REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: **CR 24 /2022**

In the matter between:

(HIGH COURT MD REVIEW CASE NO.: 926/2020)

THE STATE

and

FAUSTINUS MBANGU **ACCUSED**

(HIGH COURT MD REVIEW CASE NO.: 1861/2020)

THE STATE

and

MUKATOKA JOHANNES **ACCUSED**

(HIGH COURT MD REVIEW CASE NO.: 1862/2020)

THE STATE

and

NYANGA JOHANNES **ACCUSED**

Neutral citation: *S v Mbangu and Others* (CR 24/2022) [2022] NAHCMD 174 (05 April 2022)

Coram: USIKU J et CLAASEN J
Delivered: **05 April 2022**

Flynote: Criminal procedure – Need to keep proper record – Incomplete court record – Record irretrievably lost – Administrative task of the magistrate and/or the clerk of the court to reconstruct record in a manner which is fair and reliable – Procedure for reconstruction upon completion of trial – Informal compilation of record as 'reconstructed version' by magistrate alone not sufficient – Reconstruction to be done jointly with all parties be it accused and legal representative, and prosecutor. Each of the parties to give his/her view to ensure that the record corresponds with their recollection of the evidence adduced. Reconstructed proceedings also need to be certified as correct by the compiler of the proceedings.

Automatic review – S 304 of the CPA – Criminal cases to be forwarded to High Court within 7 days and not years later – Grave prejudice to accused and administration of justice – Consequences exacerbated if a magistrate takes an inordinately long time to respond to a review query – Court officials cautioned to exercise greater care in this regard and acquaint themselves with procedures on reconstruction of records.

Summary: The three cases were sent on automatic review from the district court of Rundu. Not only were the court records sent on review years after the matters had been finalised, but the magistrate and clerk of court did not, upon realisation of the incomplete records, proceed to reconstruct the missing portions of the records or file affidavits that it is impossible to do so. The magistrate furthermore only replied to the review queries after the accused persons had completed serving their respective

sentence. Need for proper court record reiterated and guidance given for reconstruction of court records.

Held – Reconstruction cannot be done in an informal manner by the magistrate alone, without involving any of the parties involved in the matter. Judicial officer is to direct the clerk of court to inform the parties and arrange a date for joint reconstruction. Each party to give his or her view to ensure that it corresponds with their recollection of the evidence adduced. Reconstructed proceedings also need to be certified as correct by the compiler of the proceedings.

Held, further, where the record of proceedings in a court of law cannot be reconstructed, an appeal court, and by analogy, a review court may not refer the matter back to the court *a quo* to start proceedings *de novo* or for a *retrial.*

Held, further, when the record of the proceedings under review only comes to the attention of a judge years later and where the accused person(s) has finished serving his/her sentence, then such judge is not in the position to certify that the proceedings are in accordance with justice.

Held, further, in two of the matters the summaries by the magistrate cannot be regarded as reliable and valid reconstructions and in the third matter, there was no purported reconstruction. In the circumstances the conviction, sentences and additional orders given in these criminal matters cannot be confirmed and are set aside.

ORDER

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1. In *S v Faustinus Mbangu*, the convictions, sentences and additional orders given on 18 December 2019 are set aside.
2. In *S v Mukatoka Johannes*, the convictions, sentences and additional order given on 22 May 2018 are set aside.
3. In *S v Nyanga Johannes*, the conviction and sentence and additional orders given on 05 September 2017 are set aside.
4. The Registrar is directed to bring this judgment to the attention of the Executive Director of the Office of the Judiciary and the Chief Magistrate, who need to attend to the issues identified in the judgment as a matter of urgency.

REVIEW JUDGMENT

Background

[1] The three criminal matters were all submitted for automatic review in terms of s 302(1) of the Criminal Procedure Act, Act 51 of 1977, as amended (the CPA). They will be dealt with together as they turn on the same legal issue and all hail from the district court of Rundu.

[2] In the matter of *S v Faustinus Mbangu* the review cover sheet indicates that the accused was convicted of 'Reckless or Negligence Driving' and 'No Driver's License' both contraventions under the Road Traffic and Transportation Act, Act 22 of 1999 (the RTTA). On 18 December 2019 Mr Mbango was sentenced to pay a fine of N$ 4000 or 12 months' imprisonment and N$ 2000 or 6 months' imprisonment on count 1 and count 2, respectively.

