



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

**HIGH COURT REF NO: 43/2021
REVIEW CASE NO.: C7/2021
MAGISTRATE'S SERIAL NO.: 01/2021**

In the matter between:

THE STATE

v

BENJAMIN WOELF

First Accused

ROSWIN MOOS

Second Accused

JUDGMENT DELIVERED: FRIDAY, 7 MAY 2021

Nziweni AJ:

[1] On 05 February 2021, the two accused tendered guilty pleas, in the Magistrate's Court, Somerset West on a charge of housebreaking with intent to steal and theft. Both were convicted on the strength of their pleas and sentenced to 12 months imprisonment. The sentences imposed on both accused rendered the case subject to automatic review.

[2] Having been presented with the record of the proceedings for review purposes, I noted that part of the mechanically recorded record was missing and that there was also a hand written record. I then raised a query to the presiding magistrate, along the following lines:

- '1. The record is quite confusing. It indicates that the proceedings were mechanically recorded, yet it contains a hand-written record. Were the proceedings mechanically recorded? If so, kindly furnish the transcribed record. Because the furnished mechanically recorded one only ends with the state putting the charges to the accused; the rest of the mechanically recording is missing.
2. The hand written proceedings are also not typed. Kindly rectify on an urgent basis. '

[3] In her response, the learned magistrate and the Digital Court Recording System ("DCRS") clerk deposed to affidavits wherein they tendered an explanation for the incomplete transcript of the mechanical recording. In the affidavits they basically explain that they discovered after the fact that the DRCS did not record the proceedings as they expected.

[4] Having received the response from the magistrate; I then addressed a second query to her along the following lines:

- '1. In answer to my previous query both the magistrate and the CRT operator agreed that on the day in question the proceedings were mechanically recorded.

2. What emerges from both affidavits deposed is that; during the recording of the proceedings the court was unaware that the recording machine was not recording all the proceedings. The inevitable corollary of this is that there are missing parts of the record.
3. Certainly a court can keep two separate records of the same proceedings, one a being mechanical recording and the other hand written.
4. On record there is no explanation of the basis for the keeping of the hand written record.
5. Can the magistrate explain how the hand written record came into being? If the hand written proceedings were a re-construction, the magistrate should explain how she undertook the re-construction.
6. Due to the urgency of this matter the magistrate is requested to reply to this query by the 22 of March 2021.

[5] Notwithstanding the urgency of the matter, the magistrate failed to comply within specified time frame. It bears mentioning that in her response dated 13 April 2021, there was surprisingly no reason or explanation furnished for the delayed response, the magistrate simply remarked as follows:

'Annexure 'A' of the record is my handwritten recording of the proceedings whilst the Plea is also being recorded by the machine, it is not a reconstruction.'

[6] The response by the magistrate is rather unsatisfactory and very concerning. Particularly, when regard is had to the fact that a review provides an essential mechanism and a procedure meant to ensure that the interests of justice are safeguarded. It is therefore the pivotal role of any presiding officer to avoid delays and failure to respond to review queries in order to prevent any injustice that may be caused.

[7] On a reading of the responses by the magistrate and the DCRS clerk to my first query, it becomes apparent that the magistrate intended to proceed with the proceedings being mechanically recorded.

[8] The question that aptly arises therefore, is whether the record is adequate for purposes of a review as it stands.

[9] When regard is had to the contents of the charge sheet, relating to the day of the proceedings, on the 5th February 2021, the word 'mechanically recorded' appears in bold letters, before the commencement of the proceedings. The response of the magistrate and the DCRS clerk to this Court's query evinces that, on the day in question the magistrate was oblivious to the problem with the DCRS until the record had to be prepared for review purposes.

[10] Even though the magistrate intended to have the proceedings mechanically recorded, seemingly she also simultaneously kept a handwritten recording of the proceedings.

[11] Under the circumstances of the instant case I grapple with the question of whether it is permissible for a court to keep two separate records of the same proceedings. One being the mechanically recorded and the other being hand written notes. The facts of the present matter raises another issue for consideration, which is; if it happens that the machine was not recording as in this case, can the hand written notes be considered to be the record?

Can a court keep two separate recording of the same proceedings?

