REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: A 100/2008

DATE:26/08/2011

REPORTABLE

In the matter between

LEPHOI MOREMOHOLO **APPELLANT**

and

THE STATE **RESPONDENT**

Criminal Procedure – Appeal - Record of proceedings in the court below – exhibit (a transcript of proceedings in a bail application prior to hearing in trial court in which the appellant had given evidence - only evidence linking appellant to robbery he was charged with) lost after proceedings in trial court – fresh transcript of bail proceedings subsequently prepared and made available to court of appeal - Powers of court on appeal - s 22 read with s 304 (2) and s 309 (3) of the Criminal Procedure Act 51 of 1977 – not appropriate for court of appeal in circumstances of this case to accept fresh transcript of bail proceedings by mere production thereof in terms of s 235 (1) of the CPA - matter remitted to trial court for allowing evidence to be led afresh – directions in remittal order aimed at full ventilation of issue.

J U D G M E N T

VAN OOSTEN J:

[1] This appeal is concerned with the powers of the Court on appeal in regard to a lost transcript of bail proceedings which was handed in at the trial as an exhibit, containing the only evidence linking the appellant to the commission of the crime he had been convicted of. The appellant was convicted in the Regional Court, Johannesburg of robbery with aggravating circumstances and sentenced to 15 years imprisonment. He now appeals against both conviction and sentence with leave of this Court granted on petition.

[2] The evidence adduced at the trial proved beyond reasonable doubt the fact of an armed robbery of cash in transit as alleged in the charge sheet. The exact details thereof are not relevant for present purposes. None of the state witnesses was able to identify the robbers or to implicate the appellant in any other way. The only evidence linking the appellant to the robbery consisted of his earlier evidence given in an application for bail after his arrest pending trial which the prosecutor presented to the court a quo by way of a certified transcript of those proceedings. In his evidence in the bail proceedings the appellant *inter alia* admitted that he had been in possession of and driving a Bantam *bakkie* (the vehicle) on the day of the incident. The vehicle it became common cause at the trial, was involved in the robbery. The evidence adduced by the State revealed that the selfsame vehicle conveyed some of the robbers as well as the spoils of the robbery shortly after its occurrence, that it was chased by the police who had also fired shots at it and that it was eventually found abandoned with several bullet holes in the body of the vehicle. Before I deal any further with the evidence it is appropriate to refer to the proceedings in the court a quo when the prosecutor sought to hand in the transcript of the bail proceedings. In this regard the record of the proceedings in the court below, reflects the following:

> PROSECUTOR: Your worship the state is in possession of a transcript of the bail application ready and is requesting that it be handed in as exhibit your worship.
> COURT: Is it a certified copy?
> PROSECUTOR: Yes, your worship it is certified on the last page. Your worship I see that it is, it says I the undersigned but I do not see any signature on the last page.

COURT: Is there a name of the person or the transcriber?
PROSECUTOR: Yes, A Lightfoot but it is printed your worship.
COURT: Let me have a look at it. Mr Mohale it does not bear the signature of the transcriber, only the name of the transcriber. Is there any objection by the defence if it is submitted as it is?
ADV MOKHALE: (Inaudible).
COURT: Yes.
ADV MOKHALE: Well we do not have any objections to that.
COURT: Thank you. Then it is admitted as EXHIBIT D.
PROSECUTOR: D your worship.
COURT: Was it consists of 47 pages unless the defence dispenses with a reading out of it, it must be read into the record. Is that necessary Mr Mokhale?
ADV MOKHALE: No, it is not necessary … (intervenes)
COURT: Thank you.
ADV MOKHALE: Your worship (inaudible).
COURT: You may proceed with the case.

[3] After closure of the State's case an application for the discharge of the appellant in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA) was made but was dismissed. The appellant testified and in essence reiterated the version he had given in the bail proceedings. In essence he alleged that he had been the victim of a hijacking and that the hijackers had forced him to drive the vehicle. The court a quo rejected the appellant's version as improbable and therefore false and concluded in finding that the appellant participated in the robbery. An application for leave to appeal was lodged. At the hearing thereof it emerged that the exhibit "D" had gone astray. Leave to appeal was refused. More than two years later and while the present appeal was pending, an affidavit deposed to by the control officer of the criminal appeals section at the Magistrates' Court Johannesburg, was filed stating that exhibit "D" could not be found. A fresh transcript of the bail proceedings certified and signed by another transcriber has been prepared and is now before us.

[4] In the heads of argument filed on behalf of the appellant the submission is made that exhibit "D" in the absence of the transcriber's signature to the certification, in any event, was wrongly allowed in evidence for want of compliance with s 235 (1) of the CPA and that the trial court therefore should have discharged the appellant in terms of s 174 of the CPA at the end of the State's case. In argument before us the submission was not persisted with and in any event does not bear scrutiny: the transcript and its contents

were clearly admitted by counsel for the appellant as is apparent from the passage quoted above. The admission was conclusive and accordingly rendered it unnecessary for the State to adduce any further evidence as to the admissibility of the transcript. This brings to the fore the real issue in this appeal which is whether the loss of exhibit "'D" can now, on appeal, be cured and if so, how?

[5] The court of appeal is endowed with wide powers in the consideration of an appeal. Those include in terms of s 22 read with s 304 (2) and s 309 (3) of the CPA, the court of appeal hearing further evidence itself or remitting the matter to the court *a quo* with directions regarding the hearing of further evidence (*Cf Hiemstra's Criminal Procedure* 30-43 *et seq*). The loss of exhibit "D" in my view is nothing but a technicality which in the interests of justice, ought to be remedied. The original recording of the evidence presented at the bail proceedings is still available and as I have mentioned, has now again been transcribed. At first blush the simple option seems to be for this Court to accept the substitution of exhibit "D" with the recent transcript on the mere production thereof under the provisions of s 235 (1) of the CPA. I am however, not satisfied that this would be the appropriate procedure as it pre-supposes that the contents of the present transcript in all respects is similar to that of exhibit "D". On the probabilities there does not appear any reason to suspect any real differences in the transcriptions. In the absence of exhibit "D" and in order to avoid any possible prejudice to the appellant, due allowance, in my view, should however, be made for the possibility of differences. The purpose of the substitution of exhibit "D" will be to ensure as far as possible, that an accurate transcript of the bail proceedings is presented to the court. The alternative and in my view most practical option, in fairness to the State and the appellant, is to remit the matter to the trial court with directions aimed at a full ventilation of this aspect. As is apparent from the directions in the order I propose to make, the appellant at the re-trial on this aspect will be afforded the opportunity not only to challenge the admissibility of the transcript or such other evidence as the State may present on this aspect but also to lead such evidence as may be relevant on the contents thereof. Finally, it bears mention that both the attorney for the appellant and counsel for the respondent agreed that the order that follows is appropriate.

[6] The following order is made:

1. The appellant's conviction and sentence are set aside.
2. The matter is remitted to the trial court

2.1 to allow the State to prove the content of the proceedings at the hearing of the appellant's application for bail before the Regional Magistrate, Mr du Plessis, on 8 December 2005, subject to the appellant's rights of cross-examination.

2.2 to allow the appellant to testify or call any witnesses whose evidence may be relevant to the proceedings referred to in paragraph 1 above.

2.3 to consider the further evidence led, hear argument thereon and give a decision *de novo*.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

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L WINDELL
ACTING JUDGE OF THE HIGH COURT

Attorney for the Appellant	***J Penton*** ***(Johannesburg Justice Centre)***
Counsel for the Respondent	***Adv CCW Steyn***
Date of hearing	***`18 August 2011***
Date of judgment	***26 August 2011***