IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

REVIEW CASE NO.: R23/12
HIGH COURT REFERENCE NO. : 83 3
DATE: 28 November 2013
Case No.: A974/13

In the matter between:

THE STATE

And

THOMAS NKOMO

REVIEW JUDGEMENT

MOLOPA-SETHOSA J

This matter came before me on review in terms of the Criminal Procedure Act, Act 51 of 1977, as amended ("The Act"), from the Magistrate' Court, Pretoria North, in the District of Wonderboom.

The accused was, on 13 August 2012, charged in the aforesaid magistrate's court, with contravening section 31(1) of the Maintenance Act 99 of 1998 ("The Maintenance

Act"), in that during an undisclosed month, the accused paid the complainant an amount of R1000.00 instead of the R1500.00 ordered by the court on 28 July 2011, towards the maintenance of his daughter, N[…] N[…].

The accused, who was unrepresented throughout the proceedings, had pleaded guilty, but subsequent to the questioning of the accused in terms of section 112 (1) (b) of the Act, the magistrate recorded a plea of "not guilty" in terms of section 113(1)

Following the trial, the accused was on the same day 13 August 2012 convicted as charged and was sentenced to 4 months' imprisonment wholly suspended for 2 years on condition the accused is not convicted of contravention of section 31 of Act 99 of 1998 committed during the period of suspension and further ancillary orders.

The matter first served before J W Louw J. In view of the fact that the accused had asserted in his evidence that he had an agreement with the complainant in terms of which he would buy their child a cell phone instead of paying the extra R500.00 (for clothing), J W Louw J requested the magistrate to comment on his finding that the version of the accused was not reasonably possibly true.

The magistrate commented on the contradictions in the evidence of the accused; i.e. the price accused actually paid for the cell phone, and the fact that the complainant disputed that she and the accused had an agreement; and said the following:

> *"…I took into account the nature of the contradictions after evaluating them holistically, taking into account their importance and their bearing on the other parts of the evidence before me and rejected his version.*
>
> *When I considered the evidence in totality, I found that the version by the accused was untruthful, baseless, unreliable and not reasonably possibly true. "*

When the matter served before me, the record, together with J W Louw J's queries to the magistrate, was also referred to the office of The Director of Public Prosecutions ("DPP") for comment, together with the magistrate's response.

Advocate J P Van der Westhuizen of the DPP, with whom Adv. C J E Erasmus agrees commented that on the facts both the convictions and sentence imposed by the court *a quo* was not in order and ought to be set aside.

From the record it is clear that the fact that the accused indeed bought a cell phone for the daughter is not in dispute. This is confirmed by the complainant, who testified that she was the one that had requested the accused to buy a cell phone for their daughter. She further testified that from the price tag on the cell phone it appeared that it cost R499.00.

It is not clear why the accused did not set the record straight with regard to the amount he paid for the cell phone. However, from the available evidence, as already stated, it appears that he paid at least R499.00for the cell phone, which is course just R1.00 short of the amount he should have paid to the complainant in respect of the child's clothing.

The complainant stated that had the accused explained to her that the money he used to buy the cell phone was the same amount he was supposed to contribute towards the child's clothes, she would not have taken the matter further.

However, when asked by the Court why she then did not just set off the amount owing to her against the value of the cell phone, she contradicted herself by saying that she was unemployed and needed the money, as the accused had previously only contributed R250.00 towards the child's maintenance.

The crucial question to be answered is whether, on the basis of all the evidence presented before court, there is reasonable doubt concerning the guilt of the accused.

Looking at the totality of the evidence on record, the accused has given on explanation, namely that he and the complainant had an agreement in terms of which he would buy their daughter a cell phone, instead of paying the complainant a sum of R500.00 [in respect of clothing for the daughter] in accordance with the maintenance order.

The accused, however, does not need to convince the Court of the truth of the explanation; it suffices if the explanation is reasonably possibly true.

In **R v Difford** 1937 AD 370, which has become a classic reference, the Court remarked as follows at 373:

"It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal. "

This principle was enunciated as follows in the often-quoted passage from **R v M** 1946 AD 1023 at 1027:

"*... the Court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true. "*

In **S v Kubeka** 1982(1) SA 534 (W) at 537 F - H, Slomowitz AJ said in regard to

an accused's story:

> *"Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that this evidence may be true. Such is the nature of the ONUS on the State. "*

In S v **Munvai** 1986 (4) SA 712(V) at 715G, the court remarked as follows on this issue:

> *"...even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected false. "*

The accused's assertion that he and the complainant had an agreement, is not inherently improbable, should thus not be rejected as false, and in fact has a ring of truth to it.

From the evidence on record, it appears that there was indeed communication between the two parties [accused and complainant], although there is disagreement about what exactly was said or agreed upon.

In **S** v **Mokobe** 1991 (2) SACR 456 (W) at 460b, the Court held that

> *"It is, of course, always permissible to consider the probabilities of a case when deciding whether an accused's story may reasonably possibly be true. "*

In *casu*, it is not inconceivable that the accused's version is the truth; especially since the total amount spent by him was almost the same as the amount of the court order [R500.00 less R1.00]; thus indicating that he did not try to renege on

his maintenance responsibilities.

On the totality of the evidence on record, the accused's explanation/version can be said to be reasonably possibly true, he must thus be given the benefit of the doubt.

In the result the conviction and sentence are set aside, and replaced with the following:

1. The accused is found not guilty and is acquitted.

2. The clerk of the Magistrate's Court, Pretoria North, is directed to bring this court's order to the attention of the accused.

L M MOLOPA-SETHOSA JUDGE OF

THE HIGH COURT

I agree

T A MAUMELA JUDGE OF THE

HIGH COURT

It is so ordered