



**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE HIGH COURT, CAPE TOWN**

**Before the Hon Mr Justice NJ Yekiso**

**Case No: SS106/08**

In the matter between:

**THE STATE**

and

**MZOXOLO MABHUTI ZENZILE**

Accused

---

Coram:	<b>Yekiso J</b>
Judgment by:	<b>Yekiso J</b>
Counsel for the State:	<b>Adv S Bera</b>
Counsel for the Accused:	<b>Adv M Garces</b>
Date of Hearing:	<b>4 February 2009</b>
Date of Order:	<b>18 February 2009</b>
Date when reasons given:	<b>14 April 2009</b>

**Summary: Reconstruction of the court record: Part of trial process. An accused is entitled to be informed of same and to be represented in the process of reconstruction. Failure to do so constitutes unfair trial.**

**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE HIGH COURT, CAPE TOWN**

**Case No: SS106/08**

In the matter between:

**THE STATE**

and

**MZOXOLO MABHUTI ZENZILE**

Accused

---

**REASONS FOR THE ORDER GIVEN ON 18 FEBRUARY 2009  
HANDED DOWN ON 14 APRIL 2009**

---

**YEKISO, J**

[1] On 18 February 2009 I gave an order setting aside the convictions of the accused on two charges of rape and a further conviction on a charge of assault with intent to do grievous bodily harm. In handing down the order I gave I made an observation of the need on us, as judicial officers, to develop what has often been referred to as the sixth sense, being constitutionalism, in dealing with matters that come before us as judicial officers. In adopting such an approach, not only will fairness of trial be ensured to both the accused and the victim, but that justice will not only be manifestly done, but will be seen to have been done.

[2] The remarks I made in the preceding paragraph relate to this matter which came before me subsequent to the committal of the accused to

the High Court, in terms of section 52(1)(a)(i) of the Criminal Law Amendment Act, 105 of 1997, after conviction in the regional court on two offences referred to in part I, schedule 2 to the aforementioned piece of legislation. The convictions were a sequel to a trial which commenced in the regional court on 22 October 2007 and finalised on 26 October 2007 when the accused was convicted on two counts of rape and a further count of assault with intent to do grievous bodily harm as charged. Subsequent to the conviction of the accused, and because the accused was convicted of offences referred to in part I of schedule 2, the magistrate became of the view that the matter warranted punishment in excess of his jurisdiction hence the referral of the matter to this Court, in terms of section 52(1)(a)(i) of the Criminal Law Amendment Act, for consideration of an appropriate sentence.

[3] The matter came before me on 4 February 2009 in terms of section 52(3)(b) of the Criminal Law Amendment Act. The aforementioned section provides that before commencing with the sentencing proceedings, the Court is required to satisfy itself that the proceedings in the regional court were held in accordance with justice. Once the Court has satisfied itself that the proceedings in the court *a quo* were held in accordance with justice, the court will then proceed to confirm the conviction and, once this process has been followed, only then will the court proceed with the sentencing proceedings. It has been held in authorities such as *S v Moodie* 1961 4 SA 752(A) at 756; *R v Thedingoane* 1954 4 SA 750(O) and several other authorities that the term *justice* is not limited in meaning to the notion of retribution for the

wrongdoer. It also connotes that the wrongdoer should be fairly treated and tried in accordance with the law.

[4] In the course of considering the record of the proceedings in the regional court it came to my notice that the cassette relating to the record of the proceedings on 22 October 2007 was missing. The clerk of the court filed an affidavit confirming the missing portion of the record simultaneously stating that the missing portion of the record could not be found despite diligent search. It further appeared that the missing portion of the record pertains to the whole of the evidence tendered in the State's case. Once the record could not be found, the only option open, under the circumstances, was to have the missing portion of the record reconstructed. The presiding judicial officer was subsequently approached with a view to have the missing portion of the record reconstructed.

[5] There has been an attempt by the presiding magistrate to have the missing portion of the record reconstructed. The portion of the record, purportedly reconstructed, consists of somewhat six typed pages. The record encompasses the evidence of the two complainants in the rape charges in the persons of Anthea Mangena and Ncebakazi Diniso. It is not clear whether there was tendered at trial the evidence of a first report in respect of the two complainants as such evidence is not reflected in the reconstructed record nor does there appear any attempt having been made to reconstruct the portion of the record relating to the charge of assault with intent to do grievous bodily harm. The reconstructed portion of the record was signed by the presiding magistrate on 25 July

2008. The record, as reconstructed, is verified by the presiding magistrate by way of a verifying affidavit commissioned by the clerk of the court on 27 August 2008. In this affidavit the presiding magistrate confirms the missing portion of the record; that the missing portion of the record could not be found despite diligent search; and that the reconstruction was made on basis of notes made by the magistrate in the course of trial.

