THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 581/11

DAVID MALISELA KEKANA — Appellant

and

THE STATE — Respondent

Neutral citation: *Kekana v The State* (581/11) [2012] ZASCA 75 (25 May 2012)

BENCH: PONNAN and TSHIQI JJA and KROON AJA

HEARD: 21 MAY 2012

DELIVERED: 25 MAY 2012

CORRECTED:

SUMMARY: Evidence – assessment of - court's powers to interfere on appeal with the findings of fact of a trial court limited in the absence of demonstrable and material misdirection.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Boruchowitz and Mathopo JJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

PONNAN JA (TSHIQUI JA and KROON AJA concurring):

[1] The appellant was convicted in the Regional Court, Germiston on a charge of conspiracy to commit murder in contravention of s 18(2)*(a)* of the Riotous Assemblies Act 17 of 1956 and sentenced to imprisonment for a term of 10 years. His appeal to the South Gauteng High Court (per Boruchowitz J (Mathopo J concurring)) was partially successful inasmuch as his conviction was altered to one of attempting to commit the aforesaid offence and his sentence was, as a consequence, reduced to imprisonment for a term of 5 years.

[2] The charge levelled by the State against the appellant alleged that on or about 23 January 2006 and at or near Germiston he unlawfully and intentionally conspired with Sipho Gift Ndlovu to aid or procure the commission of or to commit an offence, to wit to unlawfully and intentionally kill Frederick Ngoma.

[3] Those allegations arose against the following factual backdrop: The appellant and Frederick Ngoma were employed by the Ekurhuleni Municipality at its Solid Waste Department in Bedfordview, Gauteng. Towards the end of 2005 the position of

supervisor within the department in which they worked became available. Both of them applied for the post. According to their manager, Ms Mthethwa, the appellant's application was unsuccessful and it fell to her to inform him that the successful candidate was Mr Ngoma. She testified that the appellant reacted angrily to the news stating, inter alia, that he will 'never be supervised by an inexperienced person' and that will only happen 'over his dead body'. He also, according to her, threatened to kill several of his co-employees including Mr Ngoma.

[4] On 23 January 2006, so testified Mr Ndlovu, he was approached by the appellant who was looking for someone named Sidney to 'do a job for him'. Ndlovu pleaded with the appellant to give him the job as he was unemployed. The appellant then told him that there was a person at his work that he wanted dead. The appellant gave Ndlovu his cell phone so that he could stay in touch with the latter. Ndlovu was then taken to the appellant's place of employment where Ngoma was pointed out to him. Thereafter Ndlovu was driven to Ngoma's home by the appellant. Once there Ndlovu contacted Ngoma telephonically and told him of the plot to killl him. Ndlovu then telephoned the appellant and told him that he had done the job. In the meanwhile the police had been contacted by Ngoma. They lay in wait for the appellant and he was arrested when he subsequently met with Ndlovu. Ndlovu's evidence was that the appellant had offered to pay him R3000.00 to kill Ngoma, but that right from the outset he had no intention of carrying out the plan but simply played along.

[5] The appellant denied the allegations against him. The gist of his evidence was that he was the victim of a conspiracy orchestrated by Ngoma and Ndlovu, and to a lesser extent Ms Mthethwa. He testified that Ngoma was his friend and that he had not had any problems with either him or Ms Mthethwa previously. According to the appellant, he had met Ndlovu on a prior occasion when Ngoma introduced the two of them to each other. He testified that when he saw Ndlovu on the second occasion during January 2006 the latter complained that he was unemployed and had been struggling to secure employment as he did not have a cell phone and accordingly could not be contacted by prospective employers. As he had two cell phones he sold one to

Ndlovu for R600.00. The latter, however, was only able to pay him R400.00 immediately with the balance of R200.00 being owed to him. On the day of his arrest he was contacted by Ndlovu, who intimated that he had run into a problem and thus requested return of the R400.00. They arranged to meet so that he could retrieve his cell phone and return the R400.00 to Ndlovu. He kept that meeting and was then arrested by the police.

[6] The high court concluded that the State had failed to prove the offence charged but rather only an attempt to commit that offence. In that, it cannot be faulted. As long ago as *Harris v Rex* (1927) 48 NPD 330 at 347, Tatham J (Matthews concurring) put it thus:

'(k) The last ground relied upon in argument is that the evidence in relation to count 1 does not support a conviction for conspiring with Lockwood, for Lockwood was not a conspirator, and there can be no conspiracy unless two or more persons are *ad idem* as to their object, that is, have come to some agreement. 9 *Halsbury's* Laws of England, par. 545, and *R v Plummer,* [1902] 2 KB 339. This argument must prevail. It is clear that whatever the appellant may have thought was the case, Lockwood was not in agreement with him as to obtaining money from Indians to defeat the course of justice, but was entrapping him. The evidence, however, leaves no room for doubt that while it does not support a conviction for conspiracy, it supports a conviction for attempting to commit that offence, for the authorities are clear that a person may attempt to commit an offence which he could not in the circumstances in fact commit. This Court has power to alter the conviction to one of attempting to commit the offence (Act 32, 1917, sections 95 and 100), and it will be altered accordingly.'

