REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN

Case no: CA&R: 204/2012
Date heard: 06.02.2013
Date delivered: 11.03.2013

In the matter between:

LONWABO MTYHIDA **Appellant**

vs

THE STATE **Respondent**

APPEAL JUDGMENT

SUMMARY: Appellant herein was convicted by the Regional Magistrate of Port Elizabeth on a charge of fraud and he was sentenced to five (5) years imprisonment. In the main, when the trial Court convicted the appellant it relied on hearsay evidence as well as on the conclusion that he had acted in concert and in the execution of common purpose with his co-accused. The Court also relied on the fact that the accused had told lies in Court. The appellant's rights in terms of sections 14 and 35(1) of the Constitution were never explained to him before his home was searched and at the time when he was subjected to the control of the police.

There was no evidence to prove that the appellant had committed the offences of which he was charged. The mere fact that appellant had told lies does not, in the absence of evidence proving his commission of the offences, show that he is guilty. Hearsay evidence which the trial Court relied on in convicting the appellant should not have been admitted because its admission did not comply with the provisions of section 3(1) of the Law of Evidence Amendment Act 45 of 1988. The state failed to prove common purpose between the appellant and his co-accused. Principles relating to admission of hearsay evidence and proof of common purpose restated. The appeal Court set aside the conviction and sentence imposed by the trial Court.

TSHIKI J:

[1] The appellant herein and his co-accused were convicted by the Port Elizabeth Regional Court on charges of fraud, and relying on the provisions of section 276 (1) (i) of the Criminal Procedure Act 51 of 1977 (the CPA), the magistrate sentenced each accused to five years imprisonment. The appellant's application for leave to appeal against his conviction was refused by the trial Court but was granted by this Court after the appellant had petitioned the Judge President in terms of section 309C (2)(a)(iii) of the CPA. The appellant's co-accused did not appeal his conviction and sentence.

[2] The charges against the appellant appear from the charge sheet as follows:

> "The accused are guilty of the crimes of:
> **COUNT 1,**
> **FRAUD; (13 Counts) OR**
> **ALTERNATIVELY COUNT 2**
> **FALSIFYING OR COUNTERFEIT (A) DRIVERS LICENCE(S) (In contravention of Section 68 (3) (a) of The National Road Traffic Act 93 of 1996); (13 Counts) OR**
>
> **ALTERNATIVELY COUNT 3**
> **BEING IN POSSESSION OF (A) FALSIFIED OR COUNTERFEITED DRIVERS LICENCES(S) (In contravention of Section 68 (3)(b) of Act 93 of 1996) (13 Counts)**
>
> **Count 1**
> **FRAUD**
> **IN THAT** between January 2009 and February 2010, and at or near Njoli Square, Kwa-Zakhele in Port Elizabeth, in the Regional Division of the Eastern Cape, the accused did one or other or both unlawfully and with intent to defraud, misrepresent to the Department of Transport that drivers licence applicants did follow the prescribed processes for the acquisition of drivers licences.

AND there and then, by means of this misrepresentation induced the Department of Transport to believe that the said driver's licence applicants qualified for such licences to the actual or potential prejudice of the Department.

WHEREAS in truth and in fact, the accused knew or ought to have known that the said applicants did not follow the prescribed processes expected of a person applying for a drivers licence.

AND DID THEREBY commit the crime aforesaid.

ALTERNATIVELY

COUNT 2
FALSIFYING OR COUNTERFEITING (A) DIRVERS LICENCES(S) (In Contravention of Section 68(3) (a) of Act 93 of 1996) (13 Counts)

IN THAT within the period January 2009 and February 2010, and at or near Njoli Square, Kwazakhele in Port Elizabeth in the Regional Division of the Eastern Cape, the accused did one or the other both unlawfully and intentionally falsified / counterfeited drivers licences by taking monies, learner's licences and copies of Identity documents from drivers licence applicants and collaborated in the production of falsified/ counterfeited drivers licences.

AND DID THEREBY commit the crime aforesaid.

OR

ALTERNATIVELY

BEING IN POSSESSION OF (A) FALSIFIED OR COUNTERFEITED DRIVERS LICENCES(S) (In contravention of Section 68 (30 (b) of Act 93 of 1996) (13 Counts)

IN THAT between January 2009 and February 2010, and or near Njoli Square, Kwazakhele, Port Elizabeth and in the Regional Division of the Eastern Cape, the accused were one or both found in possession of falsified/ counterfeited drivers licences.

