

SOUTH AFRICA / JUDGMENT

Thomas v S (A397/11) [2011]

ZAWCHC 521 (11 November 2011)

[2011] ZAWCHC 521

COURT

Western Cape High Court, Cape Town

BEFORE

SABA, VELDHUIZEN

CASE / FILE NUMBER

A397/11

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IN THE

HIGH COURT OF SOUTH AFRICA(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

A397/11

DATE:

11 NOVEMBER
2011

In the matter between:

JOHN CHARLES THOMAS

.....Appellant

and

THE STATE

.....Respondent

JUDGMENT

SABA, AJ The appellant appeared in Wynberg Regional Court on the following charges: (i) Contravention of the Riotous Assemblies Act, 17 of 1956 - incitement to commit an offence (to assist in the unlawful seizure of persons in unlawful possession of illegal gambling devices. (ii) Robbery with aggravating circumstances. (iii) Extortion. (iv) Defeating the administration of justice. (v) Fraud. (vi) Defeating the administration of justice. (vii) Extortion. (viii) Forgery and uttering. (ix) Fraud. (x) Corruption. (xi) Defeating the ends of justice. On 11 August 2005 the appellant was convicted on count 1, counts 5 to 6 and counts 7 to 11. On 13 September 2005 he was sentenced to an effective term of 15 years imprisonment. Two years after his sentence, he unsuccessfully applied for leave to appeal against

conviction and sentence in the court a quo. Three years thereafter and on 17 June 2011 he successfully petitioned this Court and now appeals against his conviction and sentence. It is common cause that the record of proceedings in the court a quo was lost. This is evident from the letter of the magistrate dated 8 April 2011. The letter reads as follows: "Dear Sir or Madam, Appeal State versus John Thomas Wynberg case SHA105/03 The Clerk of the Court at Wynberg has negligently lost or destroyed numerous case records (including the tapes on which the proceedings were mechanically recorded). I am told that the case record and tapes of this matter have also been lost or destroyed. I kept full, contemporaneous notes during the trial and confirm that these notes were handed to a typist to type. I confirm that my notes are a true and accurate reflection of the proceedings in this case. As ex tempore judgments were delivered after the trial within a tria,I on the merits and on sentence, and as I therefore have no notes on those judgments. It is impossible to reconstruct these judgments..." In his heads of argument counsel for the appellant averred that the record of the proceedings was not properly constructed as there is no indication from the record that the other parties to the proceedings were involved in the reconstruction of the record. In turn counsel for the respondent averred that even though the magistrate's judgment and reasons are not available, this Court should proceed with the appeal on the basis of the facts as reconstructed by the magistrate. Counsel for the appellant referred this Court to the case of *S v Leslie* 2000(1) SACR pg 347 (W). The following important principles on reconstruction of the record are enunciated in *S v Leslie*: "9.1 Except perhaps for the procedure of leading evidence afresh, the reconstruction of evidence or other events is in principle not dependent upon a preceding order from the court of appeal. That remains desirable because the lapse of time involved in bringing the matter on appeal is, like any other loss of time, the enemy of accuracy in human memory... 9.2. A magistrate's notes may amount to a concurrent record of any electronic recording and can be an acceptable foundation for an appeal. 9.3. Information on what was testified (or said) during trial, can be obtained and should be sought from every source which can contribute... 9.4. The accused is entitled not only to know what was written as a reconstruction of lost material but is entitled to participate in the process of reconstruction. 9.5. The object is to obtain the best available evidence to prove what was testified in the court which convicted and sentenced the accused...." In *Zenzile* 2009(2) SACR 407 (WCC) at 419 Yekiso, J had this to say about the reconstruction of the record of proceedings: "A determination whether the proceedings were held in accordance with justice can only be made on the basis of a proper record of proceedings, or, in those rare instances where the whole or a portion of the record is missing, on the basis of a properly reconstructed record." At page 416A-C Yekiso, J gives the following guidelines on the procedure to be followed by magistrates on being informed by the Clerk of the Court that the record is missing: "To 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; to arrange a date for the parties to reassemble in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate is to place it on record that the parties have re-assembled for purpose of the proposed reconstruction; the parties are 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." I fully endorse the sentiments of

Yekiso, J that none of the parties to the proceedings can cry foul that his rights have been trampled on if the above guidelines have been followed. See also *State v Gora and Another* 2010(1) SACR 159 (WCC) in this regard. In casu, both counsels are of the view that the notes of the magistrate give one an idea of what happened during the trial. That is not enough. I am not satisfied that there has been a proper construction of the record in the circumstances. To me, the process will be fair if the other parties, that is, the accused or his legal representative and the prosecutor are given an opportunity to comment on the notes made by the magistrate, and also add their comments thereto. In the result I propose that the matter be referred back to the magistrate for the guidelines set out above to be followed. SABA, AJ I agree, it is so ordered. VELDHUIZEN, J

