

SOUTH AFRICA / JUDGMENT

Juma v S (CA&R54/2011) [2014] ZAECHGC 11 (17 March 2014)

[2014] ZAECHGC 11

COURT

Eastern Cape High Court, Grahamstown

BEFORE

B Hartle, E Revelas

CASE / FILE NUMBER

CA&R54/2011

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

NOT REPORTABLE

CASE NO: CA&R 54/2011

In the matter between

ABDULLAH KHALIFA JUMA Appellant

versus

THE STATE Respondent

REASONS

HARTLE J

1. On 12 March 2014 we struck the appellant's appeal from the roll inter alia because the record of the proceedings was inadequate. We indicated that we would furnish the reasons for our decision in this regard later, as we hereby do, and that we intended to amplify our ruling by issuing further directives in the matter. The reason for these measures too is indicated below.
2. On 14 November 2012 already this court drew attention to the fact that the appeal record in this matter was demonstrably deficient. In this regard, substantial parts of the evidence given in the court a quo have not been transcribed. These parts include the cross examination of the witness Louw; the evidence in chief of the witness Jonker; all the evidence of the witness Vosloo; the evidence of the witness Webb; and all the evidence of accused number 3. Exhibits tendered in the court below, seemingly numbered from "A" –

“X”, are also absent.

3. It goes without saying that the missing parts are material to a proper adjudication of the appeal.
4. The court directed in the order dated 14 November 2012 exactly what steps both the clerk of the court and the appellant were required to undertake to attempt to remedy the situation and in any event to place sufficient information before the court so that it could make an informed decision regarding the further conduct of the matter.
5. It appeared from affidavits attached to the appeal record that, despite the efforts of court staff, the relevant electronic recordings could not be retrieved in order to transcribe the evidence missing from the record. These also established that the magistrate, Ms Opperman, who has since resigned, did not retain any notes pertaining to the matter. These facts were attested to in separate

affidavits deposed to by court staff at the East London Magistrate’s Court in April 2013.

6. A year later the appeal was before us again with the same deficient record. Except to state the obvious, namely that data is missing so that it is not possible to produce a complete transcription, the affidavits do not really deal with the substance of this court’s concern spelt out in its judgment dated 14 November 2012, which was to get to the bottom of the “highly suspicious” circumstances under which it believed the electronic recordings made in entirely different courts, on different dates, had simply vanished.
7. Apparently cassette tapes were no longer in use by the time of the trial in the court a quo, but computerized recording machines. According to my knowledge these recording machines are operated by court staff under stringent conditions. My understanding of the process, well at least in the High Court, is that a machine operator/stenographer (in the employ of the Department of Justice and Constitutional Development) remains in control of every recording machine at each court session during which evidence is mechanically recorded. During the time of his/her oversight, he/she keeps a running legend of what is happening from moment to moment as the proceedings unfold, usually noted on a brown envelope so that a transcription of the proceedings, identifying the persons participating in the proceedings at the relevant time, can be produced in due course. A written record should therefore exist indicating who the relevant operators were on the contentious dates (these being 27 May 2008, 16 July 2008, 18 February 2009, 22 October 2009 and an undisclosed date on which accused 3 testified), and what their input was respectively. No doubt these envelopes are required to be filed safely somewhere and are readily available.
8. The daily recordings are apparently downloaded and stored to compact discs (or DVD’s), which process itself must come with strict protocols concerning storage and filing. As far as I am aware, if not downloaded to a compact disc or other storage device, data is maintained on the main frame server or the recording machine’s motherboard(s) which the “Help Desk” (the Department’s information technology specialists) should be able to retrieve on

demand. I understand too that the machines are regularly checked and maintained and that if problems are encountered in the recording processes these ought to be immediately apparent to the operator who I assume would make a note on the relevant envelope. In this instance it is not suggested however that the proceedings mechanically recorded on the relevant dates cannot be produced because the data is found

wanting in some or other way, but rather that the recorded evidence in respect of the specified witness is entirely missing, despite the fact that it was delivered in entirely different courts, on different machines and on different dates.

