HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGMENT

Case No.: CA 28/2013

In the matter between:

PENDUKENI SUNDAY SOONDAHA **FIRST APPELLANT**

KAHERERO SHAUMBWA **SECOND APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Soondaha v State* (CA 28-2013) [2016] NAHCNLD 76 (22 August 2016)

Coram: JANUARY J, TOMMASI J (CONCURRING)

Heard: 25 April 2016

Released: 22 August 2016

Flynote: Criminal Procedure ─ Appeal ─ Record irretrievably lost ─ Cannot be reconstructed ─ Record to be administratively compiled afresh by magistrate or clerk of the court ─ Attempted reconstructed record in shambles ─ Cannot be properly

reconstructed ─ Guidelines to reconstruct ─ Court not in position to evaluate evidence and reasons ─ Conviction and sentence of both appellants set aside.

Summary: Where the record is irretrievably lost after conviction or sentence and is needed for an appeal, the clerk of the court would be directed to reconstruct the record with the assistance of state witnesses, the magistrate, the prosecutor, the interpreter or the stenographer. This reconstructed record is then submitted to the accused (or his or her legal representative) to obtain his or her agreement with it. The response of the accused/appellant is recorded under oath.

This court must be placed in a position to evaluate the evidence in conjunction with the reasons of the learned magistrate in order to decide if the convictions were just and in accordance with justice or if the alleged misdirection's have any merit. This court is not in a position to do that without a proper record or proper reconstructed record of those proceedings. The convictions and sentences of both appellants are set aside.

ORDER

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1. The convictions and sentences of both appellants are set aside.

JUDGMENT

JANUARY J, TOMMASI J (CONCURRING)

[1] The appellants in this matter were both convicted in the Regional Court Outapi on charges of;

1. Robbery with aggravating circumstances.
2. Contravening Section 29(1)(a) of Act 7 of 1996 as amended-Possession of a Machine Gun.
3. Contravening Section 33 of Act 7 of 1996 as amended-Possession of Ammunition.

[2] They were each sentenced as follows;

Count 1 8 (Eight) years' imprisonment

Count 2 12 (twelve) years' imprisonment

Count 3 1 (one) year imprisonment in total suspended for 3 (three) years on condition that accused is not convicted of possession of ammunition, a contravention of section 33 of Act 7 of 1996, committed during the period of suspension.

[3] The first appellant is appealing against conviction in respect of count 1 and in respect of sentence on all 3 counts. The second appellant initially appealed against both conviction and sentence but now appeals only in respect of sentence in relation to the conviction for Robbery with aggravating circumstances. Ms Mugaviri is representing the first appellant, Ms Horn as *amicus curiae* for the second appellant and Mr. Pienaar appears for the respondent.

[4] Both the appellants are applying for condonation because their notices of appeal were filed late. They were sentenced on 30 September 2009. First appellant filed a notice of appeal on 04/07/2013 with a supporting affidavit date stamped 16/07/2013. He alleges in the supporting affidavit that he filed the appeal on 12 October 2009 which was timeously as his right to appeal was explained by the court. He further alleges that he was informed on 28th June 2013 that the notice of appeal was lost. He therefore filed another notice of appeal. First appellant states that he applied for legal aid soon after filing the notice of appeal and that Ms Mugaviri was appointed. She informed him on 04 August 2015 that she had to draft a new notice and that she did so in July 2015. First appellant prays for condonation because according to him he has prospects of success on appeal. Ms Mugaviri filed a confirmatory affidavit in this regard and takes the blame for the long delay.

[5] Ms Horn filed a notice of representation *amicus curiae* for both appellants on 20 April 2015. She subsequently on 27th April 2016 filed a notice of withdrawal of all pleadings and/or notices of first appellant and stated that first appellant will proceed on documents filed by Ms Mugaviri Attorneys. Ms Mugaviri filed an amended notice of appeal against both conviction and sentence on 23rd July 2015. Ms Horn however filed an additional notice dated 09 May 2016 indicating that second appellant only appeals against his sentence.

CONDONATION

Their explanations

[6] An appellant who wants to appeal in terms of section 309 of the Criminal Procedure Act, Act 51 of 1977 shall in accordance with Rule 67(1) of the Magistrates' Court rules do so within 14 days after the sentence. In this matter the appellants were already sentenced on 30 September 2009. Their notices of appeals were filed long after the expiration of the 14 days.

