

SOUTH AFRICA / JUDGMENT

Tlhabakoe v S (CAF 04/2022) [2022] ZANWHC 59 (3 November 2022)

[2022] ZANWHC 59**COURT**

North West High Court, Mafikeng

BEFORE

Hendricks, Mongale, Reddy

CASE / FILE NUMBER

CAF 04/2022

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Source record**IN****THE NORTH WEST HIGH COURT, MAFIKENG****CASE****NO: CAF 04/2022****In****the matter between:**GODFREY
TLHABAKOE
Appellant
And
THE
STATE
Respondent**CORAM:**HENDRICKS JP et MONGALE AJ et REDDY AJ
DATE
OF HEARING 28 OCTOBER
2022
DATE
OF JUDGMENT 03 NOVEMBER 2022
FOR
THE APPELLANT MR MOREMI
FOR
THE RESPONDENT ADV GOLODA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 03 NOVEMBER 2022.

ORDER

Consequently, the following order is made:

- (i) The appeal against convictions and sentences are upheld.
- (ii) The convictions and sentences are set aside.
- (iii) The immediate release of the appellant is ordered insofar as it relates to this matter, case number CAF04/2022 [CC74/2003].

Hendricks JP

Introduction

- [1] The appellant was convicted by Nkabinde J on 4 July 2003 on a count of murder, a count of unlawful possession of a firearm and a count of unlawful possession of ammunition in contravention of sections 2 and 36 of the Arms and Ammunition Act 75 of 1969. On the same day he was sentenced to life imprisonment on the murder conviction. From the only available records, it is not clear what the sentence on the firearm and ammunition charges was, but same was ordered to run concurrently with the sentence of life imprisonment on the murder conviction, which in any event run concurrently ex lege.
- [2] This matter has a long protracted history. The reasons advanced by the appellant for the delay that occurred are set out comprehensively in his affidavit in which he sought condonation. This was dealt with by Petersen J who decided the application for leave to appeal. To borrow from his judgment, the appellant immediately upon sentence on 4 July 2003 requested his legal representative to lodge an application for leave to appeal. His legal representative promised to visit him in prison, to lodge the application within fourteen (14) days, but failed to honour this undertaking. The appellant during that period, within ten (10) days to be exact, called on officials of Correctional Services to assist him with lodging the application for leave to appeal. Correspondence was forwarded to the Registrar of this Court in which the appellant sought leave to appeal, with no acknowledgement of receipt. During January 2004 he caused a letter to be written to the Registrar after a certain attorney, whose name evades him, visited him and caused him to sign certain documents under the pretext that he was assisting him. The said attorney failed to return thereafter.

[3] The appellant continued corresponding with the Registrar in writing by requesting transcribed records of the matter, but to no avail. At this stage he was serving the sentence at Rooigrond Correctional Centre. He unsuccessfully attempted to get assistance for seven (7) years, at which point his status as a sentenced offender was changed

to medium and he was transferred to Mogwase Correctional Centre. Whilst at Mogwase Correctional Centre he contacted a certain Mr Steyn who worked at an office which assisted sentenced offenders with appeals and transcripts. Mr Steyn later informed him that the compact disc (CD) of the proceedings was available, but nothing could be transcribed as the CD was blank. Two (2) years later he was transferred to Losperfontein Correctional Facility.

[4] In 2013, now ten (10) years into his sentence, the appellant wrote to an office he refers to as the "Office District Court Efficiency" in Pretoria to complain about his appeal. He was furnished with a

response that his matter had been referred to the Mahikeng Regional Office. On 28 October 2013, the Department of Justice acknowledged

his request for the transcribed records, in writing. The Mahikeng Regional Office, in turn, forwarded a letter to the appellant

informing him that his matter was referred to the Garankuwa Office of Legal Aid South Africa, for assistance with his application for leave to appeal.

[5] In 2014 a certain Mr. Moruri from the Garankuwa Office of Legal Aid South Africa caused the appellant to sign certain legal aid documents for Legal Aid South Africa to assist him with his appeal. On contacting the Mahikeng Office of Legal Aid South Africa, he was informed that Mr. Moremi would assist him with his application for leave to appeal. The applicant was advised that the complete transcripts had to be obtained in accordance with the Practice Directives of this Division, in order to lodge the application for leave to appeal. Consequent thereto, Mr. Moremi directed several requests to be furnished with the transcribed record until being informed that the matter could not be transcribed as the records could not be traced. This process occurred between 2015 and 2020. What followed was an application to have the matter reconstructed.

[6] Several attempts were made at having the record transcribed by calling on, inter alia, the prosecutors involved in the trial, the legal aid practitioner, and the Registrar to trace the court books of the presiding judge and cassettes of the matter. All these attempts were fruitless. On 30 April 2022, this Court (per Petersen J) accordingly ordered that the practitioners involved in the trial depose affidavits regarding their inability to assist with reconstruction of the record. The two prosecutors and legal aid practitioner involved in the trial consequently deposed to affidavits that they have no records or notes of the matter and could not assist in reconstructing the record. The only court book of the presiding judge which the Registrar could trace, contained what appeared to be a judgment on conviction and cryptic notes on the sentence imposed, which was accordingly transcribed by order of

this Court (per Petersen J) and certified accordingly by the Registrar.

