SOUTH AFRICA / JUDGMENT

Mpaku v S (CA31/2018) [2024] ZANWHC 184 (11 July 2024)

[2024] ZANWHC 184

COURT
North West High Court, Mafikeng

BEFORE
DJAJE, SMIT

CASE / FILE NUMBER
CA31/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
APPEAL
CASE NO: CA31/2018

Reportable:	YES / NO Circulate to Judges: YES / NO Circulate to Magistrates: YES / NO Circulate to Regional Magistrates: YES / NO In
the matter between:	GODFREY KEFILWE MPAKU Appellant And THE STATE Respondent DJAJE AJP AND SMIT AJ
Heard:	21 JUNE 2024

Delivered:	This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 11 JULY 2024

ORDER

1. The appeal against conviction and sentence is upheld.
2. The conviction and sentence are set aside.
3. The immediate release of the appellant is ordered.

JUDGMENT

DJAJE AJP

[1] The appellant appeared before the Regional Court on a charge of rape. He was convicted and sentenced to life imprisonment on 16 September 2009. He now brings this appeal against conviction and sentence relying on his automatic right of appeal.

[2] The appellant firstly seeks condonation for the late filing of the appeal due to the challenges experienced in obtaining the full record of proceedings. There is a chronology of events provided by the appellant in his attempt to obtain the complete record of proceedings as follows:

· On 22 November 2012 the appellant personally requested the record from the clerk of the court, but it was not forthcoming.

· 27 August 2013 the legal aid attorney assisting the appellant wrote to the clerk of the court requesting the record but no response was received and several follow up letters was sent to the clerk of the court.

· On 29 October 2015 and 11 February 2016, the appellant was requisitioned by his attorney for appearance at court but that did not happen. Subsequent to that, the matter was postponed several times for the record.

· On 27 October 2016 the appellant's attorney was provided with an incomplete record and the matter was postponed to 28 November 2016 for the full record to be provided.

· On 28 November 2016 the senior interpreter informed the court that the presiding officer who heard the matter was retired, and his notes were destroyed. The matter was postponed once again to 12 December 2016 to confirm with the retired Magistrate if his notes were available of whether he could reconstruct the record.

· On 12 December 2016 the Senior Prosecutor informed the court that the retired Magistrate had indeed destroyed his notes and was not able to assist with the reconstruction.

· The appellant filed his appeal on 29 March 2018 against conviction and sentence.

[3] The delay for the late filing of the appeal was clearly not caused by the appellant as he had been attempting to obtain the record of proceeding with no success. There is no reason why the condonation for the late filing of the appeal should not be granted.

[4] In considering the appeal before us the record of proceedings is crucial and unfortunately, we were not provided with the full record. In this matter the only portion of the record that is available is the plea of not guilty to the charge by the appellant and the evidence of the medical doctor who examined the complainant. There is no evidence of other state witnesses including that of the appellant. The judgment on conviction and sentence is also not available.

[5] During trial the state prosecutor was one Mr Ramushini and the appellant was represented by Mr Mongwe. There is no indication from the explanation provided by the appellant in his affidavit if there was any attempt to get their notes to have the record of proceedings reconstructed. In any event they would not be able to assist with the judgment on conviction and sentence.

[6] It was submitted on behalf of the appellant that this court is not able to consider the appeal without the complete record of proceedings. Further that any contradictions or inconsistencies in the state case cannot be determined in the absence of the evidence of other witnesses who testified. The appellant argued that it will be difficult for the appeal court to determine whether there was any misdirection committed by the trial court in evaluating the evidence. It is the appellant's case that his right to a fair trial which includes a right of appeal has been infringed as the incomplete record makes it difficult to consider the appeal. The submission was therefore made that the conviction and sentence should be set aside.

[7] The respondent conceded that the record of proceedings was indeed incomplete and that the conviction and sentence be set aside.

Law

[8] Section 35(3)(o) of the Constitution of the Republic of South Africa Act 108 of 1996 states that:

"Every accused person has a right to a fair trial, which includes the right-

(o) of appeal to, or review by, a higher court."

[9] In Sebothe v S 2006 (2) SACR 1 (T) at para 8 it was held that:

"The Constitution of the Republic of South Africa, 1996, provides, inter alia, through section 35, that an accused person has a right to a fair trial, which includes a right to appeal or review. If the appeal court or the review court is not furnished with a proper record of the proceedings, then the right to a fair hearing of the appeal or review is encroached upon and the matter cannot properly be adjudicated."

[10] The issue of an incomplete record was dealt with by the Constitutional Court in S v Schoombee and Another 2017 (2) SACR 1 (CC) as follows:

"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."

[11] It is not in every case that the conviction would be set aside as a result of an incomplete record. In S v Chabedi 2005 (1) SACR 415 (SCA) at par 5 & 6 the following was decided that:

"[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the court of appeal. If the record is in 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 proper consideration of the appeal, not that it must be a perfect record of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand in which event a verbatim

record is impossible (see e.g. S v Collier 1976(2) SA 378 (C) 379A-D and S v S 1995(2)SACR 420(T) 423b-f).

[6] 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."

[12] In this matter it appears that the proceedings were recorded mechanically however certain portions of the record are completely missing, not that they are inaudible.

[13] The following parts of the record are missing:

13.1 the entire evidence of all the state witnesses whose evidence is crucial in relation to what transpired on the date of the incident;

13.3 the evidence of the appellant;

13.4 the cross examination of the appellant;

13.5 the entire judgment on conviction and sentence.

[14] This appeal is against both conviction and sentence. It is important to have all the evidence on record and the findings of the court a quo in relation to credibility of witnesses and contradictions. The available evidence on record is that of the doctor and cannot assist this court in any way to understand what transpired between the appellant and the complainant.

[15] The absence of the evidence by most of the witnesses and the judgment of the court a quo plays a vital part in the determination of the appeal. The evidence that is available on the record does not provide a clear picture as to what transpired in this matter and whether there was any misdirection by the court a quo. The appellant's right to a fair trial which include the right to appeal has been encroached upon due to the unavailability of the complete record of proceedings. On that basis alone, the appeal cannot be considered and the conviction stands to be set aside.

[16] This matter was heard and finalised on 16 September 2009 and the appellant has been serving sentence since then and is still serving sentence. In total the appellant has been serving sentence

for almost fifteen years which in our view is a long period which was considered as a factor for not ordering that the trial be heard de novo as argued by the respondent.

Order

[17] Consequently, the following order is made: -

J T DJAJE

ACTING JUDGE PRESIDENT

NORTH WEST DIVISION, MAHIKENG

I AGREE

D SMIT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING 21 JUNE 2024 DATE OF JUDGMENT: 11 JUNE 2024 COUNSEL FOR THE APPELLANT: ADV LAYNE QUILLIAM COUNSEL FOR THE RESPONDENT: ADV A MZAMO

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