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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO. AR141/14

In the matter between:

MSIZI NDABEZINHLE DUMA **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

STEYN J

[1] The appellant was convicted on a count of theft of a motor vehicle on 21 August 2012 at the Regional Court, Durban and sentenced to 6 (six) years' imprisonment. Leave to appeal the conviction and sentence was granted by the court *a quo* on 27 November 2012. This appeal has a long and protracted history since it was previously struck from the roll and the appellant's bail was cancelled. On 28 October 2016 Masipa J however issued an order for the appeal to be re-instated and granted the appellant bail in the amount of R8 000. It is not necessary for purposes of this judgment to traverse the details of the application that served before Masipa J.

[2] The appellant appeals against his conviction on the grounds that the learned magistrate refused him the opportunity to call a crucial defence witness and by doing so, the court deprived him of his right to a fair trial. Furthermore the State failed in its *onus* to establish his guilt beyond reasonable doubt since the defence raised by him was never negated by the evidence adduced by the State. In relation to the sentence, the appellant contended that the magistrate was misdirected when she imposed direct imprisonment without any consideration of correctional supervision in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 ('the Act') as a suitable sentence.

[3] Before I deal with the appellant's grounds of appeal, it is necessary to consider the defence raised at the plea stage of the proceedings. The appellant pleaded not guilty to the said charge and elected to tender a detailed written plea explanation in terms of s 115 of the Act that reads as follows:

> 'I, the undersigned, Msizi Ndabezinhle Duma (hereinafter referred to as the 'accused') do hereby state that:
>
> 1. I understand the charge of theft of motor vehicle that has been preferred against me by the State. I confirm that my attorney has read to me and explained the contents of the charge sheet together with the contents of the annexure thereto.
> 2. I confirm that my attorney has explained to me my rights including my right to remain silent and to be presumed innocent until my guilt has been proved beyond a reasonable doubt by the State. I however elect to waive my right to remain silent in this matter.

3. I am pleading not guilty to the charge. I understand that by making these admissions I am absolving the State from having to lead any oral evidence to prove the undisputed facts.
4. The facts that I am not placing in dispute are the following:
   4.1 That on the 7th December 2011 in the afternoon I was arrested by two Asian male police officers who were driving a marked Ford Focus police vehicle.
   4.2 At the time of my arrest I had been driving a white VW microbus with registration letters and numbers ND[…]. At the time of arrest I was [driving] this vehicle along South Coast Road, Clairwood, with the intention of going to "B" section Umlazi.
   4.3 I had been in Durban at the city centre that morning. I met up with Sandile Mkhize who is well-known to me as he resides at "C" section Umlazi. Prior to my arrest I was employed at a car wash in "B" section Umlazi and I was washing cars there. Sandile Mkhize was a usual customer at the car wash and I used to wash different cars that he would bring there to be washed.
   4.4 When I met him at Berea centre he was seated inside the VW microbus in question with another African female. I heard a hoot of the car and on approaching I realised it was him. He told me that the female inside the vehicle was his girlfriend.
   4.5 He requested me to take his microbus vehicle and drive it to Umlazi "B" section and that I must leave it with the owner of the car wash. He told me to leave the keys with owner of car wash and he was going to collect the car there late that evening.
   4.6 I asked him why was he not driving the car himself and he told me that his girlfriend arrived in her own car and that they wanted to hang around and was therefore not going to be able to drive his car and that of his girlfriend. I then agreed to help him out and I took the vehicle and drove it.
   4.7 At the intersection in Bramey Road, Clairwood, the robots turned red against me. I stopped the car I was driving. I noticed on the rear mirror that there was a marked police vehicle behind me. I got scared because I was driving the car without holding a driver's licence. I got out of the car and started to run away.
   4.8 Police officers chased after me and arrested me. I stopped because he fired a warning shot. He took me back where I had left the motor vehicle. They asked me in English where I got vehicle from. I told them that I go the vehicle from Sandile Mkhize. They asked me where he stayed and I told them he stayed at "C" section Umlazi. They told me they are arresting me for theft of motor vehicle.
   4.9 They took me to their marked police vehicle and transported me to Montclair police station where I was detained. The following day I met the investigation officer Mr Brian Njabulo Mkhize. He asked me where I got vehicle from and I told him I got it from Sandile Mkhize. He asked me where Sandile stays and I told him he stays at "C" section Umlazi. He then charged me.
   4.10 He then transferred [me] to Berea police station where I was detained. Later that evening at about 8:00 he came to the cells and booked me off. He then drove with me to "C" section Umlazi township to look for Sandile. We reached Sandile Mkhize's residence and I pointed it out to him. There were three police officers in all and I was the fourth person in police car. We all alighted from the car and went inside the house.
   4.11 We found four (4) occupants in house including Sandile Mkhize's sister. Police asked his sister about his whereabouts. She confirmed Sandile stayed there but was not at home at that time. We then left and went back

to Berea police station. I was then immediately transferred to CR Swart police station. I was then detained until I appeared in Durban court.

