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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DANIEL J J JOUBERT ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : JOUBERT, SMALBERGER, MILNE, KUMLEBEN JJA et NIENABER AJA

HEARD : 14 SEPTEMBER 1990

DELIVERED : 28 SEPTEMBER 1990

J U D G M E N T

KUMLEBEN JA:/...

KUMLEBEN JA:

On 18 November 1985 the appellant, having pleaded guilty, was convicted in the regional court at Heidelberg on three counts of theft. He was sentenced to three years' imprisonment on each count, with a partial suspension of the sentence in the case of two of them. He was unrepresented at the trial. After conviction members of his family engaged an attorney, Mr P van der Meer, to investigate the prospects of an appeal and the grant of bail pending such. He in turn instructed Mr Hellens, an advocate of Johannesburg.

Counsel went with the appellant to the court at Heidelberg and listened to a tape recording of the proceedings. It included the questioning in terms of sec 112(1)(b) of the Criminal Procedure Act 51 of 1977 in regard to his plea of

guilty and what he had said in mitigation of sentence. Counsel considered that this "evidence" indicated that the appellant suffered from some "psychological or psychiatric problem" and that in the circumstances the presiding magistrate, Mr Fourie, at some stage of the proceedings (it is not clear whether before conviction or before sentence) ought to have directed an enquiry in terms of s 77(1) or s 78(2), or both, of the Act. His failure to do so, in counsel's view, amounted to an irregularity. Counsel there and then wrote out a detailed notice of appeal, relying upon the alleged irregularity or misdirection, and the appellant signed the notice. (The urgency for noting an appeal was no doubt to enable the appellant to make what turned out to be a successful application for bail.) No copy of this notice of appeal was made since it was anticipated that it, or rather a typed copy of it, would in due course form part of the record on appeal. The facts

set out in this paragraph, which are not disputed, are included in the "Heads of Argument" of counsel and an affidavit of Mr Shapiro, who had replaced van der Meer as the appellant's attorney. (I shall refer to both these documents in more detail later in this judgment.)

The further sequence of events is not all that clear from the papers before us. On 16 September 1987 another magistrate at Heidelberg, Mr du Toit, wrote a letter to the Registrar of the Supreme Court, Pretoria. In it the writer said that the record of the case had been sent to the "Appeals Clerk" in Johannesburg and was subsequently lost without trace; that there had been no response to the writer's request to the appellant's attorney to produce a reconstructed notice of appeal and a power of attorney to prosecute an appeal; and that the available documents (without specifying them) were

enclosed in order that the appeal could be disposed of. The matter had lain dormant for almost two years. Reading between the lines it would seem that du Toit was anxious to bring the matter to finality but that the appellant did not share his concern in this regard.

The appeal was set down to be heard on 8 February 1988. This apparently prompted Shapiro to lodge the necessary power of attorney to act for the appellant in the appeal and to address the question of the lost record. On 8 January 1988 Shapiro gave notice that at the hearing of the appeal application would first be made for an order that the lost record be reconstructed by way of the best secondary evidence; alternatively, that the conviction and sentence be set aside and remitted for re-trial; or alternatively, that the appeal be adjourned. In support of this application Shapiro filed a short affidavit in which,

since he was not aware of what had taken place at the trial, he simply referred to Hellens's "Heads of Argument" which counsel had prepared for the hearing of the application. In fact the title to this document was a misnomer. These "Heads of Argument" were largely a recital of facts. Thus in them it was said inter alia:

> "Due to the lapse of time counsel who has listened to the record cannot recall the specific details of what was reflected as having been said at the trial by the appellant in this regard but it was his view that what was said was sufficient to have alerted the magistrate to the possible need to apply a provisional" (this should presumably read 'the provisions of') "Chapter 13 of the Act. Indeed reference to the brief notes of the magistrate which form part of the record before this Court reflect some reference to the appellant's having received psychiatric treatment. (Record p 6). Counsel's memory is (although he cannot be more specific) that there was significantly more said in this regard by the appellant than the brief sentence reflected on page 6 of the record. .... Counsel's memory of the specific psychological or psychiatric

problem which manifested itself from the evidence that was led is vague but either from the record or from consultation at the time of the application for bail pending appeal which was held with the appellant at the time that the application for bail was moved or from both, the appellant had said that he suffered from persistent headaches and disorientation. The appellant was addicted either physically or psychologically to the habitual use of extremely excessive quantities of aspirin (Grandpa Headache Powders) taken with beer in excessive quantities (Carling Black Label). The appellant appeared simple, lacking in perception as to what was occurring, twitchy, fidgety and definitely in need of some kind of medical or psychological care."

