THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 432/09

AKASH LACHMAN Appellant

and

THE STATE Respondent

Neutral citation: *Lachman v The State* (432/09) [2010] ZASCA 14 (15 March 2010)

Coram: MTHIYANE, VAN HEERDEN JJA and GRIESEL AJA

Heard: 19 February 2010

Delivered: 15 March 2010

Summary: *Evidence – whether police conduct amounted to a trap or an unlawful search – whether evidence discovered as a result is admissible – whether circumstantial evidence sufficient to prove appellant's guilt.*

ORDER

On appeal from: The Eastern Cape High Court (Grahamstown) (Kroon and Pickering JJ sitting as a court of appeal from a regional court):

The appeal is dismissed.

JUDGMENT

GRIESEL AJA (MTHIYANE and VAN HEERDEN JJA concurring):

[1] The appellant was convicted in the regional court, sitting in East London, on a charge of corruption in contravention of s 1(1)(*b*) of the Corruption Act 94 of 1992.[1] The essence of the charge was that, whilst employed as an auditor in the East London office of the South African Revenue Service (SARS), the appellant corruptly attempted to solicit a bribe from a certain Mr Kwame Mokoena as a reward for assisting the latter to make his tax problems 'go away', which actions constituted an excess of his powers or a neglect of his duties as such auditor.

[2] After his conviction, the appellant was sentenced to five years' imprisonment of which two years were conditionally suspended. His appeal to the Eastern Cape High Court, Grahamstown against the

[1] Since repealed and replaced by the Prevention and Combating of Corrupt Activities Act 12 of 2004, which came into operation on 27 April 2004.

conviction and sentence was unsuccessful, hence this further appeal against his conviction,[2] which comes before us with leave granted by this court.

Factual background

[3] The evidence of Mokoena was that he was at all material times the owner of a business entity styled Investorex trading as Kwasaka Agencies. He was registered with the East London branch of SARS as a vendor liable to pay Value Added Tax ('VAT'). His file at SARS was attended to by the appellant in his capacity as auditor, together with another auditor, a certain Ms Sabrina Taylor.

[4] On 23 September 2003 Mokoena received a telephone call from the appellant who sought certain details relating to Mokoena's tax affairs. Mokoena made an appointment to see the appellant at the SARS offices later that same day to discuss the matter. At the interview, the appellant pointed out to Mokoena that he had not submitted his tax returns and that SARS had decided to conduct an audit of his business affairs. Mokoena was accordingly requested to submit certain further information to SARS.

[5] Shortly after the interview, on his arrival at home, Mokoena received an anonymous text message (commonly referred to as an

[2] Although the question of sentence was also addressed in the heads of argument filed on behalf of both parties, the appellant's notice of application for leave to appeal to this court was expressly confined to the conviction. Furthermore, the order of this court simply recorded that 'special leave to appeal is granted to the Supreme Court of Appeal', without including sentence in the scope of the appeal. In the circumstances, no proper appeal against sentence is before us, as counsel for the appellant rightly conceded at the commencement of his address to this court.

'SMS', an abbreviation for 'short message service') on his cellphone, emanating from a cellphone with the number 0726786492. The message was to the following effect:

'I can help you with your tax affairs, you have got problems and I can help you with your tax affairs.'

Mokoena was instructed by the anonymous author not to call the number from which the SMS was sent, but to reply only via SMS as it was dangerous to talk over the telephone, with the sender working at SARS.

[6] Later that evening Mokoena received further SMSs from the same cellphone number, one advising him that he would only have to pay SARS the amount of R10 000 in order to get all his books with SARS up to date and another one requesting him to pay R60 000 'in order to make [his] problems with the Receiver disappear'. After commenting to his wife that the person was playing a game with him, and that he did not know what it was all about, he sent an SMS in reply to the effect that he only had R30 000 available. The response thereto was to the effect that, 'I am doing you a favour, that's only half the amount and I am doing you a favour'.

