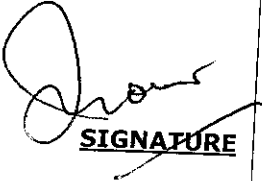


A 158/13

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ^{YES} YES / NO .	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
4/3/13 DATE	 SIGNATURE

7/3/2013

DATE: 4 March 2013

Magistrates court, Meyerton

Case no: B1310/01

High court ref no: 130/2013

THE STATE v THABO MASIYA & 2 OTHERS

REVIEW JUDGMENT

J W LOUW, J

- [1] This matter has been referred to this court for special review in terms of s. 304A of Act 51 of 1977. The accused, Johannes Tsotetsi, was the second of three accused who appeared in the Meyerton magistrates' court on 27 August 2001. The three accused were charged with the unlawful possession of stolen property in contravention of s. 36 of Act 62 of 1955. The matter was not finalised for the reasons mentioned below.
- [2] What apparently transpired is that at some stage prior to the finalisation of the case, Tsotetsi, and apparently also the other two accused, failed to attend court and warrants for their arrest was issued on 29 November 2001. The warrant in respect of Tsotetsi was executed eleven years later in November 2012, resulting in him being brought before court on 16 November 2012. The investigating officer has advised that the warrants for the other two accused have not been executed. The original charge sheet could not be traced and no indication of what transpired in the case prior to the warrants of arrest being issued could be found. The erstwhile prosecutor is no longer available and the magistrate has no recollection of the matter. On 5 December 2012, the prosecutor placed on record that it was indicated on the case docket that the accused were convicted on 12 October 2001. This inscription has since been deleted, but it is not clear by whom. As has been

pointed out in the helpful comments provided by the office of the Director of Public Prosecutions, it is very likely that the accused were in fact convicted on 12 October 2001 since the postponements on 16 October 2001 and 23 October 2001, which are indicated on the docket, were for "korrektiewe verslag", which was no doubt required for sentence purposes.

- [3] In the absence of any record of the 2001 proceedings in the case, no court will be in a position to sentence the accused and so bring the proceedings to finality. Having regard to the considerable period of time which has elapsed, it is extremely unlikely that any attempt to reconstruct the record will be met with success.
- [4] The magistrate who presided over the matter at the time has requested that the conviction in respect of Tsotetsi be set aside so that the case against him can resume *de novo*. Sec. 304A empowers a judge in chambers to review proceedings before a magistrate after conviction but before sentence if the magistrate is of the opinion that the proceedings which resulted in the conviction were not in accordance with justice, or doubts whether they were. Although there appears to have been a conviction in the present matter, there is nothing to suggest that the proceedings were not in accordance with justice. Sec. 304A is therefore not applicable.

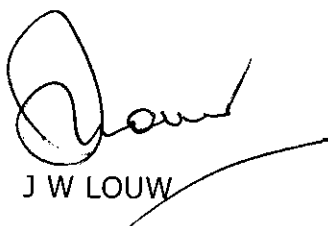
- [5] Our courts have in the past accepted that they are able, in appropriate circumstances, to intervene in the proceedings of lower courts prior to a conviction. See: *S v Mathemba*, 2002 (1) SACR 407 (E) and the cases therein referred to. The test is whether grave injustice might ensue if the court does not intervene.
- [6] If courts are able to intervene in proceedings of lower courts prior to conviction, there can, in my view, be no reason in principle why they should not be able to intervene after a conviction but before sentence, provided, of course, that the court is satisfied that a serious injustice will result if it does not intervene. Sec. 35(3) of our Constitution, Act 108 of 1996, provides the necessary authority for the making of such an order. In terms thereof, every accused person has a right to a fair trial. A trial which stops at conviction without the trial being concluded, cannot, in my view, be said to be fair and will therefore be unconstitutional. And it would be even more unfair to charge a person *de novo* where a trial cannot be finalised after conviction because the court records have, through no fault of the accused, gone astray and cannot be reconstructed. To do that would, in any event, offend against the provisions of s. 35(3)(m) of the Constitution which provide that the right to a fair trial includes the right not to be tried for an offence in respect of an

act or omission for which that person has previously been either acquitted or convicted.

[7] In my view, this is a case where a serious injustice will result if the conviction of Tsotetsi and the other two accused were not set aside.

In the result, I make the following order:

1. The convictions of Thabo Masiya, Johannes Tsotetsi and Evelyne Motaung in Case no. B1310/01 in the magistrates' court of Meyerton are set aside.
2. Johannes Tsotetsi is to be released from custody immediately.
3. The warrants of arrest in respect of Thabo Masiya and Evelyne Motaung are cancelled.



J W LOUW

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree



W.R.C. PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

IN THE ORDINARY COURSE OF EVENTS