

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Appeal number: A99/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

NEO DENNIS MOFOKENG

Appellant

and

THE STATE

Respondent

CORAM: MHLAMBI, J et LOUBSER, J

HEARD ON: 14 NOVEMBER 2022

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 17 NOVEMBER 2022

[1] The Appellant in this appeal was found guilty of raping a 3 year old girl in the Frankfort Regional Court on 7 February 2012, and on 12 June 2012 he was sentenced to life imprisonment for the crime he committed. He now appeals against his conviction and the sentence imposed, but this Court finds itself in a position

where the appeal cannot be considered since the record of proceedings in the Court *a quo* is not available.

[2] In his Notice of Appeal, the Appellant contends that the State failed to prove its case beyond a reasonable doubt, and that his version should have been accepted as being reasonably possibly true. He further contends that the Court *a quo* failed to consider the evidence in a balanced manner, which failure resulted in his conviction. It therefore follows that this Court needs to be furnished with the record of proceedings to enable us to consider the grounds of appeal as far as it relates to the conviction, as a starting point at least.

[3] Unfortunately this cannot be done. The only documents we have before us, comprise of the J15 form in the Court *a quo*, a copy of the charge sheet, a copy of the J88 medical report relating to the child complainant, documents concerning the collection of forensic evidence for DNA purposes and a victim impact report by a probation officer. The record of the proceedings itself, and more particularly of the evidence presented before conviction, is absent.

[4] An affidavit by Petunia Esterhuizen, an administrative officer at the Magistrate's Court, Heilbron, was placed at our disposal to explain the absence of the record of proceedings. In the affidavit, she states the following: She is the official responsible to ensure that transcripts are prepared and records are completed before an appeal is enrolled. In this case, the full transcripts could not be prepared, because the recordings could not be traced. They were probably destroyed in a fire at the Heilbron Court on 16 February 2015. The presiding officer in the Court *a quo* has since retired, and he does not have his trial notes anymore. The legal representative of the Appellant at the trial and the prosecution were also unable to assist with any trial notes. In the premises, Ms Esterhuizen advised that it is not possible to reconstruct the trial proceedings.

[5] It appears from the authorities that in similar circumstances, where the records of proceedings were not available and could not be reconstructed, the appeals by those affected were upheld and the convictions and sentences set aside.

The cases of **S v Van Wyngaardt**¹, **S v Collier**², **S v Marais**³, and **S v Joubert**⁴, amongst others, are relevant in this respect.

[6] The position is therefore that the same route has to be followed in the instant appeal. Mr. van Rensburg, who appeared for the State before us, agreed that this is the only available option in the circumstances.

[7] However, it does not mean that the Appellant will simply be entitled to an acquittal. Section 324 (c) of the Criminal Procedure Act⁵ provides that whenever a conviction and sentence are set aside by the court of appeal on the ground that there has been any technical irregularity or defect in the procedure, proceedings in respect of the same offence to which the conviction and sentence referred, may again be instituted on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted, provided that no judge or assessor before whom the original trial took place, shall take part in such proceedings.

[8] The absence of any record of proceedings qualifies as a technical irregularity or defect in the procedure. The provisions of Section 324 (c) are therefore applicable⁶.

[9] In the premises, the following orders are made:

1. The appeal is upheld.
2. The conviction and sentence of the Appellant are set aside.
3. The matter is referred to the Director of Public Prosecutions, Free State, for consideration in terms of Section 324(c) of the Criminal Procedure Act 51 of 1977.

¹ 1965 (2) SA 319 (O)

² 1976 (2) SA 378 (C) at 379 C-D

³ 1966 (2) SA 514 (T) at 517 A-B

⁴ 1991 (1) SA 119 (AD)

⁵ Act 51 of 1977

⁶ S v Zondi 2003 (2) SACR 227 (W)

P. J. LOUBSER, J

I concur:

J. J. MHLAMBI, J

For the Appellant:

Ms. L. Smit

Instructed by:

Justice Centre (Legal Aid)

Bloemfontein

For the Respondent:

Adv. E. van Rensburg

Instructed by:

The Director of Public Prosecutions, Free State

Bloemfontein