

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA



A42/18  
01/03/2018

Case Number: 731/17  
Special Review: 24/18

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO.  
(2) OF INTEREST TO OTHER JUDGES: NO.  
(3) REVISED.

DATE

SIGNATURE

In the matter between:

TYSEN SEKOME MASEMOLA

ACCUSED

V

THE STATE

RESPONDENT

*Coram:* PISTORIUS AJ

REVIEW JUDGEMENT

PISTORIUS AJ

[1] The matter has been referred to this court on special review, by the magistrate of Cullinan, Mrs P.W Engelbrecht.

[2.1] The accused was charged in the District of Tshwane East, held at Cullinan with one count of house breaking with intent to steal and theft.

[2.2] It was alleged that upon or about the period 20-21 December 2017 and at or near Plot45, Pienaarspoort, in the district of Tshwane East, the accused unlawfully and intentionally and with the intent to steal, break open and enter the window of the room/shack of Khomotso Dorris Mathiba and did then and there unlawfully and intentionally steal the following items, to wit two (2)\* cellphones, R500 cash, one (1)\* body mist perfume, one (1)\* roll on, the property or in lawful possession of Khomotso Dorris Mathiba.

[3.1] The accused elected to conduct his own defence.

[3.2] On 3 January 2018, the accused pleaded guilty to the charge in front of Magistrate N.V Mabunda.

[3.3] The proceedings were not mechanically recorded, although ex facie the record it was mechanically recorded.

[4.1] The Presiding Officer Mr N.V Mabunda passed away on 10 January 2018.

[4.2] No record of the proceedings were recorded, and according to the information conveyed to the Magistrate Engelbrecht, the stenographer informed her that the recording machine was broken, and accordingly the proceedings were not recorded.

[5.1] The case was postponed to 9 February 2018, for typing of the record and sentence proceedings in terms of Section 275(1) of Act 51 of 1977.

[5.2] Section 275 (1) of Act 51 of 1977 read as follows:

*" If sentence is not passed upon an accused forthwith upon conviction in a lower court, or if by reason of any decision or order of a superior court on appeal, review or otherwise, it is necessary to add or vary any sentence passed in a lower court or to pass sentence afresh in such court, any judicial officer of that court may, in the absence of the judicial officer who convicted the accused or passed the sentence, as the case may be and after consideration of the evidence recorded and in the*

*presence of the accused, pass sentence or take such other steps as the judicial officer who is absent, could lawfully have taken in the proceedings in question if he or she had not been absent."*

[5.3] The Magistrate is the second judicial officer who must consider the "evidence" recorded. No evidence or plea proceedings were recorded in *casu*. The Magistrate accordingly cannot consider any evidence and is unable to make any findings.

[6] I respectfully concur with the learned Magistrate reasoning. It is unfortunate that no measures were in place at the time of the hearing to ensure the correct functioning of the recording machine. Certainly the stenographer whose duty it was to ensure the proper function thereof should have advised the presiding officer of the defective equipment. This failure to timeously alert the court to the proper functioning or lack thereof of the recording equipment must be avoided and measures be taken to avoid repetition thereof in future.

[7] In the light of the above, I cannot make a finding that the proceedings indeed were in accordance with Justice. It follows that the conviction must be set aside

[8] **ORDER:**

[8.1] The conviction of the accused is set aside.



P. PISTORIUS  
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

*I agree.*

A handwritten signature in black ink, appearing to read 'A.J. Bam', is written over a horizontal line.

**A.J BAM**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**