

SOUTH AFRICA / JUDGMENT

Dos Santos v S (A26/2014) [2017] ZAGPPHC 641; 2018 (1) SACR 20 (GP) (7 September 2017)

[2017] ZAGPPHC 641

COURT

North Gauteng High Court, Pretoria

BEFORE

HF Jacobs, CP Rabie

CASE / FILE NUMBER

A26/2014

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

Case

No: A26/2014

ate: 07/9/17

Reportable: No
In

the appeal between: ALDINA
DOS
SANTOS
Appellant
and
THE
STATE
Respondent

JUDGMENT

HF JACOBS, AJ:

[1] The appellant, a 28 year old Mozambican national, was charged in the Regional Court on three counts of trafficking in persons for sexual purposes (Count 1, 2 and 3),[1] 60 counts of rape (Count 4-64)[2] and one count of living from the earnings of sexual exploitation of a child (Count 65).[3] The appellant was convicted on Counts 1, 2, 3 and 65 and acquitted on the other charges. Her convictions on Count 1, 2 and 3 were taken together for purposes of sentence and she was sentenced to life imprisonment for those convictions on 11 April 2011. For her conviction on Count 65 the appellant was sentenced to twelve months imprisonment.

[2] This appeal is against the imposed life sentence. Counsel for the appellant submitted in limine that the appeal record is incomplete and that the appeal should for that reason not be heard. The defects in the appeal record exist as a result of the destruction by a fire of the court building in which the hearing took place. Not all the documentary evidence, notes of the practitioners and presiding officer and electronic recording could be recovered. The prosecution, the Regional Magistrate and the appellant's legal representatives attempted to reconstruct the record and they have been successful only to an extent. It is clear that further reconstruction of the record is not reasonably possible. Parts of the evidence in chief of the complainants, their cross- examination and the judgment on conviction remains missing.

[3] Our law requires that an appeal record must be adequate for consideration of the appeal. The record need not be a perfect recordal of everything that was said at the trial.[4] The question whether defects in an appeal record are so serious that a proper consideration of the appeal is not possible should not be answered in the abstract but rather on the nature of the defects and in particular what is available of the record and the nature of the issues to be decided on appeal.[5] In Schoombees[6] the Constitutional Court added to the principles distilled in Chabedi and stated that:[7]

"[19] It is long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal. An adequate record of trial court proceedings is a key component of this right. When a record 'is inadequate for a proper consideration of an appeal, .it will, as a rule, lead to the conviction and sentence being set aside'.

[20] If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is 'part and parcel of the fair trial process'. Courts have identified different procedures for a proper reconstruction, but have all stressed the importance of engaging both the accused and the State in the process. Practical methodology has differed. Some courts have required the presiding judicial officer to invite the parties to reconstruct a record in open court. Others have required the clerk of the court to reconstruct a record based on affidavits from parties and witnesses present at trial and then obtain a

confirmatory affidavit from the accused. This would reflect the accused's position on the reconstructed record. In addition, a report from the presiding judicial officer is often required.

- [21] The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty. When a trial record is inadequate, 'both the State and the appellant have a duty to try and reconstruct the record'. While the trial court is required to furnish a copy of the record, the appellant or his/her legal representative 'carries the final responsibility to ensure that the appeal record is in order'. At the same time, a reviewing court is obliged to ensure that an accused is guaranteed the right to a fair trial, including an adequate record on appeal, particularly where an irregularity is

apparent."

The adequacy of the record for purposes of this appeal against sentence must, therefore, be assessed accordingly. The appellant has not taken any further steps to supplement the record since she noted this appeal.

- [4] In view of the grounds advanced on behalf of the appellant in her challenge of the imposed sentence of life imprisonment it is necessary to refer to some of the principles underlying the crimes of which she had been convicted. During December 2000 member States of the United Nations signed the United Nations Convention against Transitional Organised Crime in Palermo, Italy ("the

Convention"). The Convention became known as the "Palermo Convention", and records and demonstrates the political will of member states to act as part of a global response to the global challenge against cross-border crimes. National means of member states often do not facilitate cross-border law enforcement especially against those who seek to exploit the openness and opportunities offered by globalisation. In order to defend human rights and defeat the forces of crime, corruption and trafficking in human-beings it was resolved to adopt a number of protocols to supplement the Convention. One of the protocols is titled "The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children". The other protocols are not relevant here.[8]

- [5] South Africa is a signatory to the Convention and on 13 December 2007 the President of South Africa assented to the Criminal Law (Sexual Offences and Related Matters Amendment Act), 32 of 2007 ("the Act") to give effect to the Convention and its abovementioned protocol in our country. The whole Act took effect on 16 December 2007 except Chapter 5 (sections 27-39) which took effect on 21 March 2008 and Chapter 6 (sections 40-53) which took effect on 6 June 2008. The Act was amended by the Prevention and Combating of Trafficking in Persons Act 7 of 2013 on 9 August 2015. The appellant's conviction and sentence took place before the advent of Act 7 of 2013 and the appeal should be considered in that context.

