THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case no: 535/2006

In the matter between

G CARTER **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: **MTHIYANE, HEHER and MLAMBO JJA**

Heard: **24 NOVEMBER 2006**

Delivered: **1 DECEMBER 2006**

Summary: Criminal procedure – appeal – condonation – failure to file record of proceedings – responsibility of registrar of High Court in terms of s 316(7) of CPA – no lapsing of appeal – SCA rule 8 not applicable to criminal appeals.
Criminal procedure – appeal – plea of guilty at trial – failure of trial judge to comply with s 112(2) of CPA – effect.
Criminal procedure-appeal – s 322(1) of CPA – failure of justice – meaning in context of non-compliance with s 112(2).

Neutral citation: This judgment may be cited as *Carter v S* [2006] SCA 168 (RSA)

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JUDGMENT

HEHER JA

HEHER JA:

[1] On 20 February 1996 the appellant, then age 23, appeared before M J Strydom J and assessors charged with three counts of robbery with aggravating circumstances and two counts of murder. He pleaded guilty to one count of robbery and both counts of murder. His pleas were supplemented by a written statement prepared by his counsel which he signed. He was convicted in accordance with his pleas. On 5 March 1996 an effective sentence of 18 years was imposed.

[2] The appellant applied for leave to appeal against his sentence. On 27 March 1996 the application was refused. He petitioned this Court for leave to appeal out of time. His application for condonation was dismissed on 12 February 1997.

[3] On 7 May 1997 the appellant sought leave to appeal against his convictions and condonation for the late application for such leave. On 5 April 2000 Stafford DJP granted him condonation and leave to appeal to this Court.

The application for condonation.

[4] The appellant had been released on bail sometime prior to his first appearance in the High Court on 31 October 1994. When he was granted leave to appeal to this Court his bail of R5000 was extended on appropriate conditions: he was required to report every Thursday to Florida police station, he was to pursue his appeal and should he not do so he was required forthwith to present himself to commence his sentence. As appears from the respondent's affidavit in the condonation application the appellant faithfully reported until April 2004 when the investigating officer purported to release him, unilaterally, from the obligation 'aangesien hy niks meer van sy saak hoor nie'. The appellant moved to Cape Town. He did not pursue his appeal nor did he hand himself over to the authorities. Only in late 2006 when the seemingly reluctant hand of the law began to close on him were steps taken to have

the appeal heard by this Court in circumstances which are described below.

[5] The record of proceedings in the High Court was lodged with the Registrar of this Court on 29 September 2006 and was accompanied by an application in which the appellant asked for condonation for his late application for reinstatement of the appeal.

[6] Counsel for the appellant and the respondent approached the matter as if the appeal had lapsed by reason of the appellant's failure to lodge the record timeously. Both assumed that SCA rule 8 was applicable. The rule provides

'(1) An appellant shall within three months of the lodging of the notice of appeal lodge with the registrar six copies of the record of the proceedings in the court *a quo* and deliver to each respondent such number of copies as may be considered necessary or as may reasonably be requested by the respondent.

(2) The time limit for lodging the record may be extended-

(a) by written agreement of all parties to the appeal; or

(b) by the registrar upon written request with notice to all of the parties to the appeal:

Provided that the registrar shall not be entitled to extend the period for more than two months.

(3) If the appellant fails to lodge the record within the prescribed period or within the extended period, the appeal shall lapse.'

(Ss (4) – (11) do not require to be quoted in the present context.)

[7] Rule 8 is included by Kriegler and Kruger in Hiemstra, *Suid-Afrikaanse Strafproses*, 6ed at 877 as one of the rules of this Court which is applicable to criminal appeals. But in the context of rule 8(1) 'the lodging of the notice of appeal' refers to the opening words of rule 7, *viz*

'(1) An appellant in a civil case shall lodge a notice of appeal with the registrar . . .'

There is no provision in the rules or elsewhere for the lodging of a notice of appeal in criminal cases. The closest one comes seems to be Uniform Rule 52(4) which provides that

'If leave to appeal in a criminal case is granted by any division of the High Court the registrar of that division shall without delay notify the registrar of the Supreme Court of Appeal of that fact.'

[8] The statutory provision which deals with the preparation and lodging of the record of proceedings in a criminal trial in the event of an appeal to this Court is s 316 of the Criminal Procedure Act 51 of 1977 (hereinafter 'the CPA') which provides

'(7)(a) If an application under subsection (1) for leave to appeal is granted and the appeal is not under section 315(3) to be heard by the full court of the High Court from which the appeal is made, the registrar of the court granting such application shall cause notice to be given accordingly to the registrar of the Supreme Court of Appeal without delay, and shall cause to be transmitted to the said registrar a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the judges of the Supreme Court of Appeal may nevertheless call for production of the whole record.'

The notification of the grant of leave with provision for inclusion of a statement of the grounds of appeal in the record probably renders a separate notice of appeal superfluous. More important, s 316 contains no equivalent of SCA Rule 8(3) which brings about the lapse of an appeal on failure to lodge the record within the prescribed period. The reason for this is obviously that the duty is imposed on the registrar of the High Court and not the appellant. This is also understandable given that a high proportion of appellants in criminal matters come to this Court on legal aid.

[9] Consequently, if there was a failure to comply with s 316(7)(a) in this case, which as will be seen, was not resolved, then the primary responsibility must be sought in the office of the registrar of the High Court.

In these circumstances the appeal did not lapse and the application for reinstatement and condonation relating to it was unnecessary.

