

SOUTH AFRICA / JUDGMENT

Gora and Another v S (A131/09) [2009] ZAWCHC 145; 2010 (1) SACR 159 (WCC) (15 September 2009) [2009] ZAWCHC 145

COURT

Western Cape High Court, Cape Town

BEFORE

C W Kruger, N J Yekiso

CASE / FILE NUMBER

A131/09

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE HIGH COURT, CAPE TOWN

Case

number A131/09

Lower

Court case number SHE65/04

In the

matter between:

ANDILE
GORA 1st
Appellant
SIMPHIWE
TSHAWE 2nd
Appellant
and
THE
STATE Respondent

JUDGMENT

DELIVERED ON 15 SEPTEMBER 2009 C. W. KRUGER A.J.

- [1] The Appellants, males respectively 24 years and 28 years old at the time of the offences, were charged with one count of armed robbery (i.e. robbery with aggravating circumstances), four counts of attempted murder and one count of the illegal possession of firearms, all allegedly committed on Sunday, 5 October 2003, at or near Ottery, in the district of Wynberg, regional division of the Cape.
- [2] Both Appellants pleaded not guilty but were on 4 March 2005 found guilty by the Regional Court on all counts after a trial and each was sentenced to an effective term of imprisonment of 23 years, as follows: [2.1.] On count one (armed robbery): 15 years' imprisonment; [2.2.] On counts two to five (attempted murder): 5 years' imprisonment on each count, all running concurrently; [2.3.] On count five (illegal possession of a firearm): 3 years' imprisonment.
- [3] Leave was granted to the Appellants to appeal against the their conviction on the grounds that the learned magistrate erred: [3.1.] In not accepting the versions of the appellants as being reasonably possibly true, and [3.2.] In accepting the state's version as being proved beyond a reasonable doubt.
- [4] In respect of the First Appellant the appeal against conviction was expressly abandoned by Counsel acting on his behalf.
- [5] In respect of the Second Appellant the conviction on only counts 1 to 5 was criticised as being incorrect by his counsel.
- [6] Leave to appeal against sentence was granted on the grounds that the learned magistrate erred: [6.1.] by over-emphasizing the interests of the community and under-emphasizing the personal circumstances of the Appellants; [6.2.] by failing to take into account the element of mercy that should have been afforded to the Appellants; [6.3.] by failing to give due consideration to the personal circumstances of the Appellants; [6.4.] By imposing an inappropriate sentence.
- [7] It was further submitted on behalf of the Appellants that there was a reasonable prospect that another court might under the circumstances come to another decision regarding an adequate sentence. Missing record:
- [8] In terms of section 76(3)(a) of the Criminal Procedure Act, 1977 the trial court "shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept [9] Unfortunately the record of the proceedings went missing even before the applications for leave to appeal were heard.
- [10] In terms of section 35(3)(o) of the Constitution of the Republic of South Africa the right of an accused person to a fair trial includes the right of appeal to a higher court.

- [11] Counsel on behalf of the Appellants argued with reference to *S v FREDERICKS* 1992 (1) SACR 561 (C) that it is impossible to effectively appeal where there is no record. I agree with this submission.
- [12] In the absence of a record of the proceedings it is therefore clear that there cannot be a fair trial at the appeal stage. In *S v ZENZILE* (case number SS106/08), a matter in which Yekiso, J. of this division had the duty in terms of section 52(3)(b) of the Criminal Law Amendment Act, 105 of 1997 to ascertain whether the proceedings in the regional court had been held in accordance with justice, he concluded as follows after having reviewed certain authorities: "A determination whether the proceedings were held in accordance with justice can only be made on basis of a proper record of the proceedings or, in those rare instances where the whole or portion of the record is missing, on basis of a properly reconstructed record. Accuracy or the correctness of the record, particularly in instances where the record has had to be reconstructed, and where a conviction could lead to imposition of a heavy sentence, such as life imprisonment, is of paramount importance." [At paragraph 18]. [13] According to the judgment in *S v ZONDI* 2003 (2) SACR 227 (W) at 245C-D: "Where the record of the proceeding in the court a quo is inadequate for a proper consideration of the appeal, both the State and the appellant have a duty to try and reconstruct the record from secondary sources."
- [14] In view of the aforesaid I consider that the "fair trial" requirement will have been met if the parties successfully collaborated towards properly reconstructing a sufficiently accurate record of the proceedings in order to allow the court of appeal to properly adjudicate upon the issues raised on appeal. Requirements for a proper reconstruction of the missing record:
- [15] In *ZENZILE* (supra) the question that arose in the circumstances of that matter was to what extent did the reconstruction process and the events subsequent thereto measured to the accused's constitutional right to fairness of trial. [16] According to Yekiso, J., the reconstruction process is part and parcel of the fair trial process and include the following elements "... the accused to have been informed of the missing portion of the record; of the need to have the missing portion of the record reconstructed; of his rights to participate in the reconstruction process; his right to legal representation in such a reconstruction process and the right to have the reconstruction process interpreted for him should he require the services of an interpreter." [At paragraph 19].
- [17] The reconstruction process must give effect to "the accused's right to a public trial before an ordinary court, his right to be present when being tried as well as his right to challenge and adduce evidence." [at paragraph 20].
- [18] Yekiso, J. remarked as follows with regard to the duty of a presiding officer once it becomes apparent that the record is lost: "... 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; arrange a date for the parties to re-assemble, in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate to place it on record that the parties have re-assembled for

purposes of the proposed reconstruction; the parties to express their views, on record, that each aspect of reconstruction accords with their recollection of the evidence tendered at trial; and ultimately to have such reconstruction transcribed in the normal way. Once this process has been followed, none of the parties can cry foul that his rights have been trampled on" [at paragraph 21]. Reconstruction of the record in the present matter:

