

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

Review No. : 269/08

In the review between:-

THE STATE

versus

KHOTSO VINCENT MARITI

CORAM: MOLEMELA, J *et* MOLOI, AJ

JUDGMENT BY: MOLEMELA, J

DELIVERED ON: 27 NOVEMBER 2008

- [1] The matter came before me on automatic review in terms of section 302 read with section 304 of the Criminal Procedure Act, 51 of 1977 (“the CPA”). The accused person was charged with two counts of housebreaking with intent to steal and theft, for which he was sentenced to 12 (twelve) months’ imprisonment and 18 (eighteen) months’ imprisonment, respectively, with half of each sentence being suspended for 4 (four) years on condition that the accused person is not convicted of housebreaking with intent to steal and theft committed during the period of suspension.

- [2] On scrutinising the record of the magistrate's court I noted that the transcription services company transcribing the record indicated that they received two compact discs (CD's) but one that of them was completely unrelated to the matter in question. I also noted that the magistrate's judgment was not part of the record.
- [3] From the transcribed part of the record, it is clear from p. 30 of the record that when the matter was postponed that day, the state case had not been closed yet. It would appear that the state had already called 3 witnesses and still intended calling two more witnesses. The evidence of the 3 witnesses concerned in only related to count 1. The current transcribed record does not reflect any evidence in respect of count 2. No part of transcribed reflects the defence case. It also does not reflect the magistrate's judgment, from which one would have hoped to glean the remaining evidence that was presented
- [4] Having noted the above I duly sent a letter to the magistrate that had presided over the matter requesting him to arrange for a diligent search for the correct CD's. I further requested

him to reconstruct the record if he could not find the relevant CD's. Five months later, the magistrate's response was as follows:

- “(a) After a diligent search by the local court stenographer, the missing CD's could not be found.
- (b) The Magistrate regrets to inform that he is not in a position to reconstruct the record, seen to the fact (sic) that no notes were kept of the judgment.”

[5] Upon receipt of such response I contacted the prosecutor that had presided over the matter with a view of establishing whether she had kept notes that could assist with reconstruction of the evidence and also enquired whether she had record of all the witnesses that testified in the matter with a view to ordering the recalling of these witnesses if need be. Her response was that she had not made any notes pertaining to the proceedings and could not recall the names of other witnesses that were called as well as their evidence.

[6] It is trite that a magistrate's court is a court of record. Review proceedings as contemplated in section 303 of the

Criminal Procedure Act are proceedings of an urgent nature requiring that the record be forwarded to the High Court within 7 (seven) days after determination of the case. It goes without saying that the record that is forwarded should be a complete record of the proceedings. *In casu*, an incomplete the record was sent to the High Court three months after determination of the case. This in itself is unacceptable. Pursuant to my query to the magistrate, there was a further five (5) months' delay in responding to my correspondence, which was apparently caused by the fact that more CD's were sent to the transcription services company with the hope of tracing the correct CD. This is highly unacceptable. It is desirable that the presiding magistrate ensure that a complete record of the proceedings is forwarded to the High Court within 7 (seven) days of completion of the case as required by the Act. Should the magistrate discover that the record is incomplete the magistrate should, while the CD's are being sought, preserve his notes or, at that stage already, make an effort of reconstructing the record while the matter is still fresh in his memory.

[7] As already mentioned, *In casu* the presiding magistrate and the prosecutor that prosecuted the matter cannot be of any assistance in the reconstruction of the record as they, due to a time-lapse, no longer have a recollection of the matter. Considering that the convictions related to offences of an economic nature chances are that the accused has by now been released on parole as he has been in custody for more than half of his effective sentence. This despite the fact the court had during this period not made any determination as to whether the proceedings were in accordance with justice or not. Such a state of affairs can cause irreversible prejudice to an accused person. This is so unnecessary as it can easily be obviated by a presiding magistrate simply doing what he/she is supposed to do, i.e. checking whether the record of proceedings is complete before forwarding it to the High Court on review.

[8] Under circumstances like these, it would serve no useful purpose to refer the matter back to the magistrate for recalling of those witnesses whose evidence has not been recorded at all, as it would in fact almost amount to a trial *de novo*, especially as there is no evidence whatsoever on

record in respect of count 2. Such an order would, in my view, not serve the interests of justice. See **S v TALENYANE** 2006 (2) SACR 153 (O); **S v TSHUBANE** (unreported) Review No. 260/2008; **S v WHITNEY & ANOTHER** 1975 (3) SA 453 (N) at 456 E – F; **S v S** 1995 (2) SACR 420.

[8] I accordingly make the following order:

- 8.1 The conviction and sentence are set aside.
- 8.2 The registrar of this court is to serve a copy of this order on the Head of SAPS Criminal Record Centre in Pretoria.

M B MOLEMELA, J

I concur.

K J MOLOI, AJ