[3] The case was sent on review 6 months later in July 2020. A three-pronged query was sent the same month that pointed out that it was an incomplete case record, asking whether the accused was convicted of reckless driving or negligent driving and why it took 6 months to send a guilty plea in terms of s 112(1)(b) of the CPA on review.

[4] The magistrate replied 5 months later in November 2020 and stated that the digital machine had gone for repairs and the record could not be found. In December 2020 she was asked about reconstruction efforts, if any. It took a whole year for the magistrate to respond to that query[1]. The answer was simply that no notes were kept and that it is impossible to reconstruct the record.

[5] In *S v Mukatoka Johannes*, the review cover sheet reflects that the accused was convicted of negligent handling of a fire-arm and possession of a fire-arm without a license under the Arms and Ammunition Act, Act 7 of 1996 (the AAA). He

[1] Letter dated 25 February 2022.

was sentenced to pay a fine of N$ 4000 or 12 months' imprisonment on count 1 and N$ 2000 or 6 months' imprisonment on count 2 and declared unfit to possess a fire-arm for 2 years.

[6] Though he was sentenced on 22 May 2018, the case was sent on review much later and received by the Registrar's Office on 03 December 2020. It was accompanied by a letter written by the presiding officer in the following terms:

> 'This case is reviewable but due to the undermentioned factors, it is incomplete.
> 1. The transcription machine was broken and there were no records traced.
> 2. The disk has been damaged and no information could be traced.'

[7] A query was forwarded in December 2020 asking whether any effort has been made by the clerk of court or the magistrate to reconstruct the missing portion and why it took two and a half years to send the record on review. The magistrate again took her time to respond, which reply reached the Registrar's Office on 08 March 2022. In her reply, she attached a document entitled 'reconstructed version', which consists of a page and a half summary of ostensible evidence and stated that it was done with the docket and notes of the prosecutor.

[8] In *S v Nyangana Johannes* the accused was convicted of driving with an excessive amount of alcohol in blood, a contravention of the RTTA. On 05 September 2017 he was given a fine of N$ 15 000 or 3 years' imprisonment. That was accompanied with two additional orders that the accused was barred from using the road network for 6 months and his license was 'endorsed' for 3 months.

[9] Similar to the previous matters, this case arrived here on 02 December 2020, with the same explanation as referred to in paragraph 6. A query was directed that same month wherein the magistrate was asked about reconstruction efforts and why it took 3 and half years to send the matter on review. The magistrate answered in February 2022 and her response reached the Registrar's Office on 08 March 2022, stating that she was unable to find either her notes or the prosecutor's notes.

Reconstruction of missing portions of court records

[10] Unfortunately, reconstruction of lost transcripts or incomplete court records is not something alien to our courts and judgments have been written to give guidance thereon. Thus, it is inexplicable that it did not cross the mind of a judicial officer, who according to the information on the charge sheet has been a magistrate for more than 30 years, once she realised the court records are not complete. It necessitated a return of the incomplete records from the reviewing court to ask the magistrate about reconstruction, which lead to a delay and a waste of court resources, not forgetting the prejudice to the accused persons in the three matters. Eventually, by the time the magistrate replied last month the terms of imprisonment had been served in each of the criminal cases. That makes this an academic exercise, but because this is a repetitive problem with severe consequences the issue cannot be left unattended.

[11] What happened in these matters is an illustration of why it remains critical for a judicial officer to keep proper notes of plea and trial proceedings by hand. In fact, there is a legal obligation on a magistrate to keep a record of court proceedings. That is evident in s 4(1) of the Magistrates Court Act, Act 32 of 1944 as amended (the MCA) which provides that every court is a court of record. The need to keep proper record is a recurrent theme in appeal and review judgments[2], yet it continues to fall on deaf ears. In all three of these cases, the machinery failed and the magistrate had no back-up notes of her own.

Administrative task of clerks of court and magistrates to reconstruct court record

[12] The matters also bears evidence that both the clerk of court and the magistrate were oblivious of their responsibility '..that it is the administrative task of the magistrate and/or clerk of court to compile afresh a record of the completed trial in any manner which is fair and as reliable as possible…'[3]

[2] *S v Haibeb* 1993 NR 457 (HC); *S v Linus* (CR 40/2013) [2013] NAHCMD 229 (31 July 2013); *Soondaha v S* (CA 28 /2013) [2016] NAHCNLD 76 (22 August 2016).

