

SOUTH AFRICA / JUDGMENT

Zwane v S (A15/2021) [2024] ZAGPPHC 191 (28 February 2024) [2024] ZAGPPHC 191

COURT

North Gauteng High Court, Pretoria

BEFORE

MJ Mosopa, BR Rangata

CASE / FILE NUMBER

A15/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case number: A15/2021

REPORTABLE
OF INTEREST TO OTHER
JUDGES
REVISED
DATE: 28/02/2024

In the matter between:

ZAKHELE WILLIAM
ZWANE
APPELLANT
And
THE
STATE
RESPONDENT

JUDGMENT

MOSOPA J

Introduction

1. The appellant was convicted of one count of theft and sentenced to a fine of R 4 000.00 alternatively, to three years imprisonment wholly suspended for a period of five years on condition that the appellant is not convicted of theft or attempted theft during the period of suspension, on the 14 August 2018 in the Benoni Magistrate Court by Magistrate Mfikwana.
2. The appeal is with the leave of the trial Court against conviction. The presiding Magistrate became unavailable after the conviction and sentence of the appellant and leave was dealt with by a Magistrate who did not preside on the matter.
3. The appellant was not represented in his trial matter but was only represented in the leave to appeal proceedings.

Conviction

4. The State led the evidence of a single witness, Mr Pat Zakhele Zwane who was the manager of the appellant at B3 Company, which led to his conviction.
5. The appellant pleaded not guilty to a charge levelled against him. What is clear from the record is that at the plea stage, the appellant was not appraised of the fact that he has no obligation to make a statement indicating the basis of his defense, the appellant was only asked how he pleads after the charge was put to him.
6. Furthermore, after the state led evidence of Mr Zwane, the appellant was not appraised of what cross-examination is, he was only told that he must listen to the evidence then ask questions. He was not advised that he had to put his version to the witness. He had not received an explanation on the right to cross-examine and its purpose.
7. The appellant as he was unrepresented, he was led in examination-in-chief by the presiding Magistrate. Instead of leading the appellant in examination-in-chief, was cross-examined to the extent that after his testimony in chief, the prosecutor did not have any cross-examination. The leading of the appellant's evidence-in-chief proceeded in this manner.

"Court: Yes was that ever taken back to B3?"

Mr Zwane: No because Hlope took it inside the house while I was there.

I told him to go in and ask the grandmother for the laptop and then he take...they gave.

Court: If I may ask you. Why was it not taken back to B3 Company?

Mr Zwane: I think there was no agreement reached when my brother and Hlope were talking over the telephone with Mr Zwane. There was no agreement. That is according to what I have been told.

Court: Sir, you need to understand and this must be very clear to you. Now we are talking about a third person. Do you understand that the laptop was given solely and solely to you and that cellphone? It was your responsibility.

Mr Zwane: Yes, sir

Court: so you need to understand that it was you who was supposed to pressurize or communicate with your brother so that they can have the laptop returned to the said company...

Court: Do you understand you were in possession of that laptop without authorization of the company?

Mr Zwane: Based on this email that I sent to Mr...

Court: Do you (intervenes)

Mr Zwane: Yes I do

Court: You understand that?

Mr Zwane: yes I do...

Court: Do you know that you were now in possession of the cellphone, unlawfully so? Wrongfully and unlawfully so?

Mr Zwane: Okay I did not know that..."

8. In *Sithole v S*[1] it was stated that;

"An unrepresented accused has a limited appreciation of the legal process and is greatly disadvantaged in legal proceedings, where he or she has to conduct his or her own defence. Judicial officers must ensure impartiality, objectivity and procedural fairness in respect of the unrepresented accused who lacks familiarity with courtroom technique and legal knowledge in order to ensure a fair trial."

9. The appellant in *casu* was forced to accept liability for the commission of the offence by the presiding Magistrate and was neither impartial nor objective.

10. Mr Zwane's evidence is that the appellant as part of his employment he was provided with a laptop and cellphone. After

his resignation on the 18 May 2017, with an email giving a 24-hour notice, he did not return the company laptop and cellphone. It is not clear from the evidence as to when was such request made but what is on record is that the appellant did indicate that he is outside the province in the email he sent to Mr Mhlongo, Human Resources, an arrangements can be made for someone to come and fetch the keys for his house in order to collect the laptop and the phone.

11. Mr Zwane also confirmed in his testimony that he was in possession of another email in which the appellant promised to return the laptop and the cellphone within a week. The appellant did not return the laptop and the cellphone as promised and it took a period of almost a year for such laptop to be returned back to the company. In the process the cellphone was stolen from him and it was never returned to the company.
12. From the above, it is clear that before the resignation from his employment, the appellant had the authority and permission to be in possession of the company laptop and cellphone. Such authority and/or permission seized when a directive was issued by the company for the return of company property after his resignation from his employment.
13. The question that needs to be determined at this stage is whether the failure by the appellant to return the company property after his resignation from B3 Company, does it amount to intention to permanently deprive the company possession of such property. Having

regards of the facts not in dispute in the case, such question has to be answered in the negative. The appellant after his

resignation moved to another province where he resided there. He wrote an email informing the company of the arrangements that can be made for the return of the property. The Investigating Officer was also engaged to make arrangements with his brother for the return of the company laptop which unfortunately could not yield results.

14. In my considered view, I am not of the view that the appellant behaved in a manner that shows that he was the owner of the company property, taking into account that the cellphone or sim was blocked and the appellant could not use it before it was stolen from him. This conduct does not amount to that of entitlement knowing that the property does not belong to him.
15. In *S v Francis*[2] the court when dealing with the powers of the appeal court to interfere with the trial court's findings, stated;

"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 cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."

16. The state led the evidence of a single witness and in terms of the provision of section 208 of the Criminal Procedure Act[3] such evidence must be accepted with a great measure of caution by the trial court. None was done in the matter and no credible

findings made by the trial court. An accused may be convicted of evidence of a single witness in terms of section 208 but such witness must be a competent witness.

17. In R v Mokoena[4], the court when dealing with the assessment of a single witness, stated:

“Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the section], but in my opinion that section should only be relied on when the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he had been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc.”

18. All the above were not considered despite the fact that the appellant was convicted on the evidence of a single witness. In my considered view, the trial court misdirected itself in convicting and sentencing the appellant and this court ought to interfere with such a decision.

Order

19. In the result, the following order is made;

1. Appeal against conviction is upheld.
2. Both conviction and sentence is set aside.

MJ MOSOPA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION , PRETORIA

I Agree,

BR RANGATA

ACTING JUDGE OF THE HIGH

COURT, GAUTENG DIVISION,

PRETORIA

APPEARANCES

FOR THE APPELLANT: ADVOCATE VAN AS

INSTRUCTED BY: LEGAL-AID SOUTH AFRICA, PRETORIA

FOR THE RESPONDENT: ADVOCATE MASHILE

INSTRUCTED BY: DPP, PRETORIA

Date of Hearing: 31 January 2024

Date of Judgment: 28 February 2024

[1] (604/12) (2013) ZASCA 55 at para 9.

[2] 1991(1) SACR 198 (A) at headnote.

[3] 51 of 1977.

[4] 1932 OPD 79 at 80

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Prepared on 11 October 2026 · Esheria