

SOUTH AFRICA / JUDGMENT

Opperman v S (A570/2013) [2016] ZAGPJHC 304 (27 May 2016)

[2016] ZAGPJHC 304

COURT

South Gauteng High Court, Johannesburg

BEFORE

L T Modiba, R Keightely

CASE / FILE NUMBER

A570/2013

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THE

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NUMBER: A570/2013

Reportable:

YES

Of

interest to other judges: YES

Revised.

27/5/2016

OPPERMAN, JOSEPH

Appellant

and

THE

STATE Respondent

JUDGMENT

MODIBA J:

- [1] Counsel for the appellant requests this court, sitting as a court of appeal, to set aside the appellant's conviction and sentence on the basis that his trial record is lost and cannot be reconstructed. This view was expressed by the Regional Court President as far back as 2010 in a letter filed on record. Counsel for the appellant contends that the appellant has been severely prejudiced because without a trial record, he has been unable to apply for leave to appeal and to lodge an appeal. Ten year efforts to trace his trial record and to have it

reconstructed have yielded no results.

- [2] The right he seeks to assert on the appellant's behalf in having the appellant's conviction and sentence set aside is set out in section 35 (3) (o) of the Constitution of the Republic of South Africa, 1996. He enjoins the court to use its powers in terms of section 304 (4) read with section 303 and section 304 (2) (iii) of the Criminal Procedure Act 51 of 1977. These sections provide as follows:

"35 Arrested, detained and accused persons

(3)(o) Every accused person has a right to a fair trial, which includes the right—
of appeal to, or review by, a higher court."

"304 (4)

If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

"303 Transmission of record

The clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of section 302 (1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his consideration."

304 Procedure on review

If, upon considering the said proceedings, it appears to the Judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal: Provided that where the Judge concerned is of the opinion that the conviction or sentence imposed is clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the provincial or local division having jurisdiction, the judge may lay the record of the proceedings before that court without obtaining the

statement of the judicial officer who presided at the trial.

“(c) Such court, whether or not it has heard evidence, may, subject to the

provisions of section 312-

...

(iii) set aside or correct the proceedings of the magistrate's court;

....”

[3] The rationale for setting aside of a conviction or sentence where the record of the trial proceedings is lost or incomplete and cannot be reconstructed, is that the State is burdened with the responsibility of keeping proper record of trial proceedings and that an accused's right to a fair trial (and therefore also the right of appeal) should not be frustrated by the State's failure to do so.[1]

[4] Despite the above provisions, failed attempts at reconstructing a lost trial record does not automatically give right to an accused person to have his sentence and conviction set aside. Olivier J in *Van Staden v The State*[2] made reference to a plethora of cases - where similar applications were considered - from which it extrapolated the principles set out below:

[4.1] The constitutional right of an accused to a fair trial includes the right of appeal.[3]

[4.2] Where an accused has the right to appeal and a missing or incomplete record makes it impossible to consider and adjudicate such appeal, the conviction or sentence will often be set aside.[4]

[4.3] The mere fact that the record of the proceedings might be lost or incomplete would not, however, automatically entitle an accused to the setting aside of a conviction or sentence.[5]

[4.4] Such relief will only be granted where a valid and enforceable right of appeal is frustrated by the fact that the record is lost or incomplete and cannot be reconstructed.[6]

[4.5] Prerequisites for such a right of appeal are:

[4.5.1] That such right is “exercised with due diligence” and that the rules and legislation regarding, inter alia, time limits are adhered to. Failure to do so may in some cases be viewed as an abandonment of the right to appeal.[7]

[4.5.2] That the accused applied for leave to appeal within the prescribed period of 14 days after sentence.