[10] But that is not the end of the matter, unfortunately. Appellants in criminal cases, whether the State or an accused, are under a duty to pursue their appeals with reasonable expedition. The proper administration of justice demands that they do so. Undue delay may in appropriate circumstances even amount to the abandonment of an appeal. What happened in this case falls not far short of that situation. It follows that the attorneys representing appellants act to the potential detriment of both their clients and the public interest if they choose to ignore the expeditious prosecution of the appeal because they do not regard their clients as responsible for the delay.

[11] As I have noted, leave to appeal was granted in April 2000. In the condonation papers there is then a long and unexplained silence for 15 months. On 13 August 2001 Mr Spangenberg of Schoeman Maree, the Bloemfontein correspondent of the appellant's Krugersdorp attorneys wrote to the latter in the following terms:

'APPèL: GAVIN CARTER/DIE STAAT

Ons verwys na bostaande en bevestig dat ons deur die Griffier meegedeel is dat die oorkonde ingedien is. Die Griffier het ons verder meegedeel dat kondonasie verleen is vir die laat indien van die oorkonde. Benewens die korrespondensie wat ons vroeër met u hieroor gevoer het, dra ons geen kennis van die aangeleentheid nie. Ons verneem gevolglik graag of u vir ons enige opdragte hierin het en of ons die Griffier alternatiewelik in kennis kan stel dat ons nie hierin as prokureurs optree nie.

Ons verneem graag dringend van u.'

[12] On 23 August 2001 Mr Lubbe of Swart Redelinghuys Nel & Vennote, the Krugersdorp attorneys, notified Mr Spangenberg that the Registrar of this Court had also notified him that the record was ready for collection. He asked Spangenberg to collect and forward it. On 27 August the request was complied with and Lubbe apparently received the record.

[13] On 3 Decmber 2001 Lubbe wrote requesting his correspondent to confirm that a date of hearing had not yet been allocated. That was clearly a timeous and

appropriate step to take in the circumstances. But, the appellant's affidavit for condonation explains,

'Hierna het 'n lang tyderk verloop sonder enige klaarblyklike vordering. My regsverteenwoordiger deel mee dat sy kantore gewag het op terugvoering van die korrespondent. Toe daar telefonies op 26 November 2004 by die korrespondent navraag gedoen is rakende vordering, is meegedeel dat laasgenoemde reeds hul lêer gesluit het.'

This delay of almost two years in following up the matter with a view to bringing their client's appeal to finality is unacceptable. Redelinghuys & Vennote had apparently been in possession of the record since September 2001, they were entitled to expect the allocation of a date for the appeal, and a simple enquiry at the office of the Registrar of this Court would have revealed the reason for the non-allocation, whatever that may have been.

[14] I do not propose to investigate what took place thereafter. A state of confusion seems to have prevailed which extended beyond the appellant's attorneys to the Director of Public Prosecutions in Pretoria and the registrars of this Court and the High Court. On 19 April 2006 the Registrar of this Court informed the Director that

'Up to date of this letter no application for leave to appeal or record on appeal and or condonation was filed or registered . . . by this office.'

On 14 July 2006 the Registrar of the High Court at Pretoria informed Mr Pienaar (and Mynhardt J) that his office had failed to notify the Registrar of the SCA that Stafford DJP had granted the appellant leave to appeal. Neither of these averments can however, be wholly correct, since the Director thereupon produced the record which the Registrar of the High Court had caused to be prepared in July 2001 and which was, apparently, the same record as that of which Mr Lubbe had received a copy from Bloemfontein in August of that year.

[15] Finally, during the second half of 2006, the appellant's attorneys, stirred into action by rumblings from the office of the Director, caused a further record to be prepared and lodged in Bloemfontein. A date for the hearing of this appeal was then

allocated.

[16] One may fairly ask what the office of the Director of Public Prosecutions was doing in all this time. It too owed duties to the appellant and the public to pursue the appeal with reasonable expedition. Regrettably the answer is 'Very little'. As Mr Pienaar, who was one of the counsel for the State involved in the original prosecution, has explained in his affidavit, he was absent from his permanent office during the period between March 2000 and October 2004 while preparing and prosecuting an extended case. When he returned he drew the file in the Carter trial (as a matter of interest, not duty, since it was no longer his responsibility) to find out what had happened. To his surprise he found that no progress had been made in several years. It was largely due to his efforts that the appeal has eventually reached fruition. There is no doubt that the office of the Director in Pretoria by its inattention to the matter served to compound the neglect of the appellant's attorneys. Both sides deserve censure. Whether the appellant personally was apprised of what was happening (or why nothing was happening) and approved is not clear. Grounds for castigating him are absent. It plainly suited him if the case appeared to go away – he should have been told by his attorneys that it would not.

The appeal against the convictions.

[17] In *R v Mamba* 1957 (2) SA 420 (A) at 422A Schreiner JA emphasised that 'it will only be in exceptional cases that one who has pleaded guilty and been convicted in accordance with his plea will be granted relief on appeal'. The thrust of counsel's argument is that the plea statement did not deal in such detail with the offences to which the appellant had pleaded guilty as to enable Strydom J to be satisfied that the appellant was guilty of those offences. Such a level of satisfaction is necessary before a court may convict an accused person on a plea of guilty and, *inter alia*, sentence him to imprisonment without the option of a fine: s 112(1)(b) read with s 112(2) of

the CPA.

