REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: A571/12

In the matter between:

PIETER DAVIDS **Appellant**

Versus

THE STATE **Respondent**

JUDGEMENT: 18 MARCH 2013

BOZALEK, J:

[1] This is an appeal against conviction and sentence following the appellant's conviction for murder on 20 July 2005 in the Regional Court sitting at Bredasdorp.

[2] The appellant was sentenced to 15 years imprisonment and a declaration was made that he was unfit to possess a firearm. Within two weeks of his conviction and sentence the appellant directed a letter from prison to the clerk of the court indicating that he wished to appeal but that he could not afford legal representation. The appellant supplemented his notice of appeal with further correspondence setting out his grounds of appeal. What

should have happened at this point was that, in terms of s 67 of the Magistrates Courts Rules, the clerk of the court should have sent a copy of the appellant's application to the Director of Public Prosecutions and a hearing should have been arranged. Notwithstanding the appellant's efforts, however, his attempt to appeal languished for seven years until he obtained legal representation through the Legal Aid Board in August 2012.

[3] At that stage a further formal application for leave to appeal was launched. It came before a different regional magistrate on 22 August 2012 when it was established that the record of the proceedings, which had been mechanically recorded, was missing. The application was postponed for the record to be traced but on 5 October 2012 it was concluded that the record could not be found or reconstructed and the appellant's application for leave to appeal against his conviction and sentence was granted *"in (the) absence of typed record"*.

[4] On appeal the only portion of the record available is the charge sheet with a record of postponements and notes by the presiding officer, a medico-legal post-mortem report and a list of the appellant's previous convictions.

[5] The clerk of the court at the Somerset West Magistrates Court filed an affidavit indicating the various steps taken to find the record and indicating that the search commenced as far as back as September 2006. No explanation is given why the matter was not brought before the regional magistrate much earlier when the record could not be found or, indeed, why the appellant had not simply been requisitioned from prison to make his

application for leave to appeal. The office manager at the Magistrate's Court in Bredasdorp confirms that a search for the missing record was made but also does not explain why the matter was allowed to drift for more than five years without any decisive action being taken.

[6] The Court was advised by the representative of the National Director of Public Prosecutions that the codified instructions of the Department of Justice and Constitutional Development provide that the records of cases disposed of after a trial may only be destroyed after the expiration of any imposed prison term. Thus the clerk of the court was obliged to archive the records in this matter for 15 years.

[7] The history of this appeal presents a most disturbing picture. For reasons which are not clear, but appear to relate to the fact that the tape recording of the proceedings could not be traced, the appellant's timeous application for leave to appeal was effectively ignored for five years while he remained in prison. Having the record available was not a prerequisite to hearing the appellant's application for leave to appeal and, had this been dealt with expeditiously and been successful, one has little doubt that the record would either have been found or would have been reconstructed with the assistance of the presiding magistrate's notes and those of the other parties involved. By the time the application was finally heard in 2012 the trial magistrate had long since retired and, not surprisingly, had no recollection of the matter.

[8] The failure to process the appellant's application for leave to appeal amounted to a miscarriage of justice. To make matters worse the

correspondence in the appeal record reveals that there are several other instances of missing records in the same courts. In the circumstances I propose to send a copy of this judgment to the Regional Director of the Department of Justice and Constitutional Development drawing his attention to this serious problem.

[9] Quite apart from the unacceptable delay other difficulties reveal themselves in the record. There is no indication that the magistrate followed the requirements for the reconstruction of the record as set out in *S v Gora and Another* 2010 (1) SACR 159 (WCC). That case underlined that the reconstruction process is part and parcel of the fair trial process and includes the following elements: the accused must be informed of the missing portion of the record, of the need to have it reconstructed and of his right to participate in the process. It was further held that once it becomes apparent that the record of the trial is lost, the presiding officer should direct the clerk of the court to inform all the interested parties, being the accused or his legal representative and the prosecutor, of the fact of the missing record and arrange a date for the parties to re-assemble in an open court in order to jointly undertake the proposed reconstruction. From the record it would appear that neither the appellant nor the trial attorney nor the trial prosecutor, either timeously or at all, were asked to make a contribution to reconstruct the record. Be that as it may, in the light of the seven and a half year delay since the trial it is most improbable that those parties would be able to make any meaningful contribution to reconstruct the record and thus a referral back to the magistrate's court for further reconstruction would not only be futile but would add to the already excessive delay.