Although the application was principally aimed at the production of a (reconstructed) record, the merits of the appeal were to an extent canvassed in these "Heads of Argument". This may have been done for the reason that, if an appeal had no prospect of success on counsel's recollection of the proceedings based on his listening to the mechanical recording, an order for the reconstruction of the record might not have been granted on the ground that

it would serve no purpose. Be that as it may, the "Heads of Argument" did finally deal with the most pertinent issue, namely, the steps to be taken when a record is irretrievably lost.

The application was opposed. In his replying affidavit, dated 22 January 1988, Fourie said that during the trial nothing was said by the appellant which suggested to him that his (the appellant's) mental faculties were in any way impaired. Had there been any such indication, he would have set in motion the necessary enquiry in terms of the said sections of the Act. Heads of Argument were also submitted on behalf of the respondent. In substance they alleged that any further attempts to reconstruct the record would prove futile and that therefore the magistrate's account of what took place, and his impression of the appellant's mental condition, should prevail.

On 8 February 1988 the application was heard by the court of appeal in limine and the principal relief sought was granted. The last three paragraphs of the judgment (per van der Merwe J with Goldstein J concurring), and the order made, read as follows:

> "It now appears that the tape recordings of the proceedings are lost. Annexed to the papers is, inter alia, a note from the magistrate setting out his endeavours to reconstruct the record. I also need not go into further detail regarding that letter.
>
> It appears from the submissions made by counsel that it may very well be an impossible task to compile a reconstructed record, but it is also clear that there had not been proper compliance with the procedure as set out in the judgment in the case of S v Wolmarans 1942 TPD 279. In spite of the difficulties that may be encountered in reconstructing the record, it appears that counsel are ad idem that at least that effort should be made.
>
> I am of the opinion that an order should be granted in terms of prayers 1, 2 and 3 of the notice of motion, prayer 1(b) to be amended as will appear hereinafter.
>
> O R D E R

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The order is therefore as follows:-

1. The matter is referred to the Clerk of the Regional Court, Heidelberg, with the direction that he gathers together the best secondary evidence as to the contents of the record, including affidavits from -

   (a) an official who can say that the record has been mislaid;

   (b) from witnesses and others who were present or who have knowledge of what transpired at the trial, to show what the content was of the evidence led and the proceedings that took place as well as the plea and the further proceedings.

2. That he submits such reconstructed record and affidavits to the appellant/applicant and his legal representatives, to obtain from them their consent, that the record has been correctly reconstructed.

3. That the appellant/applicant makes an affidavit as to the correctness or otherwise of the reconstructed record."

(I shall for convenience refer to this order as the "reconstruction order".)

The decision referred to is that of Rex v Wolmarans and

Another 1942 T.P.D. 279. The accused in that case had pleaded guilty and the record, which was to have been submitted for automatic review, was lost. In deciding on the procedure to be followed in the light of this fact, the court approved at page 283 of what the Attorney-General had said in his report, which was as follows:

> "'It is the duty of the magistrate's clerk to transmit the record for review under sec. 94 of Act 32 of 1917. In this case it is said that he cannot do so because the record is lost. If the reviewing Court is satisfied that that is so, it will require him to submit secondary proof of the contents of the lost record. I think that reference to 'a rehearing' should be avoided, because however convenient it may be to attempt to reconstruct the lost record by simulating a rehearing it remains the duty of the clerk of the court to place before the reviewing Judge the best secondary evidence he can of the contents of the original record. He cannot subpoena the witnesses nor compel the accused to attend, but he can approach the witnesses and others who were present at the trial, to obtain from them on affidavit proof of what the record contained, and he should in equity give the accused and the Crown an opportunity to peruse his proof and submit their

version for transmission to the Supreme Court.'"