[6] Also included in the record of the proceedings is a draft affidavit, which appears to have been prepared beforehand, for signature by the accused. The draft affidavit contemplates that the accused would sign the affidavit after he shall have studied the reconstructed portion of the record in consultation with and in the presence of his legal representative; only after the accused shall have studied the reconstructed portion of the record and only when satisfied that the record, as reconstructed, accords with his recollection of the evidence tendered, and that nothing had been omitted, would he have had to sign the affidavit.

[7] The record of the proceedings, as reconstructed, was presented to the accused, ostensibly whilst in custody, not by the legal representative who represented him at trial, but by one Josephine Williams, accompanied by an interpreter in the person of one Paulus Joel. The record was presented to the accused ostensibly together with a draft verifying affidavit in which the accused would have verified the correctness of the reconstruction; that the reconstruction accorded with his recollection of the evidence tendered by the state witnesses at trial;

that he had studied the record, as reconstructed, in the presence of his legal representative; and that nothing had been omitted. The accompanying affidavit consists of one page. It appears that the accused refused to sign the affidavit. At the bottom of the one page affidavit, just below the portion provided for the accused's signature, there is a handwritten inscription which reads: "Ek, Josephine Williams, was saam met die tolk, Mnr Paulos Joel by the beskuldigde om dokument te teken, maar hy weet niks en het geweier om te teken."

[8] It is not clear on the basis of the inscription referred to in the preceding paragraph in what capacity Josephine Williams visited the accused, presumably whilst in custody; it is not clear whether she explained to the accused the purpose of her visit or whether she merely presented the document and demanded that the accused sign. Finally, there is affixed, below the handwritten inscription, a date stamp of the Clerk of the Court. The date inscription on the date stamp is "2008-08-27" presumably being the date Josephine Williams visited the accused. Just below the date inscription on the date stamp there is appended a signature of one JJ Williams, presumably being that of Josephine Williams who had presented the document to the accused for signature.

[9] There is further included, amongst the documents constituting the record of the proceedings, an affidavit of Wilhelm J Hanekom of Hanekom Attorneys, Paarl. In this affidavit Hanekom confirms that he represented the accused at trial in the regional court; that he had studied the portion of the record as reconstructed by the magistrate; that the reconstruction accords with his recollection of the evidence tendered by the state

witnesses and that to the best of his recollection nothing has been omitted. The affidavit is commissioned by JJ Williams, ostensibly the same Josephine Williams who presented a document to the accused for signature. This affidavit was commissioned on 20 August 2008, somewhat seven(7) days before Josephine Williams visited the accused on 27 August 2008. There is no reference in Hanekom's affidavit that he ever consulted with the accused subsequent to the record being reconstructed. There is no reference in the affidavit of Hanekom that the accused had studied the reconstructed record during a consultation with him as is contemplated in the draft affidavit presented to the accused for signature.

[10]In the circumstances such as in the matter before me, involving as it does a potential of a life imprisonment being imposed in the event of a conviction being confirmed, fairness would require that the accused be informed of the missing portion of the record and of the need to have the missing portion of the record being reconstructed. What concerned me in the course of considering the record was whether the accused was ever informed of the missing portion of the record and of his rights emanating therefrom. This is particularly so because of the handwritten inscription at the bottom of the draft affidavit that "maar hy weet niks en het geweier om te teken".

[11]When the matter came before me on 4 February 2009 I raised the issue of my concerns with the parties' legal representatives and subsequently called for submissions in this regard. I simultaneously addressed a

letter to the magistrate who presided at trial seeking comment from him as regards the undermentioned issues, these being:

- 1) Precisely where was the record reconstructed ?
- 2) Was the accused present in the process of such reconstruction ?
- 3) Was the accused legally represented during the course of such reconstruction ?
- 4) Is the process of reconstruction consistent with the accused's right to fair trial, in particular, a right to a public hearing before an ordinary court; a right to be present when being tried; and a right to legal representation respectively as set out in section 35(c), (e) and (g) of the Constitution of the Republic of South Africa, 1996.

I then had the proceedings postponed until 18 February 2009 to afford the magistrate an opportunity to let me have his comments to the issues raised above.

[12]The magistrate duly responded to the issues I had raised with him. In his response the magistrate states that the record was reconstructed entirely in his chambers; that the accused was not present during the process of reconstruction; and that the accused was not legally represented while the reconstruction was actually in progress. The magistrate goes further to say in his response that the reconstruction process, in terms of which a written transcript of the proceedings is created, is indeed a part of the trial process to which the constitutional right to a fair trial should apply and that the accuracy of a written record of the proceedings is essential to the fairness of the trial process as a whole citing *S v Leslie* 2000(1) SACR 347(W) as authority for the



proposition that the accused has the right to participate in the process of reconstruction of a case record. In terms of this authority the accused's right to participate in the reconstruction process goes further than the right merely to be informed of such reconstruction. But the magistrate goes further to assert that there is a distinction between the conduct of the trial itself and the process in terms of which the written record of the trial comes into being, asserting that while it is unquestionable that an accused person has the right to be present during the conduct of the trial itself, such a right does not extend to the reconstruction process. As I will demonstrate in the course of this judgment, with the greatest respect, I do not agree with this contention.