AND DID THEREBY commit the crime as aforesaid."

[3] Appellant had pleaded not guilty to all the counts and did not tender a plea explanation. The state was, therefore, required to prove its allegations against the appellant.

[4] The state led evidence of 13 witnesses. Briefly, the evidence of the police officials who arrested the appellant is that on a date not mentioned in the record, they attended to a call by Captain Bettet who informed them that there were people who had been arrested by the community members at Kentucky Fried Chicken in Njoli in Port Elizabeth. The first witness Lumkani Jali proceeded to Njoli with warrant officers Goje and Lanthu. They found the appellant and others inside the Kentucky food outlet which was closed. There were also many people some of which were inside the shop and others were outside. One of the people who were apparently speaking on behalf of the community pointed at the appellant and his co-accused. Nothing was found from the appellant at that stage until when they went to his house. It appears from the evidence that when the people were demanding money from the appellant and his co-accused he indicated that the money was at his home. At his home there was a female person who is referred to as the appellant's girlfriend from whom appellant demanded the money. She gave him a sum of money though the witness could not be certain of its amount and testified that it was about R5 000.00. They also found an envelope inside which contained identity documents, a waybill from the post office, a deposit slip and accused no 2's driver's licence. The witness further mentioned that when appellant gave him the money he mentioned that it 'belongs to those people that were still waiting for their licences'. Thereafter,

the appellant and his co-accused were arrested. Another police witness Mr Goje was called and confirmed the evidence of his colleague except for some aspects which will be dealt with later in this judgment.

[5] During cross-examination of the police witnesses, the appellant's legal representative challenged the failure by the police to obtain a search warrant before searching his premises. It was further suggested to them that they could have detained the appellant and then proceed to obtain a search warrant and that their failure to do so was a violation of the appellant's right to privacy. In any event from the evidence it appears clearly that all the allegations and evidence by the state witnesses particularly the police witnesses against the appellant were refuted by the appellant. It was further put to the witnesses that the police assaulted the appellant and his co-accused at Newton Park police station and were ordered to reveal the whereabouts of other driver's licences.

[6] Then, followed the evidence of the remaining 11 witnesses who were all warned in terms of section 204 of the CPA. Their evidence relates to how and whom they contacted when they wanted to get their driver's licences. None of them pointed out or mentioned the appellant as the person whom they either approached or that he approached them to assist them to obtain driver's licences. After the evidence of the witnesses I have referred to *supra*, the state case was closed.

[7] At the end of the state's case and after the defence's application for discharge was refused, the appellant testified. He informed the Court that on a certain date in February 2010 he was in the company of his co-accused in Njoli Square,

Kwazakhele, Port Elizabeth. They know each other and that on this day his co-accused had requested that they go to have a meal at Kentucky Fried Chicken in Njoli Square. Whilst they were still at Kentucky, police arrived and searched them forcefully and without their permission. They found nothing that did not belong to him and thereafter, they went to the appellant's place of residence where they conducted a search without his consent and without a search warrant. In the appellant's house they took his money amounting to R8 900,00, it was his money which was the proceeds of his taxi business. Other than the money nothing else was found in his house. He denied that at Kentucky there were people who were accusing them of wrongdoing. He further denied that he had told the police that the money found in his home belonged to the people who were at Kentucky in Njoli Square. He testified that when his co-accused's house was searched he was in the police vehicle and therefore could not know what was found in that house. Thereafter they were taken to the police station where they were charged for their knowledge of the false driver's licences. According to appellant's evidence, he did not see many people at Kentucky Fried Chicken in Njoli Square. It was just a normal day and was quiet. He denied having been locked inside the Kentucky shop by the disgruntled people. After he was cross-examined by the state prosecutor, appellant closed his case.

