CASE NO. CA6/2001

IN THE HIGH COURT OF NAMBIA

In the matter between:

JOSE AMERICO DE ALMEIDA **Appellant**

and

THE STATE **Respondent**

CORAM: **VAN NIEKERK, J *et* SILUNGWE AJ**

Heard: 8 March 2007

Delivered: 19 November 2010

JUDGMENT

VAN NIEKERK, J: [1] In this matter the appellant was convicted in the regional court on a charge of housebreaking with intent to rob and robbery with aggravating circumstances and a second count of robbery with aggravating circumstances. On the first count he was sentenced to 15 years imprisonment and on the second count to 10 years imprisonment. The appellant wishes to appeal against both conviction and sentence.

[2] During the course of the trial the mechanical record of proceedings was transcribed and used by the appellant when he addressed the magistrate before conviction. Unfortunately, when the appeal record had to be prepared, some portions of the record had gone missing. The matter was initially set down on the incomplete record. Earlier, on two occasions, the appeal was postponed in this Court for purposes of having the record reconstructed. The regional magistrate used his handwritten notes made during the trial to make summaries of the relevant witnesses' evidence-in-chief in 'telegram' style. The learned magistrate added some notes setting out the gist of the cross-examination.

[3] After State counsel, Mr *Marondedze,* actively pursued the matter on a previous occasion, a further 100 pages of evidence was recovered, as I understand it, from the hard drive of the computer used to transcribe the proceedings. Encouraged by this success, the State on 16 June 2006 applied for a postponement of the matter in order to have further attempts made to recover the missing parts of the record from the computers of the former transcription contractor. MANYARARA AJ granted the postponement in a detailed order regarding the various steps to be taken once the missing parts have been retrieved. On 16 December 2006 the Registrar received a letter from the regional court magistrate in which he indicated that, apart from a few pages, all efforts to retrieve the missing parts of the record came to nothing.

[4] It seems that the missing parts of the record now include all the evidence of the witnesses Petro Stander, Elizabeth van Greunen, Phillemon Ntinda, and Leevi Erkki; the evidence in chief and part of the cross examination of the witness Magdalena Cloete; and the evidence in chief of Felix Dionisio.

[5] The appeal was set down on 29 January 2007 and by agreement postponed to 8 March 2007 for the State to move an application to be granted a further opportunity to reconstruct the record by alternative means and for the appellant to arrange and properly paginate the record. On this date Mr *Marondedze* asked for an order in the following terms:

> "1. That the hearing of the appeal by the Respondent be postponed ***sine die.***
>
> 2. That the Respondent be order to deliver to the Registrar of High Court (sic) the missing part of the record of proceedings in the Court ***a quo*** in his possession.
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> 3. That in the event of him failing to do so within (7) seven days then the statements which were recorded by the police from the witnesses whose evidence is missing from the record of proceedings shall be incorporated into the record and the same shall be deemed as if was (sic) specifically stated by those witness *(sic)* during the trial in the Court ***a quo.***
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> 4. In the alternative the matter shall be remitted to the trial court for the purpose of leading the missing evidence of the relevant witnesses.

5. Further and/or alternative relief."

[6] The application is supported by an affidavit deposed to by Mr *Marondedze.* The application is opposed by the appellant, who filed an answering affidavit. Mr *Marondedze* alleges that the trial magistrate has tried his best to summarize the evidence of the witnesses whose testimony got lost. He also states that the appellant was invited to participate in the reconstruction process, but that the appellant was unresponsive. The appellant admits these allegations in his answering affidavit. Mr *Marondedze* further sets out the various efforts which the State made to assist in reconstructing the record, which have met with limited success, as I have mentioned above. He prays for an opportunity to explore other avenues of reconstruction than those already followed. He points to the fact that the appellant originally had a full copy of the record and states that it is difficult to imagine how the appellant "could just lose the record". He continues to state that the balance of probabilities points to the fact that the appellant still has the record but that he wants to benefit from the present circumstances, as he knows that there is a chance that the convictions and sentences could be said aside because of the incomplete record. He therefore requests this Court to order the appellant to deliver the record. In his answering affidavit, the appellant states that he has lost the copy of the record that he had and says that his legal representative has already before informed Mr *Marondedze* of this fact. He attaches her confirmatory affidavit in this regard. The State did not file any reply.