[4.5.3] That the accused advances his reasons or grounds for complaining that he was wrongly convicted.[8]

[4.6] The right to apply for condonation is a feature of an accused's right to a fair trial. Where an accused has failed to adhere to the prescribed time limit for the lodging of an application for leave to appeal, condonation would be required. The granting of condonation under those circumstances would amount to leave to proceed with the late application for leave to appeal. Where condonation is required, reasons for failure to comply with the applicable rules or legislation need to be sufficiently explained.[9]

[4.7] The interests of society, and of those responsible for the enforcement of the law, should be considered. Crime affects fundamental rights like the right to life, the right to freedom and security of the person and the right to property entrenched in sections 11, 12 and 25 of the Constitution. South Africans have the right to live in peace and harmony and to be free from fear. [10] The police are duty bound to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.[11] These human rights and the police duty to abate crime should not be unjustly frustrated by the accused's right to a fair trial.

[4.8] Whether an accused himself/herself is to blame for the situation in that when he eventually took steps to appeal, the record was not available and could not be reconstructed. Where he is to blame, an application to set aside a conviction and sentence has been refused.[12] Where he was found not to blame, an application to set aside a conviction and sentence has been granted.[13]

[5] The appellant was charged with one Christopher Solomon in the Regional Court held in Soweto with one count of housebreaking with intent to steal and one count of robbery with aggravating circumstances. On 14 August 2006, they were both convicted of both counts. The appellant was sentenced to 2 years imprisonment in respect of count one and 15 year's imprisonment in respect of count two. No concurrent running of sentences was ordered. In the result, he would serve an effective 17 years imprisonment.

[6] In terms of Rule 67(1) of the Magistrates' Courts Rules the appellant ought to have lodged his notice of appeal within 14 days of having been sentenced. This period expired on 4 September 2006. He contends that he filed an application for leave to appeal within the prescribed period. However his application got lost. A cover letter on the letter head of the Johannesburg Medium B Correction Centre dated 20 September 2006, bearing the Head of Prison's date stamp for that date, with the subject: 'Application for Appeal' is on the court file. The letter also bears a Clerk of Johannesburg date stamp of 21 September 2006. However the actual application for leave to appeal is not in view. On 24 March 2010, he compiled another application for leave to appeal as well as a condonation application signed at Mangaung Correctional Centre, Grootvlei where he was presumably serving his sentence at the time. In the affidavit filed in support of the condonation application, he draws the court's attention to the fact that is the second application that he has submitted. He submitted the first application while he was still at Johannesburg

Prison. He handed the latter application to the correctional services officials at Johannesburg Prison within the prescribed period. Once that was done, it is difficult to verify if the application has been processed. He stated that at that point, 'one is more often at the mercy of the officials'. It further appears from the record that his co-accused Solomon, who had also separately applied for condonation for the same reasons, had his condonation application considered and granted by the court a quo on 9 December 2010 without the requisite court record. It does not seem that the appellant's condonation application or application for leave to appeal was ever considered by the court a quo.

[7] This matter came before my sister Keightely J and me on 12 May 2016. Counsel for the appellant strongly argued in light of the prejudice suffered by the appellant over a long period that it is in the interests of justice that the appellant's conviction and sentence be set aside. At that point, we were not satisfied that all the possibilities in tracing the electronic record had been explored. We were also not satisfied that given that the appellant's co-accused had also applied for leave to appeal, it had been established that the trial record was never transcribed at his instance. We stood the matter down for two weeks to allow counsel to close these gaps and to supplement their heads of argument with a chronological sequence of events specifically setting out steps taken to trace the record (in any possible format) and at having the trial record reconstructed. In the light of the apparent prejudice suffered by this appellant over a long period, we were of the view that postponing the matter sine die would not serve the interests of justice as it would only serve to further prolong the prejudice suffered by the appellant, particularly the concerns raised by Keightely J and I were addressed and the matter could not be taken further. Counsel filed a jointly signed chronological assistance of events which I found of great assistance in considering the issue at hand as well as when preparing this judgment.

