

SOUTH AFRICA / JUDGMENT

S v Flobela (17258) [2018] ZAWCHC 31 (12 March 2018) [2018] ZAWCHC 31

COURT

Western Cape High Court, Cape Town

BEFORE

Henney, Samela

CASE / FILE NUMBER

17258

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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
(Coram: Henney, J et Samela, J)

Case Number: 17258

In the matter between:

The State

vs

Sebasto Flobela

REVIEW JUDGMENT: 12 MARCH 2018

Henney J

- [1] This is a matter that was submitted for automatic review before Van Staden AJ on 5 April 2017. This was after the accused had been convicted by the Magistrate of Cape Town on a charge of housebreaking with intent to steal and theft, that was committed on 24 August 2016. The allegations against him was that he broke into a residential premises belonging to the complainant and stole one bicycle, to the value of R10,000.
- [2] He was also charged in the alternative on one count of the contravention of section 36 of the General Law Amendment Act 62 of 1955, in that he was found in possession of stolen property referred to in the main charge on the date, time and place as mentioned in the main charge (“Possession of stolen property”).

- [3] At the first appearance of the accused before the Magistrate, the accused elected to conduct his own defence and not to acquire any legal representation. The accused pleaded not guilty, on the main as well as the alternative charge. After his rights were explained by the Magistrate during the plea proceedings, he elected to remain silent.
- [4] The Magistrate, however, found the accused guilty on the main charge of housebreaking with the intent to steal and theft. He was acquitted on alternative charge. And he was sentenced to 24 months, imprisonment. At the time when Van Staden AJ was seized with the matter, he immediately ordered that the accused be released from custody and referred the matter back to the Magistrate with some queries. These are: 1) the Magistrate was informed that the complainant had passed away, because it seemed that the complainant had passed away on 7 December 2016 before the trial commenced on 18 January 2017. And at that time, no discussion took place that the complainant had passed away; 2) whether it was fair and in the interests of justice to expect of an undefended accused to agree that the affidavit of the complainant be accepted as evidence; 3) whether the accused should not at that stage when it was discovered that the complainant passed away have been advised of his right to legal representation before he was expected to agree to the Statement of the deceased being allowed as evidence; 4) whether the evidence in this matter justify a conviction of the accused on a charge of housebreaking, when the charge sheet revealed that the accused had the intention to steal, break open and enter a residential premises. Especially, in the light of the fact that in the Statement of the complainant that was admitted into evidence, he stated that the garage door was open, but he could not say how this happened. Lastly, he enquired whether the allegations in the affidavit of the deceased complainant were sufficient to sustain the conviction of the accused in the charge of housebreaking.
- [6] The Magistrate in his response to the query regarding his admission of the hearsay evidence, States that he was advised by the prosecutor that the accused would elect to conduct his own defence, prior to the commencement of the trial. He was also advised at that stage by the prosecutor that the complainant had passed away, and that the State intended bringing an application to make use of hearsay evidence.
- [7] He further Stated that he was duly aware of the technical nature of the Law of Evidence Amendment Act 45 of 1988, which regulates the admission of hearsay evidence during a trial. When this happened, he stated that he once again warned the accused of his rights to legal representation and it took some time to explain the technical nature of the application.
- [8] He also at that stage went so far to summon the assistance of a legal aid practitioner, who once again informed the accused that he qualified for Legal Aid and who was prepared to assist him but the accused declined the offer. The accused was adamant that he wanted to conduct his own defence. The uptake of what the Magistrate said was that as soon as he became aware of the fact that the complainant had passed away, and that the State intended to present this hearsay evidence, he went out of his way to encourage the accused to make use of the services of a legal representative.

- [9] He further stated that he made the accused aware of his fair trial rights which included an explanation of his rights after the State had concluded its case. This included his right to remain silent, the right to testify and call witnesses. He also explained to him the consequences of closing his case without leading any evidence.
- [10] As to the question whether on the hearsay evidence, he admitted, whether the State had proven that the accused had indeed broken into the garage, the Magistrate says that on a conspectus of evidence based on this affidavit, the only reasonable inference to which the Court could come to was that in order for the accused to have come into the possession of this bicycle, he had to break into the garage.

