

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

C
ASE NO: R25/21

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

28 January 2022

In the matter between:

THE STATE

and

MFETWANA HERRY HENDRICKS

JUDGMENT

MALANGENI AJ

[1] This matter has been brought to the court as a special review in terms of section 304 Act 51 of 1997. It was referred by Senior Acting Magistrate Mr Reddy from Randburg Magistrate's Court to this court for its intervention.

[2]The pertinent background for a better appreciation of the issues that arise is the following:

- a) Mr Mfetwane with another person appeared before Randburg Magistrate's Court in 1992 ostensibly on a housebreaking charge. Before sentence, Mr Mfetwane absconded and his co-accused was sentenced to 6 (six) months direct imprisonment.
- b) Since then Mr Mfetwane had been at large and was later arrested and appeared before the court a quo on 24 December 2020d on a J 50 warrant. He is currently serving a sentence of 19-year's imprisonment on an unrelated case and is apparently due for parole.
- c) The original court record could not be found. Consequently, it is unknown who presided over the case. As a result, reconstruction could not be done.

[3] The matter was previously placed before Mabesele J who invited inputs from the Office of the Director of Public Prosecutions , Johannesburg. I have since received an opinion by Advocate M Van Heerden for which I am grateful. It is indicated in the opinion that the DPP managed to trace the original investigating officer who has since relocated to the Western Cape. It was not possible to get him to court and hold an enquiry for accused's failure to appear in the court a quo.

[4] The circumstances of this case are peculiar. It differs from common reasons that are normally provided to explain absence of court record. Even more peculiar is the fact that the Presiding Judicial Officer is unknown.It appears no one can be held accountable.

[5] In *S v Schoombee and Another 2017 (2) SACR 1 (CC)*, it was held that the loss of trial records was a widespread problem and raised serious concerns about endemic violations of the right to appeal. When reconstruction was necessary the obligation was necessary, the obligation lay not on the appellant but primarily on the court to ensure that the process complied with the right to a fair trial. It was an obligation that had to be

taken scrupulously and meticulously in the interests of criminal accused as well as their victims.

[6] In *S v Nyumbeka 2012 (2) SACR 367 (WCC) paragraphs [20] – [23]*, Thulare AJ (as he then was) stated that-

'The court clerk is the recorder of the proceedings, the clerk of the court is the custodian of court records and the trial magistrate is the constructor of court records through presiding over court proceedings. On the general consideration of all factors herein discussed, I find myself unable to find that the duty to reconstruct a record lies with the clerk of the court. In my view, the duty to construct lies with the trial magistrate.'

[7] It is the duty of the Presiding Judicial Officer to avoid Instances of this nature. The responsibility for the proper keeping of records lies with the court as the court a quo is a court of record. Based on the submissions by the Acting Senior Magistrate, it appears that this case is a partly heard matter wherein the accused was yet to be sentenced. Section 4(1) of Act 32 of 1944 provides that every court shall be a court of record.

[8] It is instances of this nature that probable contribute in members of the public losing confidence in the criminal justice system more especially the courts. It is not hard to imagine a complainant who is expecting to receive justice when she or he opens a case against the accused may surely be disappointed to find that such a person is a free man even before the case is finalised due to a missing record or one that could not be reconstructed.

[9] People approach courts with the expectation that their disputes would be resolved fairly. Section 34 of the South African Constitution Act 108 of 1996 provides that everyone has the right to have disputes that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[10] After an exhaustive search, I could not find any instance where the proceedings were not be set aside due to lost or destroyed record. This refers to a scenario where

reconstruction is practically impossible. On the available precedents, the only recourse will be to set aside the proceedings. The primary objective is to prevent injustice.

[11] In *S v Phakane 2018 (1) SACR 300 (CC)* It was held that –

'The failure of the state to furnish an adequate record of the trial proceedings or a record that reflects Ms Manamela's full evidence before the trial court, in circumstances in which the missing evidence cannot be reconstructed, has the effect of rendering the applicant's right to a fair appeal nugatory or illusory. Even before the advent of our constitutional democracy, the law was that, in such a case, the conviction and sentence or the entire trial proceeding had to be set aside.'

[12] In *S v Paled 2007 JOL1 9028 (T)*, it was held that the appropriate recourse in cases where the record of proceedings is missing and cannot be satisfactory reconstructed is to set aside the proceedings.

[13] On the same note, in *S v Anley (2005) JOL 15666 (T)*, the mechanical recorded evidence of the trial was missing and despite a search for the tapes it could not be found. It was held that the only recourse was to set aside the proceedings in the matter.

[14] It appears that the likely probability is that the record could not be traced due to lapse of time between when the accused last appeared in the court a quo and his recent appearance before the same court. The Acting Senior Magistrate indicated that this case was on the roll around 1992 and re- appeared on the 24 December 2020. It is almost 28 years so that is a long period.

[15] It would be unfair to keep Mr Mfetwane coming to court indefinitely. My view is to prevent an injustice and maintain fairness. To prevent injustice, the proper recourse is to set aside these proceedings..

[26] I then make the following order:

ORDER

1. The criminal proceedings against Mr Mfetwana in case no A 10 /1992 are set aside.

M MALANGENI AJ
Acting Judge of the High Court
Gauteng Division

I agree

Ismail J

Judge of the High Court

Gauteng Division