[8] There are letters on record dated between 2009 and 2016 demonstrating a concerted and consistent effort by various officials to locate and/ or reconstruct the appellant's record. The appellant's efforts in this regard may also have been frustrated by his transfer to several prisons. In addition to the two prisons alluded to above, there is also a letter on record on the letterhead of the Kimberly Corrections Centre. It could be indicative that he also served time at that prison. From the letters on record (one written by the Regional Court President: Gauteng) and two affidavits deposed to by Mr Jodaarn (Regional Magistrate, Johannesburg) and Mr Chodree (the trial prosecutor) the following appears:

8.1 The presiding magistrate retired from the Department of Justice shortly after she disposed of the trial. Considerable effort was employed to trace her. When she was eventually found, she could not assist with reconstructing the trial record because she could not find her notes from the trial.

8.2 The prosecutor and the defence attorney also could not assist with reconstructing the record for the same reason.

8.3 The docket in respect of the relevant charges could not be traced by SAPS Eldorado Park. Eventually when it was traced, no notes were found in the docket. Subsequently when the docket was traced, it was not found.

8.4 The appellant and Solomon were also requested by the clerk of the court to assist with reconstructing the trial record. It is unclear what came of this request.

[9] This is the third time that the matter is on the High Court roll. It was previously on the roll on 5 June 2014 and on 13 March

2015. On the first occasion, it was postponed to allow the clerk of the court to trace the presiding magistrate. On the second occasion it was removed from the roll because it did not appear that the appellant was granted leave to appeal. On 11 March 2016, the appellant was released from parole. This was revealed after attempts were made to bring him to court on 26 April 2016 to have his application for leave to appeal heard by the Magistrate Court.

[10] As regards the principle set out in 4.6 above, the granting of condonation is not a jurisdictional factor for the exercise by this court of its powers in terms of section 304 of Act 51 of 1997. I say so because the exercise of the relevant powers does not necessarily have to be triggered by the appellant. To require that condonation ought to have been granted by the court a quo where the court a quo could not consider such an application without a trial record would cause an appellant to run in a vicious circle, making it impossible for him to assert his right to a fair trial where his trial record is lost and cannot be reconstructed. It would also make the court's powers in terms of section 304 superfluous in a case such as this. By so saying I am not renouncing the principle set out in 4.6 above. The trial court requires a trial record to consider a condonation application. Where the trial record is not available, as in the circumstances of this case, remitting the matter again to the Magistrate Court would only further frustrate the appellant's efforts to assert his right to a fair trial, particularly in a case such as this where remitting the matter would not yield different results. The condonation principle only serves to abate the abuse of the court's powers in terms of section 304 by ensuring that an accused person was diligent in asserting his right to appeal and that he is not seeking

to assert a right that lapsed when he failed to file an application for leave to appeal within 14 days of sentence. Therefore, where an appellant ought to apply for condonation and the trial record cannot be traced or reconstructed, I see no reason why the court of appeal does not consider the condonation application as part of the factors taken into account when exercising its powers in terms of section

304. Therefore in my view, this matter is correctly before this court.

- [11] After the matter was postponed on 12 May 2016, an official of the transcribing company as well as the clerk of the Magistrate's court Johannesburg, sent emails to counsel for the appellant confirming that they have no record which was previously transcribed in this matter. The appeal clerk at the Office of the Director of Prosecutions also confirmed that records from 2005 have been perused and that there has not been a separate appeal matter for the appellant's co-accused, Solomon.
- [12] The respondent is not opposing this application. I have no basis to gainsay the appellant's version that he handed his application for leave to appeal to officials at the Johannesburg Correctional within the prescribed period. The date stamp of the clerk of the court Johannesburg shows that the application reached that office 13 days after expiry of the dies. There is no reason to attribute the 13 days delay to the appellant. Even if I had reason to attribute the delay to the appellant, as an incarcerated prisoner he would not have I great huddle showing good cause for a 13 day delay. I do not see how failure to trace or reconstruct the trial record under those circumstances would be blamed on him.
- [13] The responsibility to transcribe the trial record lies with the Clerk of the Court. The clerk of the court and an official from the contracted transcribing company has confirmed that the record was never transcribed and that it cannot be found. Without a trial record, the court a quo could not consider the condonation application. In the circumstances of this case, there is no basis for attributing this handicap to the appellant. I find that the appellant has shown good cause for the delay and that he is not to blame for it.
- [14] In his application for leave to appeal, he articulates the following grounds quoted verbatim for the appeal:

"AD THE MERITS

1. The Regional Magistrates erred in finding that there are no improbabilities in the states' case and that the state witnesses gave evidence in a satisfactory manner;
2. The Regional Magistrate erred in finding that the state has proved that the evidence of the state can be criticised on matters of details alone as alleged in the charge sheet. More particularly, the learned Regional Magistrate erred in not having regard to the evidence of the police officer and the first state witness, that there existing and glaring contradiction and discrepancies More particularly, the learned Regional Magistrate erred in not having regard to the fact that no evidence was adduced by the state that the crime committed was through the use of force.
3. The learned Regional Magistrate erred in finding that the evidence given by the accused that it is not possibly true, however the court erred by not properly analysing the evidence of the appellant.

4. The learned Regional Magistrate was incorrect in not finding that the evidence of the appellant to be contrary, but holding that the minor discrepancy was reasonably possibly true.
5. The learned Regional Magistrate erred in not taking into account the evidence of the second state witness as being self-contradictory in material respect such as good allegedly stolen.
6. The learned Regional Magistrate erred in law in finding that the only real issue to be decided was legal issue, to the negation of other interlocking circumstantial facts.

AD THE SENTENCE

7. The learned Regional Magistrate failed to take into account adequately, that the accused was a first offender, the age of the accused, overlooking the rehabilitation element.
8. The learned Regional Magistrate over-emphasised the seriousness of the offence and the interest of the society.” (sic)

[15] Given the grounds set out above, particularly in respect of the merits, without a trial record, it is impossible to gauge whether the appeal has prospects of success. This case is distinguishable from Zondi where the prospect of success requirement was postulated. In that case, the appellant had pleaded guilty. In such a case, depending on circumstances, a full trial record may not be as indispensable to determine the prospects of success. Where the accused pleaded not guilty and not only the trial record but the docket and the judgment of the court a quo is not in view, one has no tools to assess whether there is any substance to the grounds of appeal sought to be relied on by the appellant. My inability to assess whether the appellant meets this requirement should not be allowed to further prejudice the appellant. From the record, it does not appear that the appellant was legally represented when he filed the condonation application and the second application for leave to appeal. He seems to have done so in person. From the grounds set out above he does not seem to have a good grasp of procedural and substantive law. This begs the question whether he would have been of assistance in compiling the trial record.

[16] A consistent and concerted effort by various officials to trace and/ or reconstruct the trial record over a period of approximately ten years with intensity in the past two years - after he was granted legal aid to prosecute the appeal - has been demonstrated. Although the appellant has now been released on parole, it can never be argued that his inability to exercise his right to appeal does not continue to be prejudicial. Parolees often have to comply with stringent parole conditions which serve as a daily reminder that they are under retribution. He also continues to be burdened by a record of the relevant criminal convictions. Under circumstances where he has been unable to exercise his right to appeal due to no fault on his part, this prejudice ought to come to an end. Given the long time lapse since commission of the relevant offences and the disposal of the trial, as well as the fact that the police docket cannot be traced, it is unlikely that the respondent will reconstitute the prosecution. Such a proposition has also not been put before this court. In the

circumstances of this case, the duty of the police in abating crime as well as the society's rights to live a crime free life is dwarfed by the appellant's right to fair trial. A fair trial is a mechanism for determining the guilt of an accused person and of protecting the innocent against injustice.