4.12 At all material times when I took possession of vehicle from Sandile Mkhize I did not know or suspect that the vehicle was stolen as alleged by the State.'[1]

(My emphasis.)

[4] At this point I consider it convenient to summarise the evidence adduced before the court *a quo*:

(i) The complainant, the owner of a VW microbus parked her vehicle in St Thomas Road, Durban. The complainant and her mom were visiting an old family friend. Shortly after arriving at the flat of the person they were visiting, she heard her vehicle's engine running and looked through the window. The complainant saw someone inside her vehicle driving it away. She was unable to give a description of the identity of the person in the vehicle but immediately informed the tracking company of the theft. The next day she went to the police station to identify her vehicle. When she was asked about the condition of the car, she stated that the only thing missing from the car was the face of the radio. No other damage was detected by the complainant.

(ii) Warrant Officer Ramsamy testified that he drove a marked police vehicle fitted with a special system, the Tracker Retrieve, which enables him to pick up signals of stolen vehicles that are fitted with a tracker device. He was driving behind a VW microbus and when they stopped at an intersection controlled by traffic lights, the appellant jumped out of the VW microbus and ran away. The appellant was apprehended and brought back to the vehicle that was still idling. According to this witness there was no key in the ignition despite the fact that the engine was still running. He observed damage to the door lock and the ignition of the vehicle. The vehicle was identified by the owner as her property.

(iii) The investigating officer, Constable Mkhize, initially testified that he had never booked the appellant out from the cells to establish anything. However when he was probed further by the State in his evidence-in-chief, he relayed that he took the appellant out of the cells only once to go and verify his address. In

[1] At 82 *et seq* of the record.

answer to a question from the court, this witness stated that the appellant mentioned the name of Sandile Mkhize and that he, the appellant, was in the company of Sandile Mkhize. Seemingly Constable Mkhize never tried to locate Sandile Mkhize and only attempted to do so after he was directed by the court. (The record does not reflect such an instruction so it is assumed that this witness was instructed by the State prosecutor to locate Sandile Mkhize.) The State tendered no further evidence in support of its case.

(iv) The appellant testified in his own defence and conceded that he was apprehended by the police after he ran away from the VW microbus. He explained that he was frightened when he noticed the police vehicle behind him and was worried that he would be arrested since he did not have a drivers licence. According to the appellant, he received the vehicle from Sandile who is known to him. He was asked to drive the vehicle to Umlazi where Sandile would have collected it later in the day. Sandile's girlfriend's car was parked next to the VW microbus.

The appellant further testified that Constable Mkhize took him to Sandile's home at "C" section Umlazi. When they arrived there they found Sandile's sister as well as Sandile's brothers at home. He maintained that the officer had lied when he said that he did not take him to Sandile's home. The appellant then requested the opportunity to call Sandile's sister as a defence witness and the court ruled as follows:

> 'Court : The Court is of the view that Sandile's sister is not going to take the defence case any further. The application is refused.'[2]

Mr Ngcobo, acting on behalf of the accused during the trial, then closed the case for the defence.

Plea explanation

[5] In *S v Mothlaping en 'n ander*[3] Van Rhyn JP on behalf of the full court, summarised the evidential value of a plea explanation in terms of s 115 of the Act as follows:

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[2] See record at 32 lines 14 and 15.

'(a) What is stated in the explanation is not evidence, it is a disclosure of the accused's defence;

(b) The accused exercises an election to make one and should not be coerced into making one;

(c) If the accused tenders a plea explanation then it forms part of the evidential material and the accused may be cross-examined on the content of the explanation;

(d) The plea explanation cannot be used as evidential material in favour of the accused without him testifying under oath;

(e) Throughout the trial the explanation would operate in favour of the accused in that the State is obliged to disprove the defence raised in it.'[4]

(My emphasis.)

