

SOUTH AFRICA / JUDGMENT

S v Zwane (98/04) [2005] ZAGPHC 94 (22 September 2005) [2005] ZAGPHC 94

COURT

High Courts - Gauteng

BEFORE

E M Du Toit

CASE / FILE NUMBER

98/04

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IN THE HIGH COURT OF SOUTH AFRICA(WITWATERSRAND LOCAL DIVISION)

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(

WITWATERSRAND LOCAL DIVISION

)

Registrar's Ref No:98/2004DPP Ref No:

JPV 2004/0069Soweto Case No: 443/1079/2002

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Soweto Case No: 443/1079/2002

In the matter of -THE STATEvsZWANE, Erick Nhlanhla

In the matter of -

THE STATE

vs

ZWANE, Erick Nhlanhla

REASONS FOR RULING

E MDU TOIT AJ:Given on 2005 09 22

E M

DU TOIT AJ:

Given on 2005 09 22

Pursuant to my ruling as to the order in which the concluding addresses at this stage of the proceedings are to be presented, Counsel were granted time in which to prepare argument and the trial was adjourned. It is clearly desirable that these my reasons for the ruling be given before the commencement of argument.

Having convicted the accused on three charges of kidnapping and four of rape, the regional court committed him for sentence by this Court in terms of the provisions of s 52 of the Criminal Law Amendment Act 105 of 1977 [“the Act”].

As I

inter alia

stated in

S v Thobela

2002/09/25 WLD Case No 75/2003, not reported

-

“In my opinion section 52 of the Act clearly was not intended to provide for either an appeal or a review.”at p 17,

“

”

at p 17

,

and

“The obvious interpretation of the section, in my opinion, is that a Judge of the High Court sits as a Judge of first instance in the matter, both as regards verdict and as regards sentence.”at p 12.

at p 12

.

The trial proceeded before me in terms of s 52(3) of the Act, the presently relevant provisions whereof read as follows:

“(a) ...

“(

a

) ...

b

) The High Court shall, after considering the record of the proceedings in the regional court, sentence the accused as contemplated in section 51 (1) or (2), as the case may be, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass such sentence: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.

(c) If a judge acts under the proviso to paragraph (b), he or she shall inform the accused accordingly and postpone the case for judgment,

c

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), he or she shall inform the accused accordingly and postpone the case for judgment,

(d) The Court in question may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article.

d

) The Court in question may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article.

(e) Such Court, whether or not it has heard evidence and after it has obtained and considered a statement referred to in paragraph (b), may—

e

) Such Court, whether or not it has heard evidence and after it has obtained and considered a statement referred to in paragraph (

), may—

(i) confirm the conviction and thereupon impose a sentence as contemplated in section 51 (1) or (2), as the case may be;(ii) alter the conviction to a conviction of another offence referred to in Schedule 2 and thereupon impose a sentence as contemplated in section 51 (1) or (2), as the case may be;(iii) alter the conviction to a conviction of an offence other than an offence referred to in Schedule 2 and thereupon impose the sentence the Court may deem fit;(iv) set

aside the conviction;(v) remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit; or(vi) make any such order in regard to any matter or thing connected with such person or the proceedings in regard to such person as the High Court deems likely to promote the ends of justice.”.

- (i) confirm the conviction and thereupon impose a sentence as contemplated in section 51 (1) or (2), as the case may be;(ii) alter the conviction to a conviction of another offence referred to in Schedule 2 and thereupon impose a sentence as contemplated in section 51 (1) or (2), as the case may be;(iii) alter the conviction to a conviction of an offence other than an offence referred to in Schedule 2 and thereupon impose the sentence the Court may deem fit;(iv) set aside the conviction;(v) remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit; or(vi) make any such order in regard to any matter or thing connected with such person or the proceedings in regard to such person as the High Court deems likely to promote the ends of justice.

”.

As I also held in *Thobela’s case* supra: At p 22

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Thobela

’s case

supra

:

At p 22

“... I am of the view that, upon a proper construction of section 52 of the Act, the expression ‘in accordance with justice’ in subsection 52(3)(b) means that the accused’s guilt has in regular manner been established beyond reasonable doubt.”.