[18] The three charges to which the appellant pleaded guilty were counts 1, 3 and 4. They were framed in the indictment as follows:

'**AANKLAG 1**

DEURDAT die beskuldigdes op of omtrent 21 April 1992 en te of naby KLERKSDORP in die distrik KLERKSDORP wederregtelik en opsetlik vir BOBO EBENEZER TLOKOTSI TSHOLO aangerand het deur hom met vuurwapens te dreig en toe en daar met geweld uit sy besit geld en drank waarvan die hoeveelheid onbekend aan die Staat is, sy eiendom of in sy regmatige besit, geneem het en hom aldus daarvan beroof het. Verswarende omstandighede aanwesig synde die gebruik van vuurwapens.

AANKLAG 3

DEURDAT die beskuldigdes op of omtrent 21 April 1992 en te of naby KLERKSDORP in die distrik KLERKSDORP wederregtelik en opsetlik vir BOBO EBENEZER TLOKOTSI TSHOLO 'n manlike persoon, gedood het.

AANKLAG 4

DEURDAT die beskuldigdes op of omtrent 21 April 1992 en te KLERKSDORP in die distrik KLERKSDORP wederregtelik en opsetlik vir JOHN NTAMGINI 'n manlike persoon gedood het.'

[19] Count 2, to which the appellant pleaded not guilty and of which he was acquitted without the leading of evidence, is relied on by the defence in support of the submission that the plea statement was so confusing as in fact to relate to that count and not to count 1. Count 2 read as follows:

'AANKLAG 2

DEURDAT die beskuldigdes op of omtrent 21 April 1992 en te of naby KLERKSDORP in die distrik KLERKSDORP wederregtelik en opsetlik vir BOBO EBENEZER TLOKOTSI TSHOLO en MTHETHELI MDINGI aangerand het deur hulle met vuurwapens te dreig en toe en daar met geweld uit hulle besit ongeveer R600-00 kontant en 5 x 750 ml bottles brandewyn, hulle eiendom of in hulle regmatige besit, geneem en hulle aldus daarvan beroof het. Verswarende omstandighede aanwesig synde die gebruik van vuurwapens.'

[20] When the appellant pleaded guilty the trial of his co-accused Blom and Mthembu who had denied all the charges was separated. His counsel informed the

court that he had prepared a written explanation of the pleas which he read out and handed in. The statement reads as follows:

‘2. Die begrippe wederregtelikheid, toerekeningsvatbaarheid, wederregtelikheidsbewussyn en opset is volledig deur my verdedigingsadvokaat aan my verduidelik en ek is vertroud hiermee.

3. Ek pleit vrywilliglik skuldig soos hier onder uiteengesit sonder dat ek op enige wyse beïnvloed is of dat enige beloftes aan my voorgehou is.

Ad Aanklag 1: Ek pleit skuldig op hierdie aanklag deurdat ek op of omtrent 21 April 1992 en te of naby Klerksdorp tesame met beskuldigdes 1 en 3 wederregtelik en opsetlik roof gepleeg het.

Ek erken dat Bobo Ebenhaeser Tshokotsi Tsholo aangerand is en vuurwapens gebruik is tydens die roof deur beskuldigdes 1 en 3.

Ek erken verder dat ek voor die pleging van die roof bewus daarvan was dat beskuldigdes 1 en 3 in besit was van vuurwapens, maar ontken dat ek daarvan bewus was dat die vuurwapens in die roof gebruik sou word.

Ek erken egter dat daar met geweld geld en drank, die eiendom of die regmatige besit, van bogenoemde persoon geneem is en dat hy aldus van geld en drank beroof is. Ek erken verder dat hoewel ek nie bewus daarvan was dat die vuurwapens in die roof gebruik sou word nie, ek nogtans as dader opgetree het aangesien ek die moontlikheid voorsien het dat beskuldigde 1 en 3 die roof kon pleeg en die vuurwapens kon gebruik in die nastrewing van die gemeenskaplike doel “common purpose” en onverskillig was omtrent die intrede van die genoemde handelinge en hulle gevolge.

Die misdaad is gepleeg onder die omstandighede soos volledig uiteengesit in paragraaf 4 hieronder.

Ad Aanklag 3: Ek pleit skuldig op hierdie aanklag deurdat ek op of omtrent 21 April 1992 en te of naby Klerksdorp, in die distrik van Klerksdorp, saam met beskuldigdes 1 en 3 wederregtelik en opsetlik vir Bobo Ebenhaeser Tshokotsi Tsholo, ‘n manlike persoon, gedood het.

Erken die korrektheid van die oorsaak van dood soos uiteengesit in die relevante lykskouingsverslag. Alhoewel ek erken dat die oorledene opsetlik gedood is, erken ek dat ek die misdaad gepleeg het met die opset by moontlikheidsbewussyn. Alhoewel ek onbewus was toe daar na die mynskag beweeg was met die oorledenes, en by welke mynskag hulle gesterf het, dat beskuldigdes 1 en 3 van voorneme was om die oorledenes te skiet, het ek

opset by moontlikheidsbewussyn gehad aangesien ek die moontlikheid voorsien het dat die oorledenes deur beskuldigdes 1 en 3 geskiet kon word en het my nogtans met sodanige intrede versoen. Die misdaad is gepleeg onder die omstandighede soos volledig uiteengesit in paragraaf 4 hieronder.

Ad Aanklag 4: Ek pleit skuldig op hierdie aanklag deurdat ek op of omtrent 21 April 1992 en te of naby Klerksdorp, in die distrik van Klerksdorp, saam met beskuldigdes 1 en 3 wederregtelik en opsetlik vir John Ntamgini, 'n manlike persoon, gedood het.

Ek erken die korrektheid van die oorsaak van sy dood soos uiteengesit in die relevante lykskouingsverslag.