- [19] In this matter the following procedure was followed by the trial magistrate: [19.1.] The trial magistrate initially called all the parties (probably excluding the Appellants) to his office and requested them to "sit down and reconstruct the record". At that stage the magistrate had already gotten hold of his trial notes and his written judgment. The Appellants' trial attorney had resigned and the new attorney could not be of assistance. [19.2.] On 29 October 2008 the court was convened by the trial magistrate in the presence of the public prosecutor, the aforesaid new attorney for the Appellants, the Appellants personally and the court interpreter. [19.3.] The magistrate placed on record that he had had his trial notes typed and made available to the state and the defense "with a view to confirm if this was a true reflection of what would have happened in court on that particular day" and furthermore confirmed that those were the notes on which the Court had delivered its written judgment. [19.4.] The public prosecutor and the attorney for the Appellants were then both given the opportunity to comment on the magistrate's court notes. No objection in regard to the magistrate's notes was voiced and no one sought to add anything to those notes. [19.5.] At the same time the magistrate placed on record that the sentence judgment had not been written down. As a matter of fact it appears that no notes at all had been made by the court during sentence proceedings. [19.6.] The magistrate then allowed the attorney for the Appellants to proceed with their applications for leave to appeal. [19.7.] The Appellants' attorney then proceeded to read out the respective applications for leave to appeal. Immediately thereafter the magistrate's trial notes and judgment were handed in as exhibits together with the written applications for leave to appeal.
- [20] In the premises I am of the view that the record of the proceedings up until the stage of conviction was properly constructed with due regard to the rights of all the parties. [21] Consequently the trial magistrate's notes serve as the reconstructed record of the proceedings up until the stage where judgment on the merits was delivered.
- [22] An additional help in the present matter is the written ex tempore judgment on the conviction handed down by the trial magistrate,
- drafted by him with exclusive reliance upon his written notes.
- [23] In regard to the magistrate's trial notes it is significant to note from his judgment on the applications for leave to appeal that he is in the habit of making his notes as accurately as possible because he prepares his judgments on the basis of those notes. Throughout his career he has never had occasion to revert to the recording of the proceedings in order to prepare his

judgment.

[24] Everything considered I am satisfied that there is a sufficiently constructed record of the proceedings to enable the appeal of the Second Appellant against his conviction to be properly adjudicated. The Second Appellant's case on the merits: The Second Appellant's version:

[25] The Appellants placed themselves at the scene of the robbery at Fairness Motors, Ottery (also referred to as the Engen Garage by Nathan, one of the state witnesses) and remained present throughout the movement of the car that was used by them until they were apprehended by the city police near the Westgate shopping centre. [26] According to the Second Appellant, early on the drizzly morning of Sunday 5 October 2003 he went to Ottery in search of employment. He arrived in the residential area shortly after 06h00 where he tried in vain to secure employment. (The evidence of the state witness Lincorns (or "Lincoln") that it was about 06h50 when he was called to the premises where he was shot, was not disputed). The Second Appellant testified that First Appellant entered the toilet at the garage to relieve himself and, after waiting a short while for the First Appellant to reappear from the toilet at the garage, a tall man (apparently a stranger) appeared from the toilet and forced him at gunpoint to enter the toilet in order to find out who the Appellants were. Inside he saw a short man, making it four persons inside the toilet at that stage. Apparently the Appellants were detained for some time inside the toilet, while the tall man later went out to speak to four coloured men who then left. Still later, an ADT security officer appeared. The tall man once again went out and this was followed by some gun shots. This was the tall man shooting at the security officer. Subsequent to these gun shots the tall man, the short man and the Appellants went out. The short man produced two firearms and gave one to the Second Appellant. Although the Second Appellant did not want the firearm, he was forced to accept it on account of a threat by the short man that he would inform on him. The Appellants then walked in single file towards Ottery Road. Second Appellant does not indicate that he felt that his life was in danger at this stage. Nevertheless, he and the First Appellant went along with the tall man and the short man and stood by when the tall man stopped a white car and removed the driver from the driving seat. This driver was reinstated after a problem was experienced while the tall man was driving the car. Near Westgate

Mall gunfire was exchanged and the Appellants ran away. After some distance they ran into the city police. At that stage both

Appellants had still been carrying firearms. [27] Standing on its own, the Second Appellant's version is fraught with improbabilities, for instance: [27.1.] I can hardly think of a more inopportune and unreasonable time to find employment in a residential area than six o'clock on a drizzly Sunday morning. I consider it very unlikely that that was the true motivation for the Second Appellant's presence in the neighbourhood. [27.2.] Second Appellant provides no clue as to the motivation of the tall man's conduct, i.e. emerging from the toilet and forcing the Second Appellant at gunpoint to enter the toilet. This seemingly wanton conduct is nothing short of bizarre, standing on its own as the Second Appellant presented it to the trial court. [27.3.] If the