[6] From the appellant's plea explanation it is evident that he was employed at a car wash in "B" section Umlazi. The record shows that Sandile Mkhize was a regular customer. He was asked to hand the keys of the car to the owner of the car wash who should have been in a position to disprove his defence if he was called by the State. The State in my view tendered no evidence to disprove the defence raised by the appellant despite the fact that it bore the *onus* of proving that the appellant stole the vehicle. The State failed to rebut the appellant's version.[5]

[7] The court's refusal of allowing the appellant the right to call Sandile's sister raises the question of whether the appellant received a fair trial. In terms of the common law our courts have always recognised the right of accused persons to call witnesses on their behalf. In 1924, in *District Commandant South African Police &*

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[3] 1988 (3) SA 757 (NC) at 761I-762E. Cf. *S v Cloete* 1994 (1) SACR 420 (A) at 424.
[4] This is a translation of the court's words at 761I-762E. The original text is in Afrikaans.
[5] See *S v Mia & another* 2009 (1) SACR 330 (SCA) para 12 that reads:
'The proper approach in a criminal case, is that evidence must be considered in its totality. It is only in doing so that a court can determine if the guilt of an accused person has been proved beyond reasonable doubt. Should the trial court, in the course of assessing the evidence before it, find that a particular witness is unreliable and reject his version for that reason, that evidence plays no further part in the determination of the guilt or innocence of the accused in the absence of satisfactory corroboration. Even more so does this apply to evidence tendered by a co-accused incriminating another, especially where the State has not adduced any evidence proving the guilt of that other accused.' (Footnote omitted.)
See also *S v Mafiri* 2003 (2) SACR 121 (SCA) at 122g.

another v Murray,[6] the court relied on the dictum of Benjamin J. The Judge remarked:

> '[An] accused person shall have full opportunity of giving evidence in his own defence and of calling such other witnesses as he may desire is a principle of elementary justice….'

Innes CJ in the *District Commandant* case regarded a denial of such right as a gross irregularity.[7]

[8] On a statutory level an accused person's right to call witnesses and adduce evidence before a court is recognised in terms of s 151(2)(a) of the Act, which reads:

> 'The accused may then examine any other witness for the defence and adduce such other evidence on behalf of the defence as may be admissible.'

[9] In *S v Gwala*[8] Didcott J regarded the right as an absolute right and held that a denial of this right amounts to a gross irregularity that vitiated the whole trial. The court went as far as to say that the trial magistrate had no discretion to exercise. At 939B it was held:

> 'The magistrate is mistaken about the mistake he made. As I have pointed out already, he had no discretion to exercise in the affair, correctly or incorrectly. And the 'merits of the request', as he calls them, were none of his business and no proper subject for enquiry. Indeed, there was no occasion for any request. The accused had a right to call the witness, I repeat, which was neither dependent on permission received from him nor qualified in any other way.'[9]

(My emphasis.)

Constitutional Right

[10] The Constitution[10] in terms of s 35(3)(i) provides that:

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[6] 1924 AD 13.
[7] See *supra* at 18. Also see *S v Tembani* 1970 (4) SA 395 (E).
[8] 1989 (4) SA 937 (N) and *S v Selemana* 1975 (4) SA 908 (T) at 909A.
[9] At 939A-B.
[10] See Constitution of the Republic of South Africa, 1996.

'(3) Every accused person has a right to a fair trial, which includes the right –
(i) To adduce and challenge evidence.'[11]

[11] In my view, the learned magistrate in her judgment, failed to give reasons for denying the appellant the opportunity to call Sandile's sister as a witness. During the court's judgment on the merits, she merely sought justification for her refusal to allow the appellant this right. In fact, the learned magistrate overlooked the principle that there is no *onus* on the accused to prove anything.[12] His version was clear from the time that he pleaded that he did not know that the vehicle was stolen and that he was asked to take the said vehicle to the car wash in Umlazi and hand it over to the owner of the car wash. The court dealt with the accused's version as follows:

> 'The accused's version is that he met Sandile and Sandile gave him this motor vehicle and he was supposed to take it to a car wash of a person in Umlazi and then leave the car there, a car wash that he had previously been employed at, but on that particular day he was not employed. The accused could not explain why he was taking the car to a car wash of a person that he hardly knew. Also he could not explain why he was taking a customer's car to a car wash when he normally did not do this. He did not know Sandile very well, according to his version under cross-examination, he only met him at the car wash. He did not know what Sandile did for a living. It was also put to him that he had no obligation to take the car from Sandile and go anywhere else. He could not explain that.
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> He could not explain about the keys of the car. It was asked of him, "Did Sandile give you the keys", and he had no reply, in fact he replied with, "The motor vehicle was idling". When the question was repeated he stated under cross-examination that he did not notice if there was a key in the ignition.'[13]

(My emphasis.)

