

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Provincial Division)

Saakno: / Case number: **CA & R 119/2014**
Datum verhoor: / Date heard: **23 / 02 / 2015**
Datum beskikbaar: / Date available: **06 / 03 / 2015**

In the matter between:

DAVID KATZ
JOSEPH MOGAPIE

First Appellant
Second Appellant

and

THE STATE

Respondent

Coram: Kgomo, JP et Lacock, J

JUDGMENT ON APPEAL

LACOCK, J

[1] The appellants were convicted in the regional court, Warrenton, on charges of robbery with aggravating circumstances and sentenced to 12 years imprisonment each. By leave of the Court *a quo* the first appellant appeals against the sentence imposed only, whilst the second appellant appeals against his conviction and the sentence imposed.

[2] Before dealing with the merits of the appeal, it is necessary to deal with a disturbing feature pertaining to this matter. The appellants were convicted and sentenced as far back as 26 May 2011. The reason for the delay in the prosecution of the appeal can be ascribed to the inability to reconstruct the record of the proceedings in the court *a quo*. It would appear that neither a mechanical recording of the said proceedings nor the judgments on conviction and sentence of the presiding officer could be traced. Counsel for the second appellant advised as follows in regard hereto:

“7.

Before the enrolment of the Appeal, attempts to have further reconstruction of the record done were unsuccessful. The reasons for the aforementioned are due to the fact that the presiding magistrate is no longer employed as such within in the Department of Justice; and the prosecutor in the court a quo is deceased. It is further submitted that it is improbable that the 2nd Appellant would meaningfully contribute to a reconstruction almost 4 years after the trial; and undesirable that he singularly attempt to reconstruct the record.”

These submissions were confirmed by counsel for the first appellant and the State.

2.1 The unsatisfactory feature pertaining to the aforesaid information submitted is that none thereof had been explained under oath by either the clerk of the court, or a person in the employ of the relevant recording entity or any other person who could have confirmed same.

2.2 Since all counsel assured us that the record cannot be reconstructed and since the hearing of the appeal had already been delayed for a long time, we have decided to dispose of the appeal and not to prejudice the appellants any further by insisting on the compliance with proper procedure. The condoning of the said non-compliance with the proper procedures should however not be regarded as a precedent, but rather as an exception to the rule.

- [3] The only “record” of the proceedings in the court *a quo* available to us is the handwritten notes of the magistrate. Alert to the following *dictum* in **S v CHABEDI**, 2005 (1) SACR 415 (SCA) at paragraphs 5 to 6,

“On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recording of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see, eg, S v Collier 1976 (2) SA 378 (C) at 379A – D and S v S 1995 (2) SACR 420 (T) at 423b – f). The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.”

I am satisfied that the aforesaid notes of the magistrate are sufficient for the consideration of the appeal. The sequence of the events narrated by the State witnesses as

well as the accused as recorded by the magistrate is indicative of a sequential unfolding of events. It is difficult to imagine what relevant evidence had not been noted by the magistrate. The cross-examination of the witnesses had been noted by way of question and reply. It had not been suggested that the magistrate failed to note all relevant evidence, and no such discrepancy could be detected from the available notes. There is furthermore no suggestion or indication of selective noting of the evidence by the magistrate.

[4] The noted evidence portrays the following:

4.1 Past midnight on 24 December 2009, i.e. during the early hours of 25 December 2009, the complainant, Mr. Dawood Jaffer, was overpowered by two men whilst urinating outside his house. A blanket was thrown over his head preventing him from seeing the faces of his assailants. He was dragged into his bedroom, assaulted and shocked by way of electric cabling. Thereafter his legs and arms were tied and he was left lying on a bed. The two assailants ransacked his house and he was robbed of *inter alia* R600.00 in cash.

4.2 Shortly after the robbery Mr. Gregory Mitchell arrived at the house of the complainant. He found the complainant tied as described above on top of a bed.

He apprehended the first appellant who was still in the house upon his arrival and tied him up. The police were called and the first appellant was arrested. The second appellant ran away and was only arrested a few days after the incident.

[5] The second appellant denied that he participated in the robbery and pleaded an alibi. What the magistrate therefore had to determine was whether the State had proved beyond reasonable doubt that the second robber was indeed the second appellant. To my mind this had been properly proved.

5.1 The first appellant testified that he and the second appellant were the two perpetrators who attacked, assaulted and robbed the complainant.

5.2 This evidence was corroborated by both the complainant and the witness Mitchell. The complainant testified that upon the arrival of Mitchell at his house the one perpetrator ran away and the other (who turned out to be the first appellant), called out the name "Kadie". It is common cause that the second appellant is known by the name Kadie. Mitchell testified that shortly after his arrival at the house of the complainant, the second appellant returned to the house to switch off the kitchen light. He clearly saw the face of the second

appellant and identified him in court. He further testified that the first appellant had told him that his co-perpetrator was Kadie.

5.3 Adv. Van Tonder on behalf of the second appellant, submitted that it was improbable that the second appellant would return to the house of the complainant to switch off the lights, and that this evidence of Mitchell should be dismissed. To my mind it cannot be said that this evidence is improbable. If one has regard to the evidence of the complainant i.e. that the first appellant called the second appellant when he ran away, and that the first appellant was trapped in the house, I do not find it improbable that the second appellant would return to the house. He could either have returned to assist the first appellant to escape, or to prevent his presence in the house being discovered.

5.4 In cross-examination the second appellant admitted that he was in the company of the first appellant on 24 December 2009.

[6] For these reasons the appeal against the conviction cannot succeed.

[7] It is trite that a court of appeal will not interfere with the discretion exercised by a sentencing Court on sentence

unless that sentence was vitiated by irregularities or misdirections or is shockingly inappropriate.

7.1 Once again we are faced with the absence of a recorded or written version of the magistrate's judgment on sentence. However, the record, or rather the notes of the magistrate, reveals that the personal circumstances of the appellants had been properly presented to the Court. The wife of the second appellant even testified on his behalf for purposes of sentence.

7.2 Since the prescribed minimum sentence for this kind of offence is 15 years (section 51(2) of Act 105 of 1997 read with Part II of Schedule 2 thereof), the sentencing Court clearly found that substantial and compelling circumstances were present, justifying a deviation from the prescribed minimum sentence.

7.3 I am unable to find that the magistrate misdirected itself or committed an irregularity in considering an appropriate sentence. The sentences imposed are certainly not shockingly inappropriate. The offences committed are serious ones and deserve severe punishment.

7.4 None of the appeals against the sentences imposed can therefore succeed.

[8] WHEREFORE THE FOLLOWING ORDER IS MADE:

BOTH APPEALS ARE DISMISSED.

F.D. KGOMO
JUDGE-PRESIDENT

H.J. LACOCK
JUDGE

<u>For the First Appellant:</u>	Adv. I.J. Nel (oio Van Schalkwyk & Van Tonder Att.
<u>For the Second Appellant:</u>	Adv. V.Z. Nel (oio The Legal Aid Board)
<u>For the Respondent:</u>	Adv. J. Mabaso oio the Director of Public Prosecutions