

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

CASE NUMBER: A204/2012

5 **DATE:** 2 NOVEMBER 2012

In the matter between:

ANTHONY NORTJE Appellant

and

THE STATE Respondent

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J U D G M E N T

MANSINGH, AJ:

15 1. The appellant was convicted in the Regional Court
Wynberg on a charge of contravening section 3 of the
Criminal Law Amendment Act, 32 of 2006, and was
sentenced on 14 May 2003 to 15 years imprisonment.

20 2. With leave of the magistrate he now appeals against
conviction and sentence.

3. The appellant pleaded not guilty to the charge and was
legally-represented throughout his trial.

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/RG

/...

INCOMPLETE RECORD:

4. The record of the proceedings in the Magistrate's Court was incomplete and could not be reconstructed.

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5. It is common cause that the portion of the record that is not available and cannot be reconstructed is a substantial portion of the cross-examination of the appellant's cross-examination being tapes 10 and 11.

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6. The magistrate and the public prosecutor could not assist with the reconstruction of the record.

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7. It is trite that where it is impossible to reconstruct a case record, the conviction and sentence should be set aside. S v Joubert 1991(1) SA 119 (AD) and S v Mcophle 2007(1) SACR 34 (E).

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8. The right to a fair trial includes the right to a fair appeal.

9. S v Jaipal 2005(1) SACR 215 (CC) referred to the earlier cases on a right to a fair trial at page 227 – 228 "...in the words of Kentridge, AJ in S v Zuma and Others 1995(1) SACR 568 (CC):

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5 *"The right to a fair trial conferred by [s25(3)] is broader than the list of specific rights set out in paras (a) to (i) of the subsection...It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In S v Rudman and Another; S v Mthwana 1992(1) SA 343 (A), the Appellant Division while not decying the importance of fairness in criminal*

10 *proceedings, held that the function of a court of criminal appeal in South Africa was to enquire:*

15 *"whether there has been irregularity, or illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted."*

A Court of Appeal, it was said at (337):

20 *"does not enquire whether the trial was fair in accordance with notions of basic fairness and justice or with ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration."*

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That was an authoritative statement of the law before 27th April 1994. Since that date, section 25(3) has required criminal trials to be conducted in accordance with just and those notions of basic fairness and justice. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions".

In Sanderson v Attorney General Eastern Cape 1995(1) SACR 568(CC) Kriegler,J referring to Zuma, again emphasised this significant break from the past and the need to conduct criminal trials in accordance with open ended notions of basic fairness and justice and stated that a narrow textual approach was likely to miss important features of the fair trial provision.

He proceeded as follows:

"The central reason for my view ... goes to the nature of the criminal justice system itself. In principle, the system aims to punish only those persons whose guilt has been established in a fair trial. Prior to a finding on liability, and as part of the fair procedures itself, the accused is presumed innocent. He or she is also tried publically so that

the trial can be seen to satisfy the substantive requirements of a fair trial".

5 In S v Dzukuda and Others; S v Tshilo 2000(2) SACR 443 (CC) at 455 para [9], Ackermann, J referred to the concept of a substantive fairness mentioned in Zuma and said:

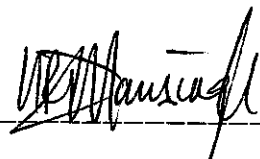
10 *"Elements of this comprehensive right as specified in paras (a) to (o) of ss(3) The words "which include the right" preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights,*
15 *some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis as our constitutional jurisprudence on a section 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial to refer to specified and unspecified*
20 *elements of the right to a fair trial, the specified*
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elements being those detailed in ss(3)."

He continued at para [11]:

5 *"At the heart of the right to a fair criminal trial and*
what infuses is for justice to be done and also to be
seen to be done. But the concept of justice itself is
a broad and protean concept. In considering what,
10 *for purposes of this case, lies at the heart of a fair*
trial in the field of criminal justice, one should bear
in mind that dignity, freedom and equality are the
foundational values of our Constitution. An
important aim of the right to a fair criminal trial is to
ensure adequately that innocent people are not
15 *wrongly convicted, because of the adverse effects*
which a wrong conviction has on the liberty, and
dignity (and possibly other) interests of the
accused".

20 10. Taking into account the right to a fair trial and the
established case law, the appeal must succeed.



MANSINGH, AJ

I agree. The conviction and sentence is set aside.

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TRAVERSO, DJP