The order made by van der Merwe J was, as the judgment indicates, based on the one granted in this earlier decision. With the exception of the Orange Free State Provincial Division, this has been the approach in the case of a lost record in most, if not all, the other Divisions of the Supreme Court: See S v Mankaji en Andere 1974(4) S.A. 113(T) 115 F; S v Whitney and Another 1975(3) S.A. 453(N) 455 F - G; S v Stevens 1981(1) S.A. 864(C); S v Quali 1989(2) S.A. 581(E); sed contra S v Van Wyngaardt 1965(2) S.A. 319(O).

The order of court granted as a result of the application was explicit and one may have supposed that there would have been strict compliance with its terms.

This was not to be.

In response to the reconstruction order, Fourie made an affidavit, dated 14 March 1988, in which he reiterated certain facts, viz: that the appellant was unrepresented; that no evidence was led; that the questioning established that he intended to plead guilty and was in fact guilty; and that the record was lost. He concluded by saying:

> "ek (het) die saakrekord gerekonstrueer soos blyk uit die aangehegte stuk wat ek toe opgestel het en wat ek hiermee bevestig en as deel van hierdie verklaring insluit."

In the bound volume of the record lodged for the present appeal this affidavit is followed by a number of documents which are intended to constitute the reconstructed record. They are:

(i) A reconstructed charge sheet with annexures.

(ii) An undated statement by Fourie.

This is the "aangehegte stuk" referred to in Fourie's affidavit and is apparently the document on which the "brief notes", mentioned in the "Heads of Argument", are recorded. Since the "Heads of Argument" were drawn up before the application was heard and were intended to be used at that hearing, one may infer that this undated statement by Fourie was before the court when the application was argued. Be that as it may, it reads as follows:

> "Uit die ondervraging ingevolge die bepalings van Artikel 112 van die Strafproseswet blyk dit dat:-
>
> (1) Beskuldigde die datums en plekke vermeld in die onderskeie aanklagte erken.
>
> (2) In die geval van aanklag 1 beweer beskuldigde dat hy 'n motorvoertuig langs die snelweg opgemerk het. Hy aanvaar dat dit die eiendom was van die klaer in die saak, mnr Cook. Hy het die voertuig geneem en vir homself reggemaak. Hy erken dat hy geen reg daartoe gehad het nie en dat wat hy gedoen het

diefstal was.

(3) In die geval van aanklag nr II hy 'n groen Granada motorvoertuig, wat hy aanvaar die eiendom van ene S W Le Roux was, vir homself geneem het en dat hy geen reg daartoe gehad het nie.

(4) In die geval van aanklag nr III hy 'n Cortina Ghia 2 liter, wat hy aanvaar die eiendom van ene Jacob Mgadi was, vir homself geneem het en dat hy geen reg daartoe gehad het nie.

Die hof is tevrede dat hy die aard van die aanklagte begryp het, dat hy bedoel het om skuldig te pleit en dat hy skuldig was soos aangekla en is hy derhalwe op die drie hoofaanklagte skuldig bevind.

VONNIS:

Beskuldigde is 35 jaar oud en het geen vorige veroordelings nie. Hy sê hy het gedurende 1981 'n Granada voertuig gehad maar dit is gesteel nadat hy dit slegs 24 uur lank gehad het. Terwyl hy op pad was het hy 'n Granada langs die pad sien staan. Hy het die motor geneem en dit reggemaak en vir homself gehou.

Ten tye van die verhoor het hy gewerk teen R230,00 netto per week. Hy het 2 kinders. Op skool het std VI geslaag en het geen verdere opleiding gehad nie.

Op 'n stadium het hy psigiatriese behandeling ontvang. Hy het al drie motors geneem, dit opgebou en gehou. Met onder andere hierdie besonderhede as agtergrond is beskuldigde gevonnis soos blyk uit die meegaande gerekonstrueerde

klagstaat. 'n Ligafdruk van die gevangesettingslasbrief gaan ook saam.

(Get.)
P J FOURIE
STREEKLANDDROS"

(iii) Copies of a committal warrant and an extract from a register together with no less than eleven letters.

None of these documents contributes in any way towards reconstructing the record. For some strange reason it was thought fit to place all this irrelevant matter before court in the response to the reconstruction order.