[12] Section 1 of the Magistrates' Court Act 32 of 1944 defines 'to record' as:

"To take down in writing or in shorthand or to record by mechanical means, and 'recorded' has a corresponding meaning".

[13] I find it necessary to emphasise the importance of a complete record in any type of proceedings. The record of the proceedings in court is of cardinal importance. As such, the credibility of the record is very important, because it's one of the guarantees to a fair hearing on review and appeal. It is so that although most courts have machines to record proceedings, it is still a notorious fact that some presiding officers personally prefer to record proceedings long hand, particularly guilty pleas.

[14] In order to preserve the credibility of proceedings and to protect the accused's rights to a fair trial, it can never be stressed enough that, it is highly desirable that courts should make use of DCRS wherever possible. Even though I am well alive to the fact that there is absolutely nothing wrong with a handwritten record, as the record may be kept as handwritten or an electronic recording. Nevertheless, I cannot really fathom why in this day and age, certain presiding officers still prefer to keep a hand written records.

[15] Gleaning from the furnished record, it becomes evident that the mechanical recorded record is incomplete, and conversely, the hand written notes are complete.

[16] In light of the fact that the DCRS failed to electronically record the court proceedings, whilst everyone was labouring under the impression that it was recording; in hindsight it is actually a good thing that the magistrate was also making a hand written record. However, the question which aptly arises is whether the hand written notes of the magistrate are a record or her notes.

[17] In *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & Others* (2005) 5 BLLR 416 (LAC), the following was stated:

“This brings me to the question: what comprised the record of the arbitration proceedings before the commissioner in the present appeal? ...The rules provided: “The record may be kept as handwritten notes or an electronic recording.”

Since the commissioner made use of an electronic recording, the desirable form, the probable inference is that he chose that form as the "official" record, and that his handwritten notes were no more than bench notes kept for the tribunal's convenience, as is the invariable practice among magistrates and Judges." (my own underlining and emphasis)

[18] In the case in *casu*, a mechanical record was made though incomplete. Insofar as the magistrate responses are concerned it is not clear as to why she chose to keep two separate recordings of the proceedings. As alluded to earlier, the magistrate in her response to the query by this Court identified that the handwritten proceedings as follows:

"Annexure "A" is my handwritten recording of the proceedings whilst the Plea is also being recorded by the machine."

[19] It is very interesting that the magistrate does not label the handwritten proceedings as her notes. In any event, under the circumstances of this matter, the notes which the magistrate had kept during the course of the proceedings cannot constitute a record of the proceedings. This I say because, by the virtue of the magistrate labouring under the impression that the DCRS was recording and her being entirely unaware and oblivious to the fault with it; she had clearly chosen to record the proceedings mechanically.

[20] The situation would have been different had the magistrate chosen to only keep a handwritten record and not to also simultaneously mechanically record. The fact that

the DCRS did not completely record the proceedings does not necessarily mean that the handwritten record should then automatically, be regarded as the official record.

[21] Without a re-construction taking place, with both the accused, the handwritten notes cannot constitute a transcript of the plea proceedings. Accordingly, I find that the record is not a complete record of the plea proceedings. Consequently, this Court is not in a position to determine the review of the plea proceedings.

[22] The record is thus remitted to the magistrate to begin with the procedures of re-construction of the record. On urgent basis the magistrate should ensure the following takes place.

1. The accused should be immediately requisitioned from prison, for their attendance at court. The accused must be brought before the court within five (5) days of receipt of the judgment.
2. On their appearance in court, they should be informed of the incomplete record and the existence of the magistrate's written notes.
3. The need to reconstruct the record and of their right to participate in the process, should also be explained.
4. Their rights to legal representation during the reconstruction process should be explained.
5. As soon as the record has been reconstructed and the parties agree on its correctness, then the re-constructed record must be submitted for review.

[23] The Registrar is directed to forward a copy of the judgment to the Legal Aid Board (Stellenbosch), with the request that the Legal Aid Board take steps as might be necessary to ensure that if the accused seeks free legal assistance, they prioritise the matter.



NZIWENI, AJ

I agree, and it is so ordered.



SLINGERS, J