IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT : CAPE TOWN]

CASE NO: A134/2008

In the matter between:

NICO SLABBERT **Appellant**

vs

THE STATE **Respondent**

JUDGMENT DELIVERED ON 6 NOVEMBER 2009

HJ ERASMUS, J:

[1] The appellant was on 20 April 2000 convicted in the Cape Town Regional Court on five counts of fraud. He was sentenced to an effective term of eighteen years imprisonment.

[2] Section 309B and 309C of the Criminal Procedure Act 51 of 1977 ("the Act"), which came into operation on 28 May 1999, provided that a convicted person had to apply within fourteen days for leave to appeal against a decision of a lower court.

[3] In *S v Steyn*[1] the provisions of sections 309B and 309C of the Act were found to be unconstitutional. However, due to the fact that the appellant was convicted and sentenced during the period 1 June 1999 to 29 May 2001, he nevertheless had in terms of the decisions in *S v Jafta; S v Ndondo; S v Mcontana*[2] and *S v Jaars; S v Willaims; S v Jantjies*[3] to apply for leave to appeal before prosecuting an appeal.

[4] On 24 November 2005 an application for leave to appeal was filed on behalf of the appellant. The operative part of the application reads as follows:

> Die applikant doen hiermee aansoek of verlof tot appel teen sy skuldigbevinding en vonnis op die volgende gronde:
>
> **Ad: Skuldigbevinding**
>
> Die verhoorhof het gefouteer deur die beskuldigde bo redelike twyfel skuldig te bevind. Beskuldigde se weergawe was redelike moontlik waar in die lig van die omstandighede. Die hof het te veel klem gelê op die klaer se getuienis.
>
> **Ad: Die vonnis**
>
> Die applikant se vonnis is onvanpas in die lig van die volgende faktore:
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> Die applikant se persoonlike omstandighede was nie genoeg inaggeneem deur die verhoorhof nie.

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[1] 2001 (1) SACR 25 (CC).

[2] 2004 (2) SACR 103 (E).

[3] 2002 (1) SACR 546 (C).

> Dit is die applikant se respekvolle betoog dat 'n Hof van Appel waarskynlik tot 'n ander bevinding met betrekking to die vonnis mag kom en versoek hy derhalwe die Agbare Hof se verlof om te appelleer.

[5] The application was brought before a regional magistrate on 24 October 2005, but she was not willing to hear the application without a transcription of the evidence. She ordered a transcription of the record to be prepared and postponed the matter to 24 November 2005.

[6] On 6 December 2005 the matter came before another regional magistrate who made the following order:

> Magistrate who convicted and sentenced the accused no longer employed by the Department of Justice and cannot be traced. In the interest of justice, benefit and regard to any decision he would have made with regard to the accuseds – applications granted to the accused and therefore to the accused. Application for condonation for late filing of appeal and application for leave to appeal against his conviction and sentence are granted. Accused requires pro deo Counsel in High Court. Accused may call witnesses and will require the Police to help him. Proceedings to be transcribed and forwarded to the High Court.

The regional magistrate made her order without having had access to the record, including the judgments on conviction and sentence, of the proceedings in the trial court. The appellant's apparently oral application for condonation was not supported by affidavit in which his failure to prosecute his appeal in good time is explained – by that time more than five years had elapsed since his conviction and sentence. Moreover, the notice of appeal placed before her is wholly inadequate in that it does not comply with the Rules of Court.

[7] The present appeal was enrolled for 23 October 2009. During July 2009 the Legal Aid Board instructed counsel to appear on behalf of the appellant.

[8] The principal reason why it took such a long time before the appeal was enrolled for hearing was the loss of a large number of the tapes containing the record. The trial in the regional court was lengthy and the proceedings were recorded on 77 tapes. Of these, numbers one to twenty-six and sixty-four to seventy-seven are available and have been transcribed. Numbers twenty-seven to sixty-three cannot be found. Pages 1 to 278 of the typed record contain the pleas and the evidence of Mr NJ Vercuiel, the investigating officer. At page 278 of the record, the case is adjourned to 28 February 1999. The rest of the transcribed record resumes at 2 November 1999, which means that the record of the proceedings from 18 February 1999 to 2 November 1999 cannot be traced. The missing tapes deal with the rest of the evidence of Mr Vercueil and with that of most of the complainants. The remaining part of the available record contains, *inter alia,* the evidence of the appellant in his defence, the judgment on conviction, and the full record of the sentencing proceedings which runs from page 416 to page 497 of the record. Efforts to reconstruct the missing parts of the record with the aid of those involved were not successful. In his regard, the magistrate who presided at the trial stated in an affidavit dated 31 March 2008:

> Met my nagaan van die saak rekord wat handel met my uitspraak kon ek weereens my waarneming rakende die kwaliteit van die getuies bevestig. Wat die inhoud van elke getuie se getuies betref kan ek egter glad nie onthou presies hoe elke getuie getuig het met betrekking to die betrokkenheid van die

> appellant in elk van die klagtes waarop hy skuldig bevind is nie. Die getuies was ongeveer 8 jaar gelede afgelê en sonder enige notas of ander hulpmiddels waaruit ek my getuie kan verfris is dit vir my onmoontlik om die ontbrekende saakrekord aan te vul. Die verlore bewysstukke, veral rakende die foto identifikasies, vererger uiteraard die problem.