[8] In her judgment, the trial magistrate noted that the evidence of the first two police witnesses was impressive. The trial Court also placed reliance on the fact that the appellant did not ask for a search warrant to be obtained before his house was searched. The magistrate appears not to have been impressed by the evidence of the appellant and referred to him as a witness who was "like a man clutching on

straws … [h]e was unable to commit himself to any clear answer as to how these ID documents, driver's licences, came to be in the possession of the police". The trial Court concluded that the appellant and his co-accused were "clearly not credible witnesses and their version was inconsistent with the probabilities". Appellant's version was on that note, therefore, rejected by the trial Court. The Court then concluded that the appellant and his co-accused had acted in concert and in the execution of a common purpose when they committed the offences. In respect of the appellant, the trial Court relied heavily on the fact that money was found in his home. The Court also relied on the fact that the appellant and his co-accused were harassed by the members of the public who demanded their money and or licences from them. The Court then convicted appellant of fraud.

[9] Before us Mr Van Der Spuy for the appellant submitted that there is no evidence proving any misrepresentation that had been made to the Department of Transport by the appellant. He submitted further that the state failed to prove the offence of fraud in the manner the charge sheet was worded and that none of the alternative counts were proved by evidence led by the state.

[10] Mr Engelbrecht for the respondent also did not support the fraud conviction returned by the trial Court. He, however, argued that the state had succeeded in proving the alternative changes of falsifying or counterfeit, or with intent to deceive, replace, alter, deface or mutilate or add anything to a certificate, licence or other document issued or recognised in terms of section 68 (3) of the National Road Traffic Act, 93 of 1996.

[11] Mr Engelbrecht submitted further that if the alternative charge has not been proved and that appellant cannot be found to have acted in concert and in the performance of a common purpose with his co-accused, he should be held liable as an accomplice.

[12] It seems to me that the trial Court has approached the evidence as if the state had led cogent evidence proving appellant's commission of the offences for which he was charged. In the first place it was the trial Court that pointedly reminded the public prosecutor about the inadmissibility of the hearsay evidence of people who, at the Kentucky shop, verbally implicated the appellant and his co-accused of the commission of the offences. That evidence could not be admitted unless some formalities for its admissibility were complied with. There were no such formalities and therefore that evidence could not be confirmed and should therefore have been disregarded. More to this will be explained in the paragraphs to follow.

[13] The state failed to call the evidence of the people who were at Njoli Square to confirm that appellant is one of the two people who was approached to organise or arrange the fraudulent and/or false driver's licences for the disgruntled people. Evidence led in this regard pointed only to the appellant's co-accused. None of the witnesses called during the trial had implicated the appellant. The evidence relied on by the magistrate in her judgment amounts to hearsay. Hearsay evidence can only be admitted if the provisions of the Law of Evidence Amendment Act 45 of 1988 (the Act) are followed and complied with.

[14] Section 3 of the Act provides:

"3(1) Subject to the provisions of any other law, hearsay evidence **shall not be admitted** as evidence at criminal or civil proceedings, **unless** –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

[is of the opinion that such evidence should be admitted in the interests of justice.]

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings; Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) … " (My emphasis)

[15] The interpretation of the above Act is that hearsay evidence is inadmissible and cannot be admitted by the Court unless the provisions of the above Act, as interpreted by the Courts, have been complied with. The use of the words **shall not be admitted … unless …** clearly shows that the requirements must be complied with. The Court should hesitate long in admitting or relying on hearsay evidence in terms of section 3(1)(c) of the Act where such evidence plays a decisive or even significant part in convicting an accused unless there are compelling justifications for doing so. (***S v Ramavhale*** 1996 (1) SACR 639 (A)). I am putting emphasis on the above point for the reason that the trial Court in its judgment on page 119 of the record remarked as follows:

> "The court considers the following facts. The money was found in possession of accused 1's house belonging to these irritated people or irate people at the KFC, Njoli Square. Driver's licences, ID books were found in accused 2's possession. State witness three, four, six, seven, nine, ten and twelve identified accused 2. **ID photos and licences of all state witnesses were found in accused 2's possession as well as accused 1**. Accused 2 was carrying a briefcase containing the fingerprint pad to obtain fingerprints in respect of the applicants. ***They were being harassed by members of the public demanding their money or licences which resulted in their arrest***. (My emphasis)

[16] The emphasized portions of the above extract from the trial Court's judgment shows clearly that the trial Court has taken into account the hearsay evidence of the so-called disgruntled people and what they had said about the appellant and his co-accused. This, in my view, was a misdirection because that evidence was not legally before Court. It should have been kept out of the record for the reason that it is hearsay evidence which has not been admitted in terms of the Act. The logical approach to the substance of the legislation, as opposed to its letter, is thus that hearsay not affirmed under oath is admissible only if the interests of justice require it.