Alhoewel ek erken dat die oorledene opsetlik gedood is, erken ek dat ek die misdaad gepleeg het met opset by moontlikheidsbewussyn. Alhoewel ek onbewus was toe daar na die mynskag beweeg was met die oorledenes, en by welke mynskag hulle gesterf het, dat beskuldigdes 1 en 3 van voorneme was om die oorledenes te skiet, het ek opset by moontlikheidsbewussyn gehad aangesien ek die moontlikheid voorsien het dat die oorledenes deur beskuldigdes 1 en 3 geskiet kon word en het my nogtans met sodanige intrede versoen. Die misdaad is gepleeg onder die omstandighede soos volledig uiteengesit in paragraaf 4 hieronder.

4. (Die omstandighede waaronder die misdrywe gepleeg is).

1. Beskuldigde (sic) en ek het gedurende die dag en aand van 21 April 1992 sterk drank ingeneem. 'n Groot hoeveelheid sterk drank was verorber voordat daar om ongeveer 21:30 deur beskuldigdes 1 en 3 en myself na Jouberton Drankwinkel in die distrik van Klerksdorp beweeg was met 'n voertuig. Beskuldigdes 1 en 3 het die oorledene, vermeld in aanklag 3, wat die bestuurder van die Jouberton Drankwinkel is, vanaf sy woonstel na die genoemde Jouberton Drankwinkel geneem waar hulle (beskuldigdes 1 en 3), wat in besit van vuurwapens was, die bestuurder van Jouberton Drankwinkel beveel het om die deur oop te sluit wat toegang tot die perseel verleen. Beskuldigdes 1 en 3 het na die bokant van die drankwinkel met trappe op beweeg, maar ek weet nie wat daar bo gebeur het nie. Beskuldigdes 1 en 3 het egter in die drankwinkel elk 'n vuurwapen op die oorledene Tsholo en ene Ndingi gerig. Die oorledene vermeld in aanklag 4, John Ntamgini, het by die genoemde drankwinkel opgedaag en die twee oorledenes het ons drie beskuldigdes na 'n mynskag te Klerksdorp vergesel. Die beskuldigdes het die twee oorledenes by die mynskag laat sit. Skielik het twee skote geklap en ek het gesien dat beskuldigdes 1 en 3 hulle skiet. Ek het nie 'n pistol gehad nie. Beskuldigdes het die twee oorledenes in die gat (mynskag) afgegooi. Ek weet nie op watter dele van hulle liggame oorledenes geskiet was nie aangesien dit stikdonker was.

Beskuldigde 1 en ek het die volgende dag na die mynskag teruggekeer en klippe daarin afgegooi.

2. Alhoewel ek en beskuldigde 1 ‘n groot hoeveelheid drank voor die pleging van die misdrywe verorber het, was ek toerekeningsvatbaar tydens die pleging van die misdrywe. Die drank het my egter aangetas.

3. Verder was ek tot ‘n groot mate beïnvloed deur beskuldigde 1, Charl Blom, wat heelwat ouer as ek is en wat ‘n intimiderende persoon is.

4. Alhoewel ek nie onder dwang verkeer het tydens die pleging van die misdrywe nie, was ek en is ek steeds baie bang vir beskuldigde 1.

5. Alhoewel ek bewus daarvan was dat beskuldigdes 1 en 3, naamlik Charl Blom en Ezekiël Mthembu, vuurwapens gehad het, was ek vooraf onbewus dat die vuurwapens tydens die aanklag van roof (aanklag 1) en moordaanklagte (aanklagte 3 en 4) gebruik sou word.

6. Ek het berou vir my aandeel in die ongelukkige gebeure en pleit op die relevante aanklagte skuldig aangesien ek opreg wil wees en genoeg gely het en eerlik met die agbare hof wil wees en my advokaat versoek het dat ek op die relevante aanklagte wil skuldig pleit.’

[21] After the appellant had confirmed what his counsel had read to the court the record proceeds

‘HOF: Mnr Van den Berg, sal u blaai na bladsy 3 van die pleitverduideliking? Die laaste sin van die tweede laaste paragraaf:

> “Ek erken die korrektheid van die oorsaak van dood soos uiteengesit in die relevante lykskouingsverslag.”

Ons weet nie wat die oorsaak van dood is nie. Daar word later in die verklaring gesê dat die twee oorledenes geskiet is, maar is hulle dood aan daardie skietwonde? Is u bereid om vir ons te sê wat die oorsaak van Tsholo se dood is?

MNR VAN DEN BERG: Kan ek net vir die agbare hof inlig dat my geleerde vriend het wel die, ek het aanvaar hy gaan die lykskouingsverslae inhandig en daarvolgens het ek gesê dat die staat gaan dit geensins betwis nie.

HOF: Ja, sê u vir my, wat is die oorsaak van Tsholo se dood, ‘n skietwond?

MNR VAN DEN BERG: Ja, Tsholo is “possibly shooting.”

HOF: Nou maar wat sê u? Wat sê u kliënt?

MNR VAN DEN BERG: Dit word so erken.

HOF: Is hy dood as gevolg van ‘n skietwond?

MNR VAN DEN BERG: Dit word so erken en so ook wat die ander oorledene aanbetref. Ek sal

. . . (tussenbei).

HOF: ‘n Skietwond van wat, die kop?

MNR VAN DEN BERG: Miskien kan die staat net vir u behulpsaam wees, want dat dit wel ingehandig is.

HOF: U kliënt het die skietery gesien, wil u gou by hom hoor? Hy het tog seer sekerlik gesien of die oorledenes in die kop of in die maag of in die bene geskiet is.