[7] It is by now trite law that any appellant who is late with a notice to appeal must give a reasonable explanation for the delay, explain why the court rules were not complied with and show reasonable prospects of success on appeal.[1]

[8] First appellant stated in his supporting affidavit that he filed his notice to appeal on 12 October 2009 but he had to file another notice of appeal as the initial one allegedly got lost at the Clerk of the court's office. He was also informed that the original court record got lost and because of that cannot prove that he indeed filed the notice of appeal timeously. He states that he is a layperson. It was eventually established that the transcribed record and/or tape recording cannot be found and the learned magistrate confirmed same.

[9] Second appellant stated in his supporting affidavit that he filed his application for condonation and notice of appeal on 29 October 2009. Attached to the supporting

[1] S v KAPUIRE 2015 (2) NR 394 (HC); S v ARUBERTUS 2011 (1) NR 157 (SC); S v ANDIMA 2010 (2) NR 639 (HC); S v NAKAPELA AND ANOTHER 1997 NR 184 (HC)

affidavit is a notice of appeal dated 29 October 2009. The second appellant further states in his supporting affidavit that his right to appeal was explained to him and that he was undefended. He is a lay person and did not understand his rights. He relied on other prisoners to assist in drafting his notice of appeal and supporting affidavit.

[10] The record reflects that both appellants conducted their own defence. The court record consists of the magistrates' court proceedings including the section 119 pleas, two photo plans, marked Exhibits "A" and "B" respectively and the notes of the Regional Court magistrate who conducted the trial. After sentencing the record only reflects; "Right to appeal explained." There is no indication of what was explained and if the appellants understood the explanation. The explanation falls short of what is needed to be explained. In these circumstances I accept as reasonable the explanation of the appellants that they are lay persons and could not grasp their rights to appeal at the time.

Prospects of success

[11] I find it of concern and disturbing that the record could not be reconstructed, that the original transcribed record is lost and that the tape recordings are likewise lost. The learned Regional Court Magistrate filed additional reasons for conviction and sentence consisting of two separate documents. The contents are as follows;

1. "It is clear from the record that during court proceedings, a detailed judgment was delivered on 30/09/2009. (Page 150 of record). There is therefore nothing more to add.

   Regarding the sentence, due to the seriousness of the offences the appellants had been convicted of, the court had no other option but to impose a sentence of direct imprisonment.

   I am therefore of the opinion that the sentence imposed, was just."

2. "The reasons for conviction are clearly set out in the judgment delivered on 30/09/2009.

> The appellant, in the notice of appeal, attack the issue of pointing out. However these averments are based on the record (notes) kept by the trial magistrate. The proceedings were mechanically recorded, of which the transcribed record was not perused by the appellant (counsel).
>
> In several attempts, I tried to get hold of the transcribed proceedings from the clerk of court, but it cannot be found. (my emphasis)
>
> This transcribed record would have shown a true reflection of what transpired in court during the trial; whether or not the issue of pointing out was addressed.
>
> It is therefore difficult to answer to the points in the Notice of Appeal without the transcribed record.
>
> **AD SENTENCE**
>
> The accused was convicted of a very serious offences *viz a viz* the personal circumstances of the appellant, the sentence that was imposed is just. The court indeed took into consideration all the circumstances during the sentencing stage."

[12] Another concern is that the record is in shambles in relation to the typed notes and handwritten documents. The undermentioned findings will illustrate why I am concluding that it is in shambles. In sequence to the pagination I had to spend a lot of unnecessary time to acquaint myself and determine which are the notes of the magistrate corresponding with the typed record and otherwise. The typed record is in order as far as the magistrates' court proceedings are reflected corresponding with the handwritten record up until the time that the 119 plea was taken. The typed magistrates' court proceedings end at the 119 pleas and referral for the Prosecutor General's decision. Proceedings however continued in the magistrates' court until the matter was transferred to the Regional Court. That portion is not typed. The Regional Court Record then follows from postponement of the matter, pleas taken and until sentencing. In the handwritten notes however, there are about 21 pages of documents in handwritings different from the Regional Magistrate's handwriting. I assume that these documents are documents collected in an attempt to reconstruct the record. These documents consist of 21 pages which are not typed but form part of the record

[13] I had to compare the handwritten notes with the typed ones to decide if the record was properly reconstructed in view of the additional reasons provided by the Regional court magistrate and considering an affidavit by the clerk of court Outapi that; "all endeavours to trace the original record/ tapes of the case had been in vain." And that; "the magistrate provided him with his notes of the proceedings." According to this affidavit all the handwritten documents are the magistrate's notes which in comparison are clearly not the case. The typed record further reflects portions that do not make sense, forcing me to peruse the handwritten record to establish what is reflected.