(Per Cameron JA in ***S v Ndhlovu and others*** 2002 (2) SACR 325 (SCA) at 343 para [32]).

[17] It should also be emphasized that the accused person's right to a fair trial is protected by the Constitution. A Court which admits or has regard to inadmissible hearsay evidence in convicting the accused person violates the accused rights to a fair trial which must be accorded to the accused and be jealously guarded in all criminal proceedings. An accused person has a constitutional right to be protected from any form of unfair trial proceedings particularly relating to the admission of evidence which should have been kept out of account due to its inadmissibility status. (***S v Molimi*** 2008 (2) SACR 76 (CC) where Nkabinde J at page 97 para [42] remarked as follows:

> "This court has said that the right to a fair trial requires a substantive rather than a formal or textual approach and that 'it has to instil confidence in the criminal justice system with the public, including those close to the accused as well as those distressed by the audacity and horror crime'. It is not open to question that a ruling on the admissibility of evidence after the accused has testified is likely to have an adverse effect of the accused's right to a fair trial. It may also have a chilling effect on the public discourse in respect of critical issues regarding criminal proceedings. More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy …"

[18] In the present case the people whom I assume had complaints against the appellant should have been called to testify against him, if the state intended to use their evidence in convicting the appellant.

[19] Having said the above, it is now important to establish whether there is any other admissible evidence justifying the conviction of the appellant. In the judgment, the trial Court based its conviction of appellant mainly on the fact that the driver's licence of appellant's co-accused, a number of unspecified documents, ID's, a waybill from the post office, a deposit slip were found in appellant's home. In his testimony on this issue witness Jali on page 11 line 11 of the record stated as follows:

> "He [appellant] asked the girlfriend to give the money that was demanded from those people who called us. So he handed over the money to us."

[20] It is significant to note that appellant's girlfriend was not present at Kentucky Fried Chicken and one wonders how she would have known that there were people who had uttered words about the money. This to me is an indication that the trial Court appears to have turned a blind eye on the rather suspicious evidence given by the state witnesses and concentrated blindly only on its reliability. In any event, the appellant had denied that this money belonged to any other people and that denial, in my view, called for the confirmation by the state of the hearsay evidence. Somewhere in Kentucky Fried Chicken at Njoli Square some people had uttered some words implicating the appellant in the commission of criminal offences. In my view, a trail of inadmissible evidence cannot be used to ultimately lead to the conviction of the accused. Convictions can only be justified by cogent and admissible evidence led in Court in conformity with the accused rights to a fair trial. The waybill from the post office and the ID's were not explained by any form of evidence. All we know is that they were found with the appellant. There is no evidence linking them with the commission of the offences of which the appellant

was convicted. The burden of proof by the state against an accused person is entrenched in the Constitution by way of, *inter alia*, the presumption of innocence. There was no sufficient evidence to justify the conviction based on the evidence led during the trial of the appellant. The state does not merely put facts forward which create a suspicion of the commission of the offence and thereafter expect the accused person to rebut the suspicion. Section 35 (3) of the Constitution provides, *inter alia*, that:

> "Every accused has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings."

[21] Reliance on common purpose also has its own requirements which must be proved to exist before the Court can return a guilty verdict based on that doctrine. Before the state can rely on the doctrine of common purpose it must first prove the commission of the offence against the accused person. Liability based on common purpose can only be based on one of the two requirements which are, liability based on prior agreement and liability based on active association. The leading cases in this regard are ***S v Safatsa and Others*** 1988 (1) SA 868 (A) and ***S v Mgedezi and Others*** 1989 (1) SA 687 (A). In ***S v Safatsa*** *supra* Botha JA stated the requirements for liability on common purpose as follows:

> " a) that the accused person must have been present at the scene of the crime when the offence was committed;
> b) that he or she must have been aware of the commission of the offences;
> c) that he or she must have intended to make common cause with the person or persons committing the offence;
> d) that he or she must have manifested his sharing of common purpose by himself or herself performing some act of association with the conduct of others;

e) that the accused must have had the requisite *mens rea* to commit the offences.