[7] I take note of State counsel's submission that the appellant provides no details of how, when and where he allegedly lost the record, which does leave one with the impression that he is deliberately vague. However, as Mr *Hinda* for the appellant submitted during argument, there is nothing inherently unlikely about the appellant's assertion that he has lost his copy of the record. For some unexplained reason he seems to be the only one who had a copy, as the magistrate and the prosecutor appear not to have had copies of the transcribed proceedings. I think that, in the circumstances, it will serve no useful purpose to order the appellant to

deliver the same to the Registrar. Even if he has a copy he is unlikely to own up to it now because he has already stated under oath that he does not have a copy. Furthermore, there is an added incentive not to produce the copy because the appellant clearly realises that the problems being experienced with the reconstruction may ultimately work to his advantage, should the Appeal Court decide that the convictions and sentences should be set aside for that reason.

[8] The State requested the Court to order, should the appellant fail to deliver the record allegedly in his possession within 7 days, that the police statements of the witnesses whose evidence is missing shall be incorporated into the record and that the contents shall be deemed to be what was stated by the witnesses during the trial. State counsel annexed copies of the relevant statements to its founding papers. Appellant gave notice of an application to strike these statements, as they are irrelevant for purposes of this hearing and were attached, so it was submitted, as an "emotive bait". Mr *Marondedze* explained that it was necessary to attach the statements so that the appellant could see what they were about. During the hearing we indicated that we had deliberately not had regard to the contents of the statements, as this could possibly preclude us from sitting on the merits of the appeal, and that we would not have regard to their contents. Mr *Hinda* was satisfied with this assurance. In the circumstances it is not necessary to deal further with the application to strike.

[9] In this jurisdiction it seems that the usual method of re-construction followed is based on the old case of *R v Wolmarans* 1942 TPD 279 which has found favour in various Provinces in the Republic of South Africa as well. In the unreported judgment of *Uanee Muundunjau and two others versus The State* (High Court Case No. CA 20/94 delivered on 22/8/1994), STRYDOM, JP (as he then was), with whom MULLER AJ (as he then was) concurred, followed the procedure as laid down in the *Wolmarans* case and in other cases such as S *v Stevens* 1981 (1) SA 864 (C) and S *v Malope* 1991 (1) SACR 458 (B).

[10] This approach was in general re-affirmed in a later case of this Court,

Stephanus B Tiboth versus The State (High Court Case No. CA 49/95, unreported judgment delivered on 4/12/1995 by STRYDOM JP (as he then was) and FRANK J), in which the steps to be taken were set out as follows (at p3-4):

> "(a) The Clerk of the Court is expected to submit to the Court of Appeal the best secondary evidence of the last record which he or she can find.
> .....
> (b) The Clerk of the Court must obtain affidavits to prove the loss of the record.
> .....
>
> (c) The Clerk of the Court must obtain affidavits from witnesses and others who were present at the trial to prove the evidence which had been adduced.
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> (d) In addition the Clerk of the Court must prove the charge or other relevant parts of the proceedings in the same manner [i.e. by affidavit, if the charges and other parts of the proceedings, e.g. the pleas are missing].
>
> (e) After the record has been reconstructed it must be furnished to the accused to establish whether he agrees therewith or not. The reaction of the accused must be confirmed by affidavit.
>
> (f) Then a further affidavit must be obtained from the magistrate to confirm the correctness of the record so reconstructed.

To this list I would add another requirement, namely if it is not possible to reconstruct the record, this must also be stated on affidavit together with the reasons why it could not be so reconstructed. " [my omissions and insertion]

[11] As far as the use of witnesses' statements is concerned, in the case of *Mathews Katoteli and another versus The State* (High Court Case No. CA 201/2004, unreported judgement delivered on 26/9/2008), HOFF J with LIEBENBERG AJ (as he then was) concurring, stated the following at para. [4]:

> "It was submitted on behalf of the respondent that reconstruction could be achieved by incorporating a witness' statement since such a statement constitutes the best available evidence to prove what was testified in court. Although a witness statement may be used as an aid in the reconstruction of

> a lost record this may only be the case where it is common cause that the *viva voce* testimony of the witness did not deviate in material respects from the witness statement."