Second Appellant were to be believed, the tall man and the short man detained the Appellants in the toilet for no apparent reason at all. This I consider to be highly unlikely. The Second Appellant did not state what transpired during the time of his and the First Appellant's apparent detention by the two other men. [27.4.] Then followed the shooting involving the tall man and the security guard (which must have been Lincorns / Lincoln, the victim of the first attempted murder). According to the Second Appellant he was forced to accept possession of a firearm and apparently also under duress to follow the procession led by the tall man. This alleged conduct I also find to be highly unlikely: if the tall man considered the shooting at the security guard to be an act of self-defense, there would have been no reason for him and the others to leave the premises, least of all to force the Appellants to join them. If, on the other hand, the shooting of the security guard was unlawful, then it seems highly improbable that the tall man and his suggested accomplice, the short man, would burden themselves with the custody of two unwilling and innocent men, namely the Appellants, and on top of that, arm them. [27.5.] To crown the fancifulness of his testimony, the Second Appellant states that, even as he and his newfound friend the First Appellant were running away from the others, he held on to the firearm that had allegedly been forced into his hand at the Engen service station. This is most certainly not the conduct of an innocent man caught up against his will in a sequence of serious violent crimes. [27.6.] In my view the only reasonable inference to be drawn from the Second Appellant's testimony is that it is false beyond reasonable doubt. The State's version:

[28] On the other hand the evidence of the various state witnesses fits together like a jigsaw puzzle and is substantially corroborated not only by one another but also by the very evidence of the Second Appellant. One only has to refer to the fact that the Appellants placed themselves on the scene at the onset of the crimes and remained present until the very last, i.e. when they were arrested by the city police near the Westgate centre. [29] According to Lincorns' colleague, Maree, who accompanied him to the panic button callout at the Engen service station, he observed from a distance of 15 to 20 meters that all four men shot in the direction of Lincorns. He also saw that it was the First Appellant who picked up the fallen Lincorns' firearm. This is the conduct of someone who actively took part in the commission of the crimes and not someone who had been forced into the company of the others. This is also the man whom the Second Appellant associated himself with by joining him on his alleged quest for employment. [30] Stemmet, another ADT security guard, came upon the procession of the white car carrying the four men, followed by the red car driven by the civilian, Nathan. He joined the procession and when the white car stopped, all four suspects emerged from the car, each carrying a firearm and each shooting at him. One shot hit his foot. Although Stemmet did not know it then, the Appellants of course formed part of the group of four men at the time.

- [31] A further ADT security guard, Eksteen, was summoned as backup to the scene where the white car became stuck. He saw three men shooting as they were running away and another man walking in the direction of Stemmet whilst shooting. [32] Witbooi, another ADT security guard, arrived at the scene and saw five people emerging from the white car, all of them shooting at Stemmet and Eksteen.
- [33] Adams, a policeman, was on his way to work when he noticed four suspect-looking men. One approached his vehicle with a firearm and more than one of the other three also produced firearms. This would therefore include at least one of the Appellants. Even if it excluded the Second Appellant, it would include the First Appellant, a man of whom the Second Appellant gave the impression that he had been a lone employment-seeking individual with no connection with the tall man and the short man they later met in the toilet at the service station. Adams observed how these four later obtained transport in a white car. He followed the white car until it stopped and noticed four men emerging from the white car and pointing firearms in the direction of an ADT security officer. Although he does not expressly state that all four had been shooting, this fact supports the evidence that all four had taken part in shooting at different stages. Later on the white car again stopped and two males emerged and then started shooting at the ADT security vehicle. Eventually the suspects ran away. On the Appellants' own version, they formed part of the group that ran away. The Second Appellant's guilt:
- [34] The evidence paints a clear picture of the Second Appellant forming part of a group of four who moved from committing one crime after the other, starting with the wounding of Lincorns, the robbing of his fire-arm, unsuccessfully trying to force motorists to stop at gunpoint, eventually succeeding and obtaining a white getaway vehicle, resisting apprehension by shooting indiscriminately at those who tried to bring them to book, running away and eventually caught with a firearm illegally in his possession.
- [35] The Second Appellant failed to avail himself of numerous opportunities to dissociate himself from the others: he could have refused to accompany the group after the security guard was shot and robbed of his firearm; he could have removed himself from the scene when the group boarded the white getaway car; he could have left when the white car stopped to switch drivers; he could have surrendered when one of the group was killed and the others (including him) ran away; he could have jettisoned the firearm he was illegally carrying instead of holding onto it until eventually apprehended by the city police.
- [36] These events, seen against the background of the Second Appellant's untenable version of the events, justify only one inference to be reasonably drawn to wit that the Second Appellant from the outset formed a willing and active part of a group of four illegally armed men that were up to no good early on that particular Sunday morning.
- [37] I am satisfied that the Second Appellant by agreement shared with the other members of the group of four, including the First Appellant, the common purpose to commit crimes involving the use of firearms, including doing whatever is necessary to prevent being

lawfully apprehended. The shooting of the security guard, the robbing of his firearm and the subsequent shooting at the several other victims of the attempted murders all fit in with this common purpose and it is quite clear from the acts and omissions of the Second Appellant that he had associated himself with each and every act of crime with which the Appellants were charged. [38] The task of a court of appeal is "... to rehear the case and to form our conclusion on the facts as well as on the law. And if we are satisfied that the Judge in the Court below came to a wrong conclusion on the facts we should not shrink from overruling him. But before doing so, we must be quite satisfied that he was wrong; if we merely have a reasonable doubt as to whether he was right, then I do not think we should be justified in reversing his decision." - see *Kunz v Swart and Others*, 1924 AD 618 at p. 655, reaffirmed in *TALJAARD v SENTRALE RAAD VIR KOOPERATIEWE ASSURANSIE BPK* 1974 (2) SA 450 (A) at 451H.

