

SOUTH AFRICA / JUDGMENT

Nkhahle v S (A68/2020) [2020] ZAFSHC 246; 2021 (1) SACR 336 (FB) (7 December 2020) [2020] ZAFSHC 246

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue, Loubser

CASE / FILE NUMBER

A68/2020

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IN

**THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN**

Case

No. A68/2020

In

the appeal of:

**MATHATSILE
EMMANUEL NKHAHLE**
Appellant
and
**THE
STATE**
Respondent

CORAM:

**DAFFUE ADJP
et LOUBSER J
HEARD**

ON:

7 DECEMBER 2020

JUDGMENT

BY: DAFFUE ADJP

DELIVERED ON: 7 DECEMBER 2020

I

INTRODUCTION

- [1] The appellant, Mr ME Nkhahle and his co-accused, Mr BP Morake were arrested on 4 & 3 June 2017 respectively and charged in the Regional Court, held at Ventersburg on two counts of robbery with aggravating circumstances allegedly committed on 3 June 2017.
- [2] The matter was swiftly dealt with in the Regional Court. On 17 August 2017 the appellant and his co-accused pleaded not guilty, but less than a month later, to wit on 8 September 2017, both were convicted on the two counts. On the same day they were sentenced to 12 years' imprisonment in respect of each count. The court a quo ordered that the sentences should run concurrently.
- [3] Appellant filed an application for condonation and leave to appeal against the convictions and sentences, but on 23 February 2018 the applications were refused. On 30 January 2020 and on petition to the High Court, two judges of this division granted leave to appeal to appellant in respect of both the convictions and sentences imposed upon him.
- [4] The appeal was set down for hearing on 24 August 2020, but removed from the roll by the Bloemfontein office of Legal Aid SA on 15 July 2020 due to an incomplete record. It did not reflect the plea proceedings or any of the evidence of witnesses who testified before the court a quo. Only the judgment and sentence were transcribed.
- [5] The appeal has again been set down for hearing on 7 December 2020, but the court and the parties eventually faced the same problem: an incomplete record. I shall revert hereto soon.

II THE PARTIES

- [6] Appellant was represented in the proceedings before us by Mr JD Reyneke of the Bloemfontein Justice Centre of Legal Aid SA. Adv J Botha represented the Director of Public Prosecutions, Free State.

III THE LOST RECORD

- [7] As mentioned, the transcribed record does not contain the plea proceedings, any rulings made and the evidence led at the hearing.

The proceedings of 25 August 2017, when the matter was postponed to 1 September 2017, have been recorded. However, there is no transcription of the proceedings of 1 September 2017 although the proceedings were allegedly mechanically recorded according to the court a quo's

handwritten notes. The matter was postponed to 8 September 2017 according to the handwritten notes and on that day (and not 9 September 2017 as the transcription reflects) judgment was delivered and the previous convictions proved against Mr Morake. The court a quo was addressed on sentence on that day where after the sentences were imposed. There is also no transcription of the application for leave to appeal proceedings in the court a quo.

[8] The DCRS Clerk (CRT Clerk) stated as follows, and I quote the full statement dated 1 August 2019 verbatim:

"I Vuyiswa Ntetha with a persal number 22572520 declare as follows on the 23rd February 2018 I was working in Ventersburg as a CRT Clerk. I tested the machine and listen to the recording whether its audible as my daily routine, proceeded to enter cases for the day. There was an application for leave to appeal case number SHVB 22/2017 of which it was recorded from the appearances to finalization. Since 2007 working as a DCRS Clerk (CRT Clerk) I have been doing my daily routine as expected from me. They have never been any complain about the cases I've recorded as I'm doing my Job to satisfactory. When Ms Wolmarans (Supervisor) informed me about this case, I enquired from the Ventersburg Court Manager Mr Mohlakwa, He explain to me that since the CRT Machine was installed there was no server Only now this month (July 2019) the server was installed. I was not made aware of this We were not suppose to use the machine while theres not backup (server)."