MNR VAN DEN BERG: Hy het nie presies gesien nie. Dit is so in sy pleitverduideliking, Edele, en ek sou verkies dat die staat miskien, die verslae is beskikbaar. Die verdediging sal geensins ontken dat hy wel dood is aan skietwonde nie, dit is beide oorledenes. Ek handig die lykskouingsverslae met toestemming in.

HOF: Dit is dan met betrekking tot Ad aanklag 4.

MNR VAN DEN BERG: Aanklag 3 en 4.

HOF: In die middel van daardie paragraaf, bladsy 4. Korrektheid van die oorsaak van sy dood, ‘n skietwond.

MNR VAN DEN BERG: Soos die hof behaag.

HOF: Mnr Carter, bevestig u dit?

BESKULDIGDE 2: Ja, Edele.

HOF: Dat beide oorledenes dood is as gevolg van skietwonde wat hulle by die mynskag opgedoen het.

BESKULDIGDE 2: Ja, Edele.’

[22] The prosecutor accepted the appellant’s pleas. In a short judgment Strydom J concluded that the court was satisfied that the appellant had admitted all the elements of the offences to which he had pleaded guilty. He duly convicted the appellant on counts 1, 3 and 4. Thereafter the trial was apparently postponed until 5 March 1996.

[23] At the resumed hearing evidence was led in support of the appropriate sentences. The appellant had in the interim been interviewed by Ms Havenga, a psychologist, and Ms Van Heerden, a social worker. Both prepared reports which were placed before the court. The reports have not been included in the record on appeal, but in passing sentence Strydom J made the following references to their contents:

‘Aan mev. Van Heerden het hy die volgende weergawe gegee. Jy en Blom het om ongeveer agtuur begin drink. Deur die loop van die dag het julle ongeveer twee liters brandewyn gedrink. Toe julle drank opgeraak het is julle na Mthembu se huis waar julle verder gedrink het. Ten einde nog drank te bekom is julle na eerste oorledene se woonstel waarna die grusame dade soos in die klagstaat verskyn, gevolg het.

Aan mev. Havenga het jy vertel dat jy en Blom baie op die betrokke dag gedrink het. In die vroeë aand het julle voortgegaan om te drink totdat julle drank opgeraak het en julle onder die invloed van drank was. Julle wou verder drink, maar julle het nie geld gehad om nog drank te koop nie.

Blom het toe voorgestel dat julle na Mthembu gaan, Mthembu het ‘n sjebeen gehad. Mthembu het egter nie meer drank oorgehad nie. Hy het gesê dat hy weet waar julle nog drank en geld sou kon kry. Hy het verwys na die eienaar van ‘n drankwinkel. Blom het voorgestel dat julle polisie uniforms moes aantrek, aangesien Tsholo, die bestuurder van die drankwinkel, dan die deur van die drankwinkel makliker sou oopmaak. Al drie van julle het polisie uniforms aangetrek. Selfs ‘n nie-lid word ‘n uniform voorsien, ‘n duidelike teken van sluwe beplanning aan julle kant.

Daarna het julle na Tsholo se woonstel gegaan en hom aangesê om julle na sy drankwinkel te vergesel waar julle drank wou kry. Tsholo het geweier om julle te vergesel, waarna julle hom forseer het om met julle saam te loop. Volgens jou het alles begin skeef loop toe julle in die drankwinkel was, julle het drank begin versamel. Tsholo wou betaling vir die drank hê. Blom het hom egter geforseer om sy brandkluis oop te sluit. Die kluis is oopgesluit en Blom het al die geld daaruit geneem.

Toe julle die drankwinkel verlaat het, het ‘n nagwag, Ntamgini, op die toneel aangekom. Mthembu het hom forseer om julle na julle motor te vergesel. Julle het vir Tsholo en Ntamgini in die voertuig laat klim en julle het na jou halfbroer se plaas gery waar julle weer gedrink het. Tsholo wil huis toe gaan en het aan julle gesê dat hy beoog om na die polisie toe te gaan. Blom het kwaad geword en Tsholo aangerand. Jy en Mthembu het hom ook aangerand. Volgens jou het julle Tsholo en Ntamgini geslaan totdat hulle amper dood was.

Na die aanranding het julle die tweestuks geforseer om hulle klere uit te trek, behalwe vir hulle onderklere. Hulle is na die voertuig geneem. Julle het reguit na die Eleton myn gery. Daar was oop skagte by die myn. Julle het by ‘n oop skag stilgehou. Mthembu het Tsholo en Ntamgini in die rigting van ‘n oop skag gedruk waar Blom en Mthembu die twee mans geskiet het en hulle in die skag ingeval het. Jy en Blom is daarna terug na die plaashuis waar julle verder gedrink het. Dit was nog nie die einde nie. Die volgende dag is jy en Blom terug na die skag waar julle dit toegegooi het.

Uit voormelde is dit duidelik dat die oorledene van kant gemaak is sodat hulle nie teen julle sou kon getuig ten aansien van die gebeure in Tsholo se woonstel en in die drankwinkel nie, en dit in omstandighede waar julle bloot net nog drank en geld vir drank wou bekom. Geeneen van die oorledenes het julle enige kwaad aangedoen nie, maar moes met hulle lewens boet, om sodoende te verhoed dat julle aan die man gebring word.'

[24] The appellant did not give evidence at any stage of the trial. Although he filed extensive affidavits in the condonation application he did not address the prospects of success in the appeal more than superficially. In particular, he did not attempt to set up any version which would provide an innocent answer to any of the charges. Nor did he in his affidavits (or indeed at the trial) take issue with or cast doubt on the accuracy of the statements attributed to him by the expert witnesses.

