

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: A207/2007

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

16/3/2018

DATE

MOKOSE SNI

In the matter between:

BONASE, SONWABO

Appellant

and

THE STATE

Respondent

JUDGMENT

MOKOSE AJ

[1] The appellant had been charged with the following crimes:

- (i) robbery with aggravating circumstances;
- (ii) unlawful possession of a firearm; and

(iii) unlawful possession of ammunition.

[2] The appellant was convicted as charged and sentenced on 16 October 2001 as follows:

(i) 15 years imprisonment on count one;

(ii) 3 years imprisonment on count 2; and

(iii) 3 years imprisonment on count 3.

The sentences in respect of counts 2 and 3 were to be served concurrently making the effective term 18 years direct imprisonment in respect of all counts.

[3] An application for condonation of the late filing of the application for leave to appeal was made by counsel for the appellants. In his affidavit, counsel merely places on record that all endeavours had been made to locate the said file, but to no avail. Counsel made submissions that although the matter had been finalised 16 October 2001, the appeal was first set down for hearing 6 years and 8 months later. No explanation was proffered as to the reasons for the delay. Counsel explained that it was due to a "failure in the system" and not due to any fault on the part of the appellant. The condonation was duly granted.

[4] The matter was enrolled for an appeal on 27 November 2008 but was not proceeded with due to the incompleteness of the trial record. It was removed from the roll for reconstruction of the record.

- [5] Counsel for the appellant submitted that the record in this matter could not be located and despite several attempts at reconstructing the record, it was still incomplete. The affidavit of the trial Magistrate was brought to the court's attention wherein he confirmed that he was the presiding officer in respect of the matter and that the charge sheet and audio cassettes on which the trial proceedings had been recorded were missing. He confirmed further that he no longer has the notes for the matter and that he does not have an independent recollection of the facts of the case. Furthermore, the prosecutor who dealt with the matter was since died and the appellant's then attorney of record could not be traced as he was no longer a practising attorney.
- [6] The issue for determination is whether in the absence of the transcript of the *court a quo*, this court as a court of appeal could fairly determine the appellant's appeal and if not, what the effect thereof would be. Both counsels were of the view that this court would not have the ability to determine the appeal fairly without the record and that the appellant's conviction and sentence be set aside.
- [7] Counsel for the appellant submitted that as the record of trial proceedings of the *court a quo* was incomplete, the appeal court must set aside the conviction for that reason alone.
- [8] Counsel for the respondent was of the view that the trial court record is of cardinal importance and that should the appeal be heard, the appellant's right to a fair hearing would be encroached upon as the matter cannot properly be adjudicated without the full and proper record. Counsel agreed that if the missing portions of the trial record cannot be reconstructed, the proceedings should then be set aside.

[9] Rule 67(5) of the Magistrate Court Rules places an obligation on the clerk of the court to prepare a copy of the record of the case, including a transcript thereof as soon as leave to appeal has been granted by the Magistrate. Rule 51(3) of the High Court Rules provides that the ultimate responsibility for ensuring that all copies of a record on appeal are in all respects properly before the court, shall rest on the appellant or his/her legal representative, provided that where the appellant is not represented the responsibility lies on the Director of Public Prosecutions.

[10] It stands to reason that the record of proceedings in the trial court is of cardinal importance. This record forms the basis of the re-hearing by the court of appeal. Where the record is inadequate or unavailable for the consideration of the appeal, it could lead to the conviction and sentence being set aside.

[11] Although the appellant and/or his legal representatives carry the ultimate responsibility to ensure that the record is in order, the courts have commented that the responsibility not only lies with them but also with the presiding officer, clerk of the court and the operators of recording machines. The absence of such a record hampers a just hearing of the appeal or review thereby constituting a "technical irregularity or defect in the procedure" within the meaning of section 324 of the Criminal Procedure Act ("CPA")¹ read with section 313 thereof and renders the conviction and/or sentence liable to be set aside.

S v Joubert 1991 (1) SA 119 (A) at 126F – J

[12] Section 35(3) of the Constitution of the Republic of South Africa protects the rights of accused persons and reads as follows:

"Every accused person has the right to a fair trial, which includes the right –

.....

(o) of appeal to, or review by, a higher court."

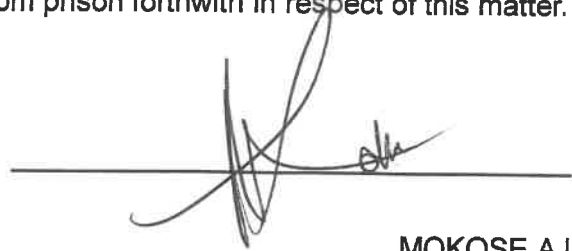
[13] In order to properly consider the issues, it is necessary to examine how the trial court came to the conclusion that the appellant was guilty of the charges laid against him. The summary of the evidence led as a whole, as well as the questions put to the appellant and all witnesses in both examination and cross-examination are of importance. In the absence of a transcript of the proceedings of the *court a quo* or any reconstruction of the record of the proceedings, an appeal court would never know the details of the matter. In the matter of **S v Chabedi 2005 (1) SACR 415 (SCA) para 5 – 6** Brand JA said the following:

"On appeal, the record of the proceedings in the trial court is of cardinal importance. The requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial."

[14] The appellant's right to a fair appeal is entrenched in Section 35(3) of the Constitution and would be compromised should the appeal proceed and be heard in the absence of a record. In view of this and the fact that the Magistrate is unable to locate his notes and the record of the *court a quo* having been misplaced, we are of the considered view that the appellant would not have a fair appeal if it were to proceed.

[15] In the premises, I make the following order:

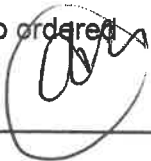
- (i) The trial proceedings relating to the appellant as well as the conviction and sentence of the appellant by the trial court are hereby set aside;
- (ii) The appellant must be released from prison forthwith in respect of this matter.



MOKOSE AJ

Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree and is so ordered



COLLIS J

Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

For the Appellant:

Adv S Nobangule instructed by
Legal Aid South Africa

For the State:

Adv T Byker instructed by
The Office of the Director of Public Prosecutions
Johannesburg

Date of hearing: 27 February 2018

Date of judgement: 19 March 2018