

SOUTH AFRICA / JUDGMENT

# Khoza v S (AR286/10) [2010]

## ZAKZPHC 54 (21 September 2010)

[2010] ZAKZPHC 54

## COURT

Kwazulu-Natal High Court, Pietermaritzburg

## BEFORE

Van Zyl, Gcaba

## CASE / FILE NUMBER

AR286/10

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IN THE HIGH COURT OF KWAZULU-NATAL, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case number : AR286/10

In the appeal matter of:-

ELIAS JOSEPH KHOZA .....Appellant

and

THE STATE .....Respondent

## JUDGMENT

VAN ZYL, J.:-

The appellant was charged before the Regional Magistrate sitting at Ixopo, KwaZulu-Natal with of the rape of a girl, alleged to have been 14 years of age at the time of the occurrence “during 2007”. The charge sheet indicates that the relevant provisions of the Criminal Law Amendment Act 105 of 1997 are applicable to the charge of rape. The appellant was legally represented during the trial and entered a plea of not guilty, but was convicted as charged and apparently sentenced on 5 June 2009 to imprisonment for life.

As he is entitled to do in terms of the proviso to section 309(1)(a)(ii) of the Criminal Procedure Act 51 of 1977 (“the

CPA”), the appellant by notice of appeal dated 8 June 2009 noted an appeal to this Court against both conviction and sentence.

Pending adjudication of his appeal, it appears that the appellant remains in custody.

The matter was due to come before us on appeal on the 21st September 2010. However, we have been advised that the matter cannot proceed because the appeal record is incomplete and will need to be referred back to the Court a quo for reconstruction. Indeed, even the most cursory perusal of the record will reveal its woeful inadequacies. The cover page at the commencement of the transcribed proceedings proclaim as follows –

*“REPORT ON RECORDING*

RECORD INCOMPLETE. CD 4 is a copy of CD 3. Sentence not provided for transcription.”

The transcription of the Regional Magistrate’s judgement at the end of the trial commences at page 36 of the transcription.

However, pages 37 and 38 are missing and the transcription resumes with page 39 and ends on page 46 with the conviction of the

appellant, as charged.

The transcription then indicates that the matter was postponed to the following day, namely 5 June 2009, for sentence, but ends with the annotation “[CD4 IS A COPY OF CD3]”. No further transcription is contained in the record and the sentence imposed by the Regional Magistrate has to be ascertained from the Magistrate’s entry on the charge sheet.

The situation is most unsatisfactory. In my view an appellant is entitled, as part of his rights to a fair trial, not to have his right to an appeal hearing as envisaged by section 35(3)(o) of the Constitution of the Republic frustrated by needless delays in the finalisation thereof.

The state of the present appeal record is also symptomatic of a malaise which is increasingly manifesting itself in this Court. It has become the exception during criminal appeal hearings when there is not at least one, and often more, appeal matters which cannot be finalised because of defects or omissions in the appeal records. This necessitates the return of the records to the courts of origin for rectification or reconstruction, resulting in unnecessary delays, inconvenience, a waste of this Court’s resources and potential prejudice to the appellant involved.

Responsibility for the preparation and furnishing of a complete and accurate appeal record lies with the Clerk of the Court where the appeal originates. This much is clear from the provisions of section 309(2) of the CPA which provides that “An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court”.

In *S v Banyane; S v Moila* 1999 (1) SACR 622 (W) Nugent J (as he then was) remarked with reference to the Rules of the Magistrates’ Courts that Rule 67 placed an obligation upon the Clerk of the Court to prepare a transcript of the record where an appeal was noted and that the clerk was not absolved of that obligation, even where the appeal was noted out of time.

Since leave to appeal is not required in a matter such as the present, the provisions of Rule 67(5) became operative as soon as the appellant noted his appeal. This rule requires the clerk of the court to prepare a copy of the record of the case, including a transcript thereof if it was recorded in accordance with the provisions of rule 66 (1), and then to place such copy before the presiding magistrate who must within 15 days thereafter furnish a statement containing the facts he or she found to be proved, his or her reasons for any findings of fact specified in the appellant's grounds of appeal and his or her reasons for any rulings on any questions of law, or as to the admission or rejection of evidence, so specified, as being appealed against.

The appeal record, including the statement of the Magistrate, then needs to be transmitted to the Registrar of this Court for purposes of the hearing of the appeal. A similar situation appears to prevail in respect of criminal appeal records for transmission from the High Court to the Supreme Court of Appeal (See : S v Carter 2007 (2) SACR 415 (SCA)).

Accordingly, in my view the primary responsibility for preparing and providing a complete and satisfactory criminal appeal record for use by this Court, lies with the Clerk of the Court where the appeal originates (See : Carter (supra) at para 9).

In the present matter the Clerk of the Court at Ixopo failed to discharge this duty in respect of the appeal record. This omission

needs to be addressed and the record rendered complete and satisfactory as soon as reasonably possible. For this reason it is

desirable that the matter be postponed to a specific date and not merely sine die.

In the circumstances I would propose that it be ordered that:

- a. The Appeal is postponed to \_\_\_\_ 2010.
- b. The Clerk of the Court, Ixopo, KwaZulu-Natal is:-
  - i. Directed to submit to this Court, as soon as is reasonably possible and verified by affidavit;
    1. an explanation for;
      - aa. the circumstances under which compact disc number 4, forming part of the trial record, came to be a copy of compact disc number 3, or was lost and could accordingly not be transcribed;
      - bb. what efforts have been made to locate the missing compact disc number 4;
      - cc. the other defects and omissions apparent from the record, including but not limited to the omission of transcribed pages 37 and 38 and the Magistrate's Rule 67(5) statement.
    2. The best evidence that the Clerk of the said Court can obtain of the contents of the aforesaid lost portions of the record of the proceedings at the trial.

ii. Referred, in the process of reconstruction of the said record, to take guidance from decisions such as;

1. R v NORTJE 1950(4)SA725 (EDLD) at page 726D-H;
2. S v WHITNEY & ANO 1975(3)SA453 (N) at 455F – H; and
3. S v LESLIE 2000 (1) SACR 347 (W).

I agree.

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GCABA, A.J.

It is so ordered.

VAN ZÿL, J.

## Judgment

was not reserved

Appeal set down on: 21st September 2010

Judgment handed down: 21st September 2010

For the Appellant: Advocate Marimuthu

(Justice Centre)

For the State: Adv. Bromley-Gans

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