[39] In my view the trial court did not misdirect itself in convicting both Appellants. If further corroboration of that view is necessary, one only has to consider that the First Appellant, being the Second Appellant's partner with whom he sided throughout the events, conceded his conviction on all charges. Sentence: [40] Appellants' counsel argued, with reference to *S v ZONDI* 2003 (2) SACR 227 (W), that due to the fact that there exists no record of the sentencing proceedings, the sentences should be set aside as an

irregularity.

[41] In *Zondi* (supra) the court remarked as follows at 243G-I: "It is the appellant who asserts and exercises her or his right by noting and prosecuting an appeal; the duty of showing some error or unfairness in the trial proceedings resulting in her or him having been wrongly convicted, rests upon the appellant; and the Court requires an adequate record in order to consider and decide the appeal. On first principles therefore, it is the appellant who has the duty of placing an adequate record of the proceedings in the court a quo before the Court of appeal in order to enable it to consider and decide the appeal. And, indeed, subrule 51(3) of the Uniform Rules of this Court provides that: '(3) The ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the Court shall rest on the appellant or his attorney.'"

[42] In *Zondi* (supra) at 246D-F the following from *S v Leslie* 2000 (1) SACR 347 (W) was quoted with approval: "He who complains that the conviction should be set aside, ought to make his own contribution. There is no reason why, during the process of reconstruction, it should not be expected also of the legal representative of the accused and the accused himself to say what, according to them, the evidence on a particular point was or what the evidence generally was. The attorney's notes made during the trial are as relevant as the notes of the prosecutor or a social worker or other witness who attended the trial and so was "present in court" (*R v Wolmarans* (supra)). Cf *S v Ntantiso* (supra at 304h -j); *S v Seleke* (supra). The process is not aimed at proving the guilt of the accused and he is not required to prove his guilt. Like any other "person present in court" he and his attorney are able to testify about what was said and should do so in the interests of a fair administration of justice which is

not protective only of accused and of the guilty."

- [43] It is noteworthy that in Zondi (supra) the court held that setting aside the conviction and sentence as a technical irregularity in terms of section 324(c) of the Criminal Procedure Act is the result "in the event of the record being found to be inadequate for purposes of considering and determining the appeal and incapable of further reconstruction".
- [44] There is no record in respect of the sentencing proceedings. We therefore do not know which extenuating circumstances (if any) were placed before the trial court by way of evidence or otherwise and considered by the trial court. [45] Presumably a record of the sentence proceedings was kept. This, however, does not appear unambiguously from the record of the proceedings during which the magistrate set out the facts and circumstances surrounding the loss and reconstruction of the record.
- [46] What does appear, is that the magistrate did not make and keep any notes on sentencing, contrary to what he did in respect of the trial itself.
- [47] All that we have is an assurance by the magistrate that he would have taken into consideration the seriousness of the offences, the manner in which those offences were committed, and the fact that firearms were used. No reference is made to the personal circumstances of the Appellants save that he was not sure whether the Appellants were first offenders.
- [48] I also take into consideration the very fact that the magistrate granted leave to appeal against sentence and that he conceded that it was possible that another court may impose a different sentence.
- [49] We do not know if the Appellants or their legal counsel could have assisted the trial court in constructing a record of the sentence proceedings. What does appear from the record is that the attorney who acted on behalf of the Appellants during the trial and presumably sentence, has resigned and that the subsequent attorney, Ms Hendricks, could be of no assistance in reconstructing a record of proceedings.
- [50] While there remains a duty on the Appellants to collaborate towards the reconstruction of a missing record I am not convinced that the failure to do so can be attributed to them, the more so in view of the fact that the primary responsibility for keeping a record rested upon the trial court.
- [51] It is incumbent upon this court to ensure that the values set out in the Constitution be upheld. The most important function this court is required to perform, is to dispense justice. Justice is dispensed through the mechanism of a fair trial. Inasmuch as an appeal is part of the fair trial and cannot be properly adjudicated without an original record or at least a properly reconstructed record, it stands to reason that as far as their appeal against sentence is concerned the Appellants cannot be given a fair trial.

- [52] In these circumstances I consider that justice would be best served if the sentences were to be set aside and the matter be referred back to the trial court to sentence the Appellants afresh.
- [53] This approach would ensure that the Appellants' constitutional right to a fair trial be upheld, while the interests of the community would not be adversely affected at all.
- [54] In the circumstances I propose the following order: [54.1.] Second Appellant's appeal against his conviction is dismissed and the conviction of both Appellants on all counts is confirmed; [54.2.] The sentences on all counts in respect of both Appellants are set aside and the matter is referred back to the trial court for the imposition of sentence afresh; [54.3.] The Appellants are to remain in custody subject to any decision that may be taken on account of any application to be released on bail or otherwise, pending the imposition of sentence; [54.4.] The Regional Court Control Prosecutor, Magistrate's Court, Wynberg is directed to take all steps necessary to ensure that the matter is enrolled for a day within 14 days from date of this order, for purposes of the imposition of sentence.

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Case number A131/09

Lower Court case number SHE65/04

In the matter between:

ANDILE GORA 1st Appellant

SIMPHIWE TSHAWA 2nd Appellant

and

THE STATE Respondent

JUDGMENT

DELIVERED ON 15 SEPTEMBER 2009

C. W. KRUGER A.J.

- [1] The Appellants, males respectively 24 years and 28 years old at the time of the offences, were charged with one count of armed robbery (i.e. robbery with aggravating circumstances), four counts of attempted murder and one count of the illegal possession of firearms, all allegedly committed on Sunday, 5 October 2003, at or near Ottery, in the district of Wynberg, regional division of the Cape.