[14] First appellant's grounds of appeal are briefly that the learned magistrate; allowed inadmissible evidence of a pointing out and considered it in his judgment; that he failed to hold a trial within the trial in relation to the pointing out; he erred by concluding that one Alube was the first appellant; he failed to assist the unrepresented first appellant in relation to the evidence of the pointing out; he erred by failing to consider that no rights were explained to first appellant before the pointing out; he erred by admitting evidence of admissions or confessions as same were not properly obtained because the appellant's right were not explained at the time of making it: no admissions were proved to have been made; he erred by considering footprint evidence that was never proved; he erred by not considering that appellant's version is reasonably possibly true.

AD SENTENCE

[15] The learned magistrate failed to take properly into account the personal circumstances of the appellant; the sentences induce a sense of shock in the circumstances and a reasonable court would not have imposed such a sentence; he erred by not assisting the unrepresented appellant to establish if there were any compelling and substantial circumstances.

[16] The second appellant initially also appealed against the conviction on more or less the same grounds of first appellant but Ms Horn filed a new notice of appeal confining the second appellant only to appeal against the sentence. The grounds of appeal against the sentence are as follows; the trial court misdirected itself on the facts or on the law; an irregularity which was material occurred during the sentence proceedings; the trial court

failed to take into account material facts or overemphasized the importance of other facts; the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal; the magistrate failed to assist the unrepresented appellant to place all personal factors and information in respect of mitigation factors before the court to enable the court to impose a just sentence; the magistrate failed to consider rehabilitative properties and the youthfulness of the second appellant; the magistrate failed to consider the time spent in custody trial awaiting before the conviction and sentence; the magistrate overemphasized the seriousness of the offence and the interest of society; the sentence is shocking and unreasonable; the magistrate did not exercise his discretion judicially and properly.

[17] Mr Pienaar in opposition to the appeals of both appellants initially raised a *point in .limine* that in relation to second appellant there is no reasonable explanation for the delays to file the notices of appeal timeously. Ms Horn then informed the court that she was in possession of an affidavit which the second appellant did not sign. A signed copy was eventually handed to the court and Mr Pienaar. After perusal he further submitted that there are no reasonable prospects of success on appeal for both appellants.

[18] I find that the record is not properly reconstructed and is still incomplete for reasons referred to above in paragraphs 12 and 13. Furthermore the learned magistrate in his additional reasons referred to the fact that specifically in relation to the notice of appeal it is difficult to answer without the proper transcribed record. It is not only difficult for this court to evaluate and make findings in relation to the grounds of appeal raised but impossible. This court is confined to decide the appeals within the four corners of the record. The record is however incomplete.

[19] It is not surprising therefore that counsel for both appellant and the respondent had so much difficulty to draft and file final notices and heads of argument. Notices were from time to time withdrawn, new notices filed and new heads of argument filed. This court already had difficulty with the record on 10 August 2015 when it was removed from the roll because the record was incomplete and on 26 August 2015 an order was made as follows;

1. “The matter is remitted to the RC Magst. with a directive i.t.o. Rule 118 of the HC Rules that a proper record be constructed.
2. The appeal to be re-enrolled once a certificate has been issued stating that the record is either complete or had been reconstructed.”

[20] There is a Filing Notice with date stamp of 04 August 2015 by the Registrar of this court from Mr Phillipus J L Brink who represented the respondent at the time dated 05th June 2015 with the contents as follow;

