

SOUTH AFRICA / JUDGMENT

## Zwane v S (A203/19) [2020] ZAGPPHC 344 (31 July 2020)

[2020] ZAGPPHC 344

COURT

North Gauteng High Court, Pretoria

BEFORE

C.J. Collis, M. Mbongwe

CASE / FILE NUMBER

A203/19

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

### Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

CASE

NO: A203/19

In

the matter between:

NKOSANA

AGREEMENT ZWANE

APPELLANT

and

THE

STATE

RESPONDENT

Summary

An

appeal against a conviction on one count of housebreaking with the intention to steal and theft, imposed by the District Court Brakpan.

The appellant duly applied for leave to appeal against both his

conviction and sentence. Leave to appeal was only granted against his conviction and refused against his sentence. No duty on a court a quo to obtain permission from litigants when the provisions of section 186 of the Criminal Procedure Act are invoked. Rights to a fair trial as envisaged by section 35 of our Constitution not infringed. Identification of the perpetrator proven by the state.

Order

1.  
The appeal against conviction is dismissed.
2.  
The sentence imposed of six years' imprisonment confirmed.

## JUDGMENT

COLLIS J (MBONGWE AJ Concurring)

## INTRODUCTION

- [1] The appellant Mr Nkosana Agreement Zwane appeared in the District Court Brakpan on one count of Housebreaking with the intent to steal and theft.
- [2] The appellant who was legally represented pleaded not guilty on 14 July 2015 but subsequently on 23 May 2017, he was convicted on a charge of housebreaking with the intent to steal and theft, and sentenced to six (6) years imprisonment.
- [3] On the same day the court a quo refused the appellant leave to appeal his sentence and only granted him leave to appeal his conviction.
- [4] Succinctly, the appellant appeals his conviction on the following grounds:
  - 4.1 that the magistrate erred in that he was biased towards the appellant by inter alia effectively cross examining the appellant by entering into the arena of the trial which resulted in the appellant not having received a fair trial;
  - 4.2 that the magistrate decided to invoke the provisions of Section 186 of the Criminal Procedure Act 51 of 1977 by calling a facial expert when identification was in dispute;
  - 4.3 that the state had failed to prove the identification of the appellant.
- [5] The appellant's conviction and sentence has its genesis from the events which occurred on 27 May 2013. Mr. Du Preez, the

complainant testified that on this day he left his premises locked on the morning when he went to work and that the CCTV cameras fitted on his premises were all switched on. Upon his return to his house at around 16h00 later that day, he had found his house having been broken into. Upon

viewing the CCTV footage, he managed to identify the appellant before court as one of the two persons who had broken into his house. Prior to the day that his house was broken into, the appellant was not known to him and the first time that he had identified him was at the hearing when he gave evidence in court. It is common cause that the complainant was not present when his house was broken into.[1]

- [6] In addition to the evidence of the complainant as to the identity of the appellant, the state also presented the evidence of Warrant Officer Jan Christoffel Andries Roos. He testified that being the assigned investigating officer he visited the premises of the complainant on 30 May 2013. It was on this day that he viewed the video footage recorded of the break-in and that he recognised the appellant as one of the suspects on the video footage. Further that he on a previous occasion had traced him on a case of theft of a firearm.[2]

## EVALUATION

- [7] The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection

the trial court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to

succeed on appeal the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial courts evaluation of oral testimony. [3]

## IDENTIFICATION

- [8] Mr. De Beer appearing on behalf of the appellant had argued that the state had failed to prove the identity of the appellant as one of the assailants who had broken into the house of the complainant. In this regard Mr. De Beer had relied on the decision of *S v Mthetwa* 1972(3) SA 766A at 768A – C, where it was held as follows:

*“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest; the reliability of his observation must also be tested. This depends on various factors; such as lighting, visibility and eyesight; the proximity of the witness, his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused, the mobility of the scene, corroboration; suggestibility; the accused face, voice built, gait and dress; the result of identification parades, if any, and of course the evidence by or on behalf of the accused. The list is not exhaustive. These factors or such of them as are applicable in a particular case are not individually decisive, but must be weight one against the other, in light of the totality of the evidence and the probabilities. See cases such as R v Msimang 1950 (2) SA 488 (AD); R v Dladla and Others 1962 (1) SA 307 (AD) at p 310C; S v Mehlape 1963*

(2) SA 29 (AD).”

[9] In the present matter the court a quo carefully evaluated the evidence of the witnesses for the state and could reach no other conclusion, but that the appellant was the person who had committed the offence which he was charged with. In this regard the trial court among others had placed reliance on the evidence of Mr. Marius Du Preez, the complainant, who testified that the appellant was one of the house breakers visible on the CCTV footage recorded on the day of the housebreaking. At the hearing Mr. Du Preez thus identified the appellant as he was in the dock.