The Evidence

- [11] The first witness, Holger Doecke testified for the State, that he is a member of the local Neighbourhood Watch. On 24 August 2016, he received information over the radio that someone had broken into a property and have stolen a bicycle. According to this information, the person was wearing a black pants, had a pink backpack on his back and he was riding the stolen bicycle.
- [12] He further received information that the person was travelling down Blaauwberg road into the direction of Potsdam road. This witness testified that he was travelling on a motorcycle and it was easy for him to travel through the traffic, when he arrived at the corner of Blaauwberg and Potsdam road, he tried to stop the suspect, who refused to adhere to his instruction. The suspect, however, ran straight into the arms of another member of the Neighbourhood Watch. He was arrested and handed over to the law enforcement officers of the City of Cape Town who later appeared on the scene.
- [13] He further testified that the accused never said to him that the bicycle was given to him by some unknown white person. The witness also stated that he was present at the police station when the owner of the bicycle came to lay a charge.
- [14] The next witness, Alfonso Williams, is a law enforcement officer for the Melkbos area. He holds the rank of constable. On 24 August 2016, he was on duty doing patrols in the Milnerton area. On the corner of Blaauwberg and Potsdam roads, he observed that a number of people were standing in the roadway. He came across two gentlemen belonging to the local Neighbourhood Watch, who held on to the accused. They required his assistance to take the accused to the local police station because he was suspected of having stolen a bicycle. There was a bicycle on the scene, which according to his knowledge was a mountain bicycle, it was black and the word "Silverback" was written on the side thereof. There was also a helmet and a water bottle mounted to the bicycle.
- [15] After he had taken the accused to the police station in Table View, the owner of the bicycle arrived at the police station. The owner identified the bicycle as his. The accused was asked to give an explanation for his possession of the bicycle and he said that he got it from his wife. The accused did not tell him that he got the bicycle from a white woman.

[16] The Magistrate thereafter took it upon himself to ask this witness a few questions from which the following evidence emerged:

That the house was broken into on 24 August 2016; That he had spoken to the owner at the police station said, who said it is his bicycle; That the owner did not give him a time when the property was broken into and when his bicycle was stolen; That the owner identified the bike and the helmet and he was also looking for a water bottle and a speedometer; That subsequently this speedometer was found in the helmet; That the bike was in a fairly good condition and that it was not old or broken; That the owner did not say what the value of the bicycle was, but in his opinion, the value thereof would most probably be between R10 000 and R15000. The matter was thereafter postponed after the prosecutor requested an adjournment 17 February 2017.

[17] The prosecutor informed the Magistrate that he will be bringing an application that the hearsay evidence of the deceased

complainant be admitted into evidence, in the words of the prosecutor in terms of “Hearsay Evidence Act, section 2 (C) (1) to submit a Statement of the complainant who passed away, who passed on.” As a result of this, the Magistrate explained the following to the accused (record page 31); “Mr Flabela let me just explain to you what is happening now. The State is saying that the State wants to adduce evidence of a person, but that person has subsequently died. But the law makes provision that the State can bring an application that hearsay evidence be allowed. The problem is that that person, the State wants to call for the hearsay evidence to be allowed is the investigating officer and he is not available.”

[18] Then the Magistrate further explains to the accused (record page 32): “The second issue is the State is asking that if you agree that, that Statement be handed in, then it will not be necessary to bring an application in terms of the Law of Evidence Amendment Act to allow the hearsay evidence. In other words, the Statement will be handed in by consent. Those are the two issues. The first issue is the request for a postponement to get, the witness year. Is there anything you would like to say with regard to that issue.”

[19] In answering the Magistrate, the accused says that he would like to continue with the case because he has been in jail for a long time. The Magistrate then asked him if he would have any objection if the said Statement is handed in. The accused then said that he did not have a problem with that. After a further explanation, the Magistrate persisted in asking the accused if he has any objection if the Statement of the witness would be handed in. The accused once again said that he would not have any problem if the Statement is admitted into evidence. It was as a result of this answer that the Magistrate admitted the Statement into evidence. The Statement was read into the record.

[20] In the Statement of the deceased witness he says that on Wednesday 24 August 2016 at approximately 05:00, he heard a door bell ringing. He went outside and he saw one African male driving a white bicycle. He observed that this person was driving out immediately (sic). The garage door was widely (sic) open, but the gate (sic) for the property was still locked. He further says the bicycle was in the garage and he does not know how the

person opened the garage door. (p35). This witness, further Stated that luckily there was a woman who was working down the street and she notified the Neighbourhood Watch. He says further that the suspect was caught later by a member of the Neighbourhood Watch with his bicycle. Lastly, he says the bicycle was black, with tyres valued at R10 000.

