IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A401/2011

DATE: 03 AUGUST 2012

In the matter between:

M SIBELEWANA Appellant

and

THE STATE Respondent

J U D G M E N T

STEYN, J:

The represented appellant in this matter was charged with 16 counts. He pleaded not guilty. On 17 September 2007 he was found guilty of **four counts of robbery with aggravating circumstances, one count of robbery and one count of theft**. There was uncertainty about his age when the crimes were committed. A probation officer's report was obtained before sentence. It was established that he was 18 years old when the crimes were committed and that he had previous convictions for six robberies committed when he was 17 years old, in respect of which he had received a three years

suspended sentence. The crimes that he was convicted of in this case, were committed during the period of suspension.

The provisions of Section 51(2) of Act 105 of 1997 the Minimum Sentence Legislation, were applicable to the convictions of robbery with aggravating circumstances. The prescribed minimum sentence for this offence is 15 years imprisonment. It does not appear on any of the charge sheets that the appellant was warned of the applicability of minimum sentence legislation.

The magistrate must have found substantial and compelling circumstances to deviate from the applicable prescribed minimum sentences as the accused was only sentenced to six years imprisonment in respect of each count of the four offences of robbery with aggravating circumstances. Sentences of five years on each of the counts of robbery and theft were also imposed and it was ordered that these latter sentences would run concurrently with the sentences in respect of the charges of robbery with aggravating circumstances. Effectively, the accused was sentenced to 24 years imprisonment, considerably less than the term of imprisonment he would have been ordered to serve had the magistrate not found substantial and compelling circumstances to impose a much lesser sentence.

This matter was dragged out an inordinately and unacceptably long time. The appellant first appeared in court on 9 March 2005 but only pleaded on 17 September 2007. On 12 October 2007 he was found guilty and on 28 November 2007, when he was sentenced, he had already been imprisoned for more than two and a half years.

His application for leave to appeal against sentence was only heard on 21 April 2011. His initial written application for condonation and leave to appeal was dated 8 October 2009. In a letter relating to the application to appeal he alleges that an earlier application for condonation and leave to appeal "came to nothing" and "could not be found at court". There were several postponements, *inter alia* because the Legal Aid Board were not initially prepared to assist the appellant. The appellant was not advised that he could also represent himself.

This one of the two matters before us today where the court record is incomplete. This aspect is of great concern in view of the extensive delays and serious offences that appellant has been found guilty of.

On page 43 of the record before us it appears that on 9 March 2010 it was recorded by the presiding magistrate, Ms Smile, that: "Only record available in this case <u>is on sentence</u> seems

as if the rest of the record was misfiled", indicating that a sentencing record was available at that stage. The case was postponed several times and it was noted that the record was still not complete. On 21 May 2010 it was recorded that the matter would be postponed for the reconstruction of the record and further postponements followed. On 17 November 2010 it was recorded that the defendant had requested a postponement after the prosecutor had received a further record that had not been available before and "court also received the extra information/record this morning".

On 7 February 2011 the matter was called before the trial magistrate who attempted to reconstruct the record. She mentioned that the appellant wished to lodge an appeal and that the record was not complete. She referred to the evidence of the first witness whose evidence had not been recorded. This evidence was then reconstructed in the presence of all the parties. She mentioned that there was evidence: "at some stage of sentence and argument before sentence that was not available" but she added that after perusing the record the only outstanding evidence that she could find was the evidence of the first witness called by the state, whose evidence was reconstructed. She and the representative of the appellant later confirmed that this was the only missing evidence, presumably at that stage. If the

sentencing and pleading evidence were missing at that stage of the proceedings the magistrate and counsel for appellant were clearly mistaken.

On 23 March 2011 it was recorded on the record before us (page 48) "all the records is (sic) now available". On 21 April 2011 the representative successfully argued appellant's application for leave to appeal against sentence. There is no indication whether sections of the record were not available at the time.

On page 205 of the record before us there is an undated but signed document titled "Magistrate's Reasons", noting that the trial court delivered an *ex tempore* judgment and that the reasons for conviction and sentence furnished therein be regarded as part of the record and, in addition, that after evidence and argument was heard, *ex tempore* reasons for sentence were given and that those reasons be regarded as part of the record.

Attached to the record presented to us is a letter from the office of the Director of Public Prosecutions dated 1 September 2011, referring to this particular case and noting that the record was still incomplete with the transcript ending on page 145 simultaneously with a postponement of the matter

for the report of the probation officer.

It was noted that it is apparent from the magistrate's reasons that I have just referred to, that evidence was presented in respect of sentence and that the sentencing proceedings should be transcribed. **Urgent rectification** was required of all the records. A letter was filed by the trial magistrate dated 4 April 2012, seven months after the date of the letter from the office of Public Prosecutions urging urgency. She noted that the probation officer report can be found on page 171 of the record and added: "I have already reconstructed the case as fully as I could". She refers to the page containing her reasons and says it is a standard form included by the transcribers without commenting on the contents of this signed form. She added "I regard the record as complete and have nothing further to add".

It is quite clear that at some stage the record containing the pleading procedure as well as the evidence of the first witness was absent. The evidence relating to the first witness was transcribed but the record relating to the pleading of the accused and whether or not he was warned of the applicability of minimum sentence legislation does not appear. In addition the sentencing proceedings are now absent from the record, save for the report of the probation officer.

I am not aware whether or not anybody testified on behalf of the appellant regarding sentence or whether submissions were made by his legal representative relating to his personal circumstances. The reasons of the magistrate for the sentence are absent. These missing documents appear to be relevant and material in order to hear the appellant's application for leave to appeal against sentence.