(iv) Finally, a further affidavit made by Fourie, dated 22 April 1988, in which he declares that:

"Op 18.11.85 tydens die verhoor van ene D J J Joubert in Saak Nr SH 259/85 het ek as voorsittende beampte opgetree. By 'n latere geleentheid is ek versoek om behulpsaam te wees met die rekonstruksie van die notule van verrigtinge aangesien die oorspronklike stukke nie beskikbaar was nie. Ek het in 'n beëdigde verklaring 'n weergawe

> gegee van die gebeure soos ek dit bekom het vanuit die notas wat ek ten tye van die verhoor gehou het en wat toe nog beskikbaar was. Ek is snelskrif magtig en hou volledige verbatim notas van wat gesê word sover ek dit dienstig ag. Aangesien sodanige notas slegs vir 'n beperkte tyd gehou word, beskik ek tans nie meer daaroor nie." (The first italics are mine.)

This affidavit, it would seem, explains how he was able to state the facts in (ii) above, although that document is an undated statement and not an affidavit as alleged.

Had the matter followed its proper course the relevant matter, (i), (ii) and (iv) above, contributing to, or forming, the reconstructed record - from the compiler's point of view - ought to have been submitted to the appellant and his legal representatives for their consent as envisaged in paragraph 2 of the order or, alternatively, for them to

have had an opportunity of responding in terms of paragraph 3 of the order.

Instead, on or about 19 April 1988, Shapiro received a notice of set down of the appeal for hearing on 13 June 1988. Both Hellens and Shapiro reacted to this notice. Counsel submitted further heads of argument (in the true sense) dated 5 May 1988 and, for the first time, an affidavit dated 19 May 1988. Shapiro furnished a further affidavit dated 20 May 1988. The new allegations of significance in these three documents can be thus summarised. Hellens in his affidavit, after confirming on oath the factual allegations in his earlier "Heads of Arguments", alleged

> "that the record of the proceedings as reconstructed and as it appears in the above Honourable Court's file, is by no means complete and that significantly more was said during the

hearing than appears in the reconstructed record."

Counsel in his heads of argument, restricting them to the question of the lost record, submitted that the efforts to place a reconstructed one before court had failed and that in the circumstances the convictions and sentences ought to be set aside. Shapiro expressed his surprise at receiving a notice of set down of the appeal when neither he nor his counsel nor the appellant himself had been approached on the question of reconstructing the record. His objection was in effect that the audi alteram partem principle, embodied in the court's order, had been disregarded. He said that he had complained to counsel acting for the respondent in this matter and was told that

> "the Honourable Magistrate stood by the reconstructed record and was not prepared to attend a meeting with the Appellant and his legal representatives to prepare a reconstructed record."

In passing one notes that the attitude of counsel and his attorney were somewhat contradictory: the former contending that it was not possible to create a reconstructed record; the latter deploring the fact that the procedure to produce one was not followed.

With these documents (to which it has been necessary to refer at some length) before the court a quo the appeal was heard. It was dismissed. The reasons for this conclusion, and the approach of the court to the "reconstructed record" submitted, appear from the following excerpt from the judgment (per Harms J):

> "Die advokaat wat na die bandopname geluister het, het meer as twee jaar na die tyd 'n beëdigde verklaring gemaak van wat hy sou onthou wat op die bandopname was. Hy sê dat hy die indruk gekry het dat die landdros homself wanvoorgelig het deurdat die landdros versuim het om die bepalings van hoofstuk 13 van die Strafproseswet toe te pas. Hy sê dit moes geblyk het aan die landdros dat die

appellant deur 'n distriksgeneesheer ondersoek moes word. Dit hou verband met wat die landdros neergestip het, naamlik, dat die appellant op 'n stadium psigiatriese behandeling ontvang het. Die beëdigde verklaring gaan voort en sê dat die advokaat nie meer die detail kan onthou nie, maar dat hy van oordeel was dat genoeg gesê is om die landdros bedag te maak op die bepalings van hoofstuk 13. Hy kan nie onthou wat in die kennisgewing van appèl staan nie, en die probleem wat blyk, is dat die advokaat ex post facto met die appellant gekonsulteer het. Sekere aspekte van wat die advokaat glo in die hof gesê is, kon moontlik aan hom meegedeel gewees het tydens die konsultasie met die appellant.

