

REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE	
[1] REPORTABLE: YES / NO	
[2] OF INTEREST TO OTHER JUDGES:	
YES / NO	
[3] REVISED	
DATE 15/3/17	SIGNATURE <i>[Signature]</i>

A 122 / 2017
20103 / 2017

High Court ref: A208/10
Review Case no: B468/12
Mag. Serial no: 27/16

In the matter between:

THE STATE

v

THANDIWE NKOSI & 2 OTHERS

REVIEW JUDGMENT

J W LOUW, J

[1] The record of the proceedings in this matter in the magistrates' court, Lesedi have been submitted to this court for special review in terms of s 304A of the Criminal Procedure Act, 51 of 1977 (the Act). The three

accused were convicted on 24 January 2012 by magistrate Van Niekerk who, before handing down sentence, became ill and subsequently vacated her office on 24 August 2012 due to ill health. Before vacating her office, magistrate Van Niekerk had received evidence in respect of sentence and had remanded the matter on 28 March 2012 for a correctional supervision report.

[2] In the letter in which the special review is sought, magistrate De Bruin requests that the conviction against all three accused be set aside and that the prosecution should proceed *de novo* against the accused.

[3] After magistrate Van Niekerk became unavailable, the matter was postponed on a number of occasions by other magistrates for transcription of the record and submission thereof on special review. The missing transcription relates to the evidence on behalf of the defense, the court's judgment and the evidence in respect of sentence. It does not appear from the record if the correctional supervision report was received. The matter was eventually struck from the roll on 6 December 2012.

[4] It is not clear whether the other magistrates who dealt with the matter were aware that the accused had been convicted by magistrate Van Niekerk. Section 275 of the Act provides the following:

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 to 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 on the accused 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. (Emphasis added).

[4] Section 275(1) clearly finds application in the present matter and should have been employed in order for the matter to proceed after magistrate Van Niekerk became unavailable. The fact that she received evidence in respect of sentence is of no consequence. Such evidence, together with the evidence received before conviction and any further evidence in respect of sentence which may be tendered, including a correctional supervision report, will have to be considered by the sentencing magistrate when passing sentence.

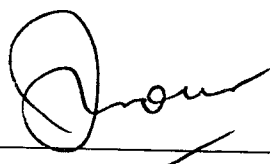
[5] The letter of magistrate De Bruin explains that the service provider responsible for the transcription of the record was replaced with another service provider during 2016. That appears to be the reason why the missing parts of the record have not been transcribed. There is no indication that any attempts have been made to retrieve the voice

recordings from the original service provider in order for them to be transcribed. This is something which must be done. If a diligent search for the voice recordings proves to be fruitless, proper attempts should be made to reconstruct the missing part of the record. That will include obtaining the input of the trial magistrate Ms Van Niekerk if she is available.

[6] The order which I make is the following:

- [a] The clerk of the court is instructed, assisted where necessary by magistrate De Bruin and/or any other magistrate of the Lesedi magistrates' court, to take all reasonable steps to retrieve the voice recordings of the missing part of the record from the previous service provider or anyone else in whose possession they may be, and to arrange for them to be transcribed.
- [b] In the event of it not being possible to retrieve the said voice recordings, the clerk of the court is instructed, assisted where necessary by magistrate De Bruin and/or any other magistrate of the Lesedi magistrates' court, to take all reasonable steps to reconstruct the missing part of the record.

- [c] Once the missing part of the record has been transcribed or reconstructed, the matter must proceed before any other magistrate of the Lesedi magistrates' court for sentencing in terms of s 275(1) of Act 51 of 1977.

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J W LOUW
JUDGE OF THE HIGH COURT

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