[22] The need for the application of the above requirements apply squarely to the case under discussion. The only difference is that in ***Safatsa's*** case the offence was murder and herein we are dealing with fraud and the other alternative counts. If one has regard to the first requirement the presence of the appellant at Njoli Square Kentucky Fried Chicken cannot be denied but what happened there does not take the state's case anywhere towards proof of the commission of the offence by appellant. Secondly, there is also no evidence that there was an offence committed by the appellant except to suggest that it is where appellant and his co-accused were arrested or at least were under police custody until detained. Thirdly, there is no evidence that the appellant had intended to make common cause with his co-accused in the commission of the offences. The evidence led does not implicate the appellant in respect of all the offences of which his co-accused was convicted. Fourthly, that the appellant has manifested his showing of the common purpose by himself performing an act of association with the conduct of his co-accused has not been proved. As I have alluded to above there is no sufficient evidence to come to such conclusion. As for the *mens rea* requirement, it follows that one cannot have *mens rea* to commit offences he or she is not aware of.

[23] The definition of common purpose appears in Jonathan Burchell – *Principles of Criminal Law,* 3rd ed (2008) at 574 which reads:

> "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise each will be responsible for the **specific** criminal conduct committed by one of their number which falls within their common design." (My emphasis)

[24] In ***S v Mzwempi*** 2011 (2) SACR 227 (ECM) Alkema J analysed the requirements of common purpose at 248-249 para [51]-[53] as follows:

> "[51] The definition embodies two elements or stages. The first stage refers to the conditions which must be fulfilled before the principle of imputation of conduct can operate; and the second stage refers to the scope and extent of imputing the conduct of one party to the others. The second stage, to repeat, only comes into operation when the conditions of the first stage are fulfilled.
>
> [52] The conditions in the first stage which trigger the principle of imputation are either a prior agreement or an active association in the joint venture. Any one of these conditions must exist.
>
> [53] The second stage of the definition imputes conduct to an accused which "*falls with the common design or purpose".* (My emphasis) Conduct which falls with the common purpose seems to be any or all conduct in the execution of the common design or purpose. In the case of a prior agreement, therefore, all the parties thereto will be held liable for the act of any one of their members which either falls within the common design or is executed in the course of the implementation of the agreement (provided, however, the other definitional requirements such as *dolus* are also present)."

[25] In our case, no prior agreement has been proved and therefore the first requirement falls away. At the time of the trial the state was left to prove the second requirement of active association and this requirement could only be proved by evidence of the people who were involved in the scheme with both the appellant and his co-accused. There is also no such evidence other than the suspicion created by the police when they arrested the two men at Kentucky in Njoli Square.

[26] Much emphasis was placed by the trial court on the discovery of the appellant's co-accused driver's licence from appellant's home. This discovery, even if proved correct, does not prove common purpose between the two men in

committing the offences. In my view, it does not in itself alone prove active association between the appellant and his co-accused. Mr Engelbrecht, has tried to persuade us to accept that the appellant's denial of the discovery of his co-accused driver's licence in his house leads to one conclusion, that the appellant has told lies and that the only conclusion is that they were both active participants in the commission of the offences. For the reasons that follow I do not agree.

[27] In the first place, the discovery of the driver's licence in itself does not amount to an offence because the appellant's co-accused driver's licence was never involved in the commission of the offences so charged and has not been proved to be a false document. Secondly, even if it is correct that appellant has told lies to the court that does not amount to the proof of the commission of the offences of which he has been charged. Caution must always be exercised not to attach too much weight to untruthful evidence of accused when drawing conclusions and determining guilt of the accused. The weight to be attached to the lies told by the accused must be related to the circumstances of each case. The conclusion that, because an accused is untruthful he therefore is probably guilty must especially be guarded against. Untruthful evidence or a false statement does not always justify the most extreme conclusion (***S v Mtsweni*** 1985 (1) SA 590 (A)). In this case Smalberger JA at 591 H-I formulated guidelines which the trial Court should take into account when considering false testimony by an accused which are:

a) the nature, extent and materiality of the lies and **whether they necessarily point to a realisation of guilt**; (my emphasis)

b) the accused's age, level of development and cultural and social background and standing insofar as they might provide an explanation of his lies;

c) possible reasons why people might turn to lying, eg, because, in a given case, a lie might sound more acceptable than the truth;

d) the tendency which might arise in some people to deny the truth out of fear of being held to be involved in a crime, or because they fear that an admission of their involvement in an incident or crime, however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth. (See also ***S v Burger and Others*** 2010 (2) SACR 1 (SCA))

[28] In the present case even if a portion of the appellant's testimony is found to be false, its effect is neutral and does not improve the strength of the state's case. No evidence has been led to prove his commission of the offences. It, therefore, follows that there can be no evidence which can be accepted as proving his guilt as against his untruthful evidence which becomes neutral on the basis that it does not improve the version of the state's case to the level of proving his guilt beyond a reasonable doubt. In any event, I am not convinced that the entire evidence of the appellant should be rejected as utter untruths.