[2] Both Appellants pleaded not guilty but were on 4 March 2005 found guilty by the Regional Court on all counts after a trial and each was sentenced to an effective term of imprisonment of 23 years, as follows:

[2.1.] On count one (armed robbery): 15 years' imprisonment;

[2.2.] On counts two to five (attempted murder): 5 years' imprisonment on each count, all running concurrently;

[2.3.] On count five (illegal possession of a firearm): 3 years' imprisonment.

[3] Leave was granted to the Appellants to appeal against the their conviction on the grounds that the learned magistrate erred:

[3.1.] In not accepting the versions of the appellants as being reasonably possibly true, and

[3.2.] In accepting the state's version as being proved beyond a reasonable doubt.

[4] In respect of the First Appellant the appeal against conviction was expressly abandoned by Counsel acting on his behalf.

[5] In respect of the Second Appellant the conviction on only counts 1 to 5 was criticised as being incorrect by his counsel.

[6] Leave to appeal against sentence was granted on the grounds that the learned magistrate erred:

[6.1.] by over-emphasizing the interests of the community and under-emphasizing the personal circumstances of the Appellants;

[6.2.] by failing to take into account the element of mercy that should have been afforded to the Appellants;

[6.3.] by failing to give due consideration to the personal circumstances of the Appellants;

[6.4.] By imposing an inappropriate sentence.

[7] It was further submitted on behalf of the Appellants that there was a reasonable prospect that another court might under the circumstances come to another decision regarding an adequate sentence.

Missing record:

[8] In terms of section 76(3)(a) of the Criminal Procedure Act, 1977 the trial court "shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept

[9] Unfortunately the record of the proceedings went missing even before the applications for leave to appeal were heard.

- [10] In terms of section 35(3)(o) of the Constitution of the Republic of South Africa the right of an accused person to a fair trial includes the right of appeal to a higher court.
- [11] Counsel on behalf of the Appellants argued with reference to *S v FREDERICKS* 1992 (1) SACR 561 (C) that it is impossible to effectively appeal where there is no record. I agree with this submission.
- [12] In the absence of a record of the proceedings it is therefore clear that there cannot be a fair trial at the appeal stage. In *S v ZENZILE* (case number SS106/08), a matter in which Yekiso, J. of this division had the duty in terms of section 52(3)(b) of the Criminal Law Amendment Act, 105 of 1997 to ascertain whether the proceedings in the regional court had been held in accordance with justice, he concluded as follows after having reviewed certain authorities: "A determination whether the proceedings were held in accordance with justice can only be made on basis of a proper record of the proceedings or, in those rare instances where the whole or portion of the record is missing, on basis of a properly reconstructed record. Accuracy or the correctness of the record, particularly in instances where the record has had to be reconstructed, and where a conviction could lead to imposition of a heavy sentence, such as life imprisonment, is of paramount importance." [At paragraph 18].
- [13] According to the judgment in *S v ZONDI* 2003 (2) SACR 227 (W) at 245C-D: "Where the record of the proceeding in the court a quo is inadequate for a proper consideration of the appeal, both the State and the appellant have a duty to try and reconstruct the record from secondary sources."
- [14] In view of the aforesaid I consider that the "fair trial" requirement will have been met if the parties successfully collaborated towards properly reconstructing a sufficiently accurate record of the proceedings in order to allow the court of appeal to properly adjudicate upon the issues raised on appeal.

Requirements for a proper reconstruction of the missing record:

- [15] In *ZENZILE* (supra) the question that arose in the circumstances of that matter was to what extent did the reconstruction process and the events subsequent thereto measured to the accused's constitutional right to fairness of trial.
- [16] According to Yekiso, J., the reconstruction process is part and parcel of the fair trial process and include the following elements "... the accused to have been informed of the missing portion of the record; of the need to have the missing portion of the record reconstructed; of his rights to participate in the reconstruction process; his right to legal representation in such a reconstruction process and the right to have the reconstruction process interpreted for him should he require the services of an interpreter." [At paragraph 19].
- [17] The reconstruction process must give effect to "the accused's right to a public trial before an ordinary court, his right to be present when being tried as well as his right to challenge and adduce evidence." [at paragraph 20].

[18] Yekiso, J. remarked as follows with regard to the duty of a presiding officer once it becomes apparent that the record is lost: "... 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; arrange a date for the parties to re-assemble, in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate to place it on record that the parties have re-assembled for purposes of the proposed reconstruction; the parties to express their views, on record, that each aspect of reconstruction accords with their recollection of the evidence tendered at trial; and ultimately to have such reconstruction transcribed in the normal way. Once this process has been followed, none of the parties can cry foul that his rights have been trampled on" [at paragraph 21].

Reconstruction of the record in the present matter:

[19] In this matter the following procedure was followed by the trial magistrate:

[19.1.] The trial magistrate initially called all the parties (probably excluding the Appellants) to his office and requested them to "sit down and reconstruct the record". At that stage the magistrate had already gotten hold of his trial notes and his written judgment. The Appellants' trial attorney had resigned and the new attorney could not be of assistance.

[19.2.] On 29 October 2008 the court was convened by the trial magistrate in the presence of the public prosecutor, the aforesaid new attorney for the Appellants, the Appellants personally and the court interpreter.

