

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

**DATE: 15/05/2009
CASE NO: A1000/2006**

UNREPORTABLE

In the matter between:

PATRICK MLAMBO

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

MAVUNDLA. J.;

- [1] The appellant was charged at the regional court at Benoni as follows:**
Count one: robbery with aggravating circumstances, and sentenced to 15 years imprisonment;
Count two: unlawful possession of a firearm, found not guilty,
Count three: unlawful possession of an unknown quantity of ammunition, found not guilty;
Count four: murder, sentenced to fifteen years imprisonment.
Count five : unlawful possession of a firearm, sentenced to two Years;

Count six: Unlawful possession of ammunition; one (1) year Imprisonment. It was ordered that the three (3) years of count five and six (6) are to run concurrently with count four and that five years of count 4 are to run concurrently with the 15 years of count 1. The effective sentence is 25 years.

- [2] The appellant is appealing against both the conviction and sentence. The appellant prepared his own the notice of appeal. It would seem that the appeal is noted against the conviction on murder. However, in the heads of argument submitted on behalf of the appellant it is submitted that the appeal is against both conviction and sentence. It would seem that the State is also in agreement that the appeal is against both conviction and sentence. In my view, having regard to the fact that the appellant was unrepresented when he noted his appeal, and having regard to the long sentence imposed, it is proper that the appeal be accepted to be against conviction and sentence.
- [3] Before dealing with the merits of the appeal, it is necessary to deal with a preliminary point *in limine* raised on behalf of the appellant. It is submitted by Mr. Tshabalala from Pretoria Justice Centre, who appears on behalf of the appellant that the reconstructed record does not assist this Court to reappraise the appellant's trial. He states that the appellant admitted in mitigation of sentence that he killed the deceased but did not make any admission about the offences which he was charged.

[4] On 26 March 2007 the respondent filed his heads of argument that the matter could not be argued on 3 April 2007 as the record was incomplete. Mr. Tshabalala submits that the efforts of the magistrate to reconstruct the record have been without success and that under the circumstances the appellant's conviction and sentence should be set aside.

[5] This matter appeared on 3 April 2007 before Goodey AJ and Van Graan AJ, who ordered as follows:

- “1. That the matter is postponed sine die.
2. That the clerk of the court Benoni, is hereby ordered to reconstruct the record as soon as possible as comprehensibly as possible, with specific reference to the evidence of the following witnesses; Patric Hlene, Thomas Fana Hambu, Joseph Melanie. The applicant Moosa Shupalane (apparently taken down by long hand, annexure E) and Sus Pretty and or Bridget Ngnutheleni.
3. Such attempt to reconstruct should include a search for relevant tape recordings of the proceedings and, if found the urgent transcription thereof, if the tape recording cannot be found, it should be attempted to obtain any notes made by the presiding officer, the Prosecutor and the defence of such proceedings which should then be transcribed. The investigation officer should then also be requested to trace the above witnesses and obtain affidavits from them on the contents of their evidence at the trial. Such affidavits must then be submitted to the appellant to obtain his version by affidavit. After this, a report by the presiding officer should be requested for submissions to this Honourable Court for consideration, accompanied by an affidavit by the clerk of the Court setting out all steps that were taken to reconstruct the

record.” I shall refer to this order as the reconstruction order, for purposes of convenience.

[6] The order mentioned herein above, in directing the clerk to reconstruct the record as mentioned therein, is in line with the steps to be taken in reconstruction of the record as stated in R v Wolmarans and Another 1942 TPD 279, which decision has ever since been followed in many cases dealing with reconstruction of a record. In the Wolmarans case the following order was made:

- ‘1. The matter is referred to the clerk of the regional court, Heidelberg, with the direction that he gathers together the best secondary evidence as to the contents of the record, including the affidavits from—
 - (a) an official who can say that the record has been mislaid;
 - (b) from witnesses and others who were present or who have knowledge of what transpired at the trial. To show what the content was of the evidence led and the proceedings that took place as well as the plea and further proceedings,
2. That he submits such reconstructed and affidavits to the appellant/ applicant and his legal representatives, to obtain from them their consent that the record has been correctly reconstructed.
3. That the appellant / applicant makes an affidavit as to the consent or otherwise of the reconstructed record.”

[7] In the matter of S v Booysen 1996 (2) SACR (2) (EC) 393 at 394b-e the court on appeal pointed out that the magistrate summarised the evidence and gave his judgment, which it would seem was premised, *inter alia*, on the court's credibility findings. The court on appeal further remarked that the magistrate pointed out various

improbabilities and contradictions that emerged from the evidence of the appellants. The court on appeal said that in order to evaluate the magistrate's observations and reasoning, it is necessary to do so in the light of the tendered evidence. The magistrate's summary of the evidence is not the record thereof."

- [8] The court in *Booyesen (supra)* at 394 was referred to the matter of *S v S* 1995 (2) SACR 420 (T) where Van Dijkhorst J said that the question to be answered, is whether the reconstructed record is substantially correct and complete? Absolute agreement is not required. The question must be answered in the context of the relevant incident, and not *in vacuo*. However, Van Dijkhorst J in that matter, where the magistrate had a comprehensive judgment and had summarised all important and relevant evidence and made credibility findings, rejected the submission that a court on appeal can with confidence place much value on these findings, rather than on the questions and the answer portions of the record which was incomplete. Van Dijkhorst J said that it is precisely on the magistrate's evaluation of the evidence that the court on appeal must make a finding.