- [21] A second Statement of this deceased witness also admitted into evidence, wherein he states that he pointed out his bicycle, to the police. The bicycle is black in colour and that the make is Silverback. He further identified a black helmet, a transparent water bottle and a broadband speedometer, as his property.
- [22] The accused in his evidence says that the bicycle was given to him as a gift, and he was unaware of the fact that it was stolen. He was on his way home from the shop when he was approached by the Neighbourhood Watch people who arrested him. He was taken to Table View police station and requested them to take him back to the person who gave him the bicycle, but they refused to do that.
- [23] He does not deny that he was driving the bicycle. He further testified that he does not know anything about the garage door of the complainant that was open. He further does not dispute that the bicycle that was found in his position was the bicycle complainant described as his. He further says he did not see the complainant at the police station.

Discussion

- [24] The Magistrate in his reasons, supplied as well as his judgment relied heavily on the hearsay evidence of the deceased witness.

From this Statement he came to certain conclusions and made some findings as to the guilt of the accused and more especially the

decision that the accused had broken into the garage of the complainant to steal his bicycle.

- [25] It further seems that the prosecutor in cross-examining the accused relied heavily on the Statement of the deceased complainant (Record page 42). If there was no such evidence, it seems that the Magistrate would not have come to such a conclusion. It is not clear on what basis the Magistrate admitted the Statement of the deceased witness into evidence. The reasons for this confusion is because the Magistrate said to the accused if he agrees that the Statement can be handed in, then there would be no need for the prosecutor to bring an application in terms of the provisions of the Law of Evidence Amendment Act 45 of 1988 to have the Statement admitted into evidence.

- [26] It is not clear whether he wanted the accused to make an admission in terms of provisions of section 220[1] of the Criminal Procedure Act 51 of 1977 (“the CPA”), that the contents of the Statement be admitted into evidence in terms of the provisions of section 222[2] of the CPA. Or whether such hearsay Statement can be admitted in terms of section 3 (1) (a) of the Law of Evidence Amendment Act[3], where a party against such evidence is presented may agrees to the admission thereof.
- [27] If the purpose of the Magistrate was to extract an admission in terms of the provisions of section 220 of the CPA, he failed to comply with the provisions said section, because the admission was not formally made. It was also not formally recorded. The Court also did not explain the content and the consequences that would follow if the Statement is admitted against the accused. The learned authors Schmidt and Rademeyer: Law of Evidence at 7-11 says... “The requirement that the admission be made “formally” obliges the Court to record it fully and accurately. If it is not so recorded, Court of Appeal may possibly not be able to take cognizance of it. Not only the content of an admission has to be recorded, but also, where relevant, the Court explanation to the accused of the consequences of an admission of his right to remain silent.”

The Court should be more cautious in the case of an unrepresented accused. In this regard, the learned authors State the following at 7-10...” When an accused is not represented the Court must proceed with caution. The accused must know the implications of a formal admission and must realise that he has no obligation to admit any fact. “

- [28] In *S v Daniels* 1983(3) 275 (A) and *S v Mavundla* 1976(4) SA 731, the principle has long been established that when an accused person wants to make an admission, but he lacks legal representation, the judicial officer trying must satisfy him or herself before accepting such admission that the accused decision to make it has been taken with the full understanding of its meaning and effect.
- [29] The same principle would be applicable where an undefended accused person as in this case would agree to evidence being admitted against him in terms of the Law of Evidence Amendment Act. It has been said that[4] ...”Such consent may, however, be given without a full appreciation of the nature and extent of the prejudice that might ensue. It is submitted that it will be a salutary practice, before this evidence is received against an accused in a criminal trial, the

Courts to warn the accused of this danger, particularly when he is unrepresented. It would be preferable, too, to insist on his express consent and not to construe failure to object its reception as implied or tacit consent. There is, moreover, a duty on a judicial officer, when he becomes aware that the witness is-either deliberately or out of ignorance-giving hearsay evidence to explain the rule against hearsay to him in simple terms. (see *S v Zimmierie en ‘n ander* 1989(3) SA 484 (C) v *Congola* 2002(2) SACR 383 (T) at 386 c-e). This duty assumes particular importance when the accused is unrepresented (see *S V Ngwani* 1990 (1) SACR 449(N).”

