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

CASE NO. HR 290/2001

In the matter between:

THE STATE

and

JEFFREY SHABANGU

ACCUSED

JUDGMENT

MOGOENG JP.

[1] This matter came before me as an automatic review in terms of s 304(A)(i) of the Criminal Procedure Act. What is said to have happened is that the accused was charged with rape in the Regional Court and convicted as charged on 21 October 2004. Following upon the conviction, the matter was referred to the High Court in terms of the provisions of the Criminal Law Amendment Act 105

of 1997 for sentence.

[2] The cassettes were then sent to the transcribers so that the record of the proceedings could be transcribed. To date, no transcription was done. The reason given is that the cassettes are missing and could, notwithstanding a diligent search, not be traced. All manner of attempts were made to reconstruct the record but it is impossible to do so. Even the Magistrate who presided over that case had already destroyed his notes when approached with a view to a possible reconstruction of the record. Evidently, the record of the proceedings is incapable of reconstruction.

[3] It is for the aforegoing that the Deputy Director of Public Prosecutions, Mr G.S. Maema, has applied that the conviction be set aside.

[4] Section 52(3)(e)(v) of the Criminal Law Amendment Act, No. 105 of 1997 provides that this Court may remit the case to the Regional Court with instruction to deal with any matter in such manner as the High Court may deem fit. The meaning and effect of this provision was considered and dealt with by Pickering J in the matter of *S v Appel* 2004 (2) SACR 360 (ECD) at 364b–g as set out below:

> "In my view, the same principles apply to a matter such as the present where, because of the defective record, I am unable to say whether the proceedings were in accordance with justice or not. The conviction in the present matter must therefore be set aside. I should perhaps mention that because there has been no acquittal on the merits, a plea of *autrefois acquit*, were it to be raised by the accused, would not succeed. See *S v Moodie* 1962 (1) SA 587 (A); *S v Naidoo* 1962 (4) SA 348 (A) at 353E–F.

> In *S v Quali* (*supra*) the accused was convicted during June 1981 of assault with intent to do grievous bodily harm, but for some reason, was never sentenced. In December 1985 he was brought before another magistrate who sent the matter on review because the record could not be traced and it was not possible to reconstruct it. Mullins J, with whom Kannemeyer JP concurred, accordingly set aside the proceedings. At 584B–C Mullins J stated:
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> 'The only case which I have been able to find where a matter was remitted for hearing *de novo* was *S v Dumondila and Another* 1977 (1) PH H105 (C). It is not clear from the very brief report what the facts were in that case, but none of the authorities referred to therein supports the order that was made that the case be remitted for trial *de novo* which was stated to be the appropriate course ("die gepaste procedure") to adopt. I am not prepared to follow that decision.
>
> In my view therefore the proper course in the present matter is merely to set aside the conviction. It will be open in my view to the prosecuting authority to determine whether or not to prosecute the accused *de novo*.'
>
> In the present matter, however, s 52(3)(e)(v) of the Act provides that the High Court may 'remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit'.
>
> Counsel were therefore agreed, correctly in my view, that the matter should be remitted to the regional court for hearing *de novo* before a different regional magistrate."

See also *S v Joubert* 1991 (1) SA 119 (AD) at 126D–I; *S v Solomons* 2005 (2) SACR 432 (CPD) at 434e–435a and 436; *S v Mcophele* 2007 (1) SACR 34 (ECD) at 37g–38b.

[5] It follows, therefore, that the conviction in this matter stands to be set aside. I will leave it open to the Director of Public Prosecutions to determine whether or not the trial should start ***de novo***, as was the case in *S v Quali* 1989 (2) SA 581 (E). Unlike in the case of *S v Appel* ***supra***, there has been no agreement between the parties that the matter be remitted to the Regional Court for a hearing ***de novo*** before a different Regional Court Magistrate.

[6] Accordingly, the conviction is set aside.

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M.T.R. MOGOENG
JUDGE PRESIDENT OF THE HIGH COURT

DATED: 14 November 2007