[6] Sections 70 and 71 of the Act read as follows:

"70. Application and interpretation - (1) Pending the adoption of legislation in compliance with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Trans-National Organized Crime (signed on 14 December 2000) and the repeal of this Part, the transitional provisions in this Part relating to the trafficking in persons for sexual purposes are provisionally provided for in partial compliance of our international obligations and to deal with this rapidly growing phenomena globally.

(2) For purposes of this Part -

- (a) 'commercial carrier' includes a company, or the owner, operator or master of any means of transport, that engages in the transportation of goods or people for commercial gain; and
- (b) 'trafficking' includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of -

- (i) a threat of harm;

- (ii) the threat or use of force, intimidation or other forms of coercion;

- (iii) abduction;

- (iv) fraud;

- (v) deception or false pretences;

- (vi) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or

- (vii) the giving or receiving of payments, compensation, rewards, benefits or any other advantage, for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic, and 'trafficks' and 'trafficked' have a corresponding meaning.

71. Trafficking in persons for sexual purposes.- (1) A person ('A') who trafficks any person ('B'), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes.

(2) A person who -

- (a) orders, commands, organises, supervises, controls or directs trafficking;

- (b) performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating

in trafficking; or

- (c) incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause, bring about, promote, perform, contribute towards or participate in trafficking,

is guilty of an offence of involvement in trafficking in persons for sexual purposes.

- (3) For the purpose of subsection (1), 'consent' means voluntary or uncoerced agreement.

- (4) Circumstances in which B does not voluntarily or without coercion agree to being trafficked, as contemplated in subsection (3), include, but are not limited to, the following -

- (a) where B submits or is subjected to such an act as a result of any one or more of the means or circumstances contemplated in subparagraphs

- (i) to (vii) of the definition of trafficking having been used or being present; or

- (b) where B is incapable in law of appreciating the nature of the act, including where B is, at the time of the commission of such act

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- (i) asleep;

- (ii) unconscious;

- (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgment is adversely affected ;

- (iv) a child below the age of 12 years; or

- (v) a person who is mentally disabled.

- (5) A person who has been trafficked is not liable to stand trial for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked.

- (6)

- (a) A commercial carrier commits an offence if the carrier brings a person into or removes a person from the Republic and, upon entry into or departure from the Republic, the person does not have the travel documents required for lawful entry into or departure from the Republic.

- (b) A commercial carrier is not guilty of an offence under paragraph

- (a) if-
- (i) the carrier had reasonable grounds to believe that the documents that -the person has are the travel documents required for lawful entry into or departure from the Republic by that person;
 - (ii) the person possessed the travel documents required for lawful entry into or departure from the Republic when that person boarded, or last boarded, the means of transport to travel to or from the Republic; or
 - (iii) entry into the Republic occurred only because of illness of or injury to a child or adult on board, stress of weather or other circumstances beyond the control of the commercial carrier.
- (c) A commercial carrier is, in addition to any offence under this section, liable to pay the costs of the trafficked person's care and safekeeping and return from, the Republic.
- (d) A court must, when convicting a commercial carrier of an offence under this section, in addition order the commercial carrier concerned to pay the costs contemplated in paragraph (c)."
- [7] The Regional Magistrate's full judgment on sentence forms part of the record. So does the evidence presented

after conviction for purposes of sentence by both the State and the appellant. That evidence includes a written psycho-social report compiled by a probation officer in the employ of the Department of Health and Social Development of the Gauteng Provincial Government. The facts recorded by the report tally with those gleaned from the evidence of the appellant which also forms part of the appeal record. The appellant's version was that she met the three complainants on the beach near Maputo in Mozambique where the complainants worked as prostitutes. They told her that they wanted to work as prostitutes in South Africa. The appellant's version is that she then agreed to accommodate the complainants as prostitutes in Pretoria where she resided. The appellant had a hair salon in the central business district of Pretoria where she also sold clothing. From the evidence it is clear that the appellant knew the complainants from Mozambique. The appellant commuted between Pretoria and Mozambique regularly to visit and sell clothing. When she returned from Mozambique after one of her trips and while the appellant was in Pretoria, one of the complainants phoned the appellant and said that they were near Komatipoort. The appellant testified that she then asked a friend of hers to transport the complainants to Pretoria. When they arrived in Pretoria the three complainants stayed with the appellant in her flat in Silver Lakes, east of Pretoria. The flat was too small and the appellant decided to rent a 3 bedroom house in Moreleta Park, a short distance from her flat. A brothel was kept at that house. The appellant was arrested and some of the complainants were taken into custody there. The Regional Magistrate rejected the appellant's evidence on grounds of credibility. Her rejected evidence only differed from that of the complainants in respect of the complainant's alleged prostitution in Mozambique and the collection of the complainants near Komatipoort. The