[25] Both counsel argued the appeal without reference to or reliance on the evidence of Havenga and Van Heerden. Defence counsel adopted the approach that if the plea explanation fell short of the required standard the appeal had necessarily to succeed. The only question which remained, she submitted, was whether it was appropriate to apply the provisions of s 312 of the CPA and remit the matter to the trial court or to set aside the conviction and permit the Director of Public Prosecutions to charge the appellant afresh if he thinks fit. She opted for the last-mentioned as the right course to follow relying on, among other aspects, the death of both the original trial judge and the investigating officer, the virtual concession by the prosecutor that evidence to prove a case against the appellant is no longer available, and the unfairness of continuing to pursue an accused who has stood in jeopardy for some 14 years since the events which gave rise to the charge. The co-accused Blom has also departed the scene. Counsel for the State, by contrast, cast the whole weight of his resistance to the appeal on a submission that the plea explanation was substantially sufficient to provide the statutory assurance. He pressed, in the alternative, for a remittal but did not suggest how that was to take place in the absence of Strydom J.

The sufficiency of the plea statement.

[26] Despite the submissions of counsel for the State it seems clear to me that the statement falls materially short of what is necessary to underpin the elements of the charges and thereby to satisfy the presiding judge that the appellant was guilty of the offences. The statement should have made clear the extent of the appellant's participation in all of the offences but it did not. The result is that it contains no facts sufficient to disclose common purpose in the planning of the offences or, in so far as any of the offences were not preceded by agreement (expressly or by necessary implication) as to the scope of the common purpose it contains no facts which associate the appellant by his own conduct with the criminal acts of his co-accused.

[27] The appellant's counsel also submitted that the purported plea of guilty to count 1 is in fact supported by a statement which relates to count 2 (to which he pleaded not guilty). That may be so, although the inference is by no means certain. Count 1 was so broadly framed as to apply equally to facts that properly related to count 2. In so far as doubt may have arisen concerning the scope of the intended admission the trial judge should have asked appropriate questions to clarify the uncertainty.

Was there 'a failure of justice'?

[28] The shortcomings in compliance with the terms of s 112(1)(b) and 112(2) are however not, as counsel supposed, decisive of this appeal. Section 322(1) of the CPA confers wide powers on a court on appeal, but they are qualified:

'Provided that notwithstanding that the Court of Appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the Court of Appeal that

a failure of justice has in fact resulted from such irregularity or defect.'

The meaning of 'a failure of justice'.

[29] The terms of the proviso which now exists in s 322(1) of the CPA were first introduced by an amendment to s 374 of the Criminal Procedure Act 31 of 1917 by s 70 of Act 46 of 1935. Its meaning and operation have frequently been considered since then. The effect of the amendment arose for consideration in *R v Rose* 1937 AD 467. At 476 De Wet JA said

'The proviso in our section is the converse of that in the English section, the proviso operates unless the Court is satisfied that there has in fact been a failure of justice. If a test analogous to the House of Lords test is to be applied here, it seems to me that the result would be that the conviction is to be affirmed unless the Court is satisfied that without the irregularity of defect, the jury would have acquitted. This test might be in accord with the popular meaning of the words "failure of justice" *viz*: that an innocent man has been convicted or that a guilty man has escaped conviction. But the consequences of giving such a meaning to the words are startling. Irregularities could take place in the course of the trial and inadmissible evidence could be admitted and yet the conviction would stand unless the accused could satisfy the Court of Appeal by reasoning from the record that but for the irregularity he would have been acquitted. In view of the whole policy of our criminal law, I do not think the legislature could by this amendment have intended to throw such an *onus* on the accused. If follows therefore that some other meaning must be given to the words "failure of justice."

It was suggested that the meaning of the proviso was that if, apart from the irregularity, there was evidence on which a jury could convict, then there was no failure of justice and the conviction should not be set aside. This test, however, is also unsatisfactory for here again the Court of Appeal is not in a position to determine the credibility of the witnesses. The jury may have discarded what seems clear evidence against the accused and may have decided to convict on some inadmissible evidence.

If we turn to the Dutch version of the words "failure of justice" we find it is "rechtschending." This could more correctly be rendered "violation of justice," i.e., the justice due to the accused. Now the term justice is not limited in meaning to the notion of retribution for the wrongdoer: it also connotes that the wrongdoer should be fairly tried in accordance with the

principles of the law. This would not mean that every provision of the law should have been rigidly and precisely observed but that the accused has not been substantially prejudiced by non-observance of such provisions. In other words we come back to the conception of prejudice to the accused. It is unnecessary and indeed impossible to attempt to prescribe the actual limits of such prejudice: the idea is well known and its application depends on all the facts and circumstances of each particular case. I come therefore to the conclusion that the meaning of the amendment is that the Court, before setting aside the conviction, must be satisfied that there has been actual and substantial prejudice to the accused.'

