

SOUTH AFRICA / JUDGMENT

Nhlapho v S (A196/2017) [2018] ZAGPPHC 880 (2 August 2018)

[2018] ZAGPPHC 880

COURT

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla, Ntloko-Gobodo

CASE / FILE NUMBER

A196/2017

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE NO: A196/2017

2/8/2018

In the matter between:

MANDLENKOSI

NHLAPHO

Appellant

and

THE

STATE

Respondent

Delivered on: 3 August 2018

JUDGMENT

SARDIWALLA J

INTRODUCTION:[1]

- [1] This is an appeal against conviction and sentence. The appellant appeared in the Regional Court Carolina on charge of murder. The appellant was found guilty and sentenced to ten years imprisonment without the option of a fine.
- [2] On 22 November 2013 the application for leave to appeal was refused. On 25 November 2013 the appellant filed a petition to this Court. The matter was referred back to the Court in Bethal Middelburg and Carolina on 11 April 2016 to reconstruct the incomplete record. Leave to appeal was granted on 15 February 2017 on the fact that the accused has a right to a fair trial which includes
- his right to appeal.
- [3] In an affidavit dated 7 December 2016 the presiding Magistrate B.W Mene stated that it was impossible for him to reconstruct the record as his trial notes together with other cases were misplaced during his relocation to the Eastern Cape Regional Division. Further that there is no secondary evidence that can be relied on to reconstruct the record.
- [4] A period of three years has lapsed from the time of the conviction to the granting of the leave to appeal. This was apparently due to the fact that the record was sent to the magistrate to reconstruct. It remained under his control for that purpose until the filing of his affidavit.
- [5] According to the appellant's heads of argument, supplemented by his address to the court, the record containing the evidence of the trial was incomplete. Further that it was not due to the fault of the appellant who had timeously filed for leave to appeal and the petition. This is not in dispute.

ISSUES

ON APPEAL

- [6] The State in its heads of argument confirmed that the evidence of the appellant, accused three and the judgment by the magistrate were not transcribed. The State conceded that in light of the incomplete record and the case law on the subject that the appeal should succeed.

LAW AND ANALYSIS

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

[8] 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. "

[9] In *S v Sebotho 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.

[10] 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."

[11] 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".

[12] In *S v Banyane; S v Moila* 1999 (1) SACR 622 (WJ 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.

[13] *S v Zenzile* {20091 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

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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."

[14] In *David's v S Jo/ 28983 rweeJ 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.

[15] In *S v M Sibelewana* wee A401/2011 Judge Stevn 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."

[16] From the evidence it would appear that none of the relevant parties made any contribution to reconstruct the record. Be that as it may, in the light of the three year delay since the trial it is 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 unreasonable delay.

[17] The Magistrate as is evident from an affidavit filed could not reconstruct the record and also failed to assemble all the role players involved in this process to assist. Ms E. Nthombeni the Evander appeals clerk indicated that the prosecutor's notes and statements have been stripped from the police docket and hence there is no secondary evidence available to reconstruct the record.

[18] 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.

[19] Having considered both arguments before this court 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

[20] It is ordered that:

1. The appeal is upheld and the conviction and sentence is set aside.
2. The matter is remitted to the DPP for further consideration.

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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