BOLADO, Appellant, v. COOPER, Appellee.

**MOTION FOR DIMINUTION OF RECORD.**

Argued April 12, 1978. Decided April 28, 1978.

1 A motion for diminution of record can be made at any time before the case is called for hearing ; and if during the hearing of the case it appears that the record is incomplete, steps will be taken to insure that the court has the complete record on which to base.

2 A case will not be considered by an appellate court until it has received the complete record of the proceedings in the trial court.

3 The verdict is a document essential to the completeness of the record of the trial court, for which a statement of facts implying its existence or mention of the amount of the verdict may not be substituted.

4 A motion for diminution of record is the proper procedure for questioning the correctness of records transmitted to the Supreme Court on appeal.

5 Where diminution will not cure incompleteness of the record, as when the missing documents cannot be found, the case will be remanded for new trial, and especially when the loss is due to the negligence of the clerk of court.

On appeal of this case to the Supreme Court, appellee filed a motion to dismiss the appeal, and appellant filed a motion for diminution of record on the ground that the verdict of the jury was missing from among the documents transmitted to the higher court. It further appeared that the missing verdict could not be found.

The Court held that, although a motion for diminution of record is the accepted procedure for curing incompleteness of the record, since in this case an essential document was missing and could not be found, the *judgment* of the lower court should be *reversed* and the *case remanded* for a new trial.

*C. L. Simpson* and *M. Fahnbulleh Jones* for appellant. *Tilman Dunbar* and *James E. Pierre* for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

When this case was called for hearing, it was discovered 25

that on December 6, 1977, the appellee had filed a motion to dismiss the appeal for failure to file an appeal bond and a notice of completion of appeal, and on December 12, 1977, the appellant had filed a motion for diminution of record.

Since the motion for diminution of record questioned the completeness of the record certified to this Court, we decided to hear it first. The motion referred to our first opinion in this case concerning the irregular preparation and transmission of the record to this Court at that time, and the instructions sent to the clerk of the trial court to withdraw those records, transcribe properly the trial records, invite the counsel on both sides to tax them, and transmit the certified copies to this Court through registered post. *Bolado v. Cooper, 25* LLR 414 (1977). The motion also stated that after the clerk of the lower court had transcribed the record, which was taxed, it was discovered that the verdict of the jury, sheet 1 of

the 32nd day's session, June 16, 1976, and sheet 4 of the 33rd day's session, June 17, 1976, were missing from the record. The absence of these documents was mentioned in a certificate from the said clerk ; and in the clerk's letter of transmittal to the Clerk of the Supreme Court, the missing documents are not listed among the documents sent to this Court. The motion requested that the clerk be instructed to send the missing record before this Court takes any action on the matter.

The appellee resisted the motion for diminution on the following grounds : (1) the appellant noted exception to the verdict, filed a motion for a new trial in which was mentioned the amount awarded by the jury's verdict, and on which the trial judge based his judgment; in other words, for the appellant to ask for a new trial, and for the judge to render a judgment, there had to be a verdict ; (2) the absence of the missing documents did not prevent the appellant from completing the jurisdictional steps leading to an appeal ; and (3) the motion for diminution of record
was belatedly filed; it should have been done prior to the appeal's being attacked by appellee's motion to dismiss.

Traversing these issues in the reverse order, it is our opinion, and it has been a practice since the early days of this Court, that a motion for diminution of record can be made at any time before the case is called for hearing, and if, during the hearing of the case, the incompleteness of the record is brought to the court's attention, due notice will be taken of this and steps will be taken to insure that the court has the complete record on which to base its decision. *Marrschalk v. Re public,* **1**LLR 27 (1865).

With respect to the contention that the missing documents did not prevent the perfecting of the appeal, two things should be taken into account: (1) the motion to dismiss the appeal is not before this Court now; and (2) a complete record of what transpired in the lower court must be transmitted to the Court before a case on appeal can be considered. This means that the Court must first satisfy itself that the clerk of the trial court has done his duty in transcribing and sending forward the complete record before taking cognizance of what a party failed to do. In *Cooper v. Brapoh,* 16 LLR 297, 304 (1965), this Court said : "The clerk's certificate, made profert with his [appellee's] application, could under no legal reason be accepted in preference to the court's record; nor does this Court enjoy any color of legal right to order the original records before it except on a motion for diminution."

The court concedes the contention that in order for a
party to ask for a new trial and for the judge to give a
judgment there had to be a verdict, but there must be evidence of the verdict, and the fact that a verdict was mentioned in another document does not preclude the clerk of the trial court from including it in the certified record transmitted to this Court. The Judiciary Law requires
the clerk to take minutes of all trials of cases and record all
things ordered and done there; and take charge of all records and papers and give copies of them when required by Law. Rev. Code 17:3.13 (e, f). It also requires that all of the records must be sent to this Court. The verdict in any case is a document essential to the completeness of the records of the trial court. In *Marrschalk v. Republic, supra,* it was held that a case cannot be considered where one or more essential documents are absent from the record. Similarly in *Faber v. Republic,* 3 LLR 69 (1929), it was held that this Court will not entertain a case legally deficient in its record.

It should be observed that the absence of the documents from the record is due to the acting clerk of the lower court, who allegedly had the first set of records transcribed at the home of an attorney who was not counsel of record. It seems that after this Court ordered that the record be properly transcribed and transmitted through proper channels, these documents disappeared.

The appellee, in his resistance to the motion for diminution, alleged that neither an appeal bond nor a notice of appeal was filed, implying that a bill of exceptions was filed, yet the clerk's certificate does not state that a bill of exceptions was not filed, and the letter transmitting the record to this Court does not list the bill of exceptions among the documents sent to this Court. It is clear therefore that due to the negligence of the acting clerk of court, who has been dismissed, the record certified to this Court is incomplete.

From time immemorial this Court has held that a motion for diminution of record is the proper procedure for questioning the correctness of records transmitted to the Supreme Court on appeal, *Attia v. Rigby, 1* LLR 534
(1907); *Wolo* v. *Samobollah,* 21 LLR 22 (1972), because this Court takes cognizance only of matters of record certified and transmitted through the proper channel. *Hulsmann v. Johnson,* 2 LLR 20 (1909).

Where the record is incomplete, a motion for diminution will be granted, *Vietor & Huber v. Vines, 2* LLR 146 (1914), and where diminution will not cure the incompleteness of the record, as when the missing documents cannot be found, which is the situation in this case, the case will be remanded for new *trial, Henrichsen v. Moore,* 5 LLR 6o (1936), and especially where the loss is due to negligence of the clerk of court. *Larmouth v. Republic,* 13 LLR 23 (1957); *Williams v. Republic,* 14 LLR 602 (1961).

In view of the foregoing, the judgment of the lower court is reversed, and the case remanded for a new trial, costs to abide final determination. And it is hereby so ordered.

*Judgment reversed, case remanded.*