



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

2021.05.13

DATE

J. Mabuse
SIGNATURE

CASE NUMBER: A264/17

DATE: 13 May 2021

ELLIAS HLABANE MOYENG

Appellant

V

THE STATE

Respondent

JUDGMENT

MABUSE J (Raikane AJ concurring)

[1] This matter came before us as an appeal against both conviction and sentence. The Appellant, Mr Elias Hlabane Moyeng, and not Moeng, approached this court without having been granted any leave to appeal either on petition by Judges of this Court or by the presiding officer in the Court *a quo*.

[2] According to the affidavit of Ms Elsje Mari Theron ("Ms Theron"), the Regional Court Magistrate stationed at Thulamahasha Magistrate's Offices, the Appellant was convicted and

sentenced by the Regional Court Magistrate, Mr Mathebula, since deceased, on 8 November 2008. The Appellant had been found guilty of six counts of rape involving under aged children. Upon conviction he was sentenced to life imprisonment. It is not known whether it was life imprisonment in respect of each such conviction or in respect of the whole six convictions. If he wanted to appeal against both convictions and sentences, the Appellant had fourteen (14) days from the date of the sentences to lodge his leave to appeal. The Appellant did not do so, hence his application for condonation and application for leave to appeal on 24 October 2016, approximately eight years after his convictions and sentences by the said Regional Court Magistrate.

[3] In his founding affidavit, dated 6 March 2016, he claims that he noted his application for leave to appeal within the prescribed fourteen (14) days. He claims furthermore that the said application for leave to appeal was not entertained by the said Regional Court Magistrate until he passed away. The Appellant has not furnished the date on which he lodged his application for leave to appeal. This he could have verified from his application for leave to appeal. Secondly, he has not attached a copy of his application for leave to appeal which he lodged within fourteen days. He does not even explain what happened to his own copy of the application for leave to appeal. In the circumstances, it is difficult for this Appeal Court to accept that the Appellant's version that he lodged his appeal within fourteen days.

[4] Having been arraigned on very serious offences, one would expect that he was represented at that trial. In the circumstances he could have referred to his legal representative in the court *a quo*. He has failed to do likewise. His failure to refer to his legal representative leads one to conclude otherwise about whether or not he had lodged his application for leave to appeal on time. Furthermore, no such copy was attached to the affidavit dated 6 March 2016.

[5] For inexplicable reasons, the late Mr Mathebula did not deal with the Appellant's application for leave to appeal. Certainly he must have been alive at the time the Appellant lodged his application for leave to appeal if the Appellant's word is anything to go by. There is no indication whatsoever of his date of death, nor is there, in particular, any affidavit that he died within fourteen days of sentencing of the Appellant.

[6] What is of paramount importance though, is that the Appellant has not been granted any leave to approach this Court on appeal. This is unusual. Even more importantly is the fact that the record of the trial court, including the Regional Court Magistrate's particulars, are not available. It is not available because according to Ms Theron:

"The Clerk of the Court, Ms NP Khoza informed me that the Court Manager, Mr TP Tjiane destroyed court books and charge sheets a few years ago.

It was reported to Ms T du Preez, the Head of the Office, who in turn reported it to the Regional Court in Mbombela." It is not known what the Regional Court in Mbombela did with the matter.

[7] Certainly Mr TP Tjiane had no right to destroy court records. According to Mr TA du Plessis, the Senior Magistrate at Mahala:

"[8] Several allegations have been made by different staff members about the "destruction" of court records and court books.

[9] If these allegations are to be true it will result in a serious miscarriage of justice and the possible release of very dangerous criminals. As a result, the administration of justice will be defeated."

It would appear that there is more in the destruction of the court records and court books than meets the eye. There seems to be reasonable grounds to suspect foul play. It would appear that good grounds existed for the thorough investigations of the destructions of the court records and court books. Ms du Plessis, states that according to Amendment Notice 21 of 2016, court books must be archived (and not destroyed) after ten years. It is not known when Mr Tjiane destroyed the court records and court books. If it was after 2016,

whether he knew about the Amended Notice 21 of 2016 or whether he had any authority to destroy the Regional Court Books as a Court Manager, it would appear that he exceeded his mandate.