9. Given the controls described above it should in my view be a relatively simple exercise to identify those responsible along the way for the handling of the relevant recordings and to hold them to account in each instance for their role in the record-keeping or lack of it. The person responsible for downloading the recordings and for the storage of the compact discs and the envelopes should be able to determine the chain of control in each situation and also be able to identify who would have had access to the envelope or storage devices from time to time. The information technologists should further be able to explain to the court why the missing data, if it was not retained on separate compacts discs or other storage devices, cannot be accessed or retrieved by them from the main server or relevant motherboard(s).
10. From the incomplete record before us it is apparent that a tatty mechanical recording envelope did exist, which the magistrate had reason to mention when she was asked to request a transcript on 12 May 2010 (see pages XIX and 220 respectively of the record). The recording was noted to be necessary “in examining the evidence of accused 3 (sic)[1] and for purposes of addressing and judgment”. The circumstances under which the relevant data presently eludes us might therefore not be suspicious at all because the transcript may well have been produced when the court earlier requested it. Nothing in the record after 12 May 2010 suggests that at that time the transcript was requisitioned it could not be provided. If I am correct in my assessment of the circumstances then it is likely therefore that the storage discs are still in the possession of the relevant transcriber. Surely the prosecutor, Mr Mvinjelwa, and the attorney who represented the appellant, Mr Mbiyo, should be able to clarify whether a transcript was or was not provided at the time, and who the relevant transcriber was. The magistrate ought also to be able to shed light on this aspect. Evidently she must have been assisted by a transcript by the time she delivered her judgment three years after the evidence had commenced as she commented at the time that she was not going to give a long and detailed judgment because “all the evidence is on record”. If the discs themselves and the envelope have become lost in the process, at the very least between the magistrate, the prosecutor and the defence representative, a typed transcript should be able to be produced.
11. In the circumstances we were not convinced that the affidavits placed before us did justice to paragraph 2 of this court’s order dated 14 November

2012. They do not inspire confidence that all avenues have been exhausted in the first place, neither do they offer an adequate explanation for the so-called missing data from the responsible role-players. We do not accept that nothing further can be done to get to the bottom of the investigation.

12. Although rule 67(5) of the Magistrate's Court Rules places an obligation on the clerk of the court to prepare a copy of the record of the case, including a transcript thereof if the proceedings were mechanically recorded, the appellant bears equal responsibility to ensure that the record provided is an adequate one and is in order for purposes of appeal.[2] This is even more so where this court has specifically drawn attention to the inadequacies in the record and pertinently directed the appellant to take certain steps towards remedying the shortcomings. He can hardly rest on his laurels and simply

point to the failure of the court staff to bring up their end. In this regard the appellant did nothing, so it appeared, to satisfy paragraph 4 of the court's order dated 14 November 2012 either. The anticipated "full report" explaining that serious attempts have been made to reconstruct the record with reference to the notes of the respective legal representatives at least was not even attempted.

13. Mr Msesiwe who appeared on behalf of the appellant purported to address us from the bar concerning what appeared to me to be a last minute attempt on his part to contact Mr Mbiyo (who is traceable incidentally) in order to discuss the court order of 14 November

2012. Evidently he hoped to persuade this court that the appeal could be disposed of on the basis of an incomplete record. He did not suggest (but may perhaps have if we had not ordered the matter struck from the roll) that the deficiencies in the record (and the clerk's inability to resolve these) provide a basis for the conviction and sentence to be set aside. It does not follow however that if the record cannot be transcribed that this fact alone provides an easy way out for the appellant. In this regard both the State and the appellant have a duty to try and reconstruct the record from secondary sources.[3] This court recognized that joint responsibility in its order dated 14 November 2012, which the appellant seemingly fails to appreciate.

14. The appellant's attorneys would do well to have regard to the useful list of sources from which secondary evidence can be obtained found in *S v Leslie*[4] and to heed the advice in that judgment that :

'(h)e 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 ...'