[13]When the matter resumed on 18 February 2009 I had had a benefit of the parties' submissions on the following issues, these being:

- a) Whether the accused had a right to be informed of the missing portion of the record;
- b) Whether the accused had a right to be informed of the need to have the missing portion of the record reconstructed;
- c) Whether the accused had a right to legal representation in the process of reconstructing the missing portion of the record;
- d) Whether the process of reconstruction of the record, in the manner in which the magistrate indicates it was done, is consistent with the accused's right to a public trial before an ordinary court, a right to be present when being tried, a right to adduce and challenge evidence; and
- e) Whether the reconstruction of the record in the magistrate's chambers is consistent with the value of transparency and openness espoused

in section 1 of the Constitution of the Republic of South Africa, 1996.

I must also express a debt of gratitude to *Mr L J Badenhorst*, Senior Advocate in the Office of the Provincial Directorate of Public Prosecutions for his submissions filed as *amicus curiae*. *Mr Badenhorst's* comprehensive submissions, together with authorities cited therein, were indeed helpful.

[14]After hearing argument by the parties on 18 February 2009 I informed the parties that I was not persuaded that the proceedings in the regional court were held in accordance with justice. I subsequently gave an order setting aside the convictions of the accused of the rape charges as well as the conviction on the charge of assault with intent to do grievous bodily harm. I subsequently ordered that the accused be released from custody. Save for the remarks I made as set out in paragraph [1] of this judgment, I did not then give reasons for the order I gave but I did indicate to the parties that full reasons for the order I gave would be furnished after I shall have returned from circuit on 27 March 2009. In the paragraphs which follow is included the reasons for the order I gave.

[15]What emerges from the background material set out in the preceding paragraphs is that the cassette in which is recorded the whole of the evidence in the state's case is missing; that the clerk of the court filed an affidavit stating that the missing portion of the record could not be found despite diligent search; the magistrate reconstructed the missing portion of the record using his notes made during the course of trial as a source for such reconstruction; that the record was reconstructed entirely in the

magistrate's chambers; there is no indication, on basis of the record forward to this court, if the accused was informed of the missing portion of the record and of the need to have the missing portion of the record reconstructed; there is no indication, on basis of the record before me, whether the accused was informed of his rights arising from the need to have the missing portion of the record reconstructed; and that when the accused was presented with a draft affidavit, which was intended to verify the correctness and the accuracy of the reconstructed portion of the record, the accused refused to sign the affidavit on the basis that "hy weet niks en het geweier om te teken". The question which arises in the circumstances of this matter is to what extent does the reconstruction process and the events subsequent thereto measure to the accused's constitutional right to fairness of trial.

### **THE RIGHT TO FAIR TRIAL**

[16]The concept of a fair trial, within the meaning of section 35(3) of the Constitution of the Republic of South Africa, is broader than the conduct of

a trial in terms of constitutionally mandated rules and procedures (Nico Steytler: *Constitutional Criminal Procedure*: Butterworths 1998 p216). Before the advent of the new constitutional order, the right to a fair trial was expressed in the infamous *dictum* of Nicholas AJA in *S v Rudman*; *S v Mthethwa* 1992 1 SA 343(A) at 387 A-B as follows:

"What an accused person is entitled to is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice."

This is a statement which Kentridge AJ, in the first Constitutional Court judgment in *S v Zuma* 1995 4 BCLR 401(CC) at paragraph [16], said was an authoritative statement of the law before 27 April 1994. The view expressed by Nicholas AJA in *S v Rudman, supra*, left no room for a residual right to a fair trial. The yardstick for fairness of trial was measured against those formalities, rules and principles of procedure which the law required. What was regarded as those abstract notions of fairness and justice, was of no consequence.

[17] In *S v Zuma, supra*, Kentridge AJ expressed a view which presented a radical departure from what the state of the law was prior to 27 April 1994. In this regard, Kentridge AJ made the following observation at paragraph [16] of the judgment:

“since that date section 25(3) of the interim Constitution (now section 35(3) of the Constitution of the Republic of South Africa) has required criminal trials to be considered in accordance with these ‘notions of basic fairness and justice’. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.”