[3] *S v Catsoulis* 1974 (4) SA 371 (T).

[13] Fairness entails that an accused be informed of the need for reconstruction and the right to participate in the reconstruction process. It appears to me that the minimum process to be followed will have to include that the judicial officer will direct the clerk of court to inform all parties, namely the accused or legal representative and the prosecutor about the lost record and arrange a suitable date for the court to reconvene and jointly participate in the reconstruction. Once the court is assembled the magistrate can place the purpose on record and afford each of the parties a chance to give their views to ensure that the record corresponds with their recollection of the evidence adduced at the original trial. Upon completion of the proceedings it will need to be certified as correct by the compiler of the proceedings, be it the magistrate or the transcriber, if it is again transcribed.

[14] Hoff J (as he was then) in *S v Aribeb*[4] outlined two different procedures depending on whether it is reconstruction where an accused person has been convicted or sentenced and the instance where the accused has not yet been convicted. In respect of the situations at hand, the *Aribeb* matter at para 10 gave guidance as follows:

> '…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 J 2014 (3) NR p712 A 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'.

[15] A further question arises, namely what to do if none of the parties kept notes and or cannot recall material portions of the evidence for reconstruction purposes? In that event, the clerk of court, as the custodian of court records is to depose to an affidavit that explains the situation and that despite diligent search and effort the record could not be found neither be reconstructed or words to that effect.

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[4] *S v Aribeb* 2014 (3) NR 709 (HC).

[16] Section 304 of the CPA contemplates that a judge must decide on the basis of the court record placed before him or her whether the proceedings in the magistrates' court were in accordance with justice. Such an evaluation can only be done if there is a proper court record.

[17] What is required to be recorded is expressly dealt with in rules 66(1) of the Magistrates' Court Rules. It provides that:

'The plea and explanation or statement, if any, of the accused, the evidence orally given, any exception or objection taken in the course of proceedings, the rulings and judgment of the court and any other portion of criminal proceedings, may be noted in shorthand… either verbatim or in narrative form or recorded by mechanical means.'

[18] Furthermore rule 66(5)[5] stipulates that: 'Subject to the provisions of subrule (6), any shorthand notes and any transcript thereof, certified as correct, shall be deemed to be correct and shall form part of the record of the proceedings in question.' This is why all court records that are transcribed are accompanied by a certificate from the transcriber that the proceedings so transcribed are correct. The need for this certification of the accuracy of the proceedings is not thrown out of the window when it comes to reconstructed court records.

Effect on proceedings if material portions cannot be reconstructed

[19] The issue of reconstruction on appeal was dealt with in the matter of *Katoteli and Another v S* CA 201/2004 at para 7:

'The reconstruction of a record is an administrative process, requiring of the clerk of the court to obtain the best secondary evidence of the content of the court proceedings. It has been submitted … that there is no legal basis on which to subject an accused person to a second "trial" and that it may also be unconstitutional to do so. Where the record of proceedings in a court of law cannot be reconstructed, an appeal court may not refer the matter back to the court *a quo* to start proceedings *de novo* or for a *"retrial"*. The reason why this is the position is to be found at p. 126 in *S v Joubert* 1991 (1) SA 119 (AD) where Kumleben JA referred to the ruling in *S v Marais* 1966 (2) SA 514 (T) where the following appears at 517A-B:

[5] Rule 66(5) of the Magistrates' Court Rules.

"If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice."

[20] We return to the three cases on automatic review and apply the principles as set out in the *Katoteli* matter. In *S v Nyangana Johannes and S v Mukatoka Johannes* the magistrate requested the reviewing court to uphold the convictions and sentences on the basis of the summaries of purported reconstructions. This court is unable to confirm the proceedings merely on the strength of the summaries attached to the records. It appears to me that none of the reconstruction guidelines in the judgments or the applicable statutory provisions were followed. In fact, in *S v Nyangana Johannes*, the whole trial evidence was lost. According to the magistrate's letter there was nothing which could help her reconstruct, which makes it a mystery as to what was used as a source in the purported reconstruction.