> “Please take note that the Respondent is unable to file heads of argument due to the poor quality of the reconstructed record. Since this appeal is based on the factors taken into account by the sentencing court, it would be vital to have access to those factors to be able to argue for or against the sentence imposed. A few examples can be mentioned:
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> 1. The reasons for sentencing are not included in the record. The copy of the handwritten notes/record in possession of the Respondent seems to refer only to 2 counts (p158). Whereas the typed version shows 3 counts.
> 2. It seems clear that parts of the tape recordings were inaudible (e.g. P57), but it is unclear which parts of the handwritten notes are actual parts of the record and which are notes used for reconstruction. The evidence and cross-examination on p89-90 is in the form of a recording of the proceedings, yet the handwriting differs from that of the learned magistrate and it is followed (p94) by what seems to be a statement under oath made to the police.
> 3. Exhibits “D” and “E” contains the previous convictions of the accused persons, yet they are absent from the reconstructed record. It is noted that those exhibits were handed in as J14’s which means they were compiled by the clerk of the court. There seems to be no explanation as to why copies could not be obtained. Previous convictions could play a major role in sentencing, yet the record is completely silent on it. It is not even noted if accused admitted to those convictions. It is unthinkable that the sentencing magistrate would not have referred to it.
>
> It is therefore submitted that the interest of justice would be best served if the case is either postponed or removed from the roll pending a more comprehensive reconstruction of the record.”

All the above mentioned shortcomings were not addressed and the record/notes are still the same. I assume that the matter was removed from the roll on 10 August 2015 because of the Notice filed by Mr. Brink on 04 August 2015.

[21] It is evident from the notes that the mechanical recording was done on at least 3 tapes. The typed notes from the appellants' pleas to sentence consist of 20 pages only. 3 (Three) of the 20 pages reflect notes to postponements only. Logic and experience of how much is usually on one tape recording dictates that a lot more must have been on the tapes that cannot be reconstructed.

[22] The notes reflect that there was no cross-examination of the complainant in the matter. That makes sense as she did not implicate any of the appellants. It is however of concern that in relation to the second, third, fourth and fifth witnesses the notes indicate that there was cross-examination by both appellants and another co-accused who was eventually discharged. The notes however reflect very little or nothing about the content of this cross-examination. Likewise both appellants testified in their defences. The notes indicate that there was extensive cross-examination by the prosecutor but nothing is reflected in the notes/record.

[23] We have requested all counsel in the matter to address the court on the incomplete record and evidence by first appellant incriminating second appellant after they argued on the merits of the appeals of both appellants. They have all submitted very helpful argument and we are indebted to them.

[24] Accused persons are not automatically entitled on appeal or review to the setting aside of a conviction and sentence when the whole or part of the record is lost or that a tape recorder did not record the evidence.

> "An accused is not *ipso facto* entitled to his discharge if the record or portions thereof get lost. The best possible evidence of the record should rather be obtained. Information on what was testified or said during the trial should be sought from every source that can make a contribution….Such evidence would then form the basis for a review or appeal"[2]

[2] Du Toit et al, Commentary on the Criminal Procedure Act: Service 42, 2009 at 30-40

[25] Various guidelines of how a proper reconstruction of the record is to be achieved crystalized in this jurisdiction over years.[3] Magistrates and clerk of court are urged to acquaint themselves in this regard to ensure that injustices to either accused or the State are prevented. None of those guidelines were complied with in this case.

[26] Where the record is incomplete or lost, like in this case, both the State and the appellant have a duty to reconstruct the record from secondary sources. The reconstruction is an administrative process placing the duty on the clerk of the court.[4]

> "After conviction or sentence the clerk of the court would be directed to reconstruct the record with the assistance of state witnesses, the magistrate, the prosecutor, the interpreter or the stenographer. This reconstructed record is then submitted to the accused (or his or her legal representative) to obtain his or her agreement with it. The response of the accused is recorded under oath. (See S v Gumbi 1997 (1) SACR 273 (W); R v Wolmarans 1942 TPD 279; S v Mankaji en Andere 1974 (4) SA 113 (T); S v Whitney and Another 1975 (3) SA 453 (N); S v Stevens 1981 (1) SA 864 (C); S v Quali 1989 (2) SA 581 (E); S v Joubert 1991 (1) SA 119 (A).) In such a case the clerk of the court endeavours to obtain the best secondary evidence regarding the content of the record and there is no room for a second 'trial'.[5]

[27] *In casu* this court ordered on 26 November 2015 that the record should be reconstructed. That order was never complied with and it is in my view clear from a statement by the clerk of the court and additional reasons by the magistrate that a proper reconstruction is impossible. An order to reconstruct at this stage will be a futile exercise in the circumstances.