[9] On receipt of the appellant's petition the Senior Administration Officer of the Magistrate's office in Welkom addressed a letter to the court a quo on 15 July 2019 and similar letters dated 12 August 2019 to the prosecutor, Mr R Lekhetho and Legal Aid attorney, Mr Fourie in order to assist with the incomplete record. I quote:

"I have searched the case on the CMM with the case number, date, name of the accused, Presiding Officer, the name of the Court Clerk and Prosecutor but I cannot find it as well. I even engaged Mr Mohlakoana the Office Manager of Ventersburg MC for assistance and he only provided me with the recordings of the attached transcripts."

The transcripts referred to are those mentioned supra.

[10] The Regional Magistrate wrote on 2 August 2019 and inter alia stated the following:

"I have searched my cupboard and office several times but cannot find these notes..."

I am unable to reconstruct as I do not have any notes for this case.

I actually find it strange that on more than one occasion cases with missing record/s are also cases which I cannot find to reconstruct.

I have requested the Head of Security to improve access control into this office. I unfortunately cannot assist. I hereby

request the Senior Admin Officer to request the attorney Mr Fourie from LASA Kroonstad and the Prosecutor Mr Lekhetho to assist in compiling the record with their notes."

[11] The Head of Legal Aid, Kroonstad Office responded as follows:

“We are unable to assist with reconstructing the record herein. We searched for our practitioners closed file from the archives to no avail. And the practitioner is unable to recall what transpired in the trial.”

- [12] The prosecutor also indicated the following in a letter dated 10 October 2019 which he alleged to be an affidavit. I quote verbatim:

“I have searched for my notes but without success.

I therefore I am unable to assist with the reconstructions of the those proceedings.”

- [13] The status quo remained the same since the removal of the appeal from the roll on 15 July 2020. This caused Adv Kruger of the Bloemfontein Justice Centre to place an email in the court file which was inter alia forwarded to a certain SH Olivier of the Department of Justice on 15 September 2020. I quote her:

“I have perused the documents as supplied and it should suffice. The record can therefore be returned to the High Court. I would suggest that the clerk of the court type a covering letter explaining that the record cannot be re-constructed and as such the record is returned. This should be placed at the front of the record. That will ensure that all the parties involved are made aware of such.

I will also inform the DPP, upon arranging a date for the hearing of the appeal, that the record cannot be re-constructed and that it must be enrolled.”

- [14] I would have expected all relevant parties, but the Regional Magistrate in particular, to keep their notes and ensure that they are properly preserved and stored. The legal practitioners should keep notes as it happens frequently that matters are

part-heard or have to be taken over by a new legal representative for different reasons, such as illness, retirement or even death.

Obviously, their notes are important to assist the presiding officer to reconstruct a missing or incomplete record. Magistrates’

obligations in this regard are evident as will be explained in detail infra. This was especially the case in this matter insofar as it was clear that the appellant was dissatisfied with the convictions and sentences. He applied for leave to appeal relatively shortly after finalisation of the trial.

- [15] What is most disturbing is the fact that the stenographer – also known as the DCRS or CRT clerk - did not do his/her most basic duties: either to switch on the machine and to test the machine and all the microphones before the start of proceedings, or to listen back to the recordings from time to time, i.e. during tea time, lunch time or immediately after the day’s proceedings. If that was the case, he/she would have picked up early on the very first day of the proceedings – 1 September 2017 - that nothing was recorded. Then the matter would still be fresh in the minds of everybody and their notes intact. A reconstruction would have been easy to do. The same applies to the second trial date, to wit 8 September 2017. The excuse that no server was installed in Ventersburg where the trial was conducted is just too lame to accept. I would have thought that back-ups are made on a daily basis by making use of

memory sticks or CD's.

[16] It becomes more and more prevalent, from my own experience dealing with reviews and appeals in this division, but also reading judgments from other divisions, that courts of appeal are confronted with missing and/or incomplete records. Something needs to be done urgently. We are living in the digital era, the so-called Fourth Revolution, but it is often forgotten that the human element can never be ignored. Machines and sophisticated equipment must be operated by people and if the operators do not possess the necessary skills, the best equipment in the world become useless. I shall make some suggestions infra.

