duties. At times he would also indicate that it was because Detective Moshana came almost immediately leaving him little or no time to determine the origin of the money. Another unsatisfactory aspect of his testimony is that the appellant expected the money to be paid at court. The appellant however received the money at a food stall which was not as per the arrangement with Caroline.

[25] It is indeed so that the appellant indicated that he made a mistake when he stated he was expecting N\$200. Whether or not this was a mistake or an indication of a poorly rehearsed afterthought remains an issue of credibility. The version of the appellant, given the discrepancies and inconsistencies in his explanation and his failure to make a concerted effort to determine the source of the money are indications that his version is an afterthought concocted to explain his acceptance of money he solicited and accepted from a member of the community which he was not entitled to do.

[26] It is our considered view that the learned magistrate did not misdirect himself on the findings of fact and he correctly convicted the appellant of contravening section 35(1)(a) of the Anti-Corruption Act, 2003 (Act 8 of 2003).

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

The appeal against conviction is dismissed.

MA Tommasi

Judge

I agree

H C January

Judge

APPEARANCES

FOR THE APPELLANT:

Mr Uirab

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FOR THE RESPONDENT:

Mr Mudamburi

Office of the Prosecutor-General, Oshakati