[7] For the rest, the high court disposed of the appellant's appeal in a judgment of three pages. It identified the central issue as being 'whether the state witnesses falsely implicated the appellant and whether or not his version is reasonably possibly true'. It concluded:

'The magistrate, in a detailed judgment, accepted the evidence of the state witnesses. He held that despite certain contradictions they were reliable and credible and that they corroborated each other in material respects. The magistrate rejected the evidence of the appellant as improbable and not reasonable possibly true.'

Having expressed itself so emphatically in disposing of the appellant's appeal the high court subsequently, somewhat surprisingly, granted leave to the appellant to appeal to this court. It did so in the briefest of terms, by merely recording that in its view the appeal has reasonable prospects of success. Why it formed that view – which I must state is at odds with the view I take of the matter - was not articulated.

[8] In *S v Monyane & others* 2008 (1) SACR 543 (SCA) para 15 this court stated:

'This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. 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 (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (*S v Francis* 1991 (1) SACR 198 (A) at 204e).'

[9] Here no misdirection is relied upon. It was suggested from the bar in argument that the trial court appeared not to appreciate that it was dealing with a single witness in Ndlovu. I do not agree. Having perused the record it is plain that the trial court was careful in its approach to Ndlovu by seeking corroboration for his account of events in the testimony of the other witnesses and the objective evidence – which it clearly found. Moreover, I can find nothing in the record which would warrant us disturbing the findings of fact or credibility that have been made by the trial court. As I have already stated, on his own version the appellant enjoyed a good relationship with Ngoma. It does seem rather far-fetched that Ngoma would have conspired with Ndlovu to falsely implicate the appellant. Nothing can be gleaned from the record as to what would have motivated them - particularly Ndlovu, who was a virtual stranger to him - to do so. Moreover, the appellant had some difficulty in explaining why he so generously parted with his cell phone to Ndlovu when the latter had not yet paid the full purchase price for it. The appellant suggested that he did so because he trusted Ndlovu. But on his own version

there was no history of any relationship between them and thus no foundation for the trust he asserted. Ndlovu's version as to how he came to be in possession of the appellant's cell phone is by far the more convincing when compared to that of the appellant. Simply put, Ndlovu's evidence carries a ring of truth. The same cannot be said of the appellant's evidence. Of the appellant, the magistrate stated:

'Ek bevind beskuldigde se weergawe ten opsigte van aanklag een onwaarskylik in so mate dat dit nie reedelik moontlik waar kan wees nie.'

Further, Ndlovu was not to know that there were problems between the appellant and his co-worker. And yet he proffered that as the reason why the appellant wanted Ngoma killed. It must be asked where else would he have got that information from if not the appellant. In my view it would have taken a particularly fertile imagination to have conjured up the version adduced by Ndlovu. Having perused his evidence he hardly strikes me as the kind of witness who is sufficiently sophisticated to have made up such an elaborate story.

[10] It follows that the appeal against conviction is devoid of any merit and accordingly falls to be dismissed.

[11] As to sentence: It is trite that this court will not interfere with the sentence imposed by the court a quo unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate. No misdirection has been alluded to, nor can it be said that the sentence induces a sense of shock. It has been submitted on behalf of the appellants that the sentence is out of proportion to the gravity of the offence and that in the circumstances of this case a non-custodial sentence was appropriate. It is true that the appellant has an unblemished record and that he was a useful member of society in gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding those mitigating factors being present, the seriousness of the offence makes it necessary to send out a clear message that behaviour of the kind encountered in this case cannot be countenanced. The natural indignation that the community would feel at conduct of this kind warrants

recognition in the determination of an appropriate sentence. It bears noting that the appellant was serious in his endeavour to have Ngoma killed and but for Ndlovu's aversion to the appellant's suggestion that he kill another human being, the appellant's plan might well have come to fruition. Thus, in the circumstances of this case the alteration of the conviction by the high court involved no reduction in the moral gravity of the offence, and it may well have been arguable that the sentence which the trial court imposed ought, notwithstanding the alteration of the conviction, to have remained undisturbed. Moreover, as the version advanced by the appellant was found by the trial court to be false and in effect contrived, it is difficult to conclude in his favour that he has demonstrated any remorse or contrition. In all of the circumstances of this case therefore the moral reprehensibility of the appellant's conduct remains undiminished. There thus appears to be no warrant for interfering with the sentence imposed by the court below. It follows that the appeal in respect of sentence must also fail.

[12] In the result the appeal is dismissed.

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V PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	E S Classen (Attorney with right of appearance)
	BDK Attorneys Johannesburg Symington & De Kok Bloemfontein
For Respondent:	N Kowlas (Ms)
	Instructed by: The Director of Public Prosecutions Johannesburg The Director of Public Prosecutions Bloemfontein