

SOUTH AFRICA / JUDGMENT

S v Thobejane (CC169/07) [2009] ZAGPHC 2 (16 January 2009)

[2009] ZAGPHC 2**COURT**

High Courts - Gauteng

BEFORE

Seriti

CASE / FILE NUMBER

CC169/07

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Source record**IN THE HIGH COURT OF SOUTH AFRICA /ES
(TRANVAAL PROVINCIAL DIVISION)****REPORTABLE CASE****NO: CC169/07****DATE:**

16/1/2009

Regional Magistrate

THABAMOOPO

Case no: RCL137/05

IN

THE MATTER BETWEEN

THE

STATE

AND

MACHIKE

PETER THOBEJANE

JUDGMENT**SERITI, J**

The accused appeared before the Regional Court, Thabamooopo facing one count of rape.

The allegations against him were that on or about 21 March 2000 he unlawfully and intentionally had sexual intercourse with Z S, a 19 year old female, without her consent.

Apparently the trial started on 21 June 2006 and on 19 September 2006 he was convicted as charged.

The matter was referred to the High Court in terms of section 52 of the Criminal Law and Procedure Act 105 of 1997.

On 13 September 2007, the matter appeared before the High Court. On that date, LEGODI, J, as the Court record was not complete, made an order in the following terms:

"1. Attempts should be made to reconstruct the record, in this regard the defence prosecution and the trial Court should be

contacted by the clerk of the criminal Court to confirm the correctness of the reconstructed record.

2. The clerk of the criminal Court should ensure that the reconstructed record is properly arranged before it is forwarded to the high Court for consideration.
3. An explanation should be given as to the circumstances which led to the proceedings to be recorded mechanically and other portions not to be recorded mechanically.
4. Matter postponed to 5 February 2008 ..."

It is not clear what transpired on 5 February 2008.

On 26 March 2008 the matter appeared again before the High Court. On the said date, PRETORIUS, J granted an order which in substance is similar to the order granted by LEGODI, J, mentioned above, and the matter was postponed to 26 May 2008.

It is also not clear what happened on 26 May 2008, but the matter came again before the High Court on 26 June 2008. On the latter date, the matter was postponed to 2 December 2008.

On the last mentioned date, the matter came before me. Shortly before 2 December 2008, I read the file and I found that the missing portion of the record has not been reconstructed as yet.

I was also of the view that the matter cannot be properly be dealt with without the missing portion of the trial Court's record.

When the matter was called after short discussion with both the defence and State counsel, the matter was postponed to 4 December

2008, in order to allow both counsel to communicate with the clerk of the Court where the trial took place and the magistrate who presided over the matter about the reconstructed missing portion of the trial Court's record.

On 4 December 2008, both the defence and State counsel advised me that the relevant authorities say that it is impossible to reconstruct the missing portion of the record.

State counsel submitted that the Court should set aside the conviction of the accused and the State will be at liberty to charge

the accused at a later stage if the State so decides.

The defence counsel submitted that the Court should set aside the conviction of the accused, and the Court should also make an order that the State cannot recharge the accused.

Section 52(3)(e) of the Criminal Law and Procedure Act, *supra*, provides, *inter alia*, that in a matter which has been referred to the High Court in terms of this section, the High Court may confirm the conviction of the accused and impose a sentence or set aside the conviction.

In *S v Marais* 1966 2 SA 514 (T), the Court was dealing with an appeal from the Regional Court. The record was incomplete as there were certain portions thereof missing.

At p517A B, CLAASSEN, J said the following:

"If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case,

which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice."

See also *S v Collier* 1976 2 SA (CPD) at 378H-379A; *S v Talenyane* 2006(2) SACR 153 (OPD); *S v Ntantiso and Others* 1997(2) SACR 302 (ECD) at 305B-C and *S v Joubert* 1991 1 SA 119 (AD) at 126E-I. In my view, there are no prospects that the record will ever be reconstructed, and consequently, on the basis of the record before me, I am unable to say that the proceedings in the Regional Court were in accordance with justice.

The only available manner to deal with this case is to set aside the conviction of the accused, as submitted by both defence and State counsel.

Another issue to be considered is the submission by the defence counsel, namely that the Court should order the State not to recharge the accused.

Section 324 of the Criminal Procedure Act 51 of 1977 reads as follows:

"Whenever a conviction and sentence are set aside by the Court of Appeal on the ground-

- (a) ...
- (b) ...
- (c) that there has been any other technical irregularity or defect in the procedure, proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon other charge as if the accused had not previously been arraigned, tried and convicted."

The above quoted section has not been amended by the Criminal Law and Procedure 105 of 1997.

In S v Naidoo 1962 4 SA 348 (AA) at 354D E HOLMES, JA said:

"There are irregularities (fortunately rare) which are of so gross a nature as per se to vitiate the trial. In such a case the Court of Appeal sets aside the conviction without reference to the merits. There remains neither a conviction nor an acquittal on the merits, and the accused can be re-tried ..."

In S v Moodie 1962 1 SA 587 (AD) at 597G-H, HOEXTER, ACJ said:

"(c) Accordingly an irregularity in the procedure which justifies the setting aside of a conviction by the Court of Appeal is technical if it precludes a valid consideration of the merits; in other words if it makes it impossible for the Court to give a valid verdict on the merits."

See also S v Nzuza 1963 4 SA 856 (AD) at 859A C and S v Basson 2007(1) SACR 566 (CC) at p652a c (paragraph 255).

My view is that based on the above quoted authorities, including section 324 supra, if the conviction is set aside on the basis of a technical defect or irregularity as in this case the State, if it so decides, can recharge the accused for the same offence.

The Court therefore makes the following order:

1. The conviction of the accused is set aside.

W L SERITI

JUDGE OF THE HIGH COURT

CC169-2007

FOR THE STATE: ADV C PRUIS

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS

FOR THE ACCUSED: ADV R P W MORELDI

INSTRUCTED BY: LEGAL AID BOARD

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