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[11] The comparable provision in the interim Constitution was s 25(3)(d) that reads:
'to adduce and challenge evidence, and not be a compellable witness against himself or herself.'

[12] See *Maseti v S* [2014] 1 All SA 420 (SCA) para 25:
'The approach, that an accused person is necessarily guilty because the complainant has no apparent motive to implicate them falsely and they are unable to suggest one, is fraught with danger. This was spelled out by Mahomed J in *S v Ipeleng* in the following terms:
"It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation. The true reason why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors, they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks 'Why should the State witnesses have falsely implicated the accused?'."'

[13] See record at 40 lines 14 to 25 and 41 lines 1 to 4.

[12] The common law principle as highlighted by Didcott J in *Gwala* is now fortified in the Bill of Rights as a fair trial right and any infringement of the right has to be justified in terms of the limitation clause.[14] *In casu* the appellant was denied the opportunity to place evidence before the court that could have countenanced the evidence of Constable Mkhize who was regarded by the court *a quo* as a good witness. It is not my duty to speculate about the nature of the evidence that Sandile's sister would have presented to the court and whether her evidence would have supported the appellant's version. It remained the duty of the court *a quo* however to have given the appellant the opportunity to call witnesses in his defence. The court also regarded Warrant Officer Ramsamy's evidence as good, yet there is a startling contradiction in his evidence and that of the complainant, namely the damage to the vehicle.

[13] A critical analysis of the evidence of Constable Mkhize would have resulted in a different finding. On a constitutional level the court in *S v Jaipal*[15] stated the following on the issue of irregularities:

> 'Therefore a failure of justice must indeed have resulted from the irregularity for the conviction and sentence to be set aside. In construing when an irregularity had led to a failure of justice, regard must be had to the constitutional right of an accused person to a fair trial. If an irregularity has resulted in an unfair trial, that will constitute a failure of justice as contemplated by the section and any conviction will have to be set aside. Whether a new trial may be commenced against the accused will also require a constitutional assessment of whether that would be a breach of the right to a fair trial or not. The meaning of the concept of a failure of justice in s 322(1) must therefore now be understood to raise the question of whether the irregularity has led to an unfair trial.'[16]

[14] In my view the irregularity committed by the presiding officer to deprive the appellant of the opportunity to call a witness in his defence is so fundamental that it vitiates the proceedings to the extent that the appellant did not receive a fair trial. In

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[14] Since the constitutionalisation of the criminal procedure, the following cases were decided on this point; *S v Nkambule* 1995 (2) SACR 444 (T); *S v Younas* 1996 (2) SACR 272 (C) and *S v Lukhandile* 1999 (1) SACR 568 (C).

[15] 2005 (4) SA 581 (CC).

[16] *Ibid* at 596F-597B. Also see *S v Shikunga & another* 1997 (2) SACR 470 (NmS) at 479a-485b where Mahomed CJ analysed the assessment of irregularities as from common law to constitutional breaches.

the light of the irregularity committed by the magistrate, it is not necessary to deal with the merits in detail.

[15] As much as the right to call witnesses to testify is not an absolute right, it remains to be a fundamental right in an accusatorial criminal justice system, especially since the guilt of an accused person is usually determined on the facts. For a trial to be fair a presiding officer should not reach a conclusion adverse to the defence until all of the evidence has been heard.

Order

[16] The appeal succeeds, the conviction and sentence imposed on 26 September 2012 are set aside. If the Director of Public Prosecutions KwaZulu-Natal elects to prosecute the appellant again, the trial then needs to be presided over by a different magistrate.

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STEYN J

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D PILLAY J : I agree

Appeal heard on :	18 April 2017
Counsel for the appellant :	Advocate D Barnard
Instructed by :	B Ngcobo Attorney
Counsel for the respondent :	Advocate A Watt
Instructed by :	The Director of Public Prosecutions
Judgment handed down on :	9 May 2017