[19.3.] The magistrate placed on record that he had had his trial notes typed and made available to the state and the defense

"with a view to confirm if this was a true reflection of what would have happened in court on that particular day" and furthermore confirmed that those were the notes on which the Court had delivered its written judgment.

[19.4.] The public prosecutor and the attorney for the Appellants were then both given the opportunity to comment on the magistrate's court notes. No objection in regard to the magistrate's notes was voiced and no one sought to add anything to those notes.

[19.5.] At the same time the magistrate placed on record that the sentence judgment had not been written down. As a matter of fact it appears that no notes at all had been made by the court during sentence proceedings.

[19.6.] The magistrate then allowed the attorney for the Appellants to proceed with their applications for leave to appeal.

[19.7.] The Appellants' attorney then proceeded to read out the respective applications for leave to appeal. Immediately thereafter the magistrate's trial notes and judgment were handed in as exhibits together with the written applications for leave to appeal.

- [20] In the premises I am of the view that the record of the proceedings up until the stage of conviction was properly constructed with due regard to the rights of all the parties.
- [21] Consequently the trial magistrate's notes serve as the reconstructed record of the proceedings up until the stage where judgment on the merits was delivered.
- [22] An additional help in the present matter is the written *ex tempore* judgment on the conviction handed down by the trial magistrate,
- drafted by him with exclusive reliance upon his written notes.
- [23] In regard to the magistrate's trial notes it is significant to note from his judgment on the applications for leave to appeal that he is in the habit of making his notes as accurately as possible because he prepares his judgments on the basis of those notes. Throughout his career he has never had occasion to revert to the recording of the proceedings in order to prepare his

judgment.

- [24] Everything considered I am satisfied that there is a sufficiently constructed record of the proceedings to enable the appeal of the Second Appellant against his conviction to be properly adjudicated.

The Second Appellant's case on the merits:

The Second Appellant's version:

- [25] The Appellants placed themselves at the scene of the robbery at Fairness Motors, Ottery (also referred to as the Engen Garage by Nathan, one of the state witnesses) and remained present throughout the movement of the car that was used by them until they were apprehended by the city police near the Westgate shopping centre.
- [26] According to the Second Appellant, early on the drizzly morning of Sunday 5 October 2003 he went to Ottery in search of employment. He arrived in the residential area shortly after 06h00 where he tried in vain to secure employment. (The evidence of the state witness Lincorns (or "Lincoln") that it was about 06h50 when he was called to the premises where he was shot, was not disputed). The Second Appellant testified that First Appellant entered the toilet at the garage to relieve himself and, after waiting a short while for the First Appellant to reappear from the toilet at the garage, a tall man (apparently a stranger) appeared from the toilet and forced him at gunpoint to enter the toilet in order to find out who the Appellants were. Inside he saw a short man, making it four persons inside the toilet at that stage. Apparently the Appellants were detained for some time inside the toilet, while the tall man later went out to speak to four coloured men who then left. Still later, an ADT security officer appeared. The tall man once again went out and this was followed by some gun shots. This was the tall man shooting at the security officer. Subsequent to these gun shots the tall man, the short man and the Appellants went out. The short man produced two firearms and

gave one to the Second Appellant. Although the Second Appellant did not want the firearm, he was forced to accept it on account of a threat by the short man that he would inform on him. The Appellants then walked in single file towards Ottery Road. Second Appellant does not indicate that he felt that his life was in danger at this stage. Nevertheless, he and the First Appellant went along with the tall man and the short man and stood by when the tall man stopped a white car and removed the driver from the driving seat. This driver was reinstated after a problem was experienced while the tall man was driving the car. Near Westgate

Mall gunfire was exchanged and the Appellants ran away. After some distance they ran into the city police. At that stage both

Appellants had still been carrying firearms.

[27] Standing on its own, the Second Appellant's version is fraught with improbabilities, for instance:

[27.1.] I can hardly think of a more inopportune and unreasonable time to find employment in a residential area than six o'clock on a drizzly Sunday morning. I consider it very unlikely that that was the true motivation for the Second Appellant's presence in the neighbourhood.

[27.2.] Second Appellant provides no clue as to the motivation of the tall man's conduct, i.e. emerging from the toilet and forcing the Second Appellant at gunpoint to enter the toilet. This seemingly wanton conduct is nothing short of bizarre, standing on its own as the Second Appellant presented it to the trial court.

[27.3.] If the Second Appellant were to be believed, the tall man and the short man detained the Appellants in the toilet for no apparent reason at all. This I consider to be highly unlikely. The Second Appellant did not state what transpired during the time of his and the First Appellant's apparent detention by the two other men.

[27.4.] Then followed the shooting involving the tall man and the security guard (which must have been Lincorns / Lincoln, the victim of the first attempted murder). According to the

Second Appellant he was forced to accept possession of a firearm and apparently also under duress to follow the procession led by the tall man. This alleged conduct I also find to be highly unlikely: if the tall man considered the shooting at the security guard to be an act of self-defense, there would have been no reason for him and the others to leave the premises, least of all to force the Appellants to join them. If, on the other hand, the shooting of the security guard was unlawful, then it seems highly improbable that the tall man and his suggested accomplice, the short man, would burden themselves with the custody of two unwilling and innocent men, namely the Appellants, and on top of that, arm them.