[10] Given the loss of all the recorded evidence it is clear that the record is inadequate for a proper consideration of the appeal. In these circumstances it is inevitable that the appellant's conviction and sentence must be set aside. See *S v Chabedi* 2005 (1) SACR 415 (SCA) at para [5]. Indeed, there was no dispute between counsel that such a step must follow. However, counsel for the respondent submitted that the regional magistrate should rather have sent the matter on review in terms of s 304 (4) of the Criminal Procedure Act 51 of 1977 and that it was improper for her to have granted the application for leave to appeal on the sole ground that the record of evidence which led to the conviction, including the judgment and reasons for sentence, was not available. In these circumstances, as was pointed out in *S v Mantsha* 2009 (1) SACR 414 (SCA), it can hardly be said that the appellant is being granted leave to appeal on the merits since a consideration thereof is impossible in the absence of a record. (At para [14] and [15]).

[11] Respondent's counsel submitted further that the failure to process the appellant's leave to appeal application by the Department of Justice constituted a failure of justice which warranted the matter being sent to this Court as a review in terms of s 304 (4) of Act 51 of 1977. Respondent's counsel makes the further disturbing submission that there are *"hundreds of similar cases"* of lost or destroyed records which are in the process of becoming appeals to this Court following, or in anticipation of, similar decisions by magistrates confronted by applications for leave to appeal. Against this background respondent's counsel requested that the Court

should provide clarity to the magistrates courts as to whether matters such as these should be treated as appeals or reviews.

[12] In my view it would not be desirable for this Court to prescribe a uniform course of conduct in matters involving missing records since the circumstances of each case may vary widely. There may be matters in which only a portion of the record is missing, which portion is arguably not material to the appeal. In others there may be a dispute as to whether the reconstructed record is adequate for the purposes of an appeal in which case the arguments of counsel for both parties could be of great assistance to the Court. In this regard it must be borne in mind that where a matter is remitted by way of review the Court will generally only have the benefit of the magistrate's views although, of course, exercising its powers in terms of s 304(3), the Court may direct a question of law or fact to be argued by the Director of Public Prosecutions and by such other counsel as the Court may appoint. A further factor to be taken into account is that by and large the appeal roll of the High Court should be reserved for cases where there is an acceptable record of the proceedings and the appeal can be considered on its merits as opposed to cases, such as the present, where the record is so patently defective that the conviction and sentence cannot be sustained in the face of a proposed appeal.

[13] The inability to exercise a right of appeal because of a missing record is a breach of the constitutional right to a fair trial and in such circumstances will generally lead to the conclusion that the proceedings have not been in accordance with justice and must be set aside. In a matter such as the

present given the almost complete absence of the record of proceedings the magistrate could not have been faulted for remitting the matter for review in terms of s 304 (4) of Act 51 of 1977 rather than granting leave to appeal. Remittal on review should, of course, only be taken once the magistrate has, in the manner described in S v Gora, taken all necessary steps to attempt to reconstruct the record.

[14] As mentioned, I consider that it would be inappropriate to prescribe to magistrates when, in cases involving missing records and where leave to appeal is sought, they should exercise their power to rather send a matter on review. Not only would this tend to fetter the discretion which magistrates enjoy in this regard but any guideline would be so general as to have limited benefit. Suffice it to say that when all appropriate steps have been taken to reconstruct the record but it is irredeemably defective for the purposes of an appeal, magistrates should consider using the crisper and probably more expeditious procedure of sending the case on review in terms of s 304 (4) of Act 51 of 1977.

[15] In the present case, the matter having come before the Court as an appeal, I can see no point in now treating it as a review rather than simply upholding the appeal and setting aside the conviction and sentence.

[16] Finally, respondent's counsel submitted that the Court should make an order in terms of s 324 (c) of Act 51 of 1977 to the effect that a fresh prosecution of the appellant can be instituted by the State after consideration of all the relevant factors including the appellant's date of incarceration and when he would have qualified for release on parole. The relevant section

provides that where a conviction and sentence have been set aside on appeal on the grounds of a technical irregularity or defect in the procedure, proceedings may be re-instituted in respect of the same offence as if the appellant had not previously been arraigned, tried and convicted. However, s 324 does not envisage a prior order or declaration by the court of appeal that there has been a technical irregularity or defect and therefore I see no warrant for making such an order as a necessary prerequisite to the State reinstituting prosecution. It is for the Director of Public Prosecutions or his/her delegee to form a view on the matter and take a decision on whether to re-institute proceedings or not.

[17] In the result I consider that the following order should be made:

i. The appeal against conviction and sentence is upheld;

ii. The appellant's conviction for murder and sentence of 15 years imprisonment are set aside as well as the declaration in terms of s 103 of Act 60 of 2000 that he is unfit to possess a firearm.

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L J BOZALEK

JUDGE OF THE HIGH COURT

I agree.

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N BOQWANA

ACTING JUDGE OF THE HIGH COURT

For the Applicant:	***Adv KJ Klopper***
As instructed by:	***Legal Aid Board***
For the Respondent:	***Adv LJ Badenhorst***
As Instructed by:	***Director of Public Prosecutions***