

SOUTH AFRICA / JUDGMENT

Ndlovu v S (A778/2016) [2018] ZAGPPHC 883 (2 August 2018) [2018] ZAGPPHC 883

COURT

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla, Ntloko-Gobodo

CASE / FILE NUMBER

A778/2016

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Source record**IN THE HIGH COURT OF SOUTH
AFRICA****GAUTENG DIVISION, PRETORIA****CASE****NO: A778/2016****2/8/2018**

In the matter between:

WALTER BILLY NDLOVU

Appellant

and

THE STATE

Respondent

JUDGMENT**SARDIWALLA J****INTRODUCTION:[1]**

- [1] This is an appeal against sentence only. On 6 September 2005 the appellant appeared in the Regional Court for the Regional Division of Limpopo, held at Mhala on charges of robbery with aggravating circumstances and possession of a firearm without a licence. The appellant pleaded guilty in a section 112 (2) statement. The State accepted the facts on which the appellant pleaded guilty and was sentenced to an effective period of 48 years and can only be considered for parole after having served a period of 32 years.

- [2] The application for leave to appeal was heard pursuant to the provisions of section 3098 (2) of the Criminal Procedure Act of 1977 due to the magistrate no longer being available.

ISSUES ON APPEAL

- [3] The issue is whether the sentence imposed by the magistrate was disturbingly disproportionate. However, the appellant in its heads of argument stated that the address on mitigation, the State's address on aggravation and the judgment on sentence by the magistrate were not transcribed. The appellant therefore contends that the incomplete record of the sentencing proceedings prejudices the appellant's rights to appeal and that the matter be remitted to the court a quo for reconsideration of the sentence.

LAW AND ANALYSIS

- [4] The issue of re-construction of court records has been the subject of numerous judgments over the years.

- [5] In *S v Chabedi* 2005 (1) SACR 415 (SCA) page 417 Brand JA states the following on the issue:

"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 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 recordal 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. "

- [6] In *S v Sebothe and Others* 2006 (2) SACR 1 (T) in para [8] the full court of this division added a reference to the Constitution as follows:

"[8] The Constitution of the Republic of South Africa, 1996, provides, inter alia, through s 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 proceedings, then the right to a fair hearing of the appeal or review is encroached upon and the matter cannot properly be adjudicated. In that regard, the only avenue open to protect the right of the accused or the appellant is to set aside those proceedings if it is impossible to reconstruct the record.

- [7] In *S v Gora and another* 2010 (1) SACR 159 (WCC) it was stated:

"That the case underlined that the reconstruction process is part and parcel of the fair trial process and includes the following elements: the accused must be informed of the missing portion of the record, of the need to have it reconstructed and of his right to participate in the process. It was further held that once it becomes apparent that the record of the trial is lost, the presiding officer should direct the clerk of the court to inform all the interested parties, being the accused or his legal representative and the prosecutor, of the fact of the missing record and arrange a date for the parties to re- assemble in an open court in order to jointly undertake the proposed reconstruction".

[8] In *S v Khoza* 2010 JDR 1100 (KZP) 2010 JDR 1100 p1 Van Zyl J and Gcaba AJ stated that:

"the state of the present appeal record is also symptomatic of a malaise which is increasingly manifesting itself in this Court. It has become the exception during criminal appeal hearings when there is not at least one, and often more, appeal matters which cannot be finalized because of defects or omissions in the appeal records. This necessitates the return of the records to the courts of origin for rectification or reconstruction, resulting in unnecessary delays, inconvenience, a waste of this Court's resources and potential prejudice to the appellant involved.

Responsibility for the preparation and furnishing of a complete and accurate appeal record lies with the Clerk of the Court where the appeal originates. This much is clear from the provisions of section 309(2) of the CPA which provides that "An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court".

[9] In *S v Banyane*; *S v Moila* 1999 (1) SACR 622 (W) Nugent J remarked with reference to the Rules of the Magistrates' Courts that Rule 67 placed an obligation upon the Clerk of the Court to prepare a transcript of the record where an appeal was noted and that the clerk was not absolved of that obligation, even where the appeal was noted out of time. Accordingly, in my view the primary responsibility for preparing and providing a complete and satisfactory criminal appeal record for use by this Court, lies with the Clerk of the Court where the appeal originates.

[10] *S v Zenzile* [2009] JOL 24341 (WCC) Yekiso J found :

"What emerges from the background material set out in the preceding paragraphs is that the cassette in which is recorded the whole of the evidence in the State's case is missing; that the clerk of the court filed an affidavit stating that the missing portion of the record could not be found despite diligent search; the magistrate reconstructed the missing portion of the record using his notes made during the course of trial as a source for such reconstruction; that the record was reconstructed entirely in the magistrate's chambers; there is no indication, on basis of the record forwarded to this Court, if the accused was informed of the missing portion of the record and of the need to have the missing portion of the record reconstructed; there is no indication, on basis of the record before the court, whether the accused was informed of his rights arising from the need to have the missing portion of the record reconstructed.... What the magistrate should have done, in circumstances such as in the matter before us, once he had been informed by the clerk of the court that a portion of the record could not be found despite diligent search, is the following: to direct the clerk of the court to inform all the interested parties, being the accused or his legal representative and the prosecutor of the fact of the missing record; arrange a date for the parties to re-assemble, in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate to place it on record that the parties have re-assembled for purposes of the proposed reconstruction; the parties to express their views, on record, that each aspect of reconstruction accords with their recollection of the evidence tendered at trial; and ultimately to have such reconstruction transcribed in the normal way. Once this process has been followed, none of the parties can cry

foul that his rights have been trampled on."