[27.5.] To crown the fancifulness of his testimony, the Second Appellant states that, even as he and his newfound friend the First Appellant were running away from the others, he held on to the firearm that had allegedly been forced into his hand at the Engen service station. This is most certainly not the conduct of an innocent man caught up against his will in a sequence of serious violent crimes.

[27.6.] In my view the only reasonable inference to be drawn from the Second Appellant's testimony is that it is false beyond reasonable doubt.

The State's version:

[28] On the other hand the evidence of the various state witnesses fits together like a jigsaw puzzle and is substantially corroborated not only by one another but also by the very evidence of the Second Appellant.

One only has to refer to the fact that the Appellants placed themselves on the scene at the onset of the crimes and remained present until the very last, i.e. when they were arrested by the city police near the Westgate centre.

[29] According to Lincorns' colleague, Maree, who accompanied him to the panic button callout at the Engen service station, he observed from a distance of 15 to 20 meters that all four men shot in the direction of Lincorns. He also saw that it was the First Appellant who picked up the fallen Lincorns' firearm. This is the conduct of someone who actively took part in the commission of the crimes and not someone who had been forced into the company of the others. This is also the man whom the Second Appellant associated himself with by joining him on his alleged quest for employment.

[30] Stemmet, another ADT security guard, came upon the procession of the white car carrying the four men, followed by the red car driven by the civilian, Nathan. He joined the procession and when the white car stopped, all four suspects emerged from the car, each carrying a firearm and each shooting at him. One shot hit his foot. Although Stemmet did not know it then, the Appellants of course formed part of the group of four men at the time.

[31] A further ADT security guard, Eksteen, was summoned as backup to the scene where the white car became stuck. He saw three men shooting as they were running away and another man walking in the direction of Stemmet whilst shooting.

[32] Witbooi, another ADT security guard, arrived at the scene and saw five people emerging from the white car, all of them shooting at Stemmet and Eksteen.

[33] Adams, a policeman, was on his way to work when he noticed four suspect-looking men. One approached his vehicle with a firearm and more than one of the other three also produced firearms. This would therefore include at least one of the Appellants. Even if it excluded the Second Appellant, it would include the First Appellant, a man of whom the Second Appellant gave the impression that he had been a lone employment-seeking individual with no connection with the tall man and the short man they later met in the

toilet at the service station. Adams observed how these four later obtained transport in a white car. He followed the white car until it stopped and noticed four men emerging from the white car and pointing firearms in the direction of an ADT security officer. Although he does not expressly state that all four had been shooting, this fact supports the evidence that all four had taken part in shooting at different stages. Later on the white car again stopped and two males emerged and then started shooting at the ADT security vehicle. Eventually the suspects ran away. On the Appellants' own version, they formed part of the group that ran away.

The Second Appellant's guilt:

- [34] The evidence paints a clear picture of the Second Appellant forming part of a group of four who moved from committing one crime after the other, starting with the wounding of Lincorns, the robbing of his fire-arm, unsuccessfully trying to force motorists to stop at gunpoint, eventually succeeding and obtaining a white getaway vehicle, resisting apprehension by shooting indiscriminately at those who tried to bring them to book, running away and eventually caught with a firearm illegally in his possession.
- [35] The Second Appellant failed to avail himself of numerous opportunities to dissociate himself from the others: he could have refused to accompany the group after the security guard was shot and robbed of his firearm; he could have removed himself from the scene when the group boarded the white getaway car; he could have left when the white car stopped to switch drivers; he could have surrendered when one of the group was killed and the others (including him) ran away; he could have jettisoned the firearm he was illegally carrying instead of holding onto it until eventually apprehended by the city police.
- [36] These events, seen against the background of the Second Appellant's untenable version of the events, justify only one inference to be reasonably drawn to wit that the Second Appellant from the outset formed a willing and active part of a group of four illegally armed men that were up to no good early on that particular Sunday morning.
- [37] I am satisfied that the Second Appellant by agreement shared with the other members of the group of four, including the First Appellant, the common purpose to commit crimes involving the use of firearms, including doing whatever is necessary to prevent being lawfully apprehended. The shooting of the security guard, the robbing of his firearm and the subsequent shooting at the several other victims of the attempted murders all fit in with this common purpose and it is quite clear from the acts and omissions of the Second Appellant that he had associated himself with each and every act of crime with which the Appellants were charged.
- [38] The task of a court of appeal is "... to rehear the case and to form our conclusion on the facts as well as on the law. And if we are satisfied that the Judge in the Court below came to a wrong conclusion on the facts we should not shrink from overruling him. But before doing so, we must be quite satisfied that he was wrong; if we merely have a reasonable doubt as to whether he was right, then I do not think we should be justified in reversing his decision." -

see Kunz v Swart and Others, 1924 AD 618 at p. 655, reaffirmed in TALJAARD v SENTRALE RAAD VIR KOOPERATIEWE ASSURANSIE BPK 1974 (2) SA 450 (A) at 451H.

- [39] In my view the trial court did not misdirect itself in convicting both Appellants. If further corroboration of that view is necessary, one only has to consider that the First Appellant, being the Second Appellant's partner with whom he sided throughout the events, conceded his conviction on all charges.

Sentence:

- [40] Appellants' counsel argued, with reference to S v ZONDI 2003 (2) SACR 227 (W), that due to the fact that there exists no record of the sentencing proceedings, the sentences should be set aside as an

irregularity.