[7] The following day Mokoena received a further SMS enquiring when he would have the money available. He decided to ignore this SMS, as also further SMSs he received that day. A few days later he received a fax from the SARS offices, co-signed by Ms Taylor and the appellant, requesting a list of his assets and his banking and other details. Receipt of the fax was followed by another SMS to the following effect:

‘I work at SARS; nobody can help you but me. Not even your accountant can help you.’ A further SMS followed shortly afterwards, enquiring whether Mokoena had received the fax.

[8] Mokoena subsequently had another meeting with the appellant at the SARS offices during which the appellant informed Mokoena that the Special Investigating Unit of SARS intended to charge him and secure a criminal conviction for tax evasion. The appellant highlighted the seriousness of the matter. Within 20 or 30 minutes of his leaving the SARS offices Mokoena received another SMS that canvassed the same aspects that had been raised with him by the appellant during the earlier meeting. Mokoena described his bemusement at these events as follows:

‘And by this time I was just very, very, very suspicious as to how things were developing. Every time I received a fax, I’d get an SMS. Every time I received a call or I spoke to somebody, I’d receive an SMS.’

[9] The SMSs continued thereafter, Mokoena stating that in total he probably received more than 200 of them over a period of just over three weeks. All the SMSs emanated from the same cellphone number.

[10] On Monday, 13 October 2003, Mokoena received a further SMS instructing him to pay R20 000 or ‘the deal was off’, thus leaving him to face the consequences of the investigation by the special investigating unit. By this time, according to Mokoena, he realised that he could not trust anybody at SARS ‘as I felt as though I was either being framed or trapped or pressured into something’. He accordingly consulted his attorney, who advised him to enlist the services of a private investigator.

He thereupon approached Mr Tyrone Power, a private investigator, who advised him to 'play along' with the author of the SMSs while Power undertook to contact SARS.

[11] Matters came to a head on the morning of Thursday, 16 October 2003, when Mokoena received a further SMS instructing him to deliver the R20 000 to the author at the offices of SARS in East London. Mokoena drew R20 000 in notes, whereafter he, together with his attorney, Mr Malusi, met Power at the latter's office. There Power introduced him to Captain Buys and Inspector McIntyre of the Organised Crime Unit of the South African Police Service, who had in the interim been contacted by Power. Whilst he was with Buys at Power's office, Mokoena received a further series of SMSs asking whether he had the money ready. Upon ultimate confirmation by Mokoena that the money was available, he was instructed by the anonymous author via SMS to place the money in an envelope addressed to 'Mr Nkula c/o Riette Fellows', marked 'Private and Confidential', and to deliver the envelope to the reception desk at the SARS offices, the receptionist to be informed that the envelope had to be taken to Ms Fellows' desk. Buys accordingly marked an envelope as instructed and placed the money in the envelope. At the suggestion of Buys, only R5 000 was placed in the envelope, instead of the R20 000 demanded in order to reduce the risk of the money being lost. Prior to placing the money into the envelope, the relevant notes (or at least some of them) were photo-copied in Power's office so as to facilitate later identification.

[12] Buys then set about making arrangements for the operation to be carried out. Thus he enlisted the services of Malusi's driver to deliver the envelope at the SARS reception desk; he arranged for a member of Power's staff to video the delivery of the envelope and the collection thereof by whomever came to collect it; he secured permission from Ms Perks, a member of the investigative personnel of SARS, for Buys and McIntyre to station themselves inside the SARS building before the delivery and collection of the envelope took place. He also applied telephonically to the relevant police official for the necessary permission to conduct a covert operation, which was duly authorised.

[13] On arrival at the SARS offices Buys and McIntyre took up position in a storeroom, from which vantage point they had a view of the passage between the appellant's office and the stairway leading down to the ground floor and the reception area. A further police officer, Inspector Mbiko, was stationed in the reception area for the purpose of witnessing the delivery and collection of the envelope. An employee of Power with a concealed video camera was with him. Power and Mokoena remained in Power's car, which was parked in the street outside the SARS building.