An appeal, which is an important component of a fair trial, offers a convicted person relief against possible errors by the trial court. This is a constitutional right of every accused person. It is one of the cornerstones of a fair and a just society. Without the right to a fair trial, the rule of law and public faith in the justice system will fold. If the appellant would have been unsuccessful on appeal and conviction and sentence was confirmed, he would have served his time in prison given that he is now out on parole. The interest of society would have been served by his retribution. Therefore, the interest of society in having punishment meted out for crime would not be severely compromised. However, if he would have been successful, a great injustice would have been committed against him given that he was incarcerated for 10 years for crimes he may have not committed. As the old saying goes, it is better for 10 guilty men to roam free than 1 innocent man to languish in prison for a crime he is innocent of.[14] That is how important it is to guard against committing an injustice against an innocent man. Regrettably, without a trial record, the appellant's right to post-conviction relief against possible errors committed during the trial is unjustly compromised due to no fault on his part.

[17] Therefore his conviction and sentence stands to be set aside in terms of section 303 read with section 304 of Act 51 of 1997.

ORDER

1. It is hereby declared that the appellant's trial record cannot be traced and/ or reconstructed and that as a result, his right to a fair trial which includes the right to apply for condonation for the late filling of an application for leave to appeal and the right to file an appeal has been severely compromised due to no fault on his part.
2. The appellant's conviction and sentence in respect of count one and count two is set aside in terms of section 303 read with section 304 of Act 51 of 1997.

L T MODIBA

JUDGE OF THE HIGH COURT

R KEIGHTELY

I agree and it is so ordered.

APPEARENCES:

Appellant's Counsel: Mr EA Guarneri, Legal Aid South Africa – Johannesburg Justice Centre

Respondent's Counsel: Mr JA Barbenhorst, DPP - Johannesburg

Date heard: 12,

May 2016

Date judgment delivered: 27 May 2016

[1] S v Zondi 2003

(2) SACR 227 (W) AT 2431-244B and S v S 1995 (2) SACR 240 (T) at 424B.

[2]

[2008] ZANCHC 45; 2008 (2) SACR 626; [2008] 3 All SA 476 (NC) at 630C [para 5].

[3] Section 35 (3) (o) of the Constitution of the Republic of South Africa, 1996

[4] S v Sebothe and Others 2006

(2) SACR 1 (T) at 8.

[5] See S v K 1991

(2) SACR 190 (B) at 192I-194B; S v Ntantiso and others 1997

(2) SACR 302 (E) and S v Lesile 2000

(1) SACR 347 (W) at 353D-E.

[6] S v Zondi (Supra) at 241b-c. See also S v Carter 2007

(2) SACR 415 (SCA) at 421C-D.

[7] See s309B (1) (b) (i) of the Criminal Procedure Act, 51 of 1977 and Shinga v The State and Another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others 2007 (2) SACR 28 (CC).

[8] Zondi, (supra) at 240I-241B.

[9] 309B

(1) (b) (ii) of the Criminal Procedure Act; S v Mohlathe 2000 (2) SACR 530 (SCA) at 535G-536A; S v Di Blasi 1996 (1) SACR 1 (A) at 3 F-H'

[10] Section 198(a) of the Constitution.

[11] See s 205(3) of the Constitution

[12] Zondi supra

[13] S v Marais 1966

(2) SA 514 (T) at 516 G-H.

[14] In criminal law, Blackstone's formulation (also known as Blackstone's ratio or the Blackstone ratio) is the principle

that "It is better that ten guilty persons escape than one innocent person suffer", as expressed by the English jurist

William Blackstone in his seminal work, Commentaries on the Laws of England, published in the 1760s. Historically, the details of the ratio have varied, but the message that government and the courts must err on the side of innocence has remained constant. [http://en.m.wikipedia.org/wiki/Blackstone%27s formulation](http://en.m.wikipedia.org/wiki/Blackstone%27s_formulation)

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