[29] For the above reasons the conviction of the appellant based on common purpose cannot be justified.

[30] The next issue is liability based on the alternative charge. This charge requires the state to prove that the appellant must have falsified or counterfeited, deceived, replaced altered, defaced or mutilated or must have possessed a certificate or licence or must have produced a document which is linked to the

commission of the offence so charged. No such evidence was led by the state against the appellant herein.

[31] Lastly, it remains to be established whether or not the appellant could be found guilty as an accomplice. There is no evidence led which proves that the appellant was an accomplice in the commission of the offences so charged. The magistrate in her judgment gave the impression that the evidence of the appellant should be rejected in its totality. I do not agree.

[32] The state case had its own problems. To mention but one incidence, on the evidence of the first state witness, Mr Jali, there is no mention of them having informed the appellant of his Constitutional rights in terms of section 35 (1) a-f. These rights consist of the accused's right to remain silent and to be informed of that right and the consequences of not remaining silent, the right not to be compelled to make any confession or an admission, as well as the right to privacy which will be dealt with in the following paragraphs. On page 8 of the record Jali's evidence reads as follows at line 23-28:

> "The two accused persons Your Worship were identified to us Your Worship and then we introduced us as police officers and then we proceeded by searching them. Accused no 2 Your Worship when we were searching them he had a briefcase in his possession. We first searched their bodies physically, we searched whether they are not armed Your Worship."

[33] It is clear from the above extract that at that stage the appellant was already under the control of the police, yet none of his rights had been explained to him. However, the evidence of the second state witness Mr Goje is slightly different. He does mention that they told the appellant of their reason to approach them and

requested their permission to conduct a search on their bodies. Even if the second version is accepted, it also does not comply with the provisions of the Constitution which requires an explanation of the rights before requesting permission to search. (See sections 14 and 35 (1) of the Constitution).

[34] The police found the money from the appellant's home. The police never informed the appellant of his right to a search warrant before his home or property was searched. Their *ipse dixit* that the appellant simply allowed them to search his home cannot be countenanced. It is the state officials who have the obligation to inform the accused person of his or her legal and constitutional rights. No such rights were explained by the police to the appellant. I refer herein in particular to the right to privacy provided by section 14 of the Constitution which reads:

> "**Privacy**
> Everyone has the right to privacy, which includes the right not to have –
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed."

[35] For the police to say that the appellant should be found guilty because he did not demand the above rights is nonsensical to say the very least. Appellant could not have been aware of the existence of these rights because they were not explained to him. He could not have been reasonably expected to make an election when he did not know what that was all about in the first place. In my view, even the search of his premises without explaining his rights was unlawful and cannot be condoned.

[36] In any event, appellant's explanation that the money he gave to the police was as a result of the proceeds of his taxi business is reasonably possibly true more so that there is no evidence implicating him in the commission of the offences. The acquisition by the police of that money in any event amounted to 'eating the fruits of a poisoned tree' due to their failure to inform appellant of his constitutional rights.

[37] I am convinced that the state did not prove the case against the appellant beyond a reasonable doubt. The trial Court erred in convicting the appellant and his conviction and sentence cannot be legally justified. Therefore, I make the following order:

[37.1] The appellant's conviction and sentence are hereby set aside.

[37.2] The appellant is entitled to the return of all his property that was confiscated from his home.

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P.W TSHIKI
JUDGE OF THE HIGH COURT

Smith J:

I agree.

_____

J. SMITH
JUDGE OF THE HIGH COURT

Counsel for the appellant	:	Adv J Van Der Spuy
Instructed by	:	Legal Aid Board GRAHAMSTOWN

Counsel for the respondent	:	Adv J Engelbrecht
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