ness, he closed it. Under these circumstances it seems to me that the creditors were entitled to come to the Court and make their application for the compulsory sequestration of the respondent's estate. It does not seem to me that an insolvent ought to get the idea that he has a kind of inherent right, if he makes an application for voluntary surrender, to be allowed to carry that application through, although all the creditors, or the great bulk of them, may be of opinion that the more rapid procedure of compulsory sequestration is more for the benefit of creditors. In all these matters, after all, it is the interest of the creditors which has to be looked to. Under the circumstances I consider that the petitioning creditors (who are creditors for more than half the liabilities stated in the schedules) were justified in making the application. The estate must be finally sequestrated.

Applicants' Attorneys: *Rooth & Wessels;* Respondent's Attorneys: *Findlay, MacRobert & Niemeyer.*

[Reported by *Gey van Pittius*, Esq., Advocate.]

REX v. BOTHA.

1913. *February* 10. DE VILLIERS, J.P., and CURLEWIS, J.

Practice.—Appeal.—Records lost.—Proceedings quashed.—Case remitted.

Where the records of a criminal trial in a magistrate's court, against which an appeal had been noted, were lost, the Court by consent of parties quashed the proceedings and remitted the case to the magistrate for retrial.

Appeal against a conviction by the A.R.M., Johannesburg.

Accused was charged with contravening sec. 46 of Ordinance 32 of 1902, in selling liquor to natives; he was found guilty and sentenced to six months' imprisonment with hard labour.

The records of the trial of this case, as also of the magistrate's reasons for judgment, had been lost, and the only papers before the Court were an affidavit by the attorney of the accused, wherein he stated what he remembered of the evidence at the trial, as also affidavits of the magistrate and the public prosecutor. The magis-

trate, in his affidavit, stated that it was impossible for him to remember the details of the case, but that he convicted the accused, because he was absolutely convinced of the truth of the Crown's evidence, and did not believe the witnesses for the defence. The prosecutor, in his affidavit, only stated the names of the witnesses for the Crown and for the defence.

F. E. T. Krause, K.C. (with him *H. H. Morris*), for the accused: The question is what procedure should be followed. If the Court is satisfied with the affidavit of the attorney, it can hear the appeal. See *Rex* v. *Van der Merwe* (19 S.C. 437).

[DE VILLIERS, J.P.: There are no proceedings before the Court.]

Secondary evidence of the record can be given, see *Wigmore's Evidence*, Vol. II., § 1348; or the Court may rehear the case with the consent of the accused. The fact that the records have been lost cannot deprive the accused of his right to appeal. It is not the accused's duty to supply the Court with the records, see Rule 85 of the Magistrates' Courts Rules, also Rule 35. If there are no records, accused is entitled to have the proceedings set aside. The Court can allow the accused out on his own bail, until it appears that the records may be found or not, and the matter can be postponed *sine die* in the meantime. Or the Court may hear secondary evidence of the record, and refer the case back to the magistrate for the purpose of hearing certain witnesses. There is one further suggestion, though I do not know whether it is a proper one, *i.e.*, to agree to the proceedings and conviction being quashed, and that the magistrate should re-try the case.

I. P. van Heerden, for the Crown: Under the circumstances the Crown is no more responsible for the loss of the records than the accused. The accused must satisfy the Court that the conviction is against the weight of the evidence or bad in law, and he has not proved it. I do not oppose the hearing of secondary evidence; see *Ex parte Firth* (46 L.T.R., n.s. 120). The Court can quash the proceedings as also the conviction and sentence, and send the case back to the magistrate; see *R.* v. *Kanji* (10th June, 1912, T.P.D., not reported), where such a procedure was adopted; though it is doubtful whether the Court has such power.

F. E. T. Krause, K.C., in reply: I consent to the Court setting aside everything and ordering a trial *de novo*.

DE VILLIERS, J.P.: The Court proposes to follow the precedent laid down by the full Court in *R.* v. *Kanji* (10 June, 1912; not

reported). By consent, the proceedings in the Court below are set aside; the conviction and sentence are quashed and the case remitted to the magistrate for retrial.

[NOTE.—The accused was subsequently retried and convicted, and at the hearing of the appeal from that conviction the Court, consisting of the same judges who sat in *R.* v. *Kanji* (*supra*), made the following remarks on the procedure adopted in the above reported case.]

WESSELS, J.: The appellant came to this Court and asked, first, that he should be discharged, because the records had been stolen, or, secondly, that he should be allowed to lead secondary evidence as to the contents of the record, or alternatively, that the case should be sent back for retrial. The Crown fell in with the latter suggestion, and by consent the conviction was quashed, and the case remitted to the magistrate's court for retrial. I understand that the Supreme Court on that occasion did not express any opinion that this was the usual course which would be adopted in similar cases. I certainly cannot agree that, where a prisoner has been convicted in a lower court, and the record has been stolen from a public office, he is *ipso facto* entitled as of right to a new trial. It seems to me that, as in all other cases, the best evidence of the record must be obtained, and upon that evidence an appeal might be heard. If a person is once convicted, the presumption is that he is guilty of the crime for which he has been tried, and the best course which can be adopted is for him to show that upon the evidence which was tendered before the magistrate he was not guilty.

MASON, J.: I concur in the expression of opinion by my learned brother with reference to what was done when the case first came before this Court, in setting aside the magistrate's judgment by consent. I am not prepared to accept that as a precedent.

Accused's Attorney: *G. Trapowski.*

[Reported by *Gey van Pittius*, Esq., Advocate.]