[14] In due course Malusi's driver entered the SARS building with the envelope, approached Ms Cousins, the SARS employee on duty at the reception desk, and advised her that he had come to drop off an envelope for Ms Fellows. Ms Cousins had earlier been alerted by the appellant that an envelope would be dropped off later that morning for either him or Ms Fellows. Upon arrival of the envelope, Ms Cousins accordingly

telephoned the appellant to advise him of this fact. The appellant came down to the reception area and Ms Cousins pointed out the man who was still holding the envelope. The appellant simply collected the envelope and immediately returned to his office upstairs. On the way, Mbiko followed him, calling out to him to stop, but he simply carried on walking. He went into the office of Ms Fellows, who to his knowledge was not at work that day, and left the envelope on her desk. On exiting from that office he was confronted by Buys and McIntyre. They retrieved the envelope from Ms Fellows' office and informed the appellant that he was suspected of corruption. The appellant was searched and a silver-coloured cellphone was found on his person. At Buys's request the appellant accompanied the police to his desk. A search there revealed another cellphone, blue-coloured, in a partly opened desk drawer, which cellphone was being charged.

[15] The appellant was then requested to accompany the police to their offices at the Cambridge police station. At those offices Buys telephoned the cellphone number from which the SMSs had been sent, but neither the silver cellphone nor the blue cellphone rang in answer to the call. Buys thereupon commented to McIntyre that he wanted to return to the appellant's office to perform a further search for a cellphone or a SIM card from which the incriminating SMSs originated. Upon hearing this, the appellant immediately responded that he would not be 'responsible' for anything else that might be found on his desk. McIntyre and Power then returned to the SARS premises, accompanied by the appellant, while Buys followed a short while later.

[16] During the ensuing search by McIntyre and Power of the appellant's desk, a brown-coloured cellphone was found on top of the desk, under some papers and/or files. Power noticed on the cellphone's call register a number of missed calls made from his (Power's) cellphone. He testified that he had earlier that morning dialled the number from which the SMSs had emanated in order to see whether anyone would answer.

[17] On Buys's arrival at the SARS offices the brown cellphone was handed to him. He again dialled the 'guilty' number and this time the brown cellphone either rang or silently vibrated (Buys could not remember which), thus confirming that it was the cellphone they had been looking for. Buys accordingly arrested the appellant and returned to the offices of the Organised Crime Unit.

[18] On going through the call registers on both the brown cellphone and the silver cellphone, Buys observed that on both phones messages containing the name 'Hongfu' were stored. (The message on the silver phone was dated 15 October 2003). Asked for an explanation the appellant declined to offer an answer.

[19] Ms Fellows, who was the team leader of the audit section of SARS, East London, of which the appellant was also a member, testified that she was not at work on the day in question but was on sick leave, having been admitted to hospital. The members of her team, including the appellant, knew that she would not be at work that day. She further

testified that she did not know a man named Nkula or of the fact that any envelope was to be delivered to her office on the day in question.

The appellant's evidence

[20] The appellant denied any knowledge of the SMSs about which Mokoena testified. He claimed that on the morning in question he was in his office when he received a telephone call from an unknown man, who asked to speak to his manager, Ms Fellows. He advised the caller that she was not at work and would only be returning to work the following Monday. The caller stated that he had important business with Ms Fellows and insisted on seeing her. On the appellant's inquiry as to the man's details, including his name and VAT number, the caller merely gave his name a few times, which he pronounced differently each time. The appellant offered to assist the man with whatever his query was, but he was told that the caller had information for Ms Fellows. The appellant told him that he could bring the information (which the appellant assumed was in documentary form) in to the SARS offices and he would ensure that it reached Ms Fellows. The caller said that he would be there within 45 to 60 minutes. The appellant accordingly advised Ms Cousins, while leaving documentation with her for collection by an accountant, that a man, whose name was either Ntula or Nkula, would be coming in. When Ms Cousins telephoned him some time later, he went downstairs, where Ms Cousins pointed out a man. The man handed the appellant an envelope and, when asked if he was Mr Ntula or Mr Nkula, the man 'basically just nodded and walked away'. The appellant saw Ms Fellows'

name on the envelope ‘and took for granted that that was the gentleman I spoke to’. He accordingly put the envelope on Ms Fellows’ desk.