- [41] In Zondi (supra) the court remarked as follows at 243G-I: "It is the

appellant who asserts and exercises her or his right by noting and prosecuting an appeal; the duty of showing some error or unfairness in the trial proceedings resulting in her or him having been wrongly convicted, rests upon the appellant; and the Court requires an adequate record in order to consider and decide the appeal. On first principles therefore, it is the appellant who has the duty of placing an adequate record of the proceedings in the court a quo before the Court of appeal in order to enable it to consider and decide the appeal. And, indeed, subrule 51(3) of the Uniform Rules of this Court provides that: '(3) The ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the Court shall rest on the appellant or his attorney.'"

- [42] In Zondi (supra) at 246D-F the following from S v Leslie 2000 (1) SACR 347 (W) was quoted with approval: "He who complains that the conviction should be set aside, ought to make his own contribution. There is no reason why, during the process of reconstruction, it should not be expected also of the legal representative of the accused and the accused himself to say what, according to them, the evidence on a particular point was or what the evidence generally was. The attorney's notes made during the trial are as relevant as the notes of the prosecutor or a social worker or other witness who attended the trial and so was "present in court" (R v Wolmarans (supra)). Cf S v Ntantiso (supra at 304h -j); S v Seleke (supra). The process is not aimed at proving the guilt of the accused and he is not required to prove his guilt. Like any other "person present in court" he and his attorney are able to testify about what was said and should do so in the interests of a fair administration of justice which is not protective only of accused and of the guilty."

- [43] It is noteworthy that in Zondi (supra) the court held that setting aside the conviction and sentence as a technical irregularity in terms of section 324(c) of the Criminal Procedure Act is the result "in the event of the record being found to be inadequate for purposes of considering and determining the appeal and incapable of further reconstruction".

- [44] There is no record in respect of the sentencing proceedings. We therefore do not know which extenuating circumstances (if any) were placed before the trial court by way of evidence or otherwise and considered by the trial court.
- [45] Presumably a record of the sentence proceedings was kept. This, however, does not appear unambiguously from the record of the proceedings during which the magistrate set out the facts and circumstances surrounding the loss and reconstruction of the record.
- [46] What does appear, is that the magistrate did not make and keep any notes on sentencing, contrary to what he did in respect of the trial itself.
- [47] All that we have is an assurance by the magistrate that he would have taken into consideration the seriousness of the offences, the manner in which those offences were committed, and the fact that firearms were used. No reference is made to the personal circumstances of the Appellants save that he was not sure whether the Appellants were first offenders.
- [48] I also take into consideration the very fact that the magistrate granted leave to appeal against sentence and that he conceded that it was possible that another court may impose a different sentence.
- [49] We do not know if the Appellants or their legal counsel could have assisted the trial court in constructing a record of the sentence proceedings. What does appear from the record is that the attorney who acted on behalf of the Appellants during the trial and presumably sentence, has resigned and that the subsequent attorney, Ms Hendricks, could be of no assistance in reconstructing a record of proceedings.
- [50] While there remains a duty on the Appellants to collaborate towards the reconstruction of a missing record I am not convinced that the failure to do so can be attributed to them, the more so in view of the fact that the primary responsibility for keeping a record rested upon the trial court.
- [51] It is incumbent upon this court to ensure that the values set out in the Constitution be upheld. The most important function this court is required to perform, is to dispense justice. Justice is dispensed through the mechanism of a fair trial. Inasmuch as an appeal is part of the fair trial and cannot be properly adjudicated without an original record or at least a properly reconstructed record, it stands to reason that as far as their appeal against sentence is concerned the Appellants cannot be given a fair trial.
- [52] In these circumstances I consider that justice would be best served if the sentences were to be set aside and the matter be referred back to the trial court to sentence the Appellants afresh.

[53] This approach would ensure that the Appellants' constitutional right to a fair trial be upheld, while the interests of the community would not be adversely affected at all.

[54] In the circumstances I propose the following order:

[54.1.] Second Appellant's appeal against his conviction is dismissed and the conviction of both Appellants on all counts is confirmed;

[54.2.] The sentences on all counts in respect of both Appellants are set aside and the matter is referred back to the trial court for the imposition of sentence afresh;

[54.3.] The Appellants are to remain in custody subject to any decision that may be taken on account of any application to be released on bail or otherwise, pending the imposition of sentence;

[54.4.] The Regional Court Control Prosecutor, Magistrate's Court, Wynberg is directed to take all steps necessary to ensure that the matter is enrolled for a day within 14 days from date of this order, for purposes of the imposition of sentence.

[54.5.] In the event that any one of the Appellants is being held at a prison outside of Cape Town, the said Prosecutor must ensure the timeous transfer of such Appellant to ensure that both Appellants are present in court when the matter is enrolled as aforesaid. [54.6.] This order must in no way be seen as to be issuing any guidelines in respect of the trial court's approach to the issue of sentence, save to suggest that a full record of the proceedings be kept. C W KRUGER, A J I Agree N J YEKISO, J It is so ordered.

[54.5.] In the event that any one of the Appellants is being held at a prison outside of Cape Town, the said Prosecutor must ensure the timeous transfer of such Appellant to ensure that both Appellants are present in court when the matter is enrolled as aforesaid.

[54.6.] This order must in no way be seen as to be issuing any guidelines in respect of the trial court's approach to the issue of sentence, save to suggest that a full record of the proceedings be kept.

C W KRUGER, A J

I Agree

N J YEKISO, J

It is so ordered.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2009/145.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/gora-and-another-v-s-unknown-topic-awchc-2009>

Prepared on 9 October 2026 · Esheria