[21] Furthermore, in the matter of *S v Mukatoka Johannes*, reference is made to the docket and prosecutor's notes. The document entitled 'reconstructed version' is a summary of the state's evidence and the court's findings with no specific reference to the evidence tendered by the defence witnesses. Again, the impression I got is that the purported reconstruction took place rather informally, by the magistrate alone, without convening a session wherein all the parties gave input, nor was there any certificate as regards to the accuracy of the reconstruction. Suffice to say these do not constitute a valid or fair reconstructions of the records respectively.

[22] In *S v Mukatoka Johannes*, the evidence of one state witness and three defense witnesses, as well as the judgment and sentencing were lost. The only evidence that was on record was that of one state witness.[6] This matter was finalised

[6] The gist of that evidence was that the accused arrived at a shebeen, went to the back and discharged a firearm twice. The accused in cross-examination appears to have disputed that the witness saw him, as he asked who saw that he discharged the firearm. The witness replied that it was a certain 'Father Danny.' The witness clarified this in re-examination by saying she saw through an

on 22 May 2018, but was sent on review 30 months thereafter and after the query, the magistrate took another year to reply. Under normal circumstances the court would have considered the evidence that is available to assess to what extent it provides proof beyond reasonable doubt for the conviction(s). This court declines to do so in this case, as it would in any event not be able to endorse the matter as one that is in accordance with justice. That is because the law requires criminal cases to be forwarded within 7 days after completion[7] and not years later. I endorse the same sentiments as expressed by Liebenberg J in *S v Johannes and Others*[8] at para 5:

'However, when the record of the proceedings under review only comes to the attention of a judge years later and where the accused person(s) has finished serving his/her sentence, then such judge in my view, is not in the position to certify that the proceedings are in accordance with justice. To do so, would make a mockery of a procedure by which the unrepresented accused person's trial and sentence is subjected to automatic review in order to ensure that he/she received a fair trial and sentence.'

[23] As regards to the third case herein, namely *S v Faustinus Mbango*, the complete examination in terms of s 112(1)(b) of the CPA was lost with only the sentencing proceedings being transcribed. The answer by the magistrate was that it was impossible to reconstruct the missing portion. As such, the outcome will be the same that the convictions and sentences stand to be set aside.

[24] Incidentally, the above matter comprises of 9 cases from the same court, which were sent on automatic review years later. It was not an isolated incident as the ugly phenomenon repeated itself subsequent thereto in *S v Nankero and Others*[9], again 9 cases from the same station.

[25] Needless to say, an undefended accused is entitled to have his or her criminal conviction and sentence reviewed within 7 days. It amounts to a travesty of justice when a review case is sent on review only when an accused has completed his or her term of imprisonment. Court officials are cautioned to exercise greater care in the keeping of court records, timeous forwarding of cases on review and expedious replies to queries. The careless manner wherein these matters were handled is

opening in the structure and he was the only one who came with a fire-arm.
[7] Section 303 of CPA.
[8] *S v Johannes and Others* (CR 51/2020) [2020] NAHCMD 298 (17 July 2020).
[9] *S v Nankero and Others* (CR 89/2020) [2020] NAHCMD 505(04 November 2020).

prejudicial not just to the accused involved, but also the proper administration of justice. The consequences are exacerbated if a magistrate takes an inordinately long time to respond to a review query. These officials are cautioned to exercise greater care in this regard. Finally, these officials are also urged to acquaint themselves with the law on reconstruction of case records.

[26] In these circumstances the convictions, sentences and additional orders given in these three criminal matters cannot be confirmed.

[27] For these reasons the following orders are made:

1. In *S v Faustinus Mbangu*, the convictions, sentences and additional orders given on 18 December 2019 are set aside.
2. In *S v Mukatoka Johannes*, the convictions, sentences and additional order given on 22 May 2018 are set aside.
3. In *S v Nyanga Johannes*, the conviction and sentence and additional orders given on 05 September 2017 are set aside.
4. The Registrar is directed to bring this judgment to the attention of the Executive Director of the Office of the Judiciary and the Chief Magistrate, who need to attend to the issues identified in the judgment as a matter of urgency.

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C M Claasen
Judge

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D N Usiku
Judge