balance of the evidence that led to the appellant's conviction (which she never challenged on appeal) was based to a large extent on circumstantial evidence. The incomplete record is therefore, in my view, not so serious that a proper consideration of the appeal is not possible. On the contrary, those aspects of the case relevant to sentence are fully recorded and we were during argument not alerted to any specific evidence that should or have been taken into account for purposes of sentencing by the Court a quo that does not appear from the 953 page record. The evidence of the complainants was accepted. Their evidence was that they did meet the appellant in Mozambique where she promised them work in her hair salon and an opportunity to study while working there. They were looking for a better life. She then arranged for them to come to South Africa and the appellant in person collected all three of them at or near Komatipoort. The complainants testified that they worked for the appellant at her hair salon in Pretoria for a few days. They were forced to smoke cannabis and to have sexual intercourse with several men daily. They said they were not paid for doing so.

- [8] The appellant's cross-examination shows that she operated a brothel for financial gain. There is no evidence that suggest that the appellant was in need. On the contrary, she seems to have led a rather affluent lifestyle. Counsel for the appellant challenged the correctness of the imposition of the sentence of life imprisonment by submitting that the Regional Magistrate erred by taking into account the commission of the rapes stated in the charge sheet as if the appellant had been convicted of those crimes while she had been acquitted in that respect. It was proposed by counsel for the appellant that the rape (or the fact that sexual intercourse had taken place) should not be taken into account for purposes of sentence. I do not agree. The crime of trafficking defined by section 70(2) of the Act includes commission of an act that constitutes the "supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic" by means of what is stated in section 70(2)(b)(i)-(vii) "for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person ... ". The Regional Magistrate took into account the sexual intercourse the complainants were forced to have during their sojourn in Pretoria while the appellant harboured them and concluded that the complainants had been "trafficked" for a sexual purpose as defined by section 70(2)(b) of the Act. The appellant was convicted and sentenced for trafficking of persons

for sexual purposes and not for having committed rape. There is no merit in the submission.

- [9] The Regional Magistrate, correctly in my view, concluded that the appellant committed these crimes for financial gain or, to use the words of the Magistrate, "out of pure greed". When regard is had to the totality of the evidence one has to conclude that the appellant was not only instrumental in securing the

presence of the complainants in South Africa, but that she was also responsible for keeping them here (harbouring them) under threat of prosecution as illegal immigrants. They were vulnerable and exploited by the appellant for they had no permission to be in South Africa, of tender age and desperate for work and an income. They were forced, against their will, to perform sexual acts,

some occasions eight times a day, on the instructions of the appellant. Before I turn to the personal circumstances of the appellant, a brief reference ought to be made to the complainant's (and the other females kept by the appellant because there were several others who did not testify a quo). They were not allowed to leave the house they were kept in unaccompanied by the appellant. They received little food, no money and very little clothing. Some of them arrived at the appellant's house only with the clothes they were wearing. Soon after

their arrival the appellant arranged for a photographer to come to her flat. The photographer came on a second occasion to the house in Moreleta Park. On both occasions he photographed the complainants while they were scantily dressed and in the nude. The complainants were told that the photographs were taken to advertise them on the Internet. Soon after the complainants started working as prostitutes at the appellant's brothel, the appellant told them that she received complaints from her clients that the complainants did not perform as expected. She then showed the complainants pornographic videos, demonstrated to them by performing sexual intercourse on her boyfriend and threatened them with assault should further complaints be received. The appellant carried on her belt an instrument

described in evidence as something that resembles a whipping chain. She used that instrument to assault the complainants when she

considered it necessary. The evidence shows that the complainants were under constant threat, lived in fear and were subjected to treatment that can only be described as inhumane.