[11] In *David's v S Joi* 28983 (WCC) A 571112 Bozalek J held:

"Reconstruction of a missing record is part and parcel of the fair trial process. The accused must be informed of the missing portion of the record, of the need to have it reconstructed and of his right to participate in the process. Once it becomes apparent that the record of the trial is lost, the presiding officer should direct the clerk of the court to inform all the interested parties and arrange a date for the parties to re- assemble in an open court in order to jointly undertake the proposed reconstruction.

[12] In *S v M Sibelewana* WCC A401/2011 Judge Steyn held at page 10 as follows:

"The appellant or his representative carries the final responsibility to ensure that the appeal record is in order, but the courts have commented that the responsibility for ensuring that all copies of the appeal record are in all respects correct before the court is not limited to the appellant and his attorney. As noted, the presiding officer, the clerk of court, the operators of recording machines, all have duties in regard thereto. However, the attorney is entrusted with the final responsibility of ensuring that the appeal record is correct."

[13] There is no indication, on basis of the record forwarded to this Court, if the accused was informed of the missing portion of the record and of the need to have the missing portion of the record reconstructed; there is no indication, on basis of the record before the court, whether the accused was informed of his rights arising from the need to have the missing portion of the record reconstructed. There is also no indication that the magistrate or the clerk of court were directed to reconstruct the record or that any of the relevant parties were informed to make a contribution to reconstruction of the record. Further be that as it may, in the light of the thirteen year delay since the trial it is most improbable that the prosecutor, attorney, and the accused would be able to make any meaningful contribution to reconstruct the record and thus a referral back to the Magistrate's Court for further reconstruction was not only futile but would have added to the already excessive delay.

[14] In *S V Zuma and Others* [1995] ZACC 1; 1995 (1) SACR 568 (CC) at para 16, Kentridge AJ highlighted that in the present constitutional era it was one of the functions of the Court of Appeal hearing a criminal appeal to enquire into the fairness of the trial and to ensure that the accused's right to a fair trial was fulfilled, particularly where, as in the present matter, an irregularity appeared *ex facie* the record of the proceedings. This, in my view, incorporates the accused right to contribute to and challenge a reconstructed record.

[15] It is trite that sentencing remains pre-eminently within the discretion of the sentencing court. In *Makela v The State* 2012

(1) SACR 431 (SCA) para [9], Bosiello JA stated the following:

"This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have been distilled and set out in many judgments of this Court. See *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G; *S v Pieters* 1987 (3) SA 717 (A) at 727F-H; *S v Malgas* 2001

(1) SACR 469 (SCA) para [12]; *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) para [11]; and *S v Le Roux & others* 2010

(2) SACR 11 (SCA) at 26b-d. '

[16] It was held in *Sv Salzwedel* 1999 (2) SACR 586 (SCA) that:

"An appeal Court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion

reasonably."

[17] Ex facie the incomplete record this Court cannot determine the factors that the trial judge into account when he sentenced the appellant. There is no indication of any previous convictions which is a material factor. There is no evidence or reasoning before this Court to determine whether any substantial and compelling circumstances existed or not and whether these were taken into due consideration. There is no evidence on sentencing that must be attached to give due weight to the gravity of the crimes for which the appellant has been convicted to determine whether the sentences were 'disturbingly appropriate'. I am unable to find that the trial record for the purposes of an appeal against sentence is adequate.

[18] The attack against the sentence imposed against the appellant, which has some merit, in our considered view, is that the cumulative effect thereof [48 years' imprisonment], could arguably be perceived to be too heavy in light of the accused's plea of guilty.

[19] The power of this Court of Appeal to interfere with the imposed sentence is derived from Section 322(2) of the CPA, which states that:

"Upon an appeal under section 316 or 3168 against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial."

[20] Having considered both arguments before this court, regarding the incomplete record and in light of the constitutional imperative that an accused is entitled to a fair trial which extends to his right to appeal, I am of the view that the proceedings are not in accordance with justice and this Court cannot exercise its judicial powers correctly.

ORDER

[21] It is ordered that:

1. The appeal against sentence is upheld and the sentence is set aside.
2. The matter is remitted to the court a quo for reconsideration of sentence.

SARDIWALLA J

JUDGE OF THE HIGH COURT

I agree

NTLOKO-GOBODO AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing

: 30 July 2018

Date of judgment

: 02 August 2018

Counsel for the State

: Adv.: J van der Westhuizen

Counsel for the Appellant : Adv.: A THOMPSON

[1] This judgment deals with the appeal against the judgment in the court a quo. It therefore proceeds on the premise that the reader is familiar with that judgment, the full details of the individual charges against the accused as per the indictment and the categorisation of the charges adopted by the learned Magistrate. In the interest of brevity evidence led before the court a quo will not be repeated in this judgment in any great detail unless material to the conclusions reached. Readers of this judgment are referred to the judgment of the court a quo and the record if any additional details are required. To facilitate reading, the same terminology as adopted in the court a quo will be followed to ensure consistency and hopefully ease of understanding.

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Prepared on 9 October 2026 · Esheria