[28] This court must be placed in a position to evaluate the evidence in conjunction with the reasons of the learned magistrate in order to decide if the convictions were just and in accordance with justice or if the alleged misdirections have any merit. This court is not in a position to do that without a proper record or proper reconstructed record of

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[3] Uanee Muundunjau and two Others v The State, unreported High Court case CA 20/94, Delivered 22/8/1994; Stephanus B Tiboth v The State, unreported CA 49/95, Delivered: 04/12/1995; Mathews Katoteli and Another v The State, unreported CA201/2004 delivered 26?9/2008; Jose Americo De Almeida v The State, unreported, Delivered 19 November 2010; S v Aribeb 2014 (3) NR 709

[4] S v Aribeb *(supra)* at p711 to712

[5] S v Aribeb (*supra)* at 711-712

those proceedings. The missing record in relation to cross-examination may be material to the appeal and in my view to decide the appeal in the absence thereof may be detrimental to both the appellants and the respondent. In the circumstances the convictions and sentences stands to be set aside.

[29] I could only find the *Aribeb* matter referred to above as a reported matter on the issue of a lost or missing record in Namibia. I however found persuasive authority in the Republic of South Africa. I agree with Van Dijkhorst J in *S v S 1995 (2) SACR 420 (T)* on a situation where the record is partly lost or wholly lost where the headnote indicates as follows underneath. The judgment is unfortunately in Afrikaans but I refer to the headnote which is in English and summarises the crux of the judgment.

> "On appeal it appeared that the mechanical recording of the proceedings of 6 January 1994 was defective and that it could not be reconstructed by the trial magistrate. The appellant contended that the missing evidence was material for a proper adjudication of the case and since it could not be rectified, the appeal had to succeed.
>
> The court remarked that the test in these cases was whether the record was materially correct and complete and that this question had to be answered in the context of the case in question and not in vacuo. The question of whether a defect was material in an appeal depended on the issues in dispute on appeal, as determined by the notice of appeal. The Court held further that an accused convicted in a magistrate's court had a right of appeal which could not be frustrated by the State's defective recording of the evidence: where it was clear that the missing portions contained material evidence which could not be reconstructed, and the parties could not solve the problem by means of appropriate admissions, the proceedings had to be set aside. As to the question whether the same approach should apply where it could not be ascertained from the record whether the missing parts contained material evidence but that possibility existed, the Court remarked that it was not inclined to set aside the proceedings on the basis of mere speculation that the parts of the record in the instant case marked 'inaudible' possibly contained answers which strengthened the appellant's case and that an indication to that effect should be contained in the record itself or in an affidavit made by the accused or his legal representative. As regards the appellant and his witness' evidence, the Court pointed out that there were so many 'inaudible' portions indicated therein that no judgment could be

made as to the quality of the accused's evidence. All J S's answers, which amounted to material evidence, were inaudible. The Court accordingly held that no fair adjudication of the case could take place on the basis of the available record.[6]

[30] I also agree with Leach J in *S v Mcophele* 2007 (1) SACR 34 (E) where he states

"The magistrate's summary of the evidence may well be correct and the accused's conviction may well have been proper. However, it is for this Court on review, having regard to the evidence that was led, to consider whether the magistrate's summary of the evidence and his factual findings were in fact correct and whether the proceedings were in accordance with justice. Without a record of those proceedings, the preparation of what in effect amounts to a judgment by the magistrate is insufficient. Had there been problems with the typing of the record so that certain sections were inaudible, those sections may well have been possible to reconstruct (for example, by having regard to the notes of the magistrate, the witness statements in the police dockets, etc) so as to produce a sufficiently reliable record for this Court to decide whether the proceedings in the court below had been in accordance with justice. But merely to rely upon the magistrate's summary of the evidence and his evaluation of the witnesses' testimony, is wholly insufficient for that purpose.

I am therefore of the view that there is in fact no record of the proceedings and, in these circumstances, the conviction and sentence have to be set aside."[7]

[31] This court needs to uphold the Namibian Constitution which entrenches the right to a fair trial including the rights to appeal and/or reviews. In my view the appellants' constitutional right will be infringed if this court does not set aside the conviction and sentences in the matter.

[6] At 421G to 422B
[7] At 37D-G

[32] As a result:

1. the convictions and sentences of both appellants are set aside

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HC JANUARY J

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MA TOMMASI J

APPEARANCES:

FOR THE 1ST APPELLANT:	Ms Horn **W Horn Attorneys**
FOR THE 2ND APPELLANT:	Ms Mugaviri **Mugaviri Attorneys**
FOR THE STATE:	Adv. Pienaar **Office of the Prosecutor-General**