[17] I deemed it necessary to give this history in light of the following:

17.1 There is a duty on a presiding officer to keep a record of the proceedings.[1] I agree with Thulare AJ,[2] commenting as follows:

“The court clerk is the recorder of the court proceedings, the clerk of the court is the custodian of court records and the trial magistrate is the constructor of court records through presiding over court proceedings. On the general consideration of all the factors herein discussed, I find myself unable to find that the duty to reconstruct a record lies with the clerk of the court. In my view, the duty to reconstruct lies with the trial magistrate.”

17.2 The Judge President of this division warned presiding officers in a PEEC meeting of 27 March 2019 as follows:[3]

“The Chairperson indicated that he has a list of Magistrates who allow incomplete and unchecked records to be submitted to the High Court. A Magistrate whose name appears on that list will not be allowed to act in the High Court as a Judge, and such information will be made use of when such a person applies to be appointed as a Judge. He urged Mr Mathews to inform the Regional Court Magistrates about this.”

17.3 I was provided with an extract of the file in petition number 10/2018, RC 04/2016, where Judge President Musi requested a reconstruction of the court record. The same prosecutor was involved and his written explanation read about word for word the same as in this case. The same Regional Magistrate as in casu had the following to say:

“The notes I have for cases that have been finalised in RCP Welkom are in a state of disarray;

How that has happened is unbeknown to me.

I therefore will not be able to reconstruct any of those cases because of the possibility of relevant evidence missing or important parts of same being mixed up with other cases. I have tried to put them together but still believe that it is far too risky to reconstruct the entire proceedings as is required in this matter.

This may result in the tragedy of justice.”

The only comment I allow myself to make in this regard is that it would be a travesty of justice if more and more convicted criminals are allowed to walk free because of incomplete or lost records. Regional Magistrates deal with serious criminal cases and may even impose life imprisonment. Record-keeping should be prioritised.

17.4 The Constitutional Court held as follows in *S v Schoombee & Another*[4] and I prefer to quote quite extensively:

“[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.

38 ...The loss of trial court records is a widespread problem. It raises serious concerns about endemic violations of the right to appeal. Reconstruction should not be the norm in providing appellants with their trial records. But when reconstruction is necessary, the obligation lies not only on the appellant, but indeed primarily on the court to ensure that this process complies with the right to a fair trial. It is an obligation that must be undertaken scrupulously and meticulously in the interests of criminal accused as well as their victims.” (emphasis added)

This warning by the full Constitutional Court – a unanimous decision by 10 Judges – cannot be over-emphasised and my observations herein are in line therewith. In that case the trial judge kept detailed notes of the proceedings, but when the record had to be reconstructed he did not ask any inputs from the legal representatives of the parties. This left the door open for the

appellant's legal representative to change tact when the Constitutional Court was approached by relying on an insufficiently transparent record insofar as the parties did not jointly undertake the reconstruction. The criticism was considered as is clear from the quotation, but the court found against the appellant. Significantly, no directives were forthcoming from the Constitutional Court as to how the problem of improper record-keeping should be addressed.

17.5 In *S v Phakane*[5] the Constitutional Court stated the following:

“The failure of the state to furnish an adequate record of the trial proceedings or a record that reflects Ms Manamela’s full evidence before the trial court, in circumstances in which the missing evidence cannot be reconstructed, has the effect of rendering the applicant’s right to a fair appeal nugatory or illusory. Even before the advent of our constitutional democracy, the law was that, in such a case, the conviction and sentence or the entire trial proceedings had to be set aside.”

Again, as in *Schoombee*, no directives were issued in an attempt to prevent the numerous problems experienced with missing or incomplete records.

Froneman J agreed with the majority that the appeal ought to succeed, but suggested in his minority judgment “that the matter be referred to the High Court for an investigation into whether a retrial should proceed.”[6] In my view a retrial in that case would probably be a waste of time insofar as the murder has been committed in 2006, 12 years earlier.

