

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

Review No. : 253/2006

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In the review matters between:-

THE STATE

and

WILLIAM MOFOKENG

SELLO SIMON DHLAMINI

and

THE STATE

and

THABANG VINCENT QHEKOANE

CORAM: HATTINGH J *et* VAN ZYL J

JUDGEMENT BY: VAN ZYL J

DELIVERED ON: 16 MARCH 2006

[1] Both these review matters originate from the magistrate's court for the district of Witsieshoek, held at Makoane. For the

sake of efficacy, they are simultaneously dealt with in one judgement. In the first matter the two accused were charged with one count of robbery of R200,00. Both accused pleaded not guilty, but were subsequently convicted on 7 February 2005 and sentenced to a fine of R2 000,00 or 12 (twelve) months imprisonment. In the second matter the 22-year old accused was charged with one count of robbery of a cellphone and other articles. He pleaded not guilty, but was subsequently convicted on 9 February 2005 and sentenced to a fine of R2 000,00 or 12 (twelve) months imprisonment.

[2] Both matters were then referred to this Court in the cause of an automatic review. Although the sentences were passed on 7 February 2005 and 9 February 2005 respectively, the typed record in both matters reflect that the records were only certified on 11 January 2006, whilst the letter that accompanied both records (to which letter I will refer again shortly) is dated 27 December 2005. However, this Court only received the two records on 8 March 2006.

[3] A similar letter is attached to both records, being a letter from Ms A. Pieterse, the magistrate who presided over this matter. Both these letters read as follows:

“1. This case ... could not be sent on review, because apparently the machine or old tapes ('re-used'), were defective and no recordings were made.

2. I am unable to reconstruct these cases from my bench-notes, because

a couple of months ago there was a 'break-in' into my office during the night and all my bench-notes and several other documents and personal notes were stolen.

3. I trust that 'on the face of it', the honourable Judges will be able to compare the charge, plea and sentence and find it in order.

4. I can just add that in this case, no appeal was lodged."

[4] When the records are perused, it is evident that both the records are incomplete in that they lack essential parts of the respective proceedings. The records reflect the notes of the magistrate pertaining to appearances and postponements prior to the pleading process. From the stage when the accused actually pleaded up until the imposition of sentence, the records only reflect that the proceedings were mechanically recorded. No transcripts of the said recordings are attached to the record; obviously due to the fact that, as stated in the letter, no such recordings exist. The only information with regard to the respective trials which is evident from the records, is the information reflected on the J15 charge sheets, namely, that the accused pleaded not guilty on 7 February 2005 and 9 February 2005 respectively, that they were found guilty as charged on the said dates and that they were sentenced to the aforesaid sentences. There is no record of any evidence, cross-examination, reasons for

the judgment (if any), previous convictions of the accused (if any) and possible mitigating and aggravating factors considered before imposing sentence.

[5] Considering what has been stated in the letter by the magistrate, it will serve no purpose to send these matters back to the clerk of the court with an instruction that the records should be reconstructed. It is clear that it is impossible to reconstruct the records. This fact, as well as the long period of time which has already lapsed since the respective dates of the convictions and sentences, necessitate me to be of the opinion that the accused will be prejudiced should this judgment not be handed down forthwith in terms of section 304(2)(a) of the Criminal Procedure Act, Act 51 of 1977, without first referring the matters back to the magistrate's court.

[6] In an instance like this, where a matter is subject to automatic review and the record cannot be reconstructed, the conviction and sentence must be set aside. (See **S v FREDERICKS** 1992 (1) SACR 561 (C).) This is also the position in criminal appeals where the record is defective and in which instances the following test is applied:

“Die notule moet slegs ‘n wesenlike weergawe wees van die verrigtinge. ... Die toets bly, is die notule wesenlik korrek en volledig. Die vraag of die notule wesentlik korrek en volledig is, moet beoordeel word in die konteks van die betrokke geval en nie in *vacuo* nie.”

(See **S v S** 1995 (2) SACR 420 (T) at 423 D – E.)

[7] There is no reason why a similar test should not apply to an automatic review. When the aforesaid test is applied to the current matters, it is evident that the records lack material evidence to the extent that this Court cannot adequately review the respective convictions and sentences. They should therefore be set aside. (See **S v BOOYSEN** 1996 (2) SACR 393 (OK) at 395 E.)

[8] In addition to the aforesaid, I am also of the view that considering the severe extent to which the time limit provided for in section 303 of the Criminal Procedure Act was not observed, a serious miscarriage of justice has been caused to the accused. This should in any event result in the setting aside of the respective convictions and sentences. (See **S v LEWIES** 1998 (1) SACR 101 (C) at 103 G – 104 C and **S v MALULEKE** 2004 (2) SACR 577 (T) at 581 C – 582 I.)

[9] In the premises the following order is made:

1. The convictions and sentences are set aside.

C. VAN ZYL, J

I concur.

G.A. HATTINGH, J

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