[21] On leaving her office, he was confronted by Buys and McIntyre. The appellant confirmed, in broad outline, their evidence as to subsequent events, including the discovery of the brown cellphone on his desk. However, the appellant denied that the brown cellphone belonged to him, claiming that he had never seen it prior to that day nor had he ever owned a brown cellphone. He surmised that some unknown person must have ‘planted’ it there between the first and second search by the police. He also suggested, under cross-examination, that there might have been a conspiracy against him and that his former colleagues who testified on behalf of the state could have been ‘coaxed into saying it’. Asked by whom, the appellant replied that he had ‘no idea’.

Findings of the trial court

[22] In a comprehensive judgment, the magistrate dealt fully with the evidence presented on behalf of the state and the defence. In discussing the credibility of the state witnesses, the magistrate found that, as a witness, Mokoena was ‘sometimes evasive and did not always answer simple questions’. He was nonetheless satisfied that Mokoena did indeed receive the series of SMSs with the general tenor as explained by him. There is ample support in the record for this finding, which was not seriously challenged on appeal.

[23] The magistrate also made favourable credibility findings in respect of the other state witnesses, including the two women who shared an office with the appellant.

[24] The appellant' version, on the other hand, was rejected by the magistrate as 'totally nonsensical'.

The admissibility of the 'trap'

[25] At the trial, as also on appeal before the high court and this court, the main argument advanced on behalf of the appellant was that the police operation amounted to a trap. In fact, this defence was raised up front by the appellant's attorney in his plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977 at the commencement of the trial, when he informed the court that 'the evidence relating to the trap is inadmissible in that the state has not complied with the provisions of s 252A of the Criminal Procedure Act, in particular that the trap itself was unlawful. And secondly, that the evidence obtained from the trap is inadmissible.'

[26] In the light of this clear indication from the defence as to where the battle lines had been drawn, one would have expected this relatively crisp issue to have been determined separately by way of a trial-within-a-trial,[3] after the defence had been required to furnish 'the grounds on which the admissibility is challenged', as they were duty bound to do in

[3] As to the desirability of holding of a trial-within-a-trial, see *S v Matsabu* 2009 (1) SACR 513 (SCA) para 8. See also s 252A(7) of the Criminal Procedure Act, which provides that the question whether evidence should be excluded in terms of subsec (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute.

terms of the provisions of s 252A(6).[4] It is unfortunate that this course was not followed by the magistrate. Instead, all the evidence was adduced in the ordinary course and the cross-examination ranged far and wide across areas that turned out to be entirely irrelevant and un-contentious.

[27] Be that as it may, both courts below rejected the appellant's contention that the police conduct in question fell within the ambit of a trap. On appeal before us, the argument advanced on behalf of the appellant, was based on a *dictum* by Holmes JA in *S v Malinga & others*,[5] where a trap was described as –

'. . . a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words he creates the occasion for someone else to commit the offence.'

[28] Building on this foundation, counsel argued that the operation conducted by the police on the day in question fell within the ambit of a trap because 'a proposal was made by the police that an SMS be forwarded indicating that the money was available to be paid over to the recipient of the SMS and inviting the recipient to indicate how and where the money was to be handed over'.

[29] There is no merit in this argument. Having regard to the persistent series of SMSs addressed to Mokoena by the anonymous author, it is far-fetched in the extreme now to cast Mokoena (or the

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[4] See *S v Kotzè* 2010 (1) SACR 100 (SCA); [2009] ZASCA 93 (15/9/09) para 19.
[5] 1963 (1) SA 692 (A) at 693F–G.

police, for that matter) in the role of offeror. Quite clearly the proposal for criminal conduct all along emanated from the anonymous author of the SMSs and from no-one else.