17.6 In *S v Van Staden*[7] the full court dealt with a similar situation as in *casu* and held that it is “a matter of simple logic that, had the accused taken timeous steps to appeal, a reconstruction of the record would in all likelihood have been possible.” The court also dealt with s 7 of the Magistrate’s Court Act[8] pertaining to the preservation and custody of records and when they may be destroyed. I respectfully agree with the court that abuse of the process by accused persons may cause a travesty of justice and that it is in the public interest to ensure that

litigation is brought to finality as soon as possible. It is perhaps time for courts to approach applications for condonation more strictly instead of granting such applications as a matter of course.

IV THE RECONSTRUCTED RECORD

[18] I was not impressed with the responses from the various role players set out *supra*, especially insofar as no recordings were apparently done, or if that was done, the failure to save it in any format whatsoever. I prefer not to “laat God’s water oor God’s akker loop” as we say in Afrikaans, or in English, “to let things drift or take their own course.” Consequently, upon receipt of the appeal file I immediately requested my secretary to correspond with the Regional Magistrate, the Magistrate’s office in Welkom, Legal Aid SA and the relevant prosecutor. At a stage I was feeling as if I was flogging a dead horse, but the Legal Aid practitioner, Mr Fourie came to the court’s assistance. His records were filed under the name of appellant’s co-accused and could for that reason not be found initially. His detailed handwritten notes of the evidence were presented to my secretary. This was typed by her and forwarded to the Regional Magistrate, the prosecutor and Mr Fourie with instructions

from me to the court a quo to reconstruct the record. Fortunately, a reconstructed record could be obtained which is sufficient to consider the appeal on the merits.

[19] The Constitutional Court referred in Phakane[9] with approval to S v Joubert[10] where the Appeal Court, as it was known then, stated:

“If this failure (the incomplete record) cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure to justice.”

[20] In S v Chabedi[11] the Supreme Court of Appeal held as follows:

“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.”

V EVALUATION OF THE EVIDENCE AND CONSIDERATION OF THE LEGAL REPRESENTATIVES' SUBMISSIONS

[21] Instead of upholding the appeal on technical grounds due to a missing and/or incomplete record, we are in a position to adequately deal with the appeal on the merits.

[22] Mr JD Reyneke, an experienced attorney in the employ of Legal Aid SA and Adv J Botha, an experienced and senior State Advocate in the office of the DPP in Bloemfontein are ad idem in their approach to the merits. I quote verbatim from Adv Botha's heads of argument, conceding that the convictions cannot stand:

“7. Constable Mamane (sic) testified that he identified the Appellant by “his body physique and he was wearing an orange top”.

Significantly Warrant Officer Kareli, despite seeing the Appellant's face, could not identify him as the incident happened quickly.

8. The court also attached a lot of weight to the fact that the second perpetrator wore an orange top. That this is in line with the evidence cannot be disputed but no top was found linking an orange top to the perpetrator.
9. No evidence was presented as to who arrested the Appellant, why he was arrested, when he was arrested, was his residence searched for exhibits and how did the arresting officer know the Appellant was the 2nd perpetrator.
10. How reliable can an identification on the “body physique” of a person be especially where there is no other evidence supporting that identification.

11. That the Appellant was a bad witness cannot be disputed and in certain circumstances it can be decisive in a decision to convict.

That, with respect only play a role if the State's case is of such a nature that a conviction would follow in the absence of rebutting evidence.

A dishonest accused cannot supplement a weakness in the State's case, in this case identification.

His dishonesty cannot make an unreliable identification, reliable."

- [23] Appellant's co-accused was chased by the two policemen who testified on behalf of the State and he was apprehended a few meters from the scene of the robbery after being wounded in the leg. There cannot be any doubt that he was properly convicted.