[30] In *R v Piek* 1958 (2) SA 491 (A) at 497 Ogilvie Thompson JA said

'Once a material irregularity in the proceedings is established, this Court must allow the appeal unless it is satisfied that no "failure of justice has, in fact, resulted from such irregularity" (*vide* proviso to sec. 369 (1) of the Code). In order to be so satisfied, it must appear to this Court that a reasonable court, properly directed, would "inevitably" or "without doubt" have convicted (*Rex v. Koortz*, 1953 (1) S.A. 371 (A.D.) at p. 380, and *Rex v. Pethla*, 1956 (4) S.A. 605 (A.D.) at p.612). As was again pointed out in *Pethla's* case, *supra*, the enquiry in such cases relates, not to what the particular trial court would have decided had the irregularity not been committed, but to

"what a reasonable trial court, properly directed and unaffected by any irregularity, would have decided"

(per TINDALL J.A., in *Rex v Patel*, 1946 A.D. 903 at p. 908). It must however, not be overlooked that, although this enquiry relates to a notional trial court, the findings of fact, including findings on demeanour, made by the actual trial court are not necessarily wholly disregarded by this Court. As TINDALL, J.A., put it in *Patel's* case, *supra*, at p.909

"But while the Appeal Court considers the problem as generalized in the way I have indicated, this does not mean that it pays no regard to any findings of fact, including findings on demeanour, in the judgment appealed from. The appeal Court has regard to the possibility that the irregularity may have affected the findings, but, making allowance for such a possibility, it gives due weight to those findings."

In the practical application of this principle a great deal must manifestly depend upon the nature of the particular irregularity under consideration. It is possible to conceive of irregularities which must greatly weaken, if not entirely invalidate, the trial court's findings of fact.'

[31] In *S v Mushimba en Andere* 1977 (2) SA 829 (A) at 844G Rumpff JA

emphasised the role of public policy in the determination of whether a failure of justice has occurred:

'Die Strafprosesordonnansie vereis dat indien daar 'n onreëlmatigheid plaasgevind het, 'n skuldigbevinding alleen dan tersyde gestel kan word indien geregtigheid inderdaad nie geskied het nie. Die "geregtigheid" waarna hier verwys word, is nie 'n begrip wat veronderstel dat die beskuldigde noodwendig onskuldig is nie. Geregtigheid wat geskied het in hierdie sin is die resultaat wat 'n bepaalde eienskap van verrigtinge aandui. Die eienskap toon aan dat aan vereistes wat grondbeginsels van reg en regverdigheid aan die verrigtinge stel, voldoen is. Die vraag of onreëlmatige of met die reg strydige verrigtinge in verband met 'n verhoor van 'n beskuldigde van so 'n aard is dat dit gesê kan word dat van daardie grondbeginsels nie nagekom is nie, en geregtigheid dus nie geskied het nie, sal afhang van die omstandighede van elke geval en sal altyd 'n oorweging van publieke beleid vereis.'

[32] More recently, in *S v Jaipaul* 2005 (4) SA 581 (CC) (at para 39), Van der Westhuizen J placed the matter in a constitutional context:

'In terms of s 322(1) the Court of appeal may allow the appeal if it thinks that the judgment of the trial court should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a "failure of justice". Therefore a failure of justice must indeed have resulted from the irregularity for the conviction and sentence to be set aside. In construing when an irregularity has led to a failure of justice, regard must be had to the constitutional right of an accused person to a fair trial. If an irregularity has resulted in an unfair trial, that will constitute a failure of justice as contemplated by the section and any conviction will have to be set aside. Whether a new trial may be commenced against the accused will also require a constitutional assessment of whether that would be a breach of the right to a fair trial or not. The meaning of the concept of a failure of justice in s 322(1) must therefore now be understood to raise the question of whether the irregularity has led to an unfair trial.'

The importance of context

[33] We are concerned only with the application of the proviso to s 322(1) in the context of compliance or non-compliance with the terms of s 112(2). Irregularities committed in the application of the last-mentioned section, while not *sui generis*,

have consequences peculiar to that section. Section 312 provides

'(1) Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)(*b*) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.

(2) When the provision referred to in subsection (1) is complied with and the judicial officer is after such compliance not satisfied as is required by section 112(1)(*b*) or 112(2), he shall enter a plea of not guilty whereupon the provisions of section 113 shall apply with reference to the matter.'

In terms of s 113,

'(1) If the court at any stage of the proceedings under section 112(1)(*a*) or (*b*) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.'

It is apparent that the legislature has determined that if a conviction is set aside on appeal and a remittal follows, the accused does not plead again; the case is remitted to enable the trial court to deal with the existing plea of guilty on the basis laid down in s 112(2). Nor does the remittal enable the accused to disavow those factual admissions which he has properly made during the original proceedings.

[34] Is there any reason why the fair trial test should require the conviction and sentencing proceedings to be compartmentalized? There may be situations where such a separation is inherent in the notion of a fair trial, eg when the plea is one of not guilty and an element of the offence is proved for the first time during the course of sentencing. There is however a difference in principle once an accused pleads guilty. He thereby indicates that he no longer takes issue with the prosecution and does not

require proof by it of any of the elements of the offence. Sections 112(1)(b) and 112(2) are not concerned with *proof* ; there is no question of discharge of an onus. In order to protect an accused the judicial officer must satisfy himself, by questioning the accused if necessary, that the accused in fact admits the elements of the charge and is therefore guilty of the offence. Fairness in the judicial process is a matter of substance not technicality or procedure (though both may bear on substance). I see no reason why any evidence fairly adduced after conviction but still within the confines of the same trial should not be used to provide or strengthen the assurance which s 112(1)(b) and s 112(2) are designed to provide. As s 113 demonstrates, the legislature has expressly provided that if it appears to the court at any time before sentence is imposed following on a plea of guilty that there is doubt as to whether an accused is guilty, the court must enter a plea of not guilty. That provision is in itself an example of how fairness of the conviction is not circumscribed by the proceedings before conviction.

The determination of whether a failure of justice has occurred.