It is not clear to me why this aspect of missing parts of the record did not form part of the grounds of appeal. As a general rule an appellant is confined to the grounds of appeal as set out in his notice of appeal in an application for to leave to appeal. New grounds should be formulated in writing and furnished to the clerk of the court and the magistrate, who should be afforded an opportunity to furnish additional reasons. In this matter it does not appear that the magistrate was warned that the record of the proceedings was still incomplete and she was not apprised of what the missing documents were. It may be that the other documents are found.

Rule 67(5) of the Magistrate Court Rules places an obligation on the clerk of the court to prepare a copy of the record of the case including a transcript thereof as soon as leave to appeal

has been granted by the magistrate. Rule 51(3) of the High Court Rules provides that the ultimate responsibility for ensuring that all copies of a record on appeal are in all respects properly before the Court, shall rest on the appellant or his/her legal representative, provided that where the appellant is not represented the responsibility rests on the Director of Public Prosecutions.

It stands to reason that the record of the proceedings in the trial court is of cardinal importance. This record forms the basis of the rehearing by the Court of Appeal. Where the record is inadequate for a proper consideration of the appeal it could lead to the conviction and sentence being set aside. It has been said however that the record need not be perfect, it should merely be adequate for a proper consideration of the appeal.

I refer to the comments in Du Toit *et al*, Commentary on the Criminal Procedure Act, Supplementary Volume, p 30-31 and cases quoted therein.

An accused is not *ipso facto* entitled to his discharge if the record or portions thereof get lost. The best possible evidence of the record should rather be obtained and information on what was testified or said during the trial should be sought

from every source that can make a contribution. When the record of the proceedings in the court *a quo* is inadequate for a proper consideration of the appeal, both the state and the appellant have a duty to try and reconstruct the record.

I refer to S v Zondi 2003(2) SACR 227 (W) 245(c to d).

With this in mind the clerk of the court must obtain an affidavit to prove the loss of the record if that is the situation. Thereafter the clerk must obtain affidavits from witnesses and others who were present at the trial in order to prove the evidence that has been adduced. Eventually he will then submit a reconstructed record to the accused to establish whether he agrees with it or not. The accused's response is confirmed by means of an affidavit. A report concerning the correctness of the record must also be obtained from the presiding magistrate.

In S v Zenzele 2009(2) SACR 407 (WCC) Yekiso J gave a useful summary of the duties of the presiding magistrate once it was clear that the record of a proceedings or the part thereof had gone missing. Where it is impossible to reconstruct a missing record, the question whether the defect is material has to be answered in the context of each case.

In S v Van Staden 2008(2) SACR 626 (NC) the court held that

the constitutional right of an accused to appeal against his conviction or sentence or both was a protectable right only where the accused has complied with the applicable rules and legislation or was able to present an acceptable explanation for his failure to do so.

The appellant, or his representative carries the final responsibility to ensure that the appeal record is in order, but the courts have commented that the responsibility for ensuring that all copies of the appeal record are in all respects correct before the court is not limited to the appellant and his attorney. As noted, the presiding officer, the clerk of the court, the operators of recording machines, all have duties in regard thereto. However, the attorney is entrusted with the final responsibility of ensuring that the appeal record is correct.

See also Hiemstra Suid-Afrikaanse Strafproses, 6th edition, p 825 to 827 and 879.

On behalf of appellant it was argued that since the sentencing proceedings are not part of the current record before Court it is not clear as to whether the missing sections were transcribed or whether they were missing in their entirety. It is apparent that the magistrate was only concerned about the

missing record of the first witness' evidence during the reconstruction process, although the court noted that there was evidence of sentence and argument before sentence, that was not available.

The record of the missing proceedings in the trial court is of cardinal importance in order to properly hear this appeal and it is correct as argued on behalf of the appellant, that if it is apparent that the record is inadequate for a proper consideration of the appeal, it may lead to the conviction and sentence being set aside.

The appellant's representative requested that the current record in its incomplete form be returned to the magistrate's court in Paarl for a proper and full reconstruction before the Court deals with this matter. The state agreed with this procedure but responded that it was the duty of the appellant's representatives to ensure that the complete record of the proceedings was placed before Court and that the appellant's representative has failed to establish what has happened to the sentencing proceedings. The magistrate had not been given an opportunity to comment in this regard.

I agree that it would not be in the interests of justice for this court to proceed to deal with the matter without first giving the

magistrate an opportunity to comment on the missing plea and sentencing proceedings.

In this matter there have been many deplorable and unfortunate delays. The rights of the appellant to have the matter heard and finalised and to have the record reconstructed and finalised, have been frustrated. The legal justice system, including the appellant's representative at the time, failed the appellant by causing or not preventing inordinate delays in finalising this matter.

Due to the particular circumstances of this mater I would make the following order:

1. The matter is postponed to 12 October 2012 in order to allow the appellant the opportunity to take steps to attend to the rectification and/or reconstruction of the record as a matter of urgency.

2. The clerk of the court in the Paarl as well as the magistrate, Ms Smile, assisted if needs be by a representative of the Director of Public Prosecutions, is requested to take all steps necessary to locate and reconstruct the missing sections of the record including plea proceedings and all sentencing proceedings.

3. The clerk of the court in Paarl and the said magistrate are requested to set out in writing what steps were taken to reconstruct and/or locate the missing sections of the record which recordal shall be filed in this Court on or before 5 October 2012.

4. The appellant's representative shall set out in an affidavit all steps taken on behalf of the appellant in order to have the record reconstructed or the missing parts of the record located, which documents shall be filed at Court on or before 5 October 2012.

I agree.

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SABA, AJ

It is so ordered.

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STEYN, J

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