I am satisfied that reconstruction of the full record is no longer possible.

[9] Before the hearing of the appeal on 23 October 2009, on 5 October 2009, the Director of Public Prosecutions, Western Cape, brought an application for an order reviewing and setting aside the decision of the regional magistrate handed down on 6 December 2005, and an order striking the appeal from the roll. On 20 October 2009 the appellant brought an application for an order in the following terms:

> 1. Dat Appellant se versuim om betyds aansoek te doen om verlof om te appelleer na sy skuldigbevinding in die Streekhof op 20 April 2000, gekondoneer word;
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> 2. Dat Appellant se laat wysiging van sy Appèlgronde, hierby aangeheg as Aanhangsel "A", gekondoneer word;
>
> 3. Dat die laat liassering van die Appellant se Argumentshoofde gekondoneer word.

By bringing an application in this form, the appellant effectively concedes that the condonation and leave granted by the regional magistrate on 6 December 2005 was not validly granted.

[10] In his founding affidavit, the appellant sets out the efforts he made after conviction and sentence to get the ball rolling for an application for

leave to appeal. He says that he made contact with various officers of the Legal Aid Board but that despite undertakings and promises, nothing effective was done. He concludes:

> In die lig van bogenoemde voer ek met respek aan dat die laat liassering van my aansoek om verlof to appèl geensins aan 'n late aan my kant toegeskryf kan word nie.

The appellant does not in his founding affidavit tell the full story. In his evidence in mitigation of sentence, reference was made to the two and a half years he spent in prison prior to his conviction and sentence. The following questions and answers ensued:

> What have you been doing in Pollsmoor for the past two and a half years, three years *[ie while awailting trial]*? --- They have asked me to help with the Legal Aid Your Honour and I've done so, so I've been working with the Legal Aid for approximately two and a half years now. I've also got a letter from Mr Cloete from the Legal Aid that he wrote for mitigation here.
>
> .....
>
> You started the whole system of legal aid in prison? --- No, the legal aid was there, but the people never. I'll give you one example Your Honour. People go to the legal aid and when they go to Court for the next year and then the guy who's going to Court in a week's time does'nt come to legal aid and their cases get postponed all the time. And in that sense people get postponed for six months, nine months and a year, and I picked it up and said to myself, okay fine, I will wok out a new system, I'll bring people down who's going to Court in a week or in two week's time, so I go around the whole prison, I get Court dates, and I bring the guys down to legal aid and fill in their forms. I hand it over to Mr Cloete and Mr Cloete hands in another form and they sign it and we finish it off.

The appellant was helping people who, in his own words, were "illiterate, people that can hardly spell their own names".

[11] The appellant is an educated man; he has matriculated and ran a small business at the time of his arrest. He was well acquainted with the operation, and shortcomings, of the legal aid system within prison. In helping other inmates with their legal aid problems, he had personal contact and worked with officials of the Legal Aid Board; he knew them by name. His failure to bring an application for leave to appeal in good time cannot simply be attributed to omission on the part of the Legal Aid Board and its officials. The appellant, especially in view of his background and knowledge, must himself bear part of the responsibility.

[12] There is a further consideration which Thring J adverts to in *S v Mantsha*[4]:

> In matters of this kind, due allowance must of course be made for the fact that the lay accused concerned has been unrepresented for all or part of the relevant time. Consequently, purely superficial and technical imperfections and lapses in procedural steps taken by such an accused are usually more readily condoned that they would have been had he been represented by a legal practitioner throughout. However, there is a limit to the lengths to which a Court of appeal can go in relaxing the Rules and granting condonation to those who flagrantly fail to comply with them. It is not, and has never been, the position in our law that whilst the relevant Rules apply to appellants who are represented, they do not to others who are not. That would be a quite untenable and unjustifiable stance to adopt.

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[4] 2006 (2) SACR 4 (C) at 6e—g. The judgmend in this matter was confirmed on appeal: *S v Mantsha* 2009 (1) SACR 414 (SCA).

The delay in that case, more than four years, is described as "inordinately long" and the non-compliance with the prescribed time-limit as "gross". *In casu* the delay is nine and a half years and, as it is put in *S v Mantsha*[5]:

> The longer the delay, generally speaking, the more reluctant will a Court of appeal be to condone it and the more persuasive will the explanation for the delay have to be before condonation can be granted.

[13] In his founding affidavit, the appellant further states:

> Ek is voorts geadviseer dat my vooruitsigte op sukses soveel te meer nou moontlik is aangesien 'n groot deel van die oorkonde, wat wesenlike getuienis bevat het rakende my identifisering en beweerde betrokkenheid by die misdade, verlore is.