[30] In a careful analysis of the problem, the high court distinguished three different scenarios: one is where the trap creates the opportunity to commit a crime for someone who, but for the trap, would not have committed the crime. A second scenario occurs where the 'trap' merely creates such an opportunity for someone who wanted to commit the particular offence – and would have done so in any event, even without the trap's influence.[6] A third category is present, according to the high court, 'where the accused is himself or herself the initiator of the incriminating transaction and instigates the "trap" to conclude the transaction with him or her and the trap merely ostensibly participates therein, and in that sense creates the opportunity for the commission of the crime. *A fortiori* the accused in such a case commits the crime without any influence from the trap'.[7]

[31] The high court rightly held that the conduct of the police, in conjunction with Mokoena and the other persons who participated in the operation, did not fall within either of the first two categories, but that it rather fell within the third category. Counsel for the state aptly described the operation in question as nothing more than a 'controlled delivery'.[8] In my view, this is exactly what happened here: an unknown suspect had

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[6] See eg *S v Dube* 2000 (1) SACR 53 (N).
[7] Judgment para 77.
[8] This expression is also used in the joint guidelines issued by all DPPs in 2004 in terms of s 252A(4). See *Hiemstra's Criminal Procedure*, at 24-119 (Issue 2).

made repeated overtures to the complainant, Mokoena, in an attempt corruptly to solicit a bribe from him. Those overtures persisted over a period of more than three weeks by means of a barrage of well over 200 SMSs. This behaviour on the part of the suspect made it clear that he was prepared to indulge in corrupt activities. All that Mokoena did, with the assistance of the police, was to create the opportunity for the suspect to consummate the corrupt transaction; he did nothing to encourage or solicit the commission of the crime. Apart from conveying to the suspect that he (Mokoena) was prepared to participate in the corrupt scheme proposed by the former, Mokoena simply alerted the police to what was going on, thus enabling them not only to plan and witness the controlled delivery, but also to apprehend the suspect in the act.

[32] This scenario is analogous to the situation where a kidnapper demands a ransom from the kidnapped victim's family. If the family should inform the police of the pre-arranged time and venue for delivery of the ransom, could it ever be suggested that the police used the victim's family as a trap if the police should turn up to witness the delivery of the ransom and to arrest the culprit? The answer must surely be no.

[33] In the circumstances, I am satisfied that the police conduct in question did not amount to a trap. But even if it were to be accepted for purposes of argument, contrary to this finding, that the conduct did in fact amount to a trap, then it is clear to me that the conduct of the police did not go beyond providing an opportunity for the appellant to commit an offence, in which event such evidence is *ipso facto* admissible in terms of s 252A(1) of the Act. Counsel who appeared for the appellant at

the trial and on appeal to the high court conceded that the conduct in question did not go beyond providing an opportunity to commit an offence. On appeal before us, new counsel for the appellant sought to retract that concession. However, in the light of all the evidence I am satisfied that the concession by the appellant's original counsel was rightly made, with the result that the provisions of s 252A(3) did not come into play and the evidence surrounding the police operation on the day in question and what it produced was rightly admitted by the magistrate.

Search and seizure

[34] A second string to the appellant's bow was an argument that the police discovered the brown cellphone in the course of an unlawful search by the police. This is so, according to the argument, because the search was conducted without a search warrant, but without satisfying the requirements of s 22 of the Criminal Procedure Act. Paragraph (a) of the section provides that a police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in s 20[9] if the person consents to the search for and the seizure of the article in question. Paragraph (b) of s 22 creates a second ground of validation for a search without a warrant. This applies if a police official on reasonable grounds believes (i) that a search warrant will be issued to him under paragraph *(a)* of s 21(1) if he applies for such

[9] Including an article which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, or which may afford evidence of the commission or suspected commission of an offence, which description would clearly include the brown cellphone.

warrant; and (ii) that the delay in obtaining such warrant would defeat the object of the search.

[35] In the present case, the high court found that the appellant had in fact consented to the search, both of his person and his desk. In this regard, the appellant testified as follows:

> They [ie Buys and McIntyre] confronted me and asked me if they can search me, I said yes.
> They did ask you? --- Yes, well they actually said that we are going to search you, they didn't say can we search you.
> …
> Court: Can you just repeat to that how did it happen that you consented to the search? --- I think my exact words were sure, they said we are going to search you now and I said sure search me.