It follows that in my view the expression:

“...is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice”,

“...

is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice

”,

in context does not mean a finding made, or a settled opinion or doubt formed, without further evidence and/or benefit of argument, that the guilt of the accused has not in regular manner been established beyond reasonable doubt. If such were to be the interpretation, there would be

no point in ante omnia the proviso to para 52(3)(a) and the prefatory wording of para 52(3)(e) obtaining a statement from the presiding magistrate, nor would there be any room for a subsequent “confirmation” of the conviction. In my opinion the expression means no more than that in the view of the Judge the case is not so clear or free from difficulty as to warrant a deviation from normal procedure and render it unnecessary to hear argument on any aspect relevant to verdict or to the prior exercise by him or her of a discretion, including a discretion conferred by the Act.

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vide

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obtaining a statement from the presiding magistrate, nor would there be any room for a subsequent “confirmation” of the conviction. In my opinion the expression means no more than that in the view of the Judge the case is not so clear or free from difficulty as to warrant a deviation from normal procedure and render it unnecessary to hear argument on any aspect relevant to verdict or to the prior exercise by him or her of a discretion, including a discretion conferred by the Act.

After considering the record

in the present matter and hearing the submissions of Counsel as to whether the provisions of the proviso to s 52(3)(

) of the Act should be invoked,

I “was of the opinion that doubt existed whether the proceedings were in accordance with justice” in the aforesaid sense of the expression. I therefore directed the Registrar to obtain a statement as contemplated in the said proviso from the magistrate who presided at the trial, and adjourned the hearing.

Upon receipt of the magistrate’s statement, Counsel were furnished with copies thereof and of my directive to the Registrar, whereupon the matter in my view was ripe for argument.

The Act does not provide for any procedure or applicable principles in respect of this novel form of trial, but the Constitutional Court in

S v Dzukuda and Others; S v Tshilo

[2000] ZACC 16;2000 (2) SACR 443(CC) at 469

[2000] ZACC 16

2000 (2) SACR 443

held as follows as regards the interpretation and implementation of s 52:

“[49] ...It is, in the first instance, the duty of the High Courts to flesh out the procedures enacted in s 52 in a manner consistent with the accused’s right to a fair trial.”.

“[49] ...

In my respectful opinion the procedures can usually be “fleshed out” by adopting the time-honoured procedures and applying existing principles applicable to criminal trials, many whereof are to be found in the Criminal Procedure Act 51 of 1977[“the CPA”]. It is unnecessary for present purposes to decide the applicability of provisions of the CPA to proceedings in the High Court under s 52 of the Act.

Criminal Procedure Act 51 of 1977

In inviting Counsel to address me at this stage of the proceedings I therefore followed the normal procedure, which is also enacted in s 175 of the CPA as follows:

“(1) After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court.

- (2) The prosecutor may reply on any matter of law raised by the accused in his address, and may, with leave of the court, reply on any matter of fact raised by the accused in his address.”,

and invited Mr Baloyi, who now appears for the State, to address me.

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Mr

Baloyi

, who now appears for the State

, to address me.

protested that the State should not be called upon first, contending that the practice in these matters under s 52 of the Act is to call upon the defence first. In support of this contention he, in brief, submitted that the magistrate has given a judgment which is binding, that this Court has “a sort of review function”, and that it is for the accused to show the Court what is wrong with the proceedings in the court

a quo

and why the judgment should not be confirmed. The State would then have the right of address in answer to the accused's submissions.