The appellant relies on *S v Marais*[6], *S v Joubert*[7] and *S v Sebothe and Others*[8] in which it was held that where a record is incapable of reconstruction, despite best efforts, the conviction and sentence should be set aside. However, I am in respectful agreement with the following conclusion in *Ntopane and Another v S* [9]:

> In my view, however, the present matter is distinguishable from the cases normally encountered, in one respect. In the present matter, the record is incapable of reconstruction mainly because of the appellant's delay in noting

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[5] *Supra*, at 7b.

[6] 1966 (2) SA 514 (T) at 516G—H.

[7] 1991 (1) SA 119 (A0 at 126E—J. See also ?????

[8] 2006 (1) SACR 1 (T).

[9] [2009] JOL 23258 (T) par [12], per Makgoka AJ with Preller J concurring.

> his appeal. The appellant noted his appeal some three years after conviction and sentence. Such a delay significantly led to the reduced chances of the record construction. With passage of time, vital parts of the reconstruction material simply got lost.

In this case, the appellant's first attempt to obtain leave to appeal came before the regional magistrate five years after conviction and sentence; his current application for condonation and leave comes nine and a half years after conviction and sentence. As is pointed out in *S v Mantsha*[10], the purpose of statutory time limits in appeal proceedings is –

> ..... to avoid the very kind of situation that has arisen here, where after the lapse of a very long time the record of the trial proceedings has been lost, or parts of it have been lost, and they cannot at this stage easily be reconstructed.

[14] The appellant's submission that the loss of the record enhances the prospects of success on appeal is misconceived. It is correct that a record which is inadequate for proper consideration of an appeal will as a rule lead to the conviction and sentence being set aside. The setting aside of the conviction and sentence is in such a case not based on a finding made after consideration of the merits of the appeal. In fact, in the absence of an adequate record, the Court of appeal is unable to consider the merits of the case.[11] The fact that if condonation is granted, setting aside of the conviction and sentence will follow –

> ..... cannot lay the foundation for the submission that the appeal has prospects for success on its merits.[12]

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[10] 2006 (2) SACR 4 (C) at 7c.

[11] See *S v Marais, supra*, at 378*in fin*—378A.

[12] *S v Mantsha* 2009 (1) SACR 414 (SCA) at 420f.

The setting aside of the conviction and sentence in these circumstances does not amount to acquittal. The conviction and sentence are set aside by reason of a technical irregularity or defect in the proceedings as contemplated in section 324(c) of the Act, and the proceedings may in terms of the section again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted.[13]

[15] In view of the foregoing, the appellant's application for condonation and consequential relief falls to be dismissed, and the appeal must be struck from the roll.

[16] In his proposed amended notice of appeal, the appellant envisages an appeal against the sentence imposed by the magistrate on the ground that the cumulative effect of the effective term of eighteen years imprisonment is shockingly inappropriate ("skokkend onvanpas"). Counsel for the State is also of the opinion that the sentence is inappropriate and in his written Heads of Argument, he requests us to substitute the sentence with an effective sentence of ten or twelve years. At the hearing, counsel for the appellant chose not to address us on sentence, pinning his hopes exclusively on the submission that the conviction and sentence are to be set aside by reason of the inadequate record.

[17] As I have already indicated, the sentencing proceedings are contained in full in the record before us. From that record it is apparent

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[13] See *S v Zondi* 2003 (2) SACR 227 (W) at 248a—251a.

that the cumulative effect of the sentence imposed is indeed such as to call for intervention. This can be done in the exercise of the inherent powers of this Court.

[18] The regional magistrate in imposing sentence took all relevant considerations into account. These included a number of aggravating factors. The magistrate rightly concluded that a long term of imprisonment was called for. The sentence he imposed was as follows:

Count 2 : Two years imprisonment
Count 3 : Four years imprisonment
Count 26 : Ten years imprisonment
Count 28 : Eight years imprisonment
Count 31 : Six years imprisonment

He further ordered that the terms of imprisonment run concurrently in such a way that an effective term of eighteen years is served.

[19] Although the regional magistrate refers to the fact that the appellant had already spent almost three years in custody before conviction and sentence, he did not in my view give this factor sufficient weight in considering the cumulative effect of the sentences imposed. In my view, justice will be served by substituting an effective term of imprisonment of twelve years.

[20] The following orders are made:

1. The condonation and leave to appeal granted by the regional magistrate on 6 December 2006 are hereby reviewed and set aside.

2. The appellant's application for condonation is refused.

3. The appeal is struck from the roll.

4. The sentences imposed in respect of counts two, three, twenty-six, twenty-eight and thirty-one are confirmed.

5. The magistrate's ruling in regard to the concurrent running of sentences is set aside and replaced by the following:

   The sentences imposed in respect of counts two, three, twenty-six, twenty-eight and thirty-one are to run concurrently in such a manner that an effective term of twelve years is served.

HJ ERASMUS, J

I agree.

MATOJANE, AJ