[10] In *S v Mdlongwana* 2010 (2) SACR 419 (SCA) paragraph 10 the court held as follows:

*“Generally a dock identification carries little weight unless it is shown to be sourced in an independent preceding identification, but there is no rule of law that dock identification must be discounted altogether especially where it does not stand alone.”*

[11] In addition the CCTV footage so recorded was two days later shown to Warrant Officer Roos who upon viewing the footage identified the appellant as one of the men in the video footage. Warrant Officer Roos had testified that he was able to do so, because he during previous official dealings in his capacity as a police officer had dealt with the appellant. He thus had prior knowledge of the appellant.

[12] Further to the above, the court a quo had also placed reliance on the evidence of Warrant Officer Van Eeden, the facial recognition expert who positively identified the appellant from a picture taken of the CCTV footage.

[13] It is on this basis that the trial court concluded that it was not only convinced beyond a reasonable doubt, but that it was convinced beyond all doubt that the appellant was indeed one of the persons who participated in the house breaking and who had committed the offence.[4]

[14] Premised on the above and the totality of the evidence presented on identification, this court is consequently satisfied that no misdirection occurred as to the identification of the appellant as one of the perpetrators of the offence.

#### THE PROVISIONS OF SECTION 186 OF THE CRIMINAL PROCEDURE ACT

[16] The section provides that the court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such criminal proceedings if the evidence of such a witness appears to the court as essential to the just decision of the case.

[17] Furthermore it is trite that “A judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he had not only too direct and control the proceedings according to recognised rules of procedure, but to see that justice is done.” [5]

- [18] The magistrate presiding in the instant matter was well within his rights to act in terms of section 186 in order to secure the evidence he thought would enable him to administer justice properly in the case before him. There rests no such duty on a magistrate to seek permission or the views from the parties before invoking such provision, nor does the section require it. This assertion as made by counsel for the appellant is quite simply misguided. It is also misguided to assert that the magistrate by invoking the provisions of section 186 was biased and somehow took over the duties of the prosecution.
- [19] What the court is however obliged to do, is to afford the parties an opportunity to cross examine the witness so called by the court and in the present instance this was indeed done by the court [6] and the witness so called by the court was subjected to extensive cross-examination by the defence.
- [20] It is further important to note that while section 186 permits presiding officers to call witnesses, the exercise of their powers under section 186 should be used rather sparingly as the perceptibility of an even handed trial remains the goal. The court must not place itself in a position where a perception may reasonably arise that it is bending too much in favour of the state to the prejudice of the appellant.
- [21] In casu I am of the opinion that it was rather being extra cautious for the court to invoke the provisions of section 186. The trial court already had sufficient evidence at its disposal to administer justice properly, and by so doing it did not translate to an instance that the appellant did not receive a fair trial as provided for in section 35 of our Constitution.[7] It follows that an infringement of the rights of an accused in terms of section 35 did not occur.
- [22] Given the totality of the evidence presented, I could also in the present instance, not find a misdirection by the court by invoking the provisions of section 186 of the Criminal Procedure Act.

## ORDER

[24] In the result the following order is made.

24.1. The appeal against conviction is dismissed.

24.2. The sentence imposed by the court a quo of six years' direct imprisonment is confirmed.

24.3. The appellant being on bail, is to surrender himself within 14 calendar days, to the Tsakane Police Station to start serving his sentence.

C.J. COLLIS

JUDGE OF THE HIGH COURT

I agree

M. MBONGWE

## ACTING JUDGE OF THE HIGH COURT

### Appearances

#### For the Appellant

: Adv. De Beer

#### Instructed by

: Saayman Attorneys

#### For the Respondent

: Adv. W. Mphahlele

#### Instructed by

: Director of Public Prosecutions Pretoria

#### Date of Hearing

: 02 March 2020

#### Date of Judgment

: 31 July 2020

## Judgment

transmitted electronically.

- [1] Transcribed record p 123 line 10-15
- [2] Transcribed record p 133 line 3-8
- [3] S v Francis 1991 (1) SACR 198 (A).
- [4] Transcribed record p 302 line 8 – 11.
- [5] R v Hepworth 1928 AD 265 at 277
- [6] Transcribed record p 251 line 24.
- [7] Constitution Act 108 of 1996.

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZAGPPHC/2020/344.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/zwane-v-s-identification-evidence-agpphc-2020-a203-19>

Prepared on 9 October 2026 · Esheria