THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 38/10

In the matter between:

RASHIED STAGGIE **First Appellant**
RANDALL BOSCH **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: *Staggie v The State* (38/10) [2011] ZASCA 88 (27 May 2011)

Coram: Harms DP, Malan and Theron JJA

Heard: 24 May 2011

Delivered: 27 May 2011

Summary: Criminal appeal ─ failure to prosecute ─ effect ─ failure of criminal process – special entries.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Sarkin AJ sitting as court of first instance):

The appeal is struck from the roll.

JUDGMENT

HARMS DP (MALAN and THERON JJA concurring)

[1] The appellant, Mr R Staggie, seeks to appeal his conviction on 28 January 2003 by Sarkin AJ (sitting with assessors) in the High Court, Cape Town. The case is unfortunately a sad indictment of the criminal process in this country. It is not an instance where the accused's rights have been affected but one where the rights of the victim and the public were ignored or disregarded in an appalling manner.

[2] Staggie and one Randall Bosch were found guilty on a count of kidnapping and of rape. The events took place during August 2001. The two accused were involved in gang related activities and the complainant was suspected of being a police informant. For her punishment she was kidnapped and gang raped. The other rapists were not identified or caught.

[3] The complainant was a single witness to the event. There was some corroboration evidence from other witnesses. She and some of them were in a witness protection programme and the state sought leave for her (and others) to give evidence in camera and by means of a video link. This gave rise to a number of interlocutory applications, and lots of evidence and argument. After 24 court days (this does not mean that the court used those 24 days) and 1500 pages of record, the state closed its case.

[4] Staggie, whose defence was an alibi, chose not to testify but called witnesses in support of his alibi. Bosch, though, testified in his own defence. And the case

carried on relentlessly – for another 20 days. Even the court called a number of witnesses – most of the evidence proved to be of no assistance. In the end we were faced with a record of more than 4000 pages.

[5] Sarkin AJ delivered a judgment of some 90 pages in which he found the two accused guilty as charged. Staggie was also found guilty of the unlawful possession of a firearm but nothing turns on this. They were eventually sentenced to an effective 15 years' imprisonment.

[6] On 28 February 2003, Sarkin AJ granted the appellants leave to appeal to this court. The first ground related to the veracity of the complainant's evidence and the second concerned the judgment the court had given during the course of the hearing (on 12 November 2002) when it dealt with the interpretation of sections 153 (which deals with the court's discretion to hold an in camera hearing in the case of an indecent offence) and 158 (which deals with the use of video evidence) of the Criminal Procedure Act 55 of 1977. Why he thought that the case deserved the attention of this court is unclear.

[7] What astounds is that the acting judge, in the light of the conviction and sentence, found it appropriate to release the appellants on bail pending the appeal: Staggie at R10 000 and Bosch at R1000. And this is where the wheels that were left fell off the wagon. The appellants did not prosecute the appeal with any intention to bring it to a conclusion. An incomplete record was filed some 18 months after grant of leave, but it was rejected as being incomplete. The present record was filed on 21 January 2010 – just short of seven years late. Bosch in the meantime roamed the streets as a free man until he was shot dead during February or March 2010. Staggie after a while, was found guilty of another offence and is apparently still in prison. He is said to have some problems with obtaining parole because of the sentence imposed in this case.

[8] We were informed from the bar that the state sought to set the bail conditions aside in the high court and also sought warrants of arrest in the magistrates' courts – all to no avail. Why the state did not approach this court, where the matter was supposed to be, for an order that the appeal had lapsed was not explained.

[9] This brings me to the present proceedings. Staggie's counsel wrote a letter to

the registrar of this court on 30 April 2010 in which he mentioned that Staggie was in prison because of another conviction; he would not have been had it not been for this case; he ought to be entitled to a preferential date; and that counsel was briefed by the Legal Aid Board only on 3 March 2010. He had also not yet been told by the Board that he would be paid for reading 4000 pages but said that the appeal would nevertheless proceed. (Why counsel had to read 4000 pages in the light of his personal involvement in the case and the nature of the appeal is another matter.)

[10] The state filed its heads of argument on 27 May 2010. At the outset it raised the question whether an explanation had been proffered by Staggie for the delay in prosecuting the appeal. In addition, the submission was made that the delay was in itself evidence of an intention to abandon the appeal.

[11] The next inexcusable delay took place in the office of the registrar of this court. In spite of a directive form the judiciary that proper track be kept of cases ready for hearing, the registry apparently misfiled the case because it was only brought to the attention of the judge responsible for the roll during March 2011 instead of during May 2010. It is not the only case that has been misfiled in recent times.

[12] Counsel for the appellant had a year's time to respond to the state's mentioned submissions but he did nothing. No application for condonation was filed. We have no explanation from Staggie. We have, in fact, nothing that can be used in his favour.

[13] Apart from this, counsel did not file heads of argument although he did file a document that purports to be such. The document states that the argument was contained in the grounds of appeal (some 140 pages). That document does not contain any argument. It simply lists alleged errors by the court without any reference to the record or explanation. The only references to the record deal with the peripheral circumstances relating to a witness protection programme without any indication of how that impacts on the correctness or otherwise of the judgment. The sum total of the argument in the 'heads' consists of three sentences: the state did not prove the case beyond reasonable doubt; the appellant did not have a fair trial; and that the conviction ought to be set aside. That is not even good enough for a

notice of appeal from a magistrates' court.

[14] In fairness to counsel, he blamed me for the form of his heads because I had written an article on heads of argument in *The Advocate* which, he said, he dutifully followed. In self-defence, he is the first lawyer to interpret the article in this manner. Other lawyers keep filing exhaustive and exhausting heads in spite of the article (assuming that others have read it). And one is, I imagine, entitled to ponder why counsel brought the article along to court unless he expected that the sufficiency of the heads would become an issue during the hearing.