It has often been said that the rights conferred by section 35(3) are not exhaustive. In this regard Kentridge AJ observed:

“the right to fair trial is broader than the list set out in paragraphs (a) – (j) {now paragraphs (a) to (o)} of the subsection. It embraces a concept of fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.”

Steytler, *Constitutional Criminal Procedure, supra*, at p215 observes that the *dictum* by Kentridge AJ is important, first, for asserting that the articulated fair trial rights should be seen as a set of minimum guarantees and second, for extending the concept of a fair trial to include substantive fairness.

## **WAS RECONSTRUCTION UNDERTAKEN IN ACCORDANCE WITH THE NOTIONS OF FAIRNESS**

[18]As pointed out in the authorities cited in the preceding two paragraphs a right to fair trial is broader than the list of specific rights set out in section 35(5) of the Constitution. The conviction of an accused person does not bring about an end to the accused's right to fair trial. The trial itself does not come to an end on conviction of the accused. The right to fair trial extends up to and including sentencing proceedings. A determination whether the proceedings were held in accordance with justice can only be made on basis of a proper record of the proceedings or, in those rare instances where the whole or portion of the record is missing, on basis of a properly reconstructed record. Accuracy or the correctness of the record, particularly in instances where the record has had to be reconstructed, and where a conviction could lead to imposition of a heavy sentence, such as life imprisonment, is of paramount importance.

[19]What happened in the instance of this matter is that the accused was convicted of very serious crimes, in the form of two counts of rape, with a potential for heavy sentences, in the form of two life imprisonment, being imposed. The portion of the record, containing the whole of the state's case, obviously evidence of an incriminating nature, went missing and had had to be reconstructed. When the magistrate undertook the reconstruction of the court record in the manner he did, he did so in the comfort of his chambers, without the knowledge of the accused whose fate depended on the record which was being reconstructed and which ultimately was presented to him as an end product. It obviously did not occur to the magistrate, in as much as the reconstruction of the record is

part of the trial process to which the constitutional right to a fair trial should apply, that it would have been fair to the accused to have been informed of the missing portion of the record; of the need to have the missing portion of the record reconstructed; of his rights to participate in the reconstruction process; his right to legal representation in such a reconstruction process and the right to have the reconstruction process interpreted for him should he require the services of an interpreter. That the reconstruction itself was undertaken entirely in the magistrate's chambers negates the very right of an accused person to a public trial before an ordinary court and to be present when being tried. In my view, the method adopted by the magistrate in undertaking the reconstruction process in the manner he did, falls foul of the value of openness and transparency as espoused in section 1 of the Constitution of the Republic of South Africa.

[20] In the instance of this matter an attempt to involve the accused in the purported reconstruction was only made after the missing portion of the record had already been reconstructed. Indications are that his lawyer was only involved in the reconstruction process after the reconstruction itself had already been completed. The reconstruction itself was undertaken in the absence of all the parties that were involved in the trial process, being the prosecutor, the accused and his legal representative as well as the interpreter. The approach by the magistrate, in the reconstruction of the record, having been done entirely in his chambers, clearly violated the accused's right to a public trial before an ordinary court, his right to be present when being tried as well as his right to challenge and adduce evidence. It all boils down to the accused's right

to fair trial being significantly compromised. The right to fair trial is arguably the closest right to an accused person in the Bill of Rights. The accused's right to a fair trial is not premised on any relative degree of fairness. The trial is fair or is not fair.

[21]What the magistrate should have done, in circumstances such as in the matter before me, once he had been informed by the clerk of the court that a portion of the record could not be found despite diligent search, is the following: to direct the clerk of the court to inform all the interested parties, being the accused or his legal representative and the prosecutor of the fact of the missing record; arrange a date for the parties to re-assemble, in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate to place it on record that the parties have re-assembled for purposes of the proposed reconstruction; the parties to express their views, on record, that each aspect of reconstruction accords with their recollection of the evidence tendered at trial; and ultimately to have such reconstruction transcribed in the normal way. Once this process has been followed, none of the parties can cry foul that his rights have been trampled on.

[22]*Mr Bera*, who appeared for the State, in his submissions, proceeds from the premise that the accused, by stating in his affidavit that the reconstructed portion of the record is in accordance with his recollection amounts to and constitutes transparency. This clearly is incorrect. The accused did not sign any affidavit. In fact, the accused refused to sign the affidavit on the basis that he did not know what it was all about.



[23] It is for the reasons set out in paragraphs [15] and [21] of this judgment that I could not find that the proceedings in the regional court were held in accordance with justice and subsequently set aside the convictions. Finally, may I point out that when I made the order setting aside the convictions of the accused, I made it abundantly clear to him that the order I made was not tantamount to the acquittal of the accused of charges preferred against him. I further made it clear to him that the state may in future still proceed against him, on the basis of the same charges, should it elect to do so.

---

N J Yekiso, J