


IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: A628/2010

Date: 2012-11-08

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED ✓	
8/11/2012	
DATE	SIGNATURE

IN THE MATTER BETWEEN:

SEWELA AGNES MODIKA

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

PRETORIUS, J:

- [1] The appellant was convicted on two charges of assault with intent to do grievous bodily harm in the Ga-Kgapane Magistrate's Court on 29 April 2010. She was sentenced to 6 months imprisonment – the court did not set out whether the two counts were taken as one for purposes of sentence or how the court decided on the specific sentence.
- [2] On 12 February 2011 the matter was before this court, but was referred back to the magistrate's court as the record was not in order. On 30 October 2012 it is clear that the record has still not been properly reconstructed, despite an attempt by the magistrate to do so. Unfortunately his cryptic notes regarding the state witnesses are not enough for this court to make a decision. The evidence of the two crucial state witnesses is not available. Their evidence would have set out the full circumstances in which these assaults took place, but it is not in front of the court at this stage and it seems that, although some effort was made by the magistrate, the evidence cannot be reconstructed.
- [3] It is clear that no further reconstruction of the evidence is possible. In **S v Collier 1976 (2) SA 378 (CPD)** Burger J found at 379C-D:

"In my opinion the Court of appeal should deal with the case on the best available record unless it appears that evidence placed before the lower court does not appear on the record, that such evidence is material to the adjudication of the appeal and that the issue as to the

missing evidence cannot be settled by way of admissions or in some other manner. Where material evidence is not on record and the defect cannot be cured, the appeal should succeed."

[4] In **S v Marais 1966 (2) SA 514 (TPD)** Claassen J held at 516G-H:

"A full opportunity has already been given to the State to rectify the matter. The appellant has been seriously frustrated and prejudiced owing to a fault on the part of the State's servants. She is entitled to an appeal as of right. She is entitled to receive a copy certified as correct. This cannot be achieved. She has been frustrated in a basic right. She has been deprived of this through no fault of her own."

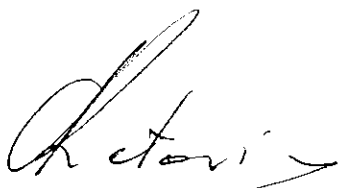
[5] Section 35(3)d) of the Constitution provides:

"(3) Every accused person has a right to a fair trial, which includes the right –

(d) to have their trial begin and conclude without unreasonable delay"

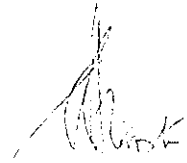
- [6] Counsel for the respondent concedes that it may not be in the interest of justice to further postpone the appeal as it is clear that it will not be possible to reconstruct the record.
- [7] The court has considered the available evidence and it is not of such a nature that this court can make any decisions as to the quality of the evidence of the state witnesses.
- [8] Therefore it would not be in the interest of justice to delay this case any further. I propose that the conviction and sentence are set aside.
- [9] It is ordered that:

The conviction and sentence imposed on 29 April 2010 by the Magistrate's Court, Ga-Kgapane are set aside.


C PRETORIUS

JUDGE OF THE HIGH COURT

I agree

A handwritten signature in dark ink, appearing to read 'L.I. Vorster', is positioned above a horizontal line.

L.I. VORSTER

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 8 November 2012

FOR THE APPELLANT: ADV. J.H. VAN ROOYEN

ON BEHALF OF: Legal Aid Board

FOR THE RESPONDENT: ADV. M. SEBELEBELE

ON BEHALF OF: Director of Public Prosecutions

DATE OF JUDGMENT: 8 November 2012