JUDGMENT

SABA, AJ

The appellant appeared in Wynberg Regional Court on the following charges:

- (i) Contravention of the Riotous Assemblies Act, 17 of 1956 - incitement to commit an offence (to assist in the unlawful seizure of persons in unlawful possession of illegal gambling devices.
- (ii) Robbery with aggravating circumstances.
- (iii) Extortion.
- (iv) Defeating the administration of justice.
- (v) Fraud.
- (vi) Defeating the administration of justice.
- (vii) Extortion.
- (viii) Forgery and uttering.
- (ix) Fraud.
- (x) Corruption.
- (xi) Defeating the ends of justice.

On 11 August 2005 the appellant was convicted on count 1, counts 5 to 6 and counts 7 to 11. On 13 September 2005 he was sentenced to an effective term of 15 years imprisonment. Two years after his sentence, he unsuccessfully applied for leave to appeal against

conviction and sentence in the court a quo. Three years thereafter and on 17 June 2011 he successfully petitioned this Court and now appeals against his conviction and sentence.

It is common cause that the record of proceedings in the court a quo was lost. This is evident from the letter of the magistrate dated 8 April 2011. The letter reads as follows:

"Dear Sir or Madam,

Appeal State versus John Thomas Wynberg case SHA105/03

The Clerk of the Court at Wynberg has negligently lost or destroyed numerous case records (including the tapes on which the proceedings were mechanically recorded). I am told that the case record and tapes of this matter have also been lost or destroyed. I kept full, contemporaneous notes during the trial and confirm that these notes were handed to a typist to type. I confirm that my notes are a true and accurate reflection of the proceedings in this case. As *ex tempore* judgments were delivered after the trial within a trial, I on the merits and on sentence, and as I therefore have no notes on those judgments. It is impossible to reconstruct these judgments..."

In his heads of argument counsel for the appellant averred that the record of the proceedings was not properly constructed as there is no indication from the record that the other parties to the proceedings were involved in the reconstruction of the record. In turn counsel for the respondent averred that even though the magistrate's judgment and reasons are not available, this Court should proceed with the appeal on the basis of the facts as reconstructed by the magistrate. Counsel for the appellant referred this Court to the case of *S v Leslie* 2000(1) SACR pg 347 (W).

The following important principles on reconstruction of the record are enunciated in *S v Leslie*:

"9.1 Except perhaps for the procedure of leading evidence afresh, the reconstruction of evidence or other events is in principle not dependent upon a preceding order from the court of appeal. That remains desirable because the lapse of time involved in bringing the matter on appeal is, like any other loss of time, the enemy of accuracy in human memory..."

9.2. A magistrate's notes may amount to a concurrent record of any electronic recording and can be an acceptable foundation for an appeal.

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9.4. The accused is entitled not only to know what was written as a reconstruction of lost material but is entitled to participate in the process of reconstruction.

9.5. The object is to obtain the best available evidence to prove what was testified in the court which convicted and sentenced the accused..."

In *Zenzile* 2009(2) SACR 407 (WCC) at 419 Yekiso, J had this to say about the reconstruction of the record of proceedings:

"A determination whether the proceedings were held in accordance with justice can only be made on the basis of a proper record of proceedings, or, in those rare instances where the whole or a portion of the record is missing, on the basis of a properly reconstructed record."

At page 416A-C Yekiso, J gives the following guidelines on the procedure to be followed by magistrates on being informed by the Clerk of the Court that the record is missing:

"To 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; to arrange a date for the parties to reassemble in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate is to place it on record that the parties have re-assembled for purpose of the proposed reconstruction; the parties are 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."

I fully endorse the sentiments of Yekiso, J that none of the parties to the proceedings can cry foul that his rights have been trampled on if the above guidelines have been followed. See also *State v Gora and Another* 2010(1) SACR 159 (WCC) in this regard. In casu, both counsels are of the view that the notes of the magistrate give one an idea of what happened during the trial. That is not enough. I am not satisfied that there has been a proper construction of the record in the circumstances. To me, the process will be fair if the other parties, that is, the accused or his legal representative and the prosecutor are given an opportunity to comment on the notes made by the magistrate, and also add their comments thereto.

In the result I propose that the matter be referred back to the magistrate for the guidelines set out above to be followed.

SABA, AJ

I agree, it is so ordered.

VELDHUIZEN, J

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