[10] The appellant is one of eight children of Mozambican nationals who

have been residing in South Africa since the early 1990's. She has three children. Two of her children live in Mozambique with their aunt and one child with the child's paternal grandmother in Cape Town. Both the appellant's parents were interviewed by the probation officer and both expressed their amazement that the appellant committed the crimes. Counsel for the respondent mentioned during argument that a person who commits crimes of the kind the appellant had been convicted of may well have been the victim of similar treatment. There is no evidence to even suggest that. The interviews the probation officer had with the appellant's parents show the exact opposite. I can find no evidence that justifies a finding that the personal circumstances of the appellant constitute a mitigating factor or compelling reason to interfere with the imposed sentence. Crimes of the kind under consideration leave no room for maudlin sympathy in addition to the well-established principles applicable during sentencing, all of which the Regional Magistrate observed.

[11] A feature of this case is that the abuse of these young complainants (and the appellant's other victims) was the result of an elaborate and organised criminal enterprise. The record shows, and the Regional Magistrate found, correctly in my view that several persons participated in the facilitation of the crimes. First, there were the desperate young females in Mozambique who were lulled into believing that they would enjoy a better life in South Africa under the wing of the appellant. They were easily misled and taken from their homes under false pretences because they were exposed to elements responsible for corruption

and the social difficulties associated therewith. One of the complainants to whom I will refer as Ms J, returned to Mozambique before the appellant's arrest. Ms J returned because she refused to perform all the sexual acts demanded by the appellant's elderly male clients. She was whisked away from the appellant's establishment and transported by taxi to Mozambique. She was given a passport containing the photograph of another individual to pass through immigration counters at the border posts. The passport was, when she was dropped off in Maputo, taken back by the taxi driver. After she reported her ordeal to her boyfriend and family in Maputo (her boyfriend gave evidence in the Court a quo) they went to the Mozambican Police to report the incident. After having reported the incident, the policeman to whom it was reported demanded payment of money from Ms J and her relatives and boyfriend before he would conduct an investigation. The investigation only later followed after Ms J and her boyfriend contacted a senior police official in Mozambique who then, in collaboration with the South African Police Service, secured the appellant's prosecution. Secondly, there clearly exists an illicit infrastructure to transport these young females across the border into South Africa under escort. The mere existence of such infrastructure justifies the inference that the crimes of which the appellant had been convicted comprise but a fraction of the criminal activity the Convention and its Protocol aim to address. Thirdly, transport of the complainants to and from South Africa demonstrates, as the Regional Magistrate correctly found, involvement of corrupt government officials. The above- mentioned circumstances create a climate that lends itself to the commission of the crimes under consideration and collectively constitute compelling reasons for imposing harsh sentences in appropriate cases. This is, in my view, an appropriate case.

- [12] The Regional Magistrate imposed the prescribed minimum sentence, the possibility of which the appellant was alerted to at the commencement of the proceedings a quo. In my view no compelling reasons exist to interfere with the imposed sentence of life imprisonment for the appellant's convictions on Counts 1, 2 and 3.
- [13] I would propose that the appeal be dismissed and that the sentence of life imprisonment imposed on the appellant for her convictions on Counts 1, 2 and 3 be confirmed.

H F JACOBS

ACTING JUDGE OF THE HGH COURT

PRETORIA

I agree, and it is so ordered.

C P RABIE

JUDGE OF THE HIGH COURT

For the appellant:

Advocate A Tompson instructed by

Legal Aid South Africa,

Pretoria Justice Centre.

For the respondent:

Advocate A van Deventer,

Director of Public Prosecutions,

Pretoria.

- [1] "Contravening the provisions of section 71(6)(a) read with sections 1, 56, 57, 58, 59, 60, 61, 70, 71(3), 71(4) and 71(5) of Act 32 of 2007. Also read with sections 256 and 261 of the Criminal Procedure Act 51 of 1977, Trafficking in Persons for Sexual Purposes."
- [2] " Rape- contravening (sic) of the provisions of section 3 read with section 1, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007. A/so read with sections 256 and 261 of the Criminal Procedure Act 51 of 1977 read with the provisions of sections 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended."
- [3] "Sexual exploitation of children: Living from the earnings of the sexual exploitation of a child - contravening the provisions of section 17(5) read with section 1, 56(5), 57, 58, 59, 60 and 61 of Act 32 of 2007. Also read with sections 256 and 261 of the Criminal Procedure Act 51 of 1977."
- [4] S v Chabedi 2005
- (1) SACR 415 (SCA).
- [5] S v Chabedi supra at par [6].
- [6] S v Schoombee 2017 JDR 0055 (CC) at 28-30.
- [7] S v Schoombee at paras [19]-[21].
- [8] Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition Supplementing

the United Nations Convention Against Transnational Organised Crime; and the Protocol Against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention Against Transnational Organised Crime.

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