15. It did not help the appellant's situation that his representatives purported to place the matter on the roll for hearing again without any ostensible attempts having first been made to comply with paragraph 4 of the order, assuming they were satisfied that the court staff had taken the matter as far as they could. The appellant is not entitled to adopt a supine attitude.
16. In conclusion, based on what was before us we were firstly not convinced that the missing data necessary to produce a complete transcription of the electronically recorded evidence has been irretrievably lost (because there are queries which can still be made), or that the appellant has taken all reasonable steps to attempt a proper reconstruction of the affected parts of the transcript, assuming the data is permanently lost to the parties. At the very least the appellant's representatives could have supplemented the record with reference to the exhibits, the absence of which on its own renders the record deficient and incomplete. No explanation was offered to us at all as to why they were not included in the record, which leads us to believe that the appellant's representatives have not independently satisfied themselves as to the adequacy of the record.
17. In the circumstances we were constrained to order that the appeal be struck from the roll.
18. I indicated that we intended to issue further directives in the matter. These guidelines appear to be necessary given the manner in which those responsible to produce the record have floundered in this regard over a protracted period.
19. In the circumstances the following directions are issued concerning the further conduct of the appeal:
 - (1) the chief clerk of the Regional Court, East London, is requested to investigate and establish whether a transcript was in fact produced following the request to Veritas or other service provider by the court a quo on 12 May 2010 and if so, why a further copy thereof cannot be provided to the appellant;
 - (2) if the option in paragraph (2) yields no positive result, the clerk is requested to identify the court operators who were responsible on each of the dates when the relevant recordings were made in the separate courts, as well as the person(s) concerned with the storage of the mechanical recording envelopes and storage devices at all relevant times;
 - (3) each person so identified is to file an affidavit setting out the manner in which he/she discharged his/her duties and exercised control of the electronically recorded evidence on the relevant dates, or relevant period as the case may be, and why in their opinion the data in respect hereof cannot now be found;
 - (4) if the staff of the Department of Justice were not themselves responsible for overseeing the electronic recordings on the relevant dates, then a report should be obtained by the clerk of the court from the relevant contractors concerning the retrieval of the evidence led on these occasions and to elicit from them why in their opinion they say the data cannot be found;

- (5) if necessary the clerk of the court must request an affidavit from a specialist at “Help Desk” to confirm that attempts have been made to retrieve the missing recordings on the main server or motherboard(s) as the case may be, and to indicate why these attempts have not been successful;
- (6) in any event the clerk of the court is directed to supplement the record with reference to a complete set of exhibits tendered during the trial.
- (7) in the event of the electronic data being found to be permanently lost or destroyed, the legal representatives of the parties must meet and then, in conjunction with the clerk of the court, endeavour to reconstruct the record to the best of their ability with reference at least to the notes of Messrs Mvinjelwa and Mbiyo who each representative is directed to make contact with respectively. If by these efforts they are unable to produce a reasonably re-constructed record the appellant’s attorneys are to file an affidavit setting out the exhaustive steps which were taken in this regard, why they say the attempts have proved to be unhelpful, and what alternative remedy the appellant then intends to pursue in the circumstances;
- (8) In any event the appellant is directed to make application for condonation for his failure to timeously provide a proper appeal record and to prosecute the appeal without delay;
- (9) The appellant shall not be entitled to re-enroll the appeal for hearing unless and until the measures indicated above have been meaningfully addressed; and
- (10) The registrar of this court is requested to furnish a copy of these reasons and directives to the chief clerk of the regional court, for his/her response and attention to the matters raised herein by no later than one month after receipt.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

E REVELAS

DATE REASONS FURNISHED : 17 March 2013

Appearances:

For the appellant: Mr Msesiwe, Msesiwe Vapi Incorporated, East London.

For the respondent: Mr S S Mtsila, Director of Public Prosecutions, Grahamstown.

- [1] At this stage accused number 3 had not yet testified. I assume therefore that this must be a reference to accused 2.

[2] See *S v Mabasa & Others* [2005] ZANCHC 3; 2005 (2) SACR 250 (NC) at 255 b – c.

[3] *S v Zondi* 2003 (2) SACR 227 (W) at 245 c – d.

[4] 2000

(1) SACR 347 (W)

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