

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: A280/2004

In the case between:

PAULUS TALENYANE

and

THE STATE

CORAM: HATTINGH, J *et* MOLEMELA, AJ

JUDGEMENT: MOLEMELA, AJ

DELIVERED ON: 8 SEPTEMBER 2005

[1] This is an appeal against conviction and sentence. The appellant appeared at the Kroonstad Magistrate's Court before Mr WF Viljoen on two contraventions of the provisions of the Arms and Ammunition Act 75 of 1969, to wit unlawful possession of a firearm and ammunition, respectively. On the 3rd June 2003 he was found guilty on

both charges. On the 8th September 2003 he was sentenced to 30 months' imprisonment. The charges were taken together for purposes of sentence.

[2] Attached to the transcript of the record was a letter received from the trial magistrate, dated 16 August 2004. In this letter he explained that the proceedings had been mechanically recorded on two cassettes but that one cassette had disappeared without trace, resulting in only one cassette being transcribed. He further indicated that he was unable to re-construct the record due to that fact he was no longer in possession of what he called his "kern aantekeninge". He mentioned further that " 'n tydperk van 9 maande het verloop voordat die getranskribeerde notule aan my getoon is".

[3] The transcribed portion of the record consists of only a part of the magistrate's judgment. The rest of the record is missing. Both the appellant and the respondent have, in their heads of argument, submitted that under the

circumstances, the conviction and sentence ought to be set aside.

[4] Counsel for the parties referred me to the following authorities, viz

4.1 S v Chabedi, 2005 (1) SASV 415 HHA

4.2 S v Peza, 1962 (1) SA 664 O

4.3 S v Leslie, 2000 (1) SASV 347 W

4.4 Du Toit *et al* : Commentary on the Criminal Procedure Act : p30- 34.

4.5 Hiemstra : Suid Afikaanse Strafproses, 6th Ed p827-828.

[5] In S v Chabedi (*supra*), the transcribed record was such that questions posed and comments made by the magistrate during the course of the hearing were not reflected in it due to the fact that the magistrate's microphone had not been in proper working order. These gaps in the recording were reflected as "inaudible" in the

record. The “inaudible” consequently became more prevalent in the judgment part of the transcript, resulting in significant parts of the judgment being incomprehensible.

[6] On page 417[5f-h], the court stated the following:

“On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the re-hearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases records of proceedings are often still kept by hand, in which event a verbatim record is impossible. The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter alia*, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.”

[7] On the basis of the above principle, the court held that the contents of the “inaudibles” in the judgments could be decided on inherent probabilities which could easily be inferred from what was contained in the record.

[8] In *S v Peza (supra)*, certain of the evidence recorded by a tape recording machine did not appear in the transcript of the record due to the fact that the machine had failed to record. The appeal court remitted the incomplete record to the magistrate with an order to re-call and re-hear the accused and witnesses that had testified in order to have that part of the evidence that was not recorded heard and placed on record. The court also directed the magistrate to report to the appeal court, upon submission of the record, whether the evidence subsequently recorded was to the best of his knowledge the same as that previously given.

[9] In *S v Leslie (supra at 355b-j)*, the tapes that had

recorded the proceedings had gone missing, resulting in the failure to create a transcribed record. The magistrate had already destroyed the notes that he had made during the proceedings and could also not recall the evidence that was adduced. The court held that insufficient steps had been taken to reconstruct the record and accordingly referred the matter back to the clerk of the court with the instruction to obtain secondary evidence of the contents of the lost record. In deciding this matter, the court listed a number of sources from which information pertaining to what was said or testified in the hearing could be found if the record was incomplete or lost. These were listed as follows:

“11.1 Inferences can be made from the context. An available answer may adequately reveal what a missing question was.

