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FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no: 034

PARTIES: THE STATE

AND

N. MCOPHELE

- Registrar: Case no. 307/06
- Magistrate:
- Supreme Court of Appeal/Constitutional Court: **EASTERN CAPE DIVISION**

DATE HEARD:

DATE DELIVERED: **08/09/2006**

JUDGE(S): Leach J

LEGAL REPRESENTATIVES -
Appearances:
- for the State/Applicant(s)/Appellant(s):
- for the accused/respondent(s): DH De La Harpe

Instructing attorneys:
- Applicant(s)/Appellant(s): Netteltons
- Respondent(s): Wheeldon Rushmere & Cole

CASE INFORMATION -
- *Nature of proceedings* : REASONS FOR JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

Review No.: 200501366
CA&R No.: 307/06
Date delivered:

In the matter between:

THE STATE

and

N. MCOPHELE

R E V I E W J U D G M E N T

SUMMARY

Automatic review under s 302 of the Criminal Procedure Act – defective record of proceedings in Magistrate's Court forwarded on review – transcript of proceedings could not be prepared from the tape upon which proceedings recorded – magistrate having lost his notes – magistrate preparing in effect a judgment, summarising and analysing the evidence and setting out his reasons why he convicted the accused – this not a record of the proceedings – conviction and sentence set aside.

LEACH, J:

The accused was tried in the district court of Alexandria on a charge of theft. Despite a plea of not guilty, he was convicted as charged and, on 16 September 2005, was sentenced to twelve months imprisonment.

The matter was automatically reviewable under the provisions of s 302 of the Criminal Procedure Act. By reason of the provisions of s 303 of that Act, the clerk of the court in Alexandria was obliged, within a week, to forward the record of the proceedings to the registrar of this court for it to be placed before a judge in chambers for review. It was at this stage that things went awry, amid circumstances of chaos which is a matter of grave concern.

It took some six weeks after sentence was imposed for the "record" to be received by the registrar. When it was received, it contained a letter dated 14 October 2005 in which the magistrate stated that in order to prepare a record, the tape upon which the proceedings had been recorded had been sent for transcription. Unfortunately, on 13 October 2005, he had been informed by those responsible for the transcription that nothing had been recorded on the tape. Alarmed by this, the magistrate ascertained that the notes which he had kept during the course of the trial had also gone missing. However, he stated that he

had been able to reconstruct the record, *inter alia* by having referred to the statements in the police docket and by reference to his memory. He then proceeded, in effect, to set out a judgment in which he summarised the evidence of the various witnesses, commented thereon, made credibility findings, rejected the accused's version of the incident (he had been found in possession of a roll of wire which the magistrate was satisfied he had stolen whereas he had stated that he had merely found it abandoned in a rubbish dump and was merely carrying it home) and explained why he had convicted the accused. He then summarised the proceedings that had taken place in regard to sentence, and concluded that, under the circumstances, a sentence of twelve months imprisonment was appropriate.

This, then, was the magistrate's "*reconstruction of the record*". In fact it was nothing more than his judgment and a summary of the proceedings which had taken place before him.

When the record in this form was placed on review before *Matthee* AJ, he asked the Director of Public Prosecutions to comment on the magistrate's so called "reconstruction" of the record, particularly as he had used information in the police docket in order to do so.

Two members of the office of the Director have proceeded to prepare an opinion in which, in the light of the decision in *S v Leslie* 2000(1) SACR 347(W), they

expressed the view that the use of witness statements in the police docket for purposes of reconstruction was permissible. However, their further opinion was that, as the magistrate had stated that he remembered the evidence well and the case was fairly straightforward, nothing was irregular.

If what was meant by this is that the record is adequate for purposes of a review, I cannot agree. I accept that it may be permissible to have regard to the statements in police docket for purposes of reconstruction of a record, but no such reconstruction in fact took place. As I have said, the magistrate summarised the evidence and set out his credibility findings in the form of a judgment. As he had no notes, he was clearly not in a position to attempt a verbatim reconstruction of the evidence. The result of the process he adopted cannot be construed as a reconstructed record from which this court can decide whether or not the proceedings were in accordance with justice. A reconstruction is, after all, to obtain the best available evidence to prove what was said in court – *cf S v Leslie supra* at 35Ad – and as was commented by *Van Diikhorst* J in *S v S* 1995 (2) SACR 420 (T) at 424*i*-424*a,*[1] a case in which a conviction and sentence were set aside where only a section of the evidence could not be transcribed or reconstructed (and not all the evidence as is here the case):

"Die respondent betoog dat die gedeeltes van die notule wat onvolledig is, nie wesenlik is nie. Die verhoorlanddros het volledig uitspraak gegee in die aan-geleentheid en alle tersaaklike relevante getuienis opgesom en geloofwaardigheidsbevindinge gemaak. Daarom betoog die respondent dat die Hof van appel met vertroue meer waarde kan heg aan hierdie bevindinge eerder as aan die vraag en antwoordgedeeltes van die notule wat wel onvolledig is.

[1] A passage cited with approval by this court in *S v Appel* 2004(2) SACR 360 (E) at 363.

Die betoog gaan nie op nie. Dit is juis oor die landdros se evaluerings van die getuienis wat die Hof op appel 'n oordeel moet vel. Om dit te doen sonder die getuienis self en bloot op sterkte van die landdros se opsomming, sou neerkom op meet sonder maatstaf. Uiteraard is dit foutief."

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.[2]

[2] *Cf* the *Appel* case *supra* and the authorities there cited.

Unfortunately, this conclusion leads to a further issue of concern. The opinion from the office of the the Director is dated 24 November 2005. This review should have been dealt with shortly after that date. However, it was only placed before me on 6 September 2006, more than nine months after the opinion had been prepared, during which time the accused has probably served his sentence.

I have ascertained that the registrar's records show that the review papers were sent to the Director on 28 October 2005. The Deputy Director has informed that for some unknown reason the opinion of his office which is dated 24 November 2005, was mislaid and it and the review papers were only sent back to the registrar on 6 September 2006. Although blame is clearly to be allocated to the Director's staff for their failure to timeously return the papers, there also appears to be culpability on the part of the Registrar's staff as insufficient systems were in place to monitor what had happened to the review. As a result of this ineptitude, a man has languished in jail unnecessarily and I hope that, in the future, greater care will be exhibited by all concerned.

Be that as it may, for the reasons set out above, the accused's conviction and sentence are set aside.

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L.E. LEACH
JUDGE OF THE HIGH COURT

FROMEMAN, J:

I agree.

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J.C. FRONEMAN
JUDGE OF THE HIGH COURT