

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

A727/1007

DATE:

11 APRIL 2008

5 In the matter of:

ZOLANI SITHONGA

Appellant

and

THE STATE

Respondent

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J U D G M E N TLOUW, J:

[1] The appellant in this matter appeared in the Regional

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Court Bellville on one charge of robbery with aggravating

circumstances, it being alleged that on 16 April 1999 he

had robbed one Van Coller of R17 090 in cash and of one

Nissan bakkie by threatening Van Coller with a firearm

and by stabbing him with a knife. On 24 May 2000 he

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entered a plea of not guilty. After the trial before the

regional Magistrate Lombard he was found guilty as

charged on 29 June 2001 and he was sentenced to 15

years' imprisonment.

[2] The appellant wishes to appeal against his conviction and sentence but it appears that the record of the proceedings of his trial have been lost and cannot be reconstructed. The facts are as follows in this regard.

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[3] On 3 July 2001 the appellant indicated in writing to the clerk of the Parow Magistrate's Court that he wished to appeal against his conviction and sentence. According to an affidavit deposed to by Ms Valencia Leary who is currently the appeals clerk at the Bellville Magistrate's Court, the matter was duly noted in the records of that court as an appeal on 27 July 2001.

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[4] Pursuant thereto on 6 August 2001, Paarl Tikdienste, the contractor then charged with transcribing records in the Bellville Magistrate's Court, was requested to prepare four copies of the record of the proceedings in the Regional Court for purposes of the intended appeal. It appears from an affidavit deposed to by Ms M Ferreira, a senior administrative clerk at the Bellville Magistrate's Court, that she forwarded the tapes relating to the appellant's trial to Paarl Tikdienste on 3 August 2001 but that neither the tapes nor the transcribed record was returned to the Magistrate's Court.

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[5] According to the affidavit of Ms Leary, who has gone through the records held at the Bellville Magistrate's Court, the register at that court contains a note that tapes had been lost by Paarl Tikdienste. Ms Leary states that she has gone through every filing box held at the Magistrate's Court from 1993 to 2007 and that she has not found the missing tapes.

[6] Ms F de Beer deposed to an affidavit on 12 December 2007 wherein she states that Paarl Tikdienste, of which she was the owner, no longer exists as an entity and that it is not possible to state whether the relevant tapes were transcribed by Paarl Tikdienste and to supply a copy of such transcription. According to her, however, there was no outstanding work owed to Bellville Magistrate's Court and she states that all records and tapes had been returned to that office.

[7] Regional Magistrate Lombard who presided at the appellant's trial deposed to an affidavit on 7 September 2007 wherein he states that while he has a vague recollection of the matter, he is unable to assist in the reconstruction of the record because he retains his notes of trials in which he presides for two years and that his notes of this trial no longer exist.

[8] Ms B Roodt-Lourens who appeared as the prosecutor for part of the appellant's trial has likewise stated in an affidavit deposed to on 12 December 2007 that she no longer has her notes relating to the trial and that since she has no recollection of the facts of the matter she is unable to assist in the reconstruction of the record.

[9] Finally, Mr L Pumela who appeared at the trial for the appellant was contacted by Ms Leary on 18 July 2007. She states in her affidavit which she deposed to on 21 December 2007 that Mr Pumela informed her that he also no longer has his trial notes and that he could not assist in a reconstruction of the record. Although she requested Mr Pumela, according to what she states in her affidavit, to provide an affidavit to this effect, he has not produced same.

[10] The investigation of the circumstances relating to the record of the appellant's trial was initiated by Ms Leary who started work as the appeals clerk at the Bellville Magistrate's Court during January 2006 after she received an enquiry from the office of the Minister of Justice and Constitutional Development during February 2007. This was followed by a renewed application for leave to appeal by the appellant on 13 March 2007.

[11] It is clear from the foregoing that the whole of the record of the trial proceedings in the Regional Court relating to the appellant's trial has been lost and cannot be retrieved or reconstructed. In the circumstances, the appellant cannot be afforded the opportunity to exercise his right to have his case reconsidered on appeal in terms of the appeal procedures of this Court. This is a part of the appellant's constitutional right to a fair trial. It is trite that the only course open is to set aside the conviction and sentence. Mr Broeksma, who appears on behalf of the State, concedes that this is the order that should be made.

[12] It follows, in my view, that the following order should be made:

The appellant's conviction and sentence are set aside.

ZONDI, J. I confirm.

LOUW, J. It is so ordered.

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LOUW, J

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