[12] HOFF J made these remarks in the context of a case in which the prosecutor in the court *a quo* alerted the Court to two "discrepancies" where the complainant had deviated from his witness statement and in which the prosecutor expressed the doubt whether the appellants should be convicted. Obviously where the prosecutor was herself doubtful about the case based on deviations by the complainant, the value of the complainant's witness statement as an aid in the reconstruction may be limited. However, in my respectful view, if it is known what the deviations are, for example, because the prosecutor quotes from the statement during her address and sets out the deviations in detail, the statement may very well prove useful with respect to those aspects on which there were no deviations.

[13] In my view it is permissible for the clerk of the court to obtain affidavits from the witnesses who state that in the trial against the accused they gave evidence which corresponds with the contents of their witness statements (provided, of course, that this is the truth) and to attach the statement to the affidavit. Alternatively, the witnesses' statements may be used to refresh the witnesses' memory, after which they may each make an affidavit in which they state what the contents of their testimony was. As far as the cross-examination is concerned, they may remember what the material points raised were. The witnesses may also refresh their memories from the existing record and the trial magistrate's notes. This procedure is in accordance with what was set out in sub-paragraphs (a) and (c) of paragraph [10] *supra.*

[14] When deciding how to reconstruct a record it is, in my view, important to be flexible, depending on the nature and extent of the reconstruction required. I do not understand any of the cases already referred to above to state that there is only one method of reconstruction that should always be followed in every case. For instance, in the *Uanee Muundunjau* matter *(supra)* the Court pointed out that that status of a certain record may or may not be relevant and left it to the clerk of the

court to decide upon this issue, although the Court set out the general basis upon which the reconstruction should be done.

[15] Although the case of *S v Leslie* 2000 (1) SACR 347 (W) deals with the situation in the Republic of South Africa where different practices are followed in different provinces, the very useful discussion about the considerations which are relevant when deciding upon an acceptable method of reconstruction is also apposite in this jurisdiction. In that case FLEMMING DJP stated as follows (at 352-353):

> "8 The acceptability of any method of dealing with the loss of records, must be guided by at least the following considerations.
>
> 8.1 Firstly, the materiality of that which is missing to the decision of the court a quo and to the appellate re-hearing (or, in review proceedings, to the consideration of whether justice was done). It may be relatively inconsequential if the evidence-in-chief of a single witness is lost but the cross-examination of that witness is available and the cross-examiner traversed the whole terrain, raising the alleged contradictions between the evidence-in-chief and later evidence. In a particular case the loss of only a portion of cross-examination may be extremely important. In another, the total loss of the evidence of a corroborating witness in a rape case may be unimportant if the complainant's evidence is supported by three other witnesses and is contrasted with that of a clearly lying accused. Examples may be added.
>
> 8.2. Secondly, it ought to be considered how effective and how fair the chosen method can be expected to be. Again there is a clear contrast between a witness called in within two weeks after the testimony is given and a policeman who, seven years after the event, has to sort out from all the other motor collisions to which he attended, the crucial distances which can determine the guilt of the accused.
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> 8.3. An important consideration which exists in its own right for sound reasons, may sometimes function as a guide. In terms of *R v Dhlumayo* 1948 (2) SA 677 (A) a conviction stands unless an accused convinces the court that the filing appealed against was wrong. If our appellate Courts are too sensitive about imperfections, those who in the society are known to have erred, walk free at the expense of the regard in which the administration of justice is held. The appeal of someone who was found guilty by a competent court should succeed on grounds unrelated to cogency of evidence only if

there is sufficient certainty that a just hearing of a valid appeal has been rendered impossible. *(S v Whitney (supra* at 456F); *S v S* 1995 (2) SACR 420 (T) at 424h; *cf S v Malope* 1991 (1) SACR 458 (B) at 440*d.)* There is a need to specifically scrutinise what the needs of a particular case are. A number of 'inaudibles' on the record does not justify automatically setting aside a conviction. It is only when the appellant convinces the court that the judicial process at the appellate stage cannot be exercised with adequate accuracy, that a court can consider setting aside a duly recorded conviction. And before that is weighed there must be certainty that all efforts which hold promise of revealing what the evidence had been, have been duly attended to. The approach in *S v Ntantiso* 1997 (2) SACR 302 (E), *S v S (supra)* and *S v Collier* 1976 (2) SA 378 E (C) at 379C - D, deserve special mention.