In Ngwani (supra) Didcott J at 449 said: “The only evidence linking the accused with the dagga, one thus sees, was blatantly hearsay in character. Endeavouring in reply to the review query to justify the conviction all the same, the magistrate maintains that s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 rendered the evidence admissible. But I am far from sure that the tests set by paras (iv) and (vi) of the subsection were met by such evidence in a case where everything turned on its admission and acceptance. To decide the question is, however,

unnecessary. For the following seems inescapable. The accused, who was unrepresented, had to have the effect of the

subsection fully explained to him, in contrast with the legal position were it not invoked. He had then to be heard on the

important one raised by para (vi), the issue whether he would be prejudiced were it to be invoked. None of this happened”.

[30] The manner in which the Magistrate admitted the hearsay evidence in this particular case falls far short of what was required of him in terms of whatever provision such evidence were admitted, especially in a case like this where the accused was not legally represented. In fact, the Court should go further, and make an assessment, of the facts the accused places in dispute; consider the hearsay evidence that the State wants to present against the accused; and whether it would serve to prove the facts, upon which the onus rest on the State, the accused places in dispute.

[31] The Court should then explain to the accused, the nature of the hearsay evidence, the purpose for which the prosecutor wants to tender such evidence and the prejudice and consequences that might flow from the admission of such evidence. And further inform the accused that there is no obligation upon him or her to agree or to admit to such evidence, because the onus the rests on the State to prove such evidence beyond reasonable doubt.

[32] The Magistrate did not in any way explain to him the consequences of his decision; that he was not obliged to agree that such evidence could be admitted against him. And that the onus of proving the evidence as contained in the Statement was on the State. That it would be prejudicial to his case and most importantly, that he would admit to evidence that would be harmful to his defence based on the fact that he denied he had broken into the garage and had stolen the bicycle of the complainant as alleged in the charge sheet.

[33] The Magistrate, it seems, did not take into account any of these considerations. And his failure to do so infringed the accused's

right to fair trial in terms of section 35 (3) of the Constitution. It seems that the only reason why the accused agreed to have the Statement admitted into evidence was because he had been in custody for some time and wanted to finalise the matter, which may be convenient to the accused and expedite his right to a speedy trial, but it adversely affected his right to a fair trial.

[34] The Magistrate in relying on the hearsay evidence of the complainant, makes the following findings:

- 1) that the complainant heard his doorbell rang and went outside;
- 2) that he went outside and saw a person driving off with his bicycle;
- 3) that he gave a clear description of this person, the clothes, the person had on and a description of the bicycle;
- 4) that this description had been passed on Neighbourhood Watch immediately;
- 5) that a few minutes later the accused is apprehended and arrested based on the description by the owner immediately, with no time delay between.

[35] For the reasons as mentioned earlier on, the Magistrate in my view, committed a serious misdirection by admitting the hearsay evidence on the basis which he did. On the basis of this evidence, he made certain findings which resulted in the conviction on a charge of housebreaking with intent to steal and theft. Absent this evidence, he could not have made a finding that the accused had broken into the garage of the owner and it stolen the bicycle.

[36] It does not mean, however, that the accused is completely exonerated. The version of the accused as to how it came into possession of this bicycle, which the Magistrate correctly found was implausible, falls to be rejected and therefore not reasonably possibly true. His evidence as to why he came in possession of this bicycle is inconsistent and cannot be believed. It is not clear whether he had received this bicycle from a white man, a white woman or his wife.

[37] The Magistrate's findings in this regard, in my view, cannot be faulted. On the objective evidence, it is clear that moments before the accused was found in possession of this bicycle, it was stolen from the complainant by someone. It is not known who this person was. There is a great suspicion that it may have been the accused that could have stolen this bicycle, but there is no such evidence, to prove this fact beyond reasonable doubt. The State elected not to call in the absence of the complainant, the member of the Neighbourhood Watch, who had observed this person coming from the premises of the complainant with this bicycle. The link between the theft of the bicycle and the subsequent finding of the accused in possession of the bicycle is missing.

[38] On the basis of this evidence, it is highly unlikely that this bicycle could have changed so easily from hand to hand. There is however, as said earlier, in the absence of the hearsay evidence, not any evidence upon which the Court could make a finding that there was a break-in at the house of the complainant. The explanation proffered by the accused as to his possession of this bicycle, is a dishonest one. He could not properly explain as to how he came into possession of this bicycle, and the only inference the Court can draw, which in my view, is the only reasonable inference, that the accused had stolen this bicycle from the complainant.

