

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

High Court Ref No.: 142

Magistrate's Serial No.: H150/05

Case No.: 63/15/2005

MAGISTRATE PRETORIA

THE STATE V GODFREY MAPHANGA

REVIEW JUDGMENT

SOUTHWOOD J

[1] On 3 August 2005 the accused was convicted in the Atteridgeville magistrates' court of assault with intent to do grievous bodily harm and sentenced to R3 000 or six months imprisonment half of which was suspended. The matter was reviewable in terms of section 302 of Act 51 of 1977 ('the Act') but the presiding magistrate failed to ensure that the proceedings were submitted for review. He has since left the Department and is no longer available to assist. Eventually the file was discovered and on 25 January 2008 the Chief Magistrate, Pretoria, Mr D. Nair, submitted the record of the proceedings for special review in terms of section 304 of the Act. The Chief Magistrate points out that the record is incomplete and cannot be reconstructed or supplemented and that in view of the defective record the conviction and sentence should be set aside. The record contains no record of payment by the accused of R1 500 and it must be accepted that he has served the sentence of three months imprisonment.

[2] The record of the proceedings is seriously defective. Three witnesses testified for the state and the accused testified in his defence. From the two available cassettes only the following can be and has been transcribed -

- 1) the evidence of the complainant, Geoffrey Ntuli;
- 2) part of the evidence in chief of the second state witness, Bonny Matloa;
- 3) part of the argument on the merits;

- 4) judgment on the merits;
- 5) proceedings on sentence; and
- 6) reasons for sentence.

Missing are the following:

- 1) the remaining evidence in chief of the second state witness and the whole of his cross-examination;
- 2) the evidence of the third state witness. Mr Makle;
- 3) the explanation of the accused's rights after the state closed its case;
- 4) the evidence of the accused.

[3] The Director of Public Prosecutions was requested to comment on the review and has furnished a comprehensive opinion by the Deputy Director of Public Prosecutions and a senior state advocate. I am indebted to them for the opinion. The DPP submits that despite the incomplete record there is enough reliable evidence to arrive at the conclusion that the proceedings were in accordance with justice as required by section 304(1) of the Act. I have studied the DPP's opinion with great interest as it seems to depart from the general approach to an incomplete record: i.e. the record must be adequate for proper consideration of the appeal or review and where material evidence is not in the record this usually leads to the conviction and sentence being set aside - compare *S v Chabedi* **2005 (1) SACR 415 (SCA)** paras 5 and 6; *S v Collier* **1976 (2) SA 378 (C)** at 378H-379D; *S v S* **1995 (2) SACR 420 (T)** at 424b-c. In *S v Fredericks* **1992 (1) SACR 561 (C)** the court stated the approach in the Cape Provincial Division as follows:

'Whatever the position may be in other Divisions, the practice in the Cape has been that where it is impossible to reconstruct a totally lost record and the lost portion contains evidence which is of material importance to the adjudication of an appeal, the appeal ought to succeed and the conviction and sentence set aside. See *S v Collier* **1976 (2) SA 378 (C)**. Nor is the position otherwise when the matter is one for automatic review. *S v Williams* **1982 (4) SA 363 (C)** at 364.

[4] In the opinion the DPP has adopted a pragmatic approach. The accused's version was that he acted in self defence. He struck the complainant when the complainant produced a firearm and pointed it at him. The primary issue was therefore whether the complainant had a firearm. The DPP points out that

according to the evidence of the complainant and Bonny Matloa the complainant was not in possession of a firearm at the time of the assault and that the presiding magistrate accepted the evidence of Bonny Matloa which makes inevitable the rejection of the accused's evidence. The DPP also highlights the improbability of the accused's version. This approach ignores the absence of material evidence and assumes that it could add nothing.

[5] In my view the accused's evidence is material and the other evidence may or may not have provided support for the accused's version that he acted in self defence. There is evidence that shortly after the incident the police made enquiries about whether the complainant had had a firearm. This indicates that the accused's version is not an afterthought and was raised at the time of the incident.

While it is possible to arrive at the conclusion reached by the DPP on the record available, for purposes of determining whether the proceedings are in accordance with justice the whole record, or at least an adequate record, containing all the material evidence, is necessary. I am not persuaded on this record that the proceedings are in accordance with justice. I cannot read the accused's evidence and that of Bonny Matloa and the third witness to be sure that the presiding magistrate arrived at the correct conclusion.

The conviction and sentence are set aside.

B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

E. BERTELSMANN

JUDGE OF THE HIGH COURT