8.4 Fourthly, it must be realised and borne in mind that the statutory standard set by s 76(3)(a) of the Criminal Procedure Act for recording proceedings in lower courts is not a verbatim version. That is the law. That remains the law even though technology has made verbatim recordings so frequent in larger centres that some people may form the impression that there is no other valid way. Thus the magistrate's notes, if they reflect fairly all the material evidence, remain adequate. *Cf S v S (supra* at 423d-e). If the same information appears from a modern transcript the same principle applies despite the record being defective from the point of view of perfection or completeness and despite such record constituting a low percentage of the total words used at the trial. If a dispute about accuracy arises, the court can devise a way to resolve the dispute. Section 76(3)(c) of the Criminal Procedure Act is relevant."

[16] The reconstruction of a court record is rather a nuisance, but nevertheless a very important task. It may often be complex and not that frequently done so that the person who is burdened with this task builds up extensive experience in how to execute it. The responsibility is usually that of the clerk of the court, who may not always be knowledgeable in how to go about it. Even some of the presiding officers may not quite know how best to approach the matter. The easy way out is simply to say that reconstruction is impossible, because everyone has forgotten what happened in court or what was said in court. However, I cannot stress enough how vital it is that this task be carried out with diligence and with the mindset that a serious effort should be made to gather together as much of the contents of the record as

possible. As was stated in S *v Leslie* at p349, ".....sometimes the best defence

for some accused is that the docket or the recording of evidence goes astray." If unscrupulous convicted accused form the opinion that efforts at reconstruction are not meticulously carried out, the number of lost records will surely rise, especially in serious cases where heavy sentences are imposed.

[17] Appellant vehemently opposed any further postponement to attempt to reconstruct the record and relied *inter alia* on the fact that there had already been postponements for this purpose on 16 June 2006 and 29 January 2007. However, it would appear that in this case, as in the *Tiboth* matter *(supra),* there may have been a lack of knowledge on how to go about the reconstruction. It should be noted that the only available judgments of this Court which discuss these aspects in any detail are unreported and therefore not easily accessible. Furthermore, in the previous order made by MANYARARA AJ, the assumption was that the computer hard drive would possibly divulge the missing parts of the record. It would appear that the learned judge did not require in his order that the witnesses' statements be obtained because he may have been influenced by the report of the trial magistrate (page A of the case record), that he failed to obtain any reaction from the witnesses or the police when he attempted to reconstruct the cross-examination of the witnesses. However, Mr *Marondedze* states in his affidavit, based on information obtained from the police, that the witnesses are available. The appellant takes issue with the fact that there is not a supporting affidavit by the police officer himself stating this. I am however inclined in the circumstances to accept the indications that the witnesses were available at the time and hopefully still are. It is regrettable that there has been a delay in the matter since the appeal was launched, as well as in rendering this judgment. However, to some extent the appellant is also to blame because, as he admits, he has not been co-operative in past attempts to reconstruct the record.

[18] When considering whether the State should be granted a postponement, the Court should weigh up the competing interests of the State, the accused and the administration of justice. The prejudice each is likely to suffer must be considered.

In this regard it is relevant that the appellant was convicted of very serious charges involving the use of firearms and which required detailed advance planning. On the available evidence the perpetrators broke into a bank during the night and surprised the staff members inside the bank when they turned up for work in the morning. They were held up and robbed of a large sum of money before the one staff member was robbed of her car, which was used by the robbers to get away. A perusal of the part of the record that is available shows that the trial magistrate was so persuaded by the strength of the State case that he *mero motu* withdrew the appellant's bail and remanded him further in custody. The available record, which includes the submissions made by the appellant during argument before judgment on the merits and during which he quoted extensively from the original record, to my mind goes quite far in being a sufficient record for purposes of hearing the appeal. In fact, I considered ordering that the matter be heard on the available record. However, it may very well be that there may be aspects which are unforeseen now which would require the benefit of reconstruction. In fact, in written submissions filed on behalf of the appellant the point is taken that no fair adjudication of the appeal can take place without the complete record. It seems to me that the prejudice to be suffered by the State in refusing the postponement may be great. At this end of the scale the interests of the administration of justice require that a person convicted of serious crimes on a strong State case should not be let off the hook because of a partly incomplete record.

