

IN THE COURT OF APPEAL OF SWAZILAND

Crim. Appeal Case No.10/02

In the matter between:

BENEDICT SIBANDZE

Appellant

VS

REX Respondent

CORAM : BROWDE,

BECK,

ZIETSMAN J.J.A.

For Appellant : Mr Ntiwane

For Respondent : Mr Ngarua

JUDGMENT

15th November 2002

Beck J.A.

In this matter the appellant was convicted in the High Court by Sapire C.J. on three counts of theft and was given an effective sentence of 3 years imprisonment back-dated to 8th November 2000. We are informed by his counsel, Mr Ntiwane, that he has by now been discharged from prison.

Through no fault of the appellant there were delays in transcribing the record of his trial, which is quite lengthy, running to more than 700 pages. When the record was eventually lodged it did not contain the cross-examination of an important witness for the Crown, as well as the evidence in chief and portion of the cross-examination of another Crown witness of lesser importance. The omission of this evidence from the transcription stems from the loss of four tapes on which it was recorded.

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The appeal was enrolled for hearing at this session of the Court of Appeal, but no heads of argument have been filed by either side. It seems that the reason for this is because, on receiving the record some weeks ago, we requested the Registrar to require the parties, with the assistance of the learned Chief Justice if necessary, to reconstruct for us the substance of the missing evidence. This they have not yet been able to do and Mr Ntiwane is pessimistic as to whether it will be possible to do so because he has no notes of his cross-examination of these witnesses, and, surprisingly, it appears that the learned trial judge does not have a note of the missing evidence either. Accordingly Mr Ntiwane has urged us to allow the appeal on the ground

that this evidence cannot now be recovered.

In the case of Siphon Computer Dlamini vs Rex, Appeal Case No.20/2000, this Court allowed an appeal where the transcribed record was so defective that no reliance could be placed on it, and when such facts as could be gleaned from the transcript were insufficient to justify the conviction of the appellant. My brother Browde J.A., who delivered the judgement, with which Van den Heever and Shearer J.J.A concurred, said this:

"(The) record of the trial.....is so poorly prepared and is so unreliable as a purported transcript of the proceedings that it can fairly be said that it denies the appellant the right to appeal.....The fact that it was done so shockingly undermines all faith that the record of the actual evidence is reliable.....(Such) facts as can be gleaned from the "transcript" do not justify the conviction of the appellant."

A similar situation arose in the case of S vs Phukungwana 1981 (4) S.A. 209 (Bophutatswana) in which Hiemstra C.J. said that the record of the trial in the lower court was in a hopeless condition because the recording machine had not worked properly, so that in what the record contained he could find no incriminating evidence. No record could be reconstructed and accordingly the appeal was allowed.

The present case however, is readily distinguishable. The record that has been transcribed is, as I have said, fairly lengthy and no criticism can be levelled at the accuracy of the transcription that is before us. More importantly, there is a substantial amount of evidence in the record as it stands which does incriminate the appellant and which, arguably, might well be sufficient to support the convictions. Under these circumstances I do not consider that justice requires us to set aside the convictions at this stage, particularly in view of the

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fact that the appellant is no longer in prison, and also in view of the fact that, however pessimistic Mr Ntiwane claims to be, I do not accept that a reconstruction of the substance of the missing evidence cannot be prepared by the joint efforts of counsel on both sides. The record contains a number of references by counsel, and by the learned Chief Justice, to the content of the missing tapes which could well be helpful in making a reconstruction.

Accordingly we order that the appeal be postponed to the next session of this Court, and counsel on both sides are requested to do their best to furnish a reconstruction of the missing evidence. If no reconstruction can be made the matter will have to be dealt with at the next session on the record as it stands.

BECK J.A

I agree

BROWDE J.A.

I agree

ZIETSMAN J.A.