- [39] I am therefore satisfied that the State has failed to prove that the accused had broken the garage of the complainant, but it has proven that the accused had stolen this bicycle. I would therefore set aside the conviction on the charge of housebreaking with intent to steal, but would confirm the conviction on the charge of theft of the bicycle.
- [40] As regards sentence, when the matter was initially sent on the review before Van Staden AJ on 5 April 2017, by that time the accused had served 1 month and 16 days of sentence. At the time of his sentence on 17 February 2017, the accused was in custody since 25 August 2016, which was a period of almost 6 (5 months and 39 days) months. After this matter was sent back with the query to the Magistrate, it took more than 6 months before the Magistrate finalised the review query before he sent it back to the High Court.
- [41] In his explanation that accompanied his reply to the query, he says that the reason for the late reply was because; the file had been erroneously misplaced in one of the Courts after it was supposed to be sent for typing. I find this explanation totally unacceptable. And that is once again one of those cases where the Magistrate has failed and neglected in a gross manner, to execute his duties as required by law.

Given the unsatisfactory explanation of the Magistrate, I am of the view that this matter should be brought under the attention of the Chief Magistrate of Cape Town, for his further consideration and possible action.

- [42] In a recent judgment of this Court where it also dealt with delays in the finalisation of the matters from the Magistrate Court in *S v Jacobs; Swart; Davids; Jas; Klaasen; Swanepoel; and Xhantu* 2017(2) SACR 546 (WCC) at para 46 it was held... “In Nyumbeka this Court previously held that even though the preparation of records for automatic review is primarily a function of the administrative component ie the clerk of each Magistrate’s Court, it is ultimately the function of the Magistrate concerned to see to it that a proper and complete record of the proceedings and sentence that has been rendered in a particular matter that the Magistrate has presided in, is sent to the High Court.[94] As was pointed out in *Letsin* a criminal matter which commences in the Magistrate’s Court is not completed until any outstanding review in respect thereof has been concluded in the High Court and, in our view, in the same way as it is the Magistrate’s duty to hand down a judgment timeously in respect of both the conviction as well as in respect of the sentence, in terms of Nyumbeka it is also accepted that post-sentence the Magistrate’s duties include ensuring that the record is properly prepared and timeously dispatched to the High Court. As such, (as was pointed out in *Letsin* and *Nyumbeka*)

Magistrates have duties and functions which go beyond merely adjudicating the matters before them. In terms of the Constitution and the law they have a duty to ensure that judgments of their Court and matters relating thereto are given effect to and they should not sit idly by and take it for granted that the administrative component of their Courts will implement and give effect to their directives.”

- [43] As a result of the delay by the Magistrate in submitting his reply, Van Staden AJ, had by that time completed his term as an acting judge, and the matter was sent to me to deal with. In the meantime, the accused had been released and in my view, the sentence imposed by the Magistrate, which was set aside by Van Staden AJ, has to be reconsidered, especially in light of the fact that the accused had been sentenced to 24 months, imprisonment on the charge of housebreaking with intent to steal and theft.
- [44] Ideally, given the fact that the accused has a previous conviction, for housebreaking with intent to steal and theft, a sentence of direct imprisonment would not have been entirely inappropriate, but given the delay in the finalisation of this case and the fact that the accused had been freed from prison pending the finalisation of the review, it would be unfair and unjust to send him back to prison by imposing a sentence of direct imprisonment on review.
- [45] I would therefore, make the following order:
- 1) that the conviction of the accused a charge of housebreaking with intent to steal and theft, is set aside and replaced with the following verdict:

The accused is found guilty on a charge of theft.

- 2) The sentence of 24 months imprisonment imposed by the Magistrate on 17 February 2017, is replaced with the following sentence:

Twelve

- (12) months imprisonment, which is suspended for a period of five (5) years on condition that the accused is not found guilty of theft, attempted theft or any competent verdict on a charge of theft and which is committed during the period of suspension.
- 3) that the registrar is requested to submit a copy of the judgment to the Chief Magistrate of Cape Town for his consideration and possible action against the Magistrate.

HENNEY, J

Judge of the High Court

I agree.

SAMELA, J

- [1] Section 220, Admissions... “An accused or his or legal advisor or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings, and any such admission shall be sufficient proof of such fact.”

[2] Section 222: Application to criminal proceedings of certain provisions of civil proceedings evidence act, 1965, relating to documentary evidence..." The provisions of sections 33 to 38 inclusive, of the Civil Proceedings Evidence Act, 1965 (Act and t25 of 1965), shall mutatis mutandis apply with reference to criminal proceedings"

[3] Section 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.

[3] Section 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.

[4] Commentary on the Criminal Procedure Act: Du Toit. De Jager,Paizes, Skeen and Van Der Merwe(vol2) [service 57,2016] at 24-49

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