

/SG  
IN THE HIGH COURT OF SOUTH AFRICA  
(TRANVAAL PROVINCIAL DIVISION)

DATE: 10/03/2009  
CASE NO: A742/2006

UNREPORTABLE

In the matter between:

THABO DONALD NTOPANE  
SIMON NTIKWANE MOROKANE

1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT

And

THE STATE

RESPONDENT

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JUDGMENT

MAKGOKA, AJ

[1] The two appellants were each convicted on a count of murder and sentenced each to fifteen years imprisonment. The second appellant was further convicted of one count of intimidation and sentenced to a further three years imprisonment, which was ordered to run concurrently with the fifteen year sentenced on the murder charge.

[2] The appellants were sentenced by the regional court Klerksdorp on 13 May 1999.

[3] At the start of argument, we were informed from the Bar that the first appellant, Mr Thabo Ntopane, has since been released on parole, thus rendering the appeal in respect of him, academic. The second appellant could not benefit from parole consideration since he had been sentenced to another fifteen years imprisonment in respect of an unrelated charge. As a result of the above, this appeal would only be relevant insofar as it concerns the second appellant, who for purposes hereof, would be referred to simply as “the appellant”.

[4] At the time of his conviction and sentence, the appeal procedure was still governed by rule 67 of the Magistrate Court Act, 32 of 1944. The said rule provided the following:

*“A convicted person desiring to appeal under section 103(1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977) shall within 14 days after<sup>4</sup> date of conviction,*

*sentence, or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law on which appeal is based ...”*

[5] Important from the said section, is that no leave to appeal was required at that stage. The requirement for leave to appeal only came into effect on 28 May 1999. What the appellant had to do was to file his notice of appeal, compliant with the provisions of rule 67(1), within fourteen days of conviction and sentence.

[6] The appellant first noted his appeal on 10 May 2002. A second notice of appeal by the appellant was filed on 23 March 2004. For some unclear reason, but apparently under an erroneous impression that leave to appeal was required, the appellant applied for, and was granted leave to appeal on 22 September 2005.

[7] It is apparent then that the appellant was well out of time with his noting of appeal, taking 10 May 2002 as the earliest

date on which such appeal was noted. Consequently, an application for condonation is required, setting out the facts and reasons for the delay. I would revert to this aspect later in this judgment.

[8] The immediate concern in this appeal though, is that the record of proceedings is incomplete. Despite an order of this court on 8 April 2008 that the record be reconstructed, both the State and the appellant are *ad idem* that efforts to reconstruct the record, have failed. This is mainly because the presiding officer who heard the matter had since retired and is unable to recollect the matter or assist in whatever manner towards reconstruction of the record.

[9] The missing parts of the record include part of the cross-examination of the appellant by the prosecutor, re-examination, arguments and the reasons for conviction, as well as the consideration of factors affecting sentence.

[10] On behalf of the appellant, Ms *Hensen*, argued that the conviction and sentence should be set aside on the basis of the record which is incapable of reconstruction. On the other

hand, Ms *Mahomed*, for the State urged us to strike the matter from the roll. I will deal with these competing arguments later.

[11] The approach to records which are not capable of reconstruction is trite and has been restated in several decisions. Generally, in the event where a situation occurs that the record is incapable of reconstruction, despite best efforts, the conviction and sentence should be set aside. See *S v Joubert* 1991 1 SA 119 (A) 126E-I.

[12] In my view, however, the present matter is distinguishable from the cases normally encountered, in one respect. In the present matter, the record is incapable of reconstruction mainly because of the appellant's delay in noting his appeal. The appellant noted his appeal some three years after conviction and sentence. Such a delay significantly led to the reduced chances of the record reconstruction. With passage of time, vital parts of the reconstruction material simply got lost.

[13] In *S v Marais* 1966 2 SA 514 (T) 516G-H the following was stated:

*“The appellant has been seriously frustrated and prejudiced owing to a fault on the part of the state's servant. 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...”* (My underlining)

[14] It seems to me therefore that where a substantial part of the blame can be attributed to an appellant, as is the case in the present appeal, the appellant is not entitled as of right, to have the conviction and sentence set aside.

[15] Ms *Mahomed* referred us to the decision of *S v Mantsha* 2006 (2) SACR 4 (C). The facts in that matter are strikingly similar to those in the present appeal. The appellant in that matter was sentenced on 7 August 1998. The appellant lodged his notice of appeal together with condonation application more than four years later. In the meanwhile, the

tapes of the evidence of the trial got lost and the magistrate was unable to assist in the reconstruction of the record. The court refused the application for condonation and struck the matter off the roll.

[16] I am therefore satisfied that the appellant should not benefit from a situation that, to a great extent, was of his making. As a result, I would strike the appeal off the roll. Given the view I take of the matter, I do not deem it necessary to consider the appellant's condonation application and the concomitant prospects of appeal.

[17] I would therefore propose the following order:

1. The appeal of the first appellant is removed from the roll.
2. The appeal of the second appellant is struck off the roll.

T M MAKGOKA  
ACTING JUDGE OF THE HIGH COURT

I agree

F G PRELLER  
JUDGE OF THE HIGH COURT  
A742/2006/sg

Heard on: 20 October 2008

For the Appellants: Adv J Henzen

Instructed by: Legal Aid Board

For the Respondent: Adv S Mahomed

Instructed by: Director of Public Prosecutions

Date of Judgment: 10/03/2009