S v Whitney (supra at 456A-B)

11.2 Important information can be gleaned from the magistrate’s judgments on conviction and sentence. If the magistrate recites the evidence and continues to say, as in

the case, that the defense argued that there were four improbabilities affecting the evidence of a particular witness, which probabilities he then discusses, that can be an adequate foundation (in accordance with ordinary logic), to eliminate fear of an injustice which hinges on the groundless hope that a further improbability may perhaps be extracted from a complete record. In the present case there is no suggestion of any desire to argue that there was a fifth improbability. It is so that it is often possible to deal with a suggested improbability without reliance upon the detail of the evidence. Such can adequately be considered even if the full evidence cannot be reconstructed.

11.3 If the magistrate's discussion of the evidence and the cross examination of a witness were fairly detailed in the judgment and the grounds of appeal which were formulated while the memory of the draftsman was fairly fresh does not raise a complaint about any conflict in the evidence of the witness, it justifies rating an idle speculation to reason that possibly there was after all just perhaps some *self – contradiction*. It can therefore allay fear of injustice if the attorney who defended the appellant so soon after the judgment failed to mention any specific contradiction in the

evidence of a State witness or between two State witnesses in the grounds of appeal.

11.4 The grounds of appeal *are* indicative of what the task of the Court will be on appeal. If the grounds of appeal raise only the complaint that the appellant's evidence was wrongly criticized as improbable, it is not unfair to draw the inference that the interests of justice do not require the postulation by the Court of speculative possibilities of unsatisfactory features in the evidence of the State witnesses – and then regard that as a basis for interference despite the grounds of appeal never having mentioned such. *S v Collier (supra at 379C-D)*.

11.5 Evidence by or on behalf of the appellant can provide a basis for regarding a specific portion of the evidence as material. Cf *S v S (supra at 424d-e)*. The absence of any such claim and some proof thereof must not be ignored. Cf *S v Collier (supra at 378H)*.

11.6 A court will also assess the importance of the evaluation of credibility and the complexity thereof relative to an issue which has been raised and the importance of that issue.”

[10] In the instant case, it is clear from the contents of the magistrate's letter that he cannot recall what transpired in the matter. I cannot blame him for not having an accurate recollection of what transpired during the proceedings, for it is indeed so that the lapse of time is "the enemy of accuracy in human memory" (see *S v Leslie* (*supra* at 353i). If he could not remember as on the 16th August 2004, would he be in a position to do so if so directed by this court at this stage, more than a year from the date of his letter? In my view, the answer is clearly in the negative. If he cannot remember, surely he will not be in a position to report whether the evidence subsequently recorded was the same as previously given.

[11] I have no doubt in my mind that where a magistrate has conceded to having forgotten what transpired in a case and the available record does not cover any of the evidence that was adduced, such a record cannot be successfully reconstructed. There would therefore be no

point in following *S v Peza (supra)* or *S v Leslie (supra)* in the instant case. Having applied the test of “adequacy” as laid out in *S v Chabedi (supra)*, I therefore find that the record is inadequate for a proper consideration of the appeal.

[12] A further point for consideration is the misgivings regarding conviction as expressed by the magistrate in his afore-mentioned letter. He mentioned that

“dit het verder aan die lig gekom dat die staat moes bewys het dat die vuurwapen voldoen het aan die nuwe omskrywing van n’ vuurwapen soos uiteengesit is in die nuwe Wet op Vuurwapens.... Gevolglik word die verdediging toegegee op die appélgrond.”

Counsel for the respondent correctly argued that the magistrate’s view was erroneous as the said act had not yet come into operation as at the time of the commission of the offence. Nevertheless, my view is that where there is no record of the evidence whatsoever, misgivings

expressed by the magistrate regarding conviction, even though based on an erroneous premise, cannot simply be ignored. I am of the view that the appeal ought to succeed even on that basis alone.

For these reasons I make the following order:

- (a) The appeal against the conviction and sentence succeeds.
- (b) The conviction of the accused and the sentence imposed are hereby set aside.

M. MOLEMELA, AJ

I agree.

G.A. HATTINGH, J

On behalf of applicant: Adv. T.B. van Rensburg
Instructed by:
Legal Aid
BLOEMFONTEIN

On behalf of The State: Adv. V. de Bruyn
Instructed by:
The State Attorney
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