It would appear that Mr

's contention is based on a premiss similar to the reasoning of the Court

in

S v Gentle

2005 (1) SACR 420(SCA) at 425

2005 (1) SACR 420

, viz -

“This Court has not brought in any independent conviction in respect of any one of them and did not even have to uphold their convictions. What did happen is that this court took the proceedings in the lower court under review and came to the conclusion that justice was properly done during such proceedings.” My translation of “Hierdie Hof het geen onafhanklike skuldigbevinding ten opsigte van enigeen van hulle uitgebring nie en het selfs nie eens nodig gehad om hul skuldigbe-vindings te bekragtig nie. Wat wel gebeur het, is dat hierdie hof die verrigtinge in die laer hof onder hersiening geneem het en tot die gevolgtrekking gekom het dat reg tydens sodanige verrigtinge behoorlik geskied het.”.

My translation of “

Hierdie Hof het geen onafhanklike skuldigbevinding ten opsigte

van enigeen van hulle uitgebring nie en het selfs nie eens nodig gehad om hul skuldigbe-vindings te bekragtig nie. Wat wel gebeur het, is dat hierdie hof die verrigtinge in die laer hof onder hersiening geneem het en tot die gevolgtrekking gekom het dat reg tydens sodanige verrigtinge behoorlik geskied het.

The Supreme Court of Appeal held that that reasoning is inconsistent with its earlier decision in S v B2003 (1) SACR 52(SCA), quoting the last two sentences of the following dictum by Streicher JA in that case: at 61c-f

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S v B

2003 (1) SACR 52(SCA)

2003 (1) SACR 52

, quoting the last two sentences of the following

dictum

by Streicher JA in that case:

at 61

f

[9] It is evident from these provisions that the trial of an accused who is committed by a regional court to an High Court for sentence has not been concluded. The record of the proceedings in the regional court form part of the record in the High Court and if the High Court is of opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, the Court may

, inter alia,

after evidence has been heard in terms of s 52(3)(

), confirm, alter or set aside the conviction; remit the case to the regional court; or make an order that is likely to promote the ends of justice. The conviction in the regional court is therefore, in effect, a provisional conviction that becomes final if it is accepted or confirmed by the High Court. In other words the Criminal Law Amendment Act created a special procedure in terms of which the trial of an accused commences in the regional court and can be concluded in the High Court.

My respectful translation of “

[9] Uit hierdie bepalings blyk dit dat die verhoor van ‘n

beskuldigde wat deur ‘n streekhof vir vonnis na ‘n HoHof verwys word nie afgehandel is nie. Die oorkonde van die verrigtinge in die streekhof maak deel uit van die oorkonde in die HoHof en indien die HoHof van mening is dat die verrigtinge nie ooreenkomstig die reg is nie of dat twyfel bestaan of die verrigtinge ooreenkomstig die reg is, kan die Hof, onder andere, nadat getuienis ingevolge art 52(3)(

) aangehoor is, die skuldigbevinding bekragtig, wysig, of tersyde stel; die saak na die streekhof terugverwys; of ‘n bevel maak wat die regspleging waarskynlik sal bevorder. Die skuldigbevinding in die streekhof is dus, in effek, ‘n voorlopige skuldigbevinding wat finaal word indien dit aanvaar word of bekragtig word deur die HoHof. Met ander woorde die Strafwysingswet het ‘n spesiale prosedure geskep ingevolge waarvan die verhoor van ‘n beskuldigde in die streekhof begin en in die HoHof afgehandel kan word. ...

In the premises I remain of the opinion that the State retains the

onus

throughout the trial, including the continuation thereof in this Court in terms of the Act. The conviction by the magistrate is provisional, and his judgment merely records his reasons for such conviction. It is my duty to arrive at an independent verdict on the evidence before me, at this stage being that contained in the record, and the

is on the State to persuade me on the record that it has regularly proved the guilt of the accused beyond reasonable doubt. The accused therefore has no

to advance reasons why he should not be convicted, nor any duty to demonstrate flaws in the magistrate's judgment. It follows that in my view the practice and order of address contended for by Mr

would not only be inappropriate, but irregular.

I therefore ruled that the order of addresses as set out in s 175 of the CPA
be followed.

E M DU TOIT

ACTING JUDGE OF THE HIGH COURT

M D Baloyi for the State M S Themba for the accused

M D Baloyi

for the State

M S Themba

for the accused

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Prepared on 11 October 2026 · Esheria