

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 260/2008

In the review between:-

THE STATE

versus

TEBOHO E. TSHUBANE

CORAM: RAMPAL, J et MOLEMELA, J

JUDGMENT BY: MOLEMELA, J

DELIVERED ON: 11 SEPTEMBER 2008

[1] The matter came before me on automatic review in terms of section 302 read with 304 of the Criminal Procedure Act, 51 of 1977 ("the CPA"). The accused person was charged with two counts of assault with intent to do grievous bodily harm. Both counts were taken together for the purpose of sentence and he was sentenced to 6 (six) months imprisonment. He was also declared unfit to possess a firearm.

[2] The transcription services company that was instructed to transcribe the record has submitted a letter stating that the

CD recording on which the proceedings were mechanically recorded was faulty and could therefore not be transcribed. The magistrate that presided over the matter also wrote a letter stating that “I am doing a lot of cases per day, I cannot recall the record of this one, besides the accused is already outside, he got a parole in November last year i.e. 2007.”

The office manager of that court also sent a letter stating “na menige pogings en alle moontlike hulpmiddele kon ons die saak nie opspoor op die rekenaar nie en kan die saak dus nie getranskribeer word nie “

- [3] I invited the office of the Director of Prosecutions to give an input as to how best to deal with the matter under the aforementioned circumstances, especially as the matter was referred to this court after the accused person had already served part of his sentence and been released on parole. In his response Adv. Botha made the following recommendations:

“(1) It is therefore submitted that the record be remitted to the Magistrate with an instruction to re-call and re-hear

the witness and the accused who gave evidence at the trial. This must happen in the presence of the accused.

(2) *The prosecutor who prosecuted in the matter must be approached if the Magistrate cannot recall who testified in the matter. It is suggested that the interpreter would also in all probability be able to make an input in this regard.*

(3) ***If for some or other reason the record cannot be reconstructed the conviction and sentence ought to be set aside as the Court cannot assess whether the conviction and sentence were in accordance with justice.***” (My emphasis).

[5] Adv Botha seems to be relying on the case of *S v Peza* 1962(1) SA 664(O) at p665(E) with regards to his first recommendation. I am not inclined to follow this recommendation for the simple reason that the circumstances of this case are distinguishable. Whereas in the case of *S v Peza* (*supra*) part of the record was available, *in casu*, there is no record at all. I agree with Adv Hiemstra’s view, who is from the same office of the Director of

Prosecutions as adv Botha, that application of what was held in *S v Peza (supra)* to the present circumstances would amount to a trial de novo as opposed to a reconstruction of the record. In my view, ordering a trial de novo in circumstances where the accused person has already served part of his sentence and been released on parole would be tantamount to subjecting the accused person to a double jeopardy. Such an order would not serve the interests of justice. The fact of the matter is that there is no record of the proceedings that were held at the district court. The remarks made by both the presiding magistrate and the office manager confirm that the record cannot be reconstructed. See *S v Talenyane* 2006(2) SACR 153 (O) at paragraph 10 on p156.

- [6] In my view, the circumstances of this case call for implementation of paragraph 3 of Adv Botha's letter as referred to in paragraph 4 hereinabove. Under such circumstances, the conviction and sentence ought to be set aside. I would accordingly be inclined to grant such an order. I would also order that the accused person's criminal record

flowing from this conviction be expunged from the records of the SAPS Criminal Record Centre in Pretoria.

It is therefore ordered as follows:

1. The conviction and sentence are set aside.
2. The Head Personnel of SAPS Criminal Record Centre in Pretoria is ordered to forthwith expunge the accused person's criminal record in respect of his conviction on two counts of assault with intent to do grievous bodily harm as effected by the Clocolan Magistrate's Court on the 2nd August 2007 under case no 144/2007 .
3. The Registrar of this court is directed to ensure that a copy of this order is served on the Head of SAPS Criminal Record Centre in Pretoria.

M B MOLEMELA, J

I concur.

M H RAMPAL, J

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