Clearly the attention of the chasing police officers was on this person and not on the other culprit that exited the shop with him and who ran away in a different direction. The dock identification of appellant by constable Namane does not convince me at all if the fleeting moment in which the second culprit was visible to the State witness is considered. Thousands, if not millions of people, fit the description provided by the witness. The two State witnesses contradicted each other in that the culprit's top was yellow in colour according to the shop assistant, whilst the constable described it as orange. No matching top was found in possession of the appellant. Ex facie the J15 appellant was arrested the following day in Virginia, a totally different town and in unknown circumstances. The State has failed to prove its case beyond reasonable doubt and the appeal must succeed.

VI SUGGESTIONS PERTAINING TO RECORD-KEEPING AND CUSTODY OF RECORDS

- [24] In years gone by magistrates did the recordings themselves by having tape recorders on their benches and inserting tapes to record the trial proceedings, properly identifying the various tapes and making sure that the tapes were safeguarded for future reference. I recall from experience that magistrates also kept their handwritten notes for some time in order to ensure that transcribed records could be amended or supplemented when the need arose, and have reason to believe that it is still the case in respect of most of them. It appears as if the Regional Magistrate wants to convey that somebody has stolen the particular notes of the case kept in her custody in her office. If this is accepted, it is a serious reflection on security and the matter should be investigated.
- [25] Adv Botha of the DPP's office in Bloemfontein informed the court from the bar that his office has a system in place in terms whereof the records and notes of all criminal cases dealt with by that office are systematically stored and preserved. Fact of the matter is that prosecutors are supposed to keep notes primarily in order to assist when the need arises as mentioned supra, but also to assist the presiding officer to reconstruct a record if so required. I am glad to hear from Mr Reyneke that the office of Legal Aid SA in Bloemfontein keeps records for five years and that their notes could be retrieved at any given time. This is obviously also the case at the Kroonstad office, although the initial search for the relevant file was unsuccessful.

[26] The missing record in casu is not an isolated incident. Similar failures should be prevented as far as possible and it is suggested that the following

be adhered to by the relevant role players:

1. all presiding officers, prosecutors and legal practitioners appearing for accused persons shall keep their own notes for at least a period of five years;
2. magistrates, prosecutors and legal representatives must ensure that their notes are systematically kept, either according to date of finalisation of a case, case number, the accused's name or all of these;
3. stenographers (DCRS – CRT - clerks) that do not know how the system works should not be appointed and if there are system changes, should be properly trained before they are allowed to do important work such as the recording of proceedings;
4. stenographers should be called upon to inform the presiding officer verbally and preferably in writing on a daily basis that they have done spot checks throughout the day and that the machines were operating properly;
5. courts should be concerned in granting condonation for late applications for leave to appeal, years after the event, especially where the records are either missing or totally incomplete;
6. security should be beefed up at all courts to prevent tampering and/or theft of court records or notes.

VII ORDER

[27] Consequently the following order is granted:

27.1 The appellant's appeal against his convictions and sentences is upheld and the order of the court a quo is set aside and substituted with the following:

27.2 Accused 2 is acquitted on both counts of robbery with aggravating circumstances.

J P DAFFUE ADJP

I concur

PJ LOUBSER J

On behalf of Appellant : Adv JD Reyneke

Instructed by

: Legal Aid South Africa

BLOEMFONTEIN

On behalf of Respondent : Adv J Botha

Instructed by

: Director of Public Prosecutions

[1] Section 76(3) of the Criminal Procedure Act, 51 of 1977; S v Nyumbeka 2012 (2) SACR 367 (WCC) paras 20 – 23; the unreported judgment of Thulare AJ concurred in by Makgoba J in the North Gauteng High Court, Pretoria,

Mabena v The State, case number A821/2011

[2] Mabena loc cit at par 17

[3] Paragraph 5.3.4 of the minutes

[4] 2017 (2) SACR 1 (CC) par 38

[5] 2018 (1) SACR 300 (CC) par 38

[6] Ibid par 62

[7]

[2008] ZANCHC 45; 2008 (2) SACR 626 (NC) par 19

[8] Act 32 of 1944

[9] Loc cit par 38

[10]

[1990] ZASCA 113; 1991 (1) SA 119 (A) at 126 G – H

[11] 2005 (1) SACR 415 (SCA) par 5

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