



**IN THE HIGH COURT OF SOUTH AFRICA  
(SOUTH GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

.....  
DATE

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SIGNATURE

**Case number: A367/2014**  
**Date of hearing: 25 May 2015**  
**Judgment: 29 May 2015**

In the matter between:

**JUNE KHUMALO**

**APPELLANT**

*Versus*

**THE STATE**

**RESPONDENT**

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**JUDGMENT**

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**A.M.L. PHATUDI, J**

[1] Appellant was originally one of two accused persons charged with contravention of the provisions of section 36 of the general Law Amendment Act 62 of 1955. (Possession of stolen property). At the commencement of the trial a quo, the charge against accused 2 was withdrawn.

[2] The appellant, who was legally represented, pleaded guilty. The appellant's legal representative read on record the appellant's statement in terms of section 112 (2) of the criminal Procedure Act 51 of 1977. Immediately thereafter, the appellant stated the following:

'Accused: No, Your Worship I was not aware that it was wrong and punishable by law...' The presiding magistrate entered a plea of not guilty as envisaged in terms of section 113 of the Criminal Procedure Act 51 of 1977.

[3] The appellant was convicted as charged and sentenced to 5 (five) years imprisonment. He was further declared unfit to possess a firearm in terms of section 103 (1) of Firearms Control Act 60 of 2000. The court further granted an order for the immediate search and seizure of all competing certificates or licences and or authorisation issued to the appellant, all firearms in his possession and all ammunition in his possession.

[4] Leave to appeal against both conviction and sentence was granted on petition to the Judge President of this Court.

### **Ad Conviction**

[5] The state called only one witness, w/o Mosalingwe who testified that he received information about a stolen motorbike. He, with the aid of the informer, managed to trace its where-about. He proceeded to the appellant's shack. He knocked at the shack and informed the occupant of the shack who he was. He then heard a noise coming from the back of the shack. On his inspection, he found the appellant trying to escape. The shack was then opened. He found the motorbike inside the shack.

There was no one inside the shack other than the appellant. He later contacted the owner who confirmed that the motorbike was hers. The owner of the motorbike informed him that when she (owner) went to sleep, the motorbike was locked in a garage.

[6] The appellant testified that on the 13 June 2013 around 12h48, one Rasta brought to him the motorbike and requested him to fix its carburettor. In the morning of 14 June 2013, the police arrived at his shack and enquired if Jabu was with him in the shack. He told them that Jabu is at his homestead (Jabu happens to be Jacob Tshabalala, who was his co-accused). He denied having tried to escape from the back of the shack. The appellant further testified that he did not know that the motorbike was stolen. He remained firm to his version notwithstanding a robust cross examination by the state.

[7] It is trite that the state must prove its case beyond a reasonable doubt. It is further trite that if the accused version is reasonably possibly true, he/she must be released.

[8] The state called only one witness. The warrant officer testified on how he found the motorbike in the appellant's shack. The appellant conceded that the motorbike was found in his possession but did not know that it was stolen. The appellant denied having tried to escape through the back of the shack.

[9] The appellant further denied the version put to state witness that he did not know who Jacob Tshabalala was. When asked during cross examination, this is how he answered.

Question: There is a version that you put to the witness that you did not even know Jacob Tshabalala. Did you hear that?

Answer: No, I did not hear that and I disagree with that because Jacob Tshabalala is the person that I always work with.

Question: So, what you are saying is that your attorney was not telling this court the truth?

Answer: Yes, on that point I did not tell him that I do not know Jacob Tshabalala. That is the person I work with your worship."

[10] The legal representative failed to rectify the point. He remained mum. He did not withdraw as an attorney of record. He proceeded with representation notwithstanding the different version put on record by the accused contrary to what he stated was in accordance with his instructions. This emerged for the first time when the "guilty plea" was read on record. The appellant denied what was read from the plea statement. This prompted me to check what was in the scripted version as opposed to what was placed on record.

[11] On my perusal of the typed version of the "guilty plea" in comparison with what was read on record, it was clear that the attorney "added" some words when placing the plea on record. This clearly shows that the attorney did not act in accordance with his instructions. What puzzles me is that he continued to represent the appellant notwithstanding all these "disagreements" mentioned by the appellant during trial. The attorney failed to withdraw as an attorney of record notwithstanding all the "disagreements" placed on record by the appellant. The court as well failed to assist the appellant by advising him to terminate his attorney's mandate.

[12] Considering the conduct of both the attorney and the presiding magistrate who decimally failed to act in accordance with instruction and failure to assist the appellant respectively renders the appellant's trial unfair.

[13] In my analysis of the evidence tendered and the version placed on record by the appellant during his examination in chief, cross examination and clarifying examination by the court, I am of the view that the appellant's version is reasonably possibly true. In the result, the appellant's conviction stands to be set aside.

I thus make the following order.

### **ORDER**

1. The appellant's appeal is upheld.
2. The trial court's conviction is set aside and replaced with the following:

**'The accused is found not guilty and must be released.'**

AML Phatudi  
Judge of the High Court

I agree

Hertenberger-Brack  
Acting Judge of the High Court

For Applicant: M Botha: Legal Aid South Africa

For State : M Mbaqa: National Prosecuting Agency

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