[35] Each case must be determined according to its own circumstances and in its own context. In the present instance the following questions may assist in arriving at an answer:

(i) Could the trial court reasonably have been satisfied that the appellant in fact admitted all the elements of the crimes to which he had pleaded guilty and was guilty of those crimes?

(ii) The appellant was represented by counsel in the proceedings. Did that conduce to the fairness of the trial?

(iii) Was the statement made by the appellant in explanation of his pleas *prima facie* in conflict with those pleas in any respect?

(iv) Were there shortcomings in the statement?

(v) How material were such conflicts or shortcomings as existed?

(vi) Was there evidence led at any stage of the trial which was not contested by the appellant which had the effect of supplementing the plea explanation?

(vii) If the conviction were to be set aside and the case remitted, as contemplated in s 312, could anything be gained by such remittal? (This is really the reverse side of the question posed in the authorities cited above: Would the result inevitably have been the same if Strydom J had put the questions which the vagueness in the plea explanation demanded?)

[36] I emphase that this is not a case where there is a danger that the accused was attempting to gild the lily in order to improve his sentencing prospects. The statements that he made to the expert witnesses were wholly against his interest and, apparently, candid. Nor does it matter that we do not have his exact words or the precise context of their utterance but are obliged to receive them at third hand. The appellant had the opportunity in the sentencing proceedings to disavow, rebut or cast doubt on the substance of their evidence. He did not do so.

The application of the law to the facts

[37] The appellant was represented by a counsel experienced in matters of criminal procedure (as appears from the affidavits in the condonation application). One may fairly accept from the plea statement that he went to some trouble to explain to the appellant what was involved in the charges. The judge was careful to obtain the appellant's confirmation of what was attributed to him by his counsel. The superficial nature of counsel's preparation is however suggested by his readiness to admit the causes of death without appreciating that they had been unascertainable on post-mortem examination.

[38] There were no material conflicts between the statement and the pleas. The facts set out were consistent with the guilt of the appellant. Nevertheless there were certain

areas which were not addressed or which were superficially dealt with: whether the robbery was planned or developed spontaneously; whether the robbery was facilitated by the use of firearms; whether the appellant shared a common purpose to rob with his co-accused; whether, in so far as the robbery was not planned the appellant committed any act in furtherance of the common purpose to rob; whether there was a common purpose to murder; whether the murders were pre-planned and, if not, whether the appellant committed any act in furtherance of the common purpose. These were all material matters about which the trial judge had to be satisfied before the court could convict the appellant on his pleas of guilty. Although they were absent from the plea explanation the learned judge asked no questions to elucidate such matters as was properly required of him by s 112(2).

[39] Were these lacunae closed by the statements made to Havenga and Van Heerden which are summarized in the judgment on sentence? I think they were. The accused went together to the bottle store in order to obtain further supplies of liquor, knowing that they had no money to purchase any and intending to procure entry by passing themselves off as policemen. We know from the plea statement that Blom and Mthembu carried firearms. The only reasonable inference is that they intended to obtain entrance by threats or force. There is clear evidence of a common purpose to rob using firearms if necessary. When Tsholo refused to accompany them to the store they forced him to do so. (This seems to clear up any doubt as to whether the appellant intended to plead guilty to count 1.) While they were helping themselves to the liquor he demanded payment. Blom then forced him to open the safe and removed all the cash that it held. The accused left the bottle store together. When Ntamgini came inconveniently on the scene Mthembu forced him to accompany them to the vehicle. All the accused compelled Tsholo and Ntamgini to enter the vehicle. They drove to the farm of the appellant's half-brother where they drank. When Tsholo wanted to leave all the accused beat him and Ntamgini severely, forced them to undress and took them to the vehicle. At the mine shaft Blom and Mthembu shot the

deceased who fell into the shaft. The appellant and Blom returned to the farm to drink. The following day Blom and the appellant made an attempt to cover the bodies by throwing stones down the shaft.

[40] From all this certain conclusions are either explicit or are the only reasonable inferences. All three accused participated in a plan that involved procuring entry to the bottle store by violence or threats and stealing liquor and cash. There was a clear common purpose to rob in which the appellant foresaw that firearms might be used, but nevertheless associated himself with the enterprise. All three forcefully abducted Ntamgini and Tsholo. They grievously assaulted both. They joined in carrying them off to the mine shaft. Both Blom and Mthembu were still in possession of firearms. From the tenor of his statement the appellant was either a direct participant or in close proximity at all material times. Although he did not assist in the actual shooting of the deceased his actions before and after the event were consistent only with a shared intention to do away with them and to conceal the crime.

[41] The appellant furnished no explanation or excuse which was consistent with a desire to distance himself from the actions of his co-accused either during the events or at the trial when the opportunity was available to him. To the extent that it cannot be said that a prior agreement to murder was proved, all the elements identified in *S v Mgedezi* 1989 (1) SA 687 (A) at 705I were present in the statements which emanated from the appellant during the trial. If Strydom J had probed the plea explanation the full story would certainly have emerged. The appellant has never suggested otherwise although the opportunity was open to him during the preparation of the condonation affidavits (in the context of a reasonable prospect of success in the appeal). The evidence not only shows that the original conviction was correct in substance but emphasizes the futility in setting aside the conviction and entering again upon the s 112(2) procedure.

[42] I am in the circumstances far from being persuaded that the irregularities which resulted in non-compliance with the terms of s 112(2) resulted in a failure of justice.

In the result this Court has no power to set aside the conviction and the appeal must fail. The appeal is dismissed.

J A HEHER
JUDGE OF APPEAL

MTHIYANE JA)Concur
MLAMBO JA)