Wat wel opmerklik ontbreek, is 'n verklaring van die appellant oor wat by die verhoor gebeur het. Inderdaad het hy geen verklaring gemaak nie. Hy betwis dus nie die gebeure voor die hof nie. Daar is ook geen aanduiding wat die appellant se beweerde psigiatriese toestand was nie. Al wat voor ons is, is 'n vae rekolleksie van die advokaat wat meer as twee jaar oud is. Ook die familie het niks voor ons geplaas nie.

Daar is dus nie getuienis waarop ons kan sê dat die rekord, soos deur die landdros voorberei, nie wesenlik korrek is nie. Daar is ook nie getuienis wat daarop wys dat appellant benadeel is in die sin dat daar 'n sogenaamde 'failure of justice' is soos neergelê in S v Marais 1965 2 SA 514 (T).

In die lig van voorgaande, sou ek die appèl van die hand wys."

It must be borne in mind that in this case two irregularities called for consideration in the court a quo. Firstly, and primarily, the failure to comply with the reconstruction order, and secondly, the alleged irregularity in the course of the trial. The judgment of the court made no mention of the first and proceeded to adjudicate upon the second. This, with respect, was the wrong approach. The enquiry should have commenced at the stage when the reconstruction order was sought. At that time no record of the trial existed. This appears from the first paragraph of the judgment of van der Merwe J quoted above and is indeed implicit in the order itself. A record was necessary before the appeal could be heard. To that end the reconstruction order was made. There was plainly a failure to comply with its terms. The court a quo none the less found that there was a (reconstructed) record enabling the court to turn to, and decide, the merits

of the appeal. It reasoned that, in the absence of controverting evidence, what the magistrate put forward as the reconstructed record was to be accepted as substantially correct. ("Daar is dus nie getuienis waarom ons kan sê dat die rekord soos deur die landdros voorberei, nie wesenlik korrek is nie.") But reliance on what was submitted as a reconstructed record could only be justified if it was shown that, notwithstanding the disregard of the court's order, what was placed before the court a quo was in all material respects a replica of the trial proceedings. This was not demonstrated to be the case.

The court a quo with good reason criticised the evidence of Hellens on what he remembered of the tape recording to which he had listened. His recollection was vague and to an extent perhaps based on what was told to him by the appellant. But, on the

other hand, counsel, in the passage from his affidavit which has already been quoted, was emphatic that the papers before court were incomplete. Shapiro had justifiably complained that he had not been afforded an opportunity to take part in the reconstruction of the record, in fact his request was treated with disdain. Moreover, the undated statement of Fourie ((ii) above) did not purport to be a comprehensive account of what was mechanically recorded. In his second affidavit ((iv) above) the magistrate candidly stated that he had made a verbatim shorthand note of all that he at the time regarded as relevant.

In the light of these facts one cannot conclude that a properly constructed record was before court and therefore that the appellant was not prejudiced by the irregularity occasioned by the failure to comply with the reconstruction order.

Counsel appearing before us were agreed that, should this be the finding in this court, no further order for the reconstruction of the record should be made since any such attempt was unlikely to succeed. I agree. A similar impasse - a lost record with no prospect of reconstructing one - arose in S v Marais 1966(2) S.A. 514(T). That being the situation, the court at page 516G - H observed that:

> "The appellant has been seriously frustrated and prejudiced owing to a fault on the part of the State's servants. She is entitled to an appeal as of right. She is entitled to receive a copy certified as correct. This cannot be achieved. She has been frustrated in a basic right. She has been deprived of this through no fault of her own. In all these circumstances the only thing to do is to exercise the powers granted in sec. 98 of Act 32 of 1944, as amended, and to set aside the whole of the proceedings."

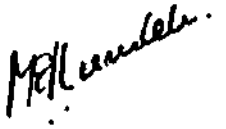
and at 517 A - B the judgment proceeded:

> "If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice."

In the result in that case the proceedings in the magistrate's court were set aside, and - it followed - the conviction and sentence were likewise rescinded. I endorse what was said in the quoted passages from that judgment and agree with the form of the resultant order. A similar one ought to have been made by Harms J in this case.

In the result the order of the court a quo is set aside and the following substituted:

"The convictions of the appellant in the regional court, together with the sentences imposed, are set aside."



M E KUMLEBEN
JUDGE OF APPEAL

JOUBERT AJC
SMALBERGER JA
MILNE JA — **Concur**
NIENABER AJA