[36] It was argued on behalf of the appellant that the state could not rely on the consent ostensibly given by the appellant because he was not advised, prior to the search, (a) that he could object to any search, or (b) that any article seized during the search could be used in evidence against him. The high court held that this circumstance was 'neither here nor there' and dealt with the argument as follows:[10]

> 'As regards the second aspect [(b) above] it need merely be commented that it was obvious that if anything incriminating was found it would constitute evidence against him and would be used as such. As regards the first aspect [(a) above], counsel did not point to any provision requiring the police to advise a subject that it was open to him to refuse to allow a search to be undertaken. (It may be recorded that even if the

[10] Judgment paras 102–105.

appellant had refused consent for the desk to be searched, the ultimate result, the retrieval of the cellphone, would, for the reasons stated below, still have followed).

The issue of legal representation is relevant here as well. Had an attorney been engaged by the appellant he would have adopted one of two courses: after consultation with the appellant he would have advised him to consent to the search or he would have insisted on Buys obtaining a search warrant. In the latter event Buys would have adopted one of two courses. He would either have invoked s 22(b) and proceeded with the search and seizure on the basis that he had reasonable grounds to believe that a search warrant would be issued to him under s 21(1)(a) should he apply therefor and that the delay in obtaining the warrant would defeat the object of the search. Alternatively, he would have taken steps to secure the appellant's desk pending his return with the search warrant. The retrieval of the cellphone would have been the inevitable result.

I would record that in any event I would, in weighing up the competing considerations (as to which see eg *S v Hena & another* 2006 (2) SACR 33 (SE)) have concluded that the admission of the evidence of the finding of the brown cellphone did not result in an unfair trial or bring the administration of justice into disrepute.'

[37] The high court accordingly concluded that the evidence in question was correctly admitted. I agree with the above reasoning and share the conclusion arrived at by the high court. I wish to add that no challenge was directed at the police conduct in order to establish whether, subjectively, they held the relevant belief, as contemplated by s 22(b), when conducting the search. Looking at the matter objectively, however, I am satisfied that, had such a challenge been advanced by the defence, the police conduct could have been justified on those grounds as well.

Rights of a suspect

[38] The high court in the course of its judgment[11] also embarked on an *excursus* in relation to the question whether someone who is neither an arrested nor detained nor accused person, but merely a suspect, has the rights conferred upon those categories of persons in terms of s 35 of the Constitution[12] and, if not, what pre-trial rights a suspect does have in respect of the aspects which are the subject of those rights. The court referred *inter alia* to the different approaches followed in some of the divisions of the high court with regard to this question, leading to conflicting decisions on the subject.[13]

[39] In the view that I take of the matter, it is not necessary for purposes of this judgment to reach any firm conclusion with regard to the question raised and I expressly refrain from doing so. The fact is that none of the evidence that has been admitted has been obtained in violation of any of the rights contained in s 35, nor has the admission of such evidence rendered the trial of the appellant unfair in any way.

Circumstantial evidence

[40] Having disposed of the 'technical' objections raised against the evidence adduced by the state, it now remains to consider the evidence on record in order to answer the question whether the state has succeeded in proving the guilt of the appellant beyond reasonable doubt. I bear in

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[11] Paras 90–94.
[12] Constitution of the Republic of South Africa, 1996.
[13] See eg *S v Sebejan & others* 1997 (1) SACR 626 (W), 1997 (8) BCLR 1086 (W); *S v Orrie & another* 2005 (1) SACR 63 (C); *S v Mthethwa* 2004 (1) SACR 449 (E).

mind in this regard that circumstantial evidence should never be approached in a piecemeal fashion. The court should not subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality.[14]

[41] Based on the evidence, the following findings by the magistrate are not open to doubt: that all the incriminating SMSs originated from the same cellphone number referred to earlier; that they all referred to Mokoena's tax problems with SARS; and that the author of the SMSs must have been someone inside SARS with knowledge of those tax problems. Against the background of the circumstantial evidence as a whole, the further inference seems irresistible that the number from which the SMSs were sent belongs to the brown cellphone. It thus appears that the case revolves largely around the question of ownership of the brown cellphone.

