IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A330/2010

DATE: 18 FEBRUARY 2011

In the matter between:

DANIEL M RINI Appellant

and

THE STATE Respondent

J U D G M E N T

KOEN, AJ:

The appellant, who was the first of two accused, was convicted on the charge of robbery with aggravating circumstances in the Cape Town Regional Court on 31 January 2006. He was sentenced to imprisonment for a period of eight years. With the leave of the trial court, which was obtained during February 2006, he appeals to this court against both his conviction and sentence.

It is apparent from what exists of the record that when the magistrate commenced delivering his judgment on 11 November 2005, all of the tapes on which the case for the

state had been recorded and also a recording of the observations made by the court pursuant to an inspection *in loco*, had been lost. This too, was the fate of the tape recordings of the evidence of the appellant in chief and a part of his cross-examination.

Faced with this situation, the magistrate said this at the commencement of his judgment:

> "I will, therefore, attempt during the judgment that I give to reconstruct the evidence and if the parties will please bear with me, the judgment will be much more elaborate in a sense that I will not summarise the evidence as I normally do, but try and be as complete as possible as far as the evidence is concerned, so that the record is that way reconstructed."

The magistrate commenced delivering judgment on 11 November 2005. He was interrupted by a power failure. The process resumed on 30 November 2005. At this juncture the magistrate said that the previous proceedings on 11 November 2005, that he had "read out the evidence" from his notes. What is significant about this statement, in my view, is that he had not mentioned that he was reading from his notes on the

earlier occasion, and it is not immediately apparent from a consideration of that part of the judgment delivered by him on 11 November 2005 that he had been reading from any notes. Indeed, his judgment, insofar as it deals with the case presented by the state and the observations made at the inspection, resembles far more closely a summary of evidence than a recitation from notes made during evidence.

After leave to appeal had been granted during February 2006, a record of some sort was obviously prepared. It is not clear when it was first produced. During August 2007, the appellant's attorney advised the Director of Public Prosecutions by letter that the appellant did not accept the record "as reconstructed during the judgment of the presiding magistrate".

Five months later, during January 2008, the Director sent the record back to the Regional Court under cover of a letter requiring that the record be corrected and requesting that the matter be given priority. It took another two years for anything to happen and during March 2010, an opportunity was offered to the appellant in open court to challenge those aspects of the judgment which amounted to a recordal of the evidence. A typed of the copy of the judgment was given to the appellant for this purpose.

The hearing which was convened for the purposes of correcting the record took place on 5 May 2010. The appellant was asked to identify those aspects of the reconstruction of the evidence contained in the judgment he was not happy with. None of his objections to the record appear to have been given heed.

In my view there were difficulties with the approach which was taken. Firstly, there is very little in the way of reconstructed evidence in the judgment. The line between conclusions drawn by the magistrate and the evidence upon which they were based, is well nigh impossible to draw. The magistrate did not draw to the appellant's attention those parts of the judgment which were a record of the proceedings and those parts which were conclusions drawn from facts.

When the appellant identified aspects of the judgment he did not agree with, he was told that he was dealing with the merits of the judgment. It seems that this occurred because the distinction between recorded facts, and findings of fact made by the magistrate, is almost indiscernible.

Secondly, it is evident that the trial had commenced on 22 May 2003 when the appellant had entered a plea. I cannot say

when the evidence for the state had been led, because there is no record of this, but it was probably more than five years prior to the attempt in May 2010 to reconstruct the record. It is unfair to expect of a person to remember, after so long a time, exactly what was said. It is what was said that is important not impressions or conclusions drawn from what was said.

Thirdly, the magistrate referred to his notes made during the trial. He said that he made extensive reference to them in the process of delivering his judgment. I can only assume that the notes could have provided considerable assistance in the attempt to reconstruct the record, but it does not appear that these were made available to the appellant at any stage and there is nothing to be gleaned from what I have before me, to indicate why this was not done. In the event, the attempts to improve upon the so-called reconstructed record, did not result in the production of anything better.

In S v Chabedi 2005 (1) SACR 415 (SCA), Brandt, JA said this:

> "On appeal the record of proceedings in the trial court is of cardinal importance. After all, the record forms the whole basis of the rehearing 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 the proper consideration of the appeal, not that it must be a perfect recording of everything that was said at the trial." (at 417e-g).

Later in the judgment the following was said:

"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." (at 417h).

In Chabedi, the magistrate's microphone had not been working properly. Questions posed by the magistrate during the proceedings and parts of his judgment on conviction and sentence were thus missing. The evidence, however, was intact. That is a far cry from the facts of this matter where there is simply no record of the entire case presented by the state, the observations made at the inspection *in loco*, the evidence of the appellant in chief and part of his cross-examination.

The appellant's defence at the trial was a denial of involvement in the offence. The complainant's identification of him, a dock identification made by a single witness, was central to his conviction. However, none of the evidence led by the state upon which the magistrate based his conclusion that this identification was reliable, is before us. The only relevant evidence recited in the judgment were statements made by the complainant in which he expresses his certainty about the reliability of his identification of the appellant. But why he was so certain is not apparent. Plainly, the complainant's own belief in the reliability of his identification of the appellant takes matters no further in the absence of a factual basis for such belief. What those facts might have been does not appear as a substantial part of the record is missing.

In my view, the record is entirely inadequate for the purposes of adjudicating this appeal. In the circumstances I think that the conviction and sentence imposed by the magistrate cannot stand. I would, therefore, make the following order. **THE CONVICTION AND SENTENCE IMPOSED BY THE REGIONAL COURT ARE SET ASIDE**.

KOEN, AJ

ALLIE, J: I agree and it is so ordered.

ALLIE, J