[8] Furthermore, according to Ms du Preez:

“All life sentences imposed by Regional Court must be achieved (sic) (should be archived) after twenty years and in other matter the cases may only be destroyed after the expiration of imposed prison term.”

Then what precisely informed the Court Manager to destroy the court records and court books? We are now informed that his conduct of destroying court records and court books has led to a flurry of appeals. In a letter dated 2 February 2016, Ms du Plessis wrote to the Area Court Manager, Mr Thabethe and stated, *inter alia*, that:

“It has come to my attention that there are several appeal matters from the Regional Court where the charge sheet cannot be traced.” She listed five such matters in the said letter.

[9] In the meantime, the said Benjamin Moifo Tjiane, the Court Manager, has made an affidavit dated 24 April 2017. In the said affidavit, he states that:

“A diligent search was made in both the record room and store room but all in vain.”

He knew that he had destroyed the court records or court books but notwithstanding the said knowledge he made *“a diligent search”*. He has failed to admit in his evidence that the court records and books were destroyed and are not to be found because he had destroyed them. He pretended as if ordinarily the records had disappeared. His affidavit is, for administrative purposes, not enough. His conduct, in our view, ought to be investigated. We found it strange that the authorities in Mpumalanga simply adopted a lackadaisical attitude towards the conduct of the Court Manager and did nothing.

[10] Now here we are. We cannot properly deal with this matter simply because the court records and court books have been destroyed. In the premises, we will not be able to establish whether the convictions and sentences were proper.

[11] In her heads of argument, Ms L Augustyn, counsel for the Appellant, pointed out that the Court Manager (the one who destroyed the court records and books), the prosecutor, the clerk of the criminal court and a senior magistrate made sworn statements to the effect that despite diligent search, the records could not be found or reconstructed and that the presiding officer has since passed away.

[12] In terms of rule 65 of the Magistrates Court Rules, *“the clerk of the court shall keep a book to be styled “the criminal record book” in which he or she shall daily enter particulars of every criminal case coming before court on that day.”* Although the duty to do so falls on the clerk of the court, in practice it is the interpreter who makes those entries. See rule 66 of the Magistrates Court Rules which deals with the records of criminal cases. It provides that:

“The plea and explanation or statement, if any, of the deceased, the evidence orally given, any exception or objection taken in the cause of the proceedings, the rulings and judgments of the Court and any other portion of the proceedings may be noted in shorthand hereinafter (also in this rule referred to as “shorthand notes”) or either verbatim or in narrative form or recorded by mechanical means.”

This section emphasises the duty of the Court to keep and preserve criminal court records.

[13] The Magistrate makes notes of the proceedings in his bench book. It is this bench book that the Court Manager destroyed. Strange enough, they were unable to retrieve a transcript from the transcribers. Hence the absence of the record.

[14] We were referred by Ms Augustyn to the judgment of **Schoonbee and Another 2017 (2) SACR 1 CC, p 13** where, at paragraph [38] the Court had the following to say:

“A loss of trial court records is a wide-spread problem. It raises serious concerns about endemic violations of the right to appeal. Reconstruction should not be the norm in providing Appellants with their trial records. But when reconstruction is necessary, the obligation lies not only on the Appellant, but indeed primarily on the Court to ensure that this

process complies with the right to a fair trial. It is an obligation that must be undertaken scrupulously and meticulously in the interest of the criminal accused as well as their victims.”

It is submitted by Ms Augustyn that the State is a keeper of records and is in control of the transcript and reconstruction of records. Accordingly, the State's failure to produce a record of the proceedings prejudices an accused person in that it infringes upon his rights to a fair trial as envisaged by the provisions of s 35(3)(o) of the Constitution. The said section provides as follows:

“Every accused person has a right to a fair trial, which includes the right (o) of appeal to, review by, a higher Court.”