[42] With regard to this question, there was direct as well as circumstantial evidence linking the brown cellphone to the appellant. First, the brown cellphone was found on his desk during the second search. Second, the state presented the evidence of two colleagues who had seen the appellant using a brown cellphone on different occasions. In this regard, the witness Lusizi, who shared the same office with the appellant, saw him using a brown cellphone 'for a long time' on the morning of his arrest. Moreover, both the appellant's two colleagues who were in the office when the first and second search of the

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[14] *S v Reddy & others* 1996 (2) SACR 1 (A) at 8*c–d*.

appellant's desk took place confirmed that no-one had entered the office between the two searches. It was not suggested to either of them that they had 'planted' the brown cellphone on the appellant's desk or that either of them was part of a conspiracy to falsely implicate the appellant. None of them appeared to bear any malice towards the appellant.

[43] This evidence on behalf of the state becomes even more compelling when weighed against the improbability of the appellant's total denial of all knowledge of the brown cellphone. As pointed out above, his version, which is entirely speculative, was that the cellphone must have been 'planted' on his desk by an unknown person in a deliberate attempt to frame the appellant. No likely suspect was identified by the appellant, nor does the evidence suggest any. The appellant even sought to place in issue the colour of the cellphone by suggesting that it was 'reddish brownish', but 'more red'. This same theme was pursued (albeit without much enthusiasm) by counsel in argument before us in an attempt to cast doubt on the identification of the brown cellphone by the state witnesses. However, this point is decisively dealt by the magistrate in his judgment, where he recorded that the colour of the cellphone is 'predominantly brown'.

[44] It follows, in my view, that the link between the appellant and the brown cellphone has been established beyond reasonable doubt, with the corrolary that he was the person who sent the series of incrimnating SMSs to Mokoena.

[45] As rightly pointed out by the magistrate, even in the absence of the brown cellphone, the remaining circumstantial evidence would have been sufficient to convict the appellant. In this regard, reference may be made to the following circumstances (to name but a few):

(a) The appellant was one of two auditors in the SARS office to whom Mokoena's file had been assigned. He was accordingly one of the SARS officials most likely to have had contact with Mokoena in connection with his tax affairs.

(b) The proximity in time between the contact between the appellant and Mokoena – either in person or via fax – and the receipt by the latter of various SMSs relating to such contact is highly suspect and is consistent with an inference that the appellant was the person responsible for sending the SMSs.[15]

(c) The receipt by the appellant of the envelope containing the 'bribe', his prior knowledge of its expected delivery, as well as the fact that it would emanate from a certain Mr 'Nkula' (or 'Ntula') – exactly in accordance with the instructions contained in the earlier anonymous SMS to Mokoena – are highly incriminating features, consistent with his guilt.

(d) The appellant's demeanour when confronted by Buys and McIntyre was noteworthy and indicative of guilty knowledge on

[15] Compare para 8 above.

his part. Buys described his demeanour as 'clearly nervous' and added:

'He was so nervous as such that I could see his lips shaking. They were – how can one describe it, it's as if someone – or a child was caught out smoking without his father knowing for instance. He had that completely surprised look.'

(e) The appellant falsely denied any involvement in the commission of the offence and falsely denied any connection with the brown cellphone. In the light of the incriminating nature of the evidence relating to that cellphone, the court is justified, in my view, in drawing an adverse inference from the appellant's false denials.[16]

[46] The following well-known observations from *Best on Evidence*[17] are particularly apposite in the present scenario:

'A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. . . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . '.

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[16] *S v Rama* 1966 (2) SA 395 (A) at 400G–H; *S v Steynberg* 1983 (3) SA 140 (A) at 146A–148D; *S v Mtsweni* 1985 (1) SA 590 (A) at 593I–594D.
[17] 10ed at p 261, quoted with approval in *S v Reddy* above at 8*h–j* and *S v Mcasa & another* 2005 (1) SACR 388 (SCA) para 13.

[47] Based on the circumstantial evidence in this case, I am satisfied that the state has proved the guilt of the appellant beyond all reasonable doubt. In the result the appeal is dismissed.

B M GRIESEL
Acting Judge of Appeal

APPEARANCES:

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Instructed by: The Director of Public Prosecutions, Grahamstown

The Director of Public Prosecutions, Bloemfontein