[15] The unfair trial argument appears to be based on what counsel called special entries in terms of s 317 of the Act. The appellant did indeed file an application for special entries on 27 February 2003 and they were, we are told, fully argued. We are also told from the bar that the acting judge intimated that he would make the entries. However, counsel could not show us where on the record the entries were made. Confronted with this, counsel's response was an accused is helpless if a judge fails to make the entries requested. The answer is that in those circumstances the accused is entitled to approach this court within 21 days in terms of s 317(5). No such approach was made. In any event, to appeal on a special entry an accused has to file a notice of appeal in terms of s 318(1) within 21 days because the appeal is an automatic one and does not require leave – something still not done after more than eight years.

[16] Special entries are an anachronism dating from the time when the right to appeal in a criminal case was severely restricted. In spite of what was said in a time frame not far removed from the extension of the right to appeal by Schreiner ACJ in *R v Nzimande & others* 1957 (3) SA 772 (A) at 773H-774D, the only purpose it serves today is to record irregularities that affect the trial that do not appear from the record. Examples given by Hiemstra[1] relate to the removal of an assessor by the presiding judge for reasons that were not debated in open court (*S v Malindi & others* 1990 (1) SA 962 (A)); the failure of the prosecutor to disclose discrepancies in a witness's statement (*S v Xaba* 1983 (3) SA 717 (A)); and where the was a breach of the attorney-client relationship and the evidence so obtained was used against the accused (*S v Mushimba* 1977 (2) SA 829 (A). Not one of the entries on which

1 *Suid-Afrikaanse Strafproses* (Kriegler and Kruger 6 ed) p 888.

Staggie sought to rely qualifies because they all concerned an attack on rulings made by the court during the proceedings.

[17] As mentioned, the court below granted leave to appeal against its decision on the interpretation and application of sections 153 and 158 of the Act. Section 153(3) gives a court a discretion in criminal proceedings relating to a charge that the accused committed an indecent act towards another to hold the proceedings behind closed doors. The court below, in a fully reasoned judgment, exercised its discretion in favour of in camera proceedings. Such discretionary judgment may be impugned on appeal on very limited grounds. Counsel did not refer us to a single passage in the judgment, reported as *S v Staggie & another* 2003 (1) SACR 232 (C), which can be assailed on this basis.

[18] This reported judgment also dealt with the interpretation of s 158(3) of the Act and its interpretation was subsequently accepted as correct in *S v Domingo* 2005 (1) SACR 193 (C).[2] Both judgments overruled *S v F* 1999 SACR 571 (C). When asked, counsel was unable to submit that the court below had erred. What *S v F* held was that if one has a list 'a, b, c, or d' it means 'a and b and c or d'. That is linguistically and contextually unsustainable. In context, a court may order video evidence if the facilities are available and any one of the five requirements spelt out in subsec (3) are present. And should a court err, s 322(1) of the Act would apply.

[19] Counsel also took the court below to task because it had reference to 'academic' works relating to the lack of police training in relation to rape investigations and the post-traumatic rape syndrome without expert evidence confirming those views. Although the judgment smacked of academic learning there is not one reference that does not conform to that which is generally known and

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2 Section 158:
'(2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
(b) A court may make a similar order on the application of an accused or a witness.
(3) A court may make an order contemplated in subsection (2) only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would ─
(a) prevent unreasonable delay;
(b) save costs;
(c) be convenient;
(d) be in the interest of the security of the State or of public safety or in the interest of justice or the public; or
(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.'

accepted. In addition, to succeed the appellant had to show that these references led to a miscarriage of justice. See *R v Harris* 1965 (2) SA 340 (A) read with the proviso to s 322(1) of the Act. No attempt was made to do so.

[20] That leaves, in the words of the acting judge, 'the question of the complainant's testimony' on which, he said 'we have spent a lot of time dealing with that.' It is correct that the court below did spend much time on the matter. We are bound by its factual findings unless it is shown that they were wrong. Counsel was invited to point to any finding in the judgment that was unsustainable but apart from submitting in most general terms that the court had erred did not accept the invitation.

[21] To conclude this sad tale, Staggie's appeal is not properly before us and Bosch's lapsed in any event because of his death. And even if we accept the lackadaisical submissions made in court as an application for condonation and reinstatement of the appeal, they did not satisfy us that the delay was excusable or that Staggie has reasonable prospects of success.

[22] Something has to be said about the state's conduct. The Directors of Public Prosecutions and even the Ministry of Justice have on an administrative level been requested by this court over many years to keep proper track of the process of criminal appeals – to no or little avail. No proper track is kept of whether persons convicted apply for leave within the prescribed period; whether appeals are prosecuted in time by the filing of records or of heads of argument; and whether appeals are enrolled in due course and do not lie waiting for doomsday somewhere in the offices of registrars, whether in this court or the high courts.

[23] Then there is the question of due compliance by the state of its obligation to comply with the practice directives of this court. The state's written argument was as could be expected in the light of the appellant's non-argument quite brief. The only references to the record were to the judgment of the court below. In spite of this the state said that we had to read all 4000 pages of the record. This is unacceptable. The state has a duty towards the court to ease its workload and not to bog it down.

The appeal is accordingly struck from the roll.

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L T C Harms

Deputy President

APPEARANCES

APPELLANTS:	J Mihálik
	Instructed by Justice Centre, Cape Town
RESPONDENT:	H Booysen
	Instructed by The Director of Public Prosecution, Cape Town
	The Director of Public Prosecution, Bloemfontein