[15] She also referred us to the judgment of **S v Gora and Another 2010 (1) SACR 159 (WCC)** para [8] – [11] where it was held by Kruger AJ that:

[8] In terms of s 76(3)(a) of the Criminal Procedure Act 51 of 1977 the Trial Court “shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept

[9] Unfortunately, the record of the proceedings went missing, even for the applications for leave to appeal were heard.

[10] In terms of s 35(3)(o) of the Constitution of the Republic of South Africa 1996, the right of an accused person to a fair trial includes the right of appeal to a higher Court.”

[16] According to Ms Augustyn, where the record is inadequate or is totally unavailable, this situation will normally lead to the whole conviction and sentence being set aside. She submitted that in the absence of the whole record, and in the face of impossibility to reconstruct the record, which is akin to the unavailability of the record in any case, the Appellant's conviction and sentence should be set aside. She proffered the following reasons for her submission:

The record of the proceedings in the trial court is of cardinal importance. That record forms the whole basis of the rehearing by the court of appeal. Where the record is inadequate or totally absent, as in this matter, for a proper consideration of appeal, it will normally lead to

the conviction being set aside. It is further submitted on behalf of the Appellant that postponing this matter for a further attempt to reconstruct the record, would cause an intolerable injustice to the Appellant.

[17] Her submissions enjoy the support of Adv GJC Maritz, the Respondent's counsel. In his heads of argument, Mr Maritz observed, quite correctly so in our view, that from the affidavits provided by the Clerk of the Court, it is clear that there are no prospects of finding or reconstructing the missing records. In conclusion, he supported the submission made by Ms Augustyn that the entire trial proceedings should, for the foregoing reasons, be set aside. In this regard, he relies on **S v Joubert, 1991 (1) SA 119 A at 126** and **S v Marais 1966 (2) SA 541 T at 516 G-H** where the Court had the following to say:

"The Appellant has been seriously frustrated and prejudiced owing to a fault on the part of the State servants. She is entitled to an appeal as of right. She is entitled to receive a copy certified as correct. This cannot be achieved. She has been frustrated in a basic right. She has been deprived of this through no fault of her own. In all these circumstances, the only thing to do is to exercise the powers granted in s 98 of Act 32 of 1944, as amended, and to set the whole of the proceedings aside."

The judgment proceeded at 517A in the following manner:

"If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice."

[18] In conclusion, Mr Maritz referred to s 324 of the Criminal Procedure Act 51 of 1977 ("the CPA") and stated that the institution of the proceedings de novo is possible because a valid

consideration of the merits could not take place. In my view, s 324 of the CPA does not apply in the circumstances of this case. The said section provides as follows:

“Whenever a conviction and sentence are set aside by the Court of Appeal on the grounds –

- (a) that the court which convicted the accused was not competent to do so; or*
- (b) that the indictment on which the accused was convicted was invalid or defective in any respect; or*
- (c) that there has been any other technical irregularity or defect in the procedure, proceedings in the respect of the same offence to which the conviction and sentence referred, may again be instituted either 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 the proceedings.”*

I have already pointed out that the provisions of this section do not apply to the present circumstances. Furthermore, if the proceedings were to start *de novo*, the accused may successfully plead *autrefois convict*.

[19] Finally, no further order for reconstruction of the record should be made, because, in our view, any such attempt is unlikely to succeed. This was a similar case in the matter of *S v Marais supra*, where a lost record with no prospects of being reconstructed was the subject. In the result we make the following order:

The convictions of the Appellant in the Regional Court, together with the sentences imposed on him, are hereby set aside.



PM MABUSE

JUDGE OF THE HIGH COURT



TV RAIKANE

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant:

Adv L Augustyn

Instructed by:

Legal-Aid South Africa

Counsel for the Respondent:

Adv GJC Maritz

Instructed by:

Director of Public Prosecutions

Date heard:

22 April 2021

Date of judgment:

13 May 2021