[19] On the other hand, the prejudice suffered by the appellant in granting the postponement is also great in that it will mean a further delay until his appeal may be heard while he is in detention serving a sentence for convictions that may be overturned. He obviously has an interest in the finality of the matter at least at this level of the Court hierarchy. He also points out that the funds intended to be used for the appeal hearing itself may be exhausted before the matter is heard. It does seem to me that in the interim he could have used the time to gather further funds or to apply for Legal Aid. However, it is clear that, at the other end of the scale, the

interests of the administration of justice require that an appellant should not suffer unduly because of a delay in reconstructing a record which initially was incomplete through no fault of the appellant, according to the available information.

[20] However, in the light of at least the following factors, namely (i) the apparent strength of the State case in the court *a quo;* (ii) the fact that the accused was unresponsive in providing assistance to reconstruct the record thus far; (iii) the seriousness of the charges against him; and (iv) that the postponement can be granted subject to relatively short time limits, the weight of the scales tends to move towards granting the postponement prayed for, albeit not *sine die.* It has come to my attention while working through the documents on the Court file that the appellant filed an amended notice of appeal on 22 August 2006 which is out of time. The postponement may also be used for the appellant to draw up the required application for condonation should he wish to pursue the appeal.

[21] The question now is, in what manner should the reconstruction be done? In my view the proposal by the State that the statements be merely incorporated into the record and deemed to be what the witnesses testified cannot be followed. As Mr *Hinda* submitted, there is no basis for making such an order in any of the authorities dealing with the way that an incomplete record may be reconstructed. I decline, therefore, to grant the relief sought in prayer 3 of the notice of motion.

[22] The alternative relief sought in prayer 4, namely that the matter be remitted to the trial court for purposes of leading the missing evidence of the relevant witnesses, is also not a practical solution to the problem. The trial magistrate has retired and is not available for such tasks. Apart from this problem, there have been some views expressed that a re-hearing of evidence would amount to subjecting the accused to a second trial for which there is no provision in the Criminal Procedure Act, 51 of 1977, and which may also be unconstitutional (see the *Mathews Katoteli* case *(supra)* and the authorities cited there). On the other hand, there are also some opposing views - see *Leslie's* case *(supra)* at 352C-G. In the case of *Reabeam Angula and others*

versus The State (High Court Case No. CA 51/2003) this Court ordered, with the agreement of the appellants and the State, that certain limited parts of the defence case be reheard. Based on the view I take of the matter before me it is not necessary to come to any conclusion whether such a manner of dealing with the problem of reconstruction in certain cases is in order or not. The State has applied for further and/or alternative relief. I think that it is open to this Court to make an order in accordance with what counsel for the appellant has described as the appropriate procedure, which is in line with the usual practice of this Court as I have set out in paragraphs [9] and [10] *(supra).*

[23] In the result the following order is made:

1. The matter is postponed to a date, for the hearing of the appeal, to be arranged with the Registrar, which shall be a date during the first term of 2011. The parties must approach the Registrar at 09h00 on the first Wednesday after the date of this order to arrange the date of hearing.

2. The Clerk of the Court, Windhoek must, with the assistance of the Office of the Prosecutor-General, obtain affidavits from the witnesses Petro Stander, Elizabeth van Greunen, Phillemon Ntinda, Leevi Erkki, Magdalena Cloete and Felix Dionisio to prove the evidence which was adduced at the trial in the manner set out in this judgment.

3. After the record has been reconstructed it must be furnished to the appellant to establish whether he agrees therewith or not. The reaction of the appellant must be confirmed by affidavit.

4. If it is not possible to reconstruct the record, the Clerk of the Court must state so on affidavit together with detailed reasons why it could not so be reconstructed.

5. The reconstruction process must be done under the supervision of a senior magistrate in the Magistrate's Office, Windhoek and must be completed by

the end of January 2011.

6. The appellant must file an application for condonation for the late filing of the amended notice of appeal dated 22 August 2006 should he wish to prosecute the appeal.

VAN NIEKERK, J

I agree.

SULUNGWE, AJ

Appearance for the parties:

For appellant:	Adv G S Hinda Instr. by Ueitele & Hans Legal Practitioners
For respondent:	Adv E E Marondedze Office of the Prosecutor-General