- [9] In casu, we have been furnished with the reconstructed record. However the affidavits of all the roll players mentioned in the reconstruction order of 3 April 2007 has not been made available to the court. The clerk of the court has not filed an affidavit stating what steps she took in complying with the aforesaid order. Whilst I have no doubt that the magistrate has to the best of his ability reconstructed the record, there is, however, no confirmation by the appellant either or his then legal representative that he agrees with the reconstructed record. It is therefore not possible for this Court to

deal with the question to be asked, whether the reconstructed record was in all material respects a replica of the trial proceedings of the trial; vide *S v Joubert* 1991 (1) (AD) where the Appeal Court record had not been placed before the appellant and that it could not be concluded that a properly reconstructed record was before the Court and that the appellant was not prejudiced by the irregularity occasioned thereby and proceeded to set aside the conviction and sentence.

[10] The appellant testified in mitigation, inter alia, as follows: At page 32 lines 4- “I went back to the deceased to him to give me back my which I gave him to safe keep it for me. Brigitte, at that stage, was not present when I went back to fetch my money and struggle and (indistinct). We started pushing each other, he appeared to me as a person who was fighting against me and the last occurrence,, (indistinct). They did not pay much attention on me when I asked them of the deceased to give me back my money and I had given him R1 000. And it appeared to me as if all the people who were there on that day of the incident was fighting against me, they know the truth. And ... (indistinct). Had a firearm in his possession, back at his bar. He gave me the money as well as the firearm and the firearm was in the bag. Got impatient and people did not pay much attention on me, so I can get back my money. I understand that I was or my conduct was wrong. I did not run away shortly after this incident , I waited for the police after this incident.”

[11] The appellant under cross examination also, stated that what he told the court during his evidence on the merits is not the truth. It would also seem that his version is now that he had given the deceased an amount of R7 000, 00 to keep for him. The deceased gave the

appellant a bag in which the money was supposed to be. Only an amount of R3000, 00 was in the bag. A struggle then ensued between the two of them. He says that the people who were there were against him the appellant. The deceased gave the appellant his money and a firearm which he had with him. The appellant got impatient with the deceased. However it is not clear from the record how was the deceased shot. The record at page 32 lines 18-22 reads as follows:

“Got impatient and people did not pay attention on me, so that I can get back my money. I understand that I was or my conduct was wrongful. I did not run away shortly after the incident. I waited for the police officers to come and arrest me.” At page 35 lines 10-26 to the court’s questions the appellant responded as follows:

“Up until now the mitigation, you have told the court that what cause you to shoot the deceased, but you also mentioned that the firearm was in the bag. How did it come about that the firearm was removed from the bag at that stage when...? (Indistinct) from the money. I took it and put in (sic) top of the table and we started counting the money. And I told him that this money was not enough, there was a shortage.

And the argument, did that result after you had counted the money and found that there was only R3 000 instead of R10 000?—that is correct.

What did you do with the firearm afterwards, did you keep it?— Shortly after I shot the deceased, I took this firearm along, but after three days I was afraid to hand it to the police officers, I was afraid that I might be arrested, because I did something bad..”

- [11] It would seem that the appellant admitted to the shooting of the deceased. It is not clear from the record whether the shooting was during the struggle or after the struggle. The magistrate does not seem to have dealt with that aspect when he sentenced the

appellant. This is crucial for purposes of deciding whether substantial and compelling circumstances exists in this matter. I am mindful of the fact that the court in its judgment found on inferential bases that the appellant shot the deceased.

- [12] Where the reconstruction is not possible, the court has discretion to set aside both the conviction and sentence. In casu, the clerk of the court, in my view, has not as yet fully complied with the reconstruction order. Having regard to the fact that the appellant, it would seem, has admitted to the killing of the deceased, it would be premature to, at this stage finalise the appeal and set aside the conviction and sentence, without affording the clerk of the court an opportunity to file her affidavit stating all the steps she has taken in complying with the reconstruction order. I am of the view, that where life has been lost as the result of admitted conduct of the appellant, it is undesirable to set aside the conviction and sentence of the appellant purely on technicality, without affording the clerk of the court to remedy the shortfall. I therefore do not accede to the submission of Mr. Tshabalala that the conviction should be set aside as well as the sentence. Only when it is impossible to reconstruct a record or obtaining the affidavits mentioned herein above, should the conviction and sentence be set aside, vide *S v S* 1995 (2) SACR 420 (T) at 4424b-c. In casu, there is no evidence under oath stating that the affidavits identified herein above cannot be obtained. Such affidavit must also indicate what steps were taken to trace those people who must make such affidavits and why they cannot be traced.

[13] In the result I make the following order:

- 1. That the matter is referred to the clerk of the regional court, Daveyton, with the direction that:**
 - (a) She submits to the Registrar of this Court within Thirty days of this order, all the affidavits and the Report referred to in the order 3 contained in the Order dated 3 April 2007, under case Number A1000/06, a copy of which is attached hereto marked "X".**
 - (b) In the event it not be possibly to comply partly or wholly with this order, the clerk of the regional court to submit an affidavit stating all the steps he/ she has taken to comply with this order, and the reasons for not being in a position to comply with the order partly or wholly.**

N. M. MAVUNDLA

JUDGE OF THE COURT

HEARD: 11 MAY 2009

I AGREE

DELIVERED : 15 MAY 2009

T. PHALANE

ACTING JUDGE OF THE COURT