

12/02/13

DELETE WHICHEVER IS NOT APPLICABLE

IN THE NORTH-GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: YES ☒ NO ☒

(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO ☒

(3) REVISED. *yes*

12.2.13

In the matter between: \_\_\_\_\_  
DATE SIGNATURE

CASE NO: A 240/10

PHINEAS LUCKY KOKO

Appellant

and

THE STATE

Respondent

### JUDGMENT

Wright AJ

1. The Appellant is a man who was convicted of rape in 2009. He was sentenced to 7 years imprisonment and it would appear that he has been on bail from very shortly after the time of his arrest. The State had alleged that he had raped a 15 year old girl.
2. The complainant and her mother testified for the State. Unfortunately a large part of the record has gone missing. A fire occurred at the Magistrate's office some time after the conviction and sentence. This has resulted in the evidence of the following witnesses being lost:
  - (a) Dr Sayed, who examined the complainant and who testified for the State

(b) the evidence of the accused

(c) the evidence of the accused's alibi witness.

3. On 23 May 2011 this Court postponed the appeal for reconstruction of the record.

4. One of the grounds of appeal is that the Appellant's version is reasonably possibly true. On what is before me I am unable to weigh this submission.

5. The J88 medical form completed by Dr Sayed was admitted by the Appellant. Presumably Dr Sayed was called by the State to clarify, add to or subtract from his report.

6. On 29 August 2012 the Clerk of the Court, Pretoria wrote to the Director of Public Prosecutions stating that:

(a) he or she had attempted unsuccessfully to get hold of back-up CD's

(b) the Presiding Magistrate no longer has her notes

(c) the attorney, Mr Beetge was contacted with a view to reconstruction  
*"maar kry nie samewerking van sy kant nie"*

(d) the Prosecutor no longer works at the Pretoria Magistrate's Court.

7. The Presiding Magistrate deposed to an affidavit stating that because of the fire she finds it impossible to assist with the reconstruction of the record and that any attempt to do so would not be a true reflection of the proceedings before her and could prejudice either side.
8. I am perturbed by the allegations made in the letter by the Clerk of the Court concerning the attorney. I make no findings in this regard however. It is not clear to me that every effort has been made to reconstruct the record. It may be that Mr Beetge or any other attorney or Counsel involved in the case is willing but unable to assist in the reconstruction of the record. I do not know what steps were taken, if any, to get hold of the Prosecutor. He or she may be able to help. If not, it should be stated in a detailed affidavit why he or she cannot assist.
9. I am not minded to make orders against the Magistrate, the Prosecutor or Mr Beetge. They have not been given an opportunity to be heard on my proposed course in this case. I propose the order set out below.
  1. The appeal is postponed *sine die*
  2. The matter is referred to the Clerk of the Court, Pretoria who is ordered:
    - 2.1 to request the Presiding Magistrate, the Prosecutor(s) involved, the defence representatives, including Mr Beetge and the Appellant to attend a hearing in a Court

presided over by the Presiding Magistrate, Ms Neethling in which the above persons attempt to reconstruct the record. Thereafter the Clerk of the Court is to file an affidavit setting out in detail the outcome of these efforts;

2.2 alternatively to 2.1, in the event of the above meeting not being possible or practicable, to file a detailed affidavit with the Registrar of this Court setting out precisely what steps have been taken by the Clerk of the Court, Pretoria:

2.2.1 to contact the persons mentioned in 2.1

2.2.2 to collate their response

2.2.3 to reconstruct the record.

3. Irrespective of whether the Clerk of the Court follows 2.1 or 2.2 above he or she is ordered to file his or her affidavit , together with a copy of the record, reconstructed as best as is possible in the circumstances, with the Registrar of this Court by no later than 30 April 2013.

4. The bail of the Appellant is extended pending the outcome of the appeal.

5. A copy of this order is to be sent forthwith by the Registrar of this Court to the Clerk of the Magistrate's Court Pretoria who shall then immediately send a copy of this order either by hand, fax or electronic means to the persons referred to in 2.1 above.
6. After 30 April 2013 both the State and the Appellant shall be entitled to set the appeal down for hearing on a date allocated by the Registrar of this Court.
7. If the Appellant does not, by 31 May 2013 serve a notice of set down of the appeal on a date allocated by the Registrar, the National Prosecuting Authority is ordered to do so immediately thereafter.

  
G C WRIGHT AJ

  
J van Schaikwyk AJ

I agree and it is so ordered/~~I disagree~~

CHAMBERS,  
TSHWANE

.... February 2013