[7] The appellant maintains that it has always been his intention to appeal both his conviction and the sentence imposed and that the delay occasioned was not due to any fault on his part. The application for condonation was not opposed by the respondent. The applicant's explanation was acceptable and good cause has been shown for condonation to be granted. Condonation for the late filing of the application for leave to appeal against both conviction and sentence was accordingly granted, per Petersen J.

[8] The appeal is premised on the following grounds of appeal:

"AD CONVICTION.

Proper evaluation of the evidence lead in the trial cannot be determined as the trial proceedings are incomplete or missing and could not be reconstructed and as a result that it cannot be proved that the State proved its case beyond reasonable doubt and the Appellant's version could not be reasonably possibly true.

AD SENTENCE

1. The sentence of Life imprisonment is shockingly inappropriate.
2. The record is inadequate, even the reconstructed portion does not outline the justification of imposing such sentence besides the deceased being a witness in a rape case.
3. The mitigating as well as aggravating factors to determine a suitable sentence are not recorded. "

[9] In *S v Schoombe and Another* 2017 (2) SACR (CC), the following is stated.

"[19] It is long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal.[1] An adequate record of trial court of trial proceedings is a key component of this right.[2] 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'.[3]

[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".[4] 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.[5] 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 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.[6]

- [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".[7] While the trial court is required to furnish a copy of the record,[8] the appellant or his/her legal representative "carries the final responsibility to ensure that the appeal record is in order".[9] 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.[10]
- [10] Despite all reasonable attempts at either securing the record of proceedings or a reconstruction of the proceedings, no fruits have been yielded through the exercise. The best available record is the transcribed judgment of Nkabinde J on conviction. In the premises, this Court is not in a position to determine whether the convictions are in accordance with the law. As such, this Court is bound to order that the appeal against convictions should be upheld. The convictions on all the counts should therefore be set aside. In as far as the sentences are concerned, it follows axiomatic that the sentences should also be set aside.

Order

[11] Consequently, the following order is made:

(ii) The convictions and sentences are aside.

RD HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

and

K MONGALE

ACTING JUDGE OF THE HIGH COURT,

A REDDY

[1] Section 35(3)(0) of the Constitution.

[2] See *Dauids v S* [2013] ZAWCHC 72 at para 13: "The inability to exercise a right of appeal because of a missing record is a breach of the constitutional right to a fair trial and in such circumstances will generally lead to the conclusion that the proceedings have not been in accordance with justice and must be set aside." *S v Sebothe* 2006 (2) SACR 1 (T) at para 8: "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." See also *S v Molaudzi* [2014] ZACC 15; 2014 (7)

BCLR 785 (CC) at para 5: "It is not necessary to decide whether a delay in appeal proceedings might also be considered a breach of fair trial rights, because here the record was eventually properly completed and available for a fair assessment of the matter on appeal. It could easily have been otherwise if the compilation of a proper record became impossible because of a lapse of time. "

[2] See *Davids v S* [2013] ZAWCHC 72 at para 13:

"The inability to exercise a right of appeal because of a missing record is a breach of the constitutional right to a fair trial and in such circumstances will generally lead to the conclusion that the proceedings have not been in accordance with justice and must be set aside. " *S v Sebothe* 2006 (2) SACR 1 (T) at para 8: "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. "

See also *S v Molaudzi* [2014] ZACC 15; 2014 (7) BCLR 785 (CC) at para 5:

"It is not necessary to decide whether a delay in appeal proceedings might also be considered a breach of fair trial rights, because here the record was eventually properly completed and available for a fair assessment of the matter on appeal. It could easily have been otherwise if the compilation of a proper record became impossible because of a lapse of time. "

[3] *S v Chabedi* [2005] ZASCA 5; 2005 (1) SACR 415 (SCA) at para 5.

[4] *S v Gora* vs 2010 (1) SACR 159 ZAWCHC 145) para 16.

[5] magistrate should have done, in circumstances such as in the matter before me, 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. " *Mohapi v Minister of Justice and Correctional Services* [2016] ZANWHC 5 at para 8: "The Presiding Regional Court Magistrate . . . shall fix a date for a hearing, which shall not be later than 30 ordinary days from the date of this order, and cause the applicant, and invite his previous and current defence legal representative (if any), prosecutor, and interpreter to attend in open court in order to jointly undertake a reconstruction of the missing parts of the record, where this is feasible. The proceedings shall be recorded. The Magistrate shall invite those present to express their views whether each aspect of the reconstruction accords with their

recollection of the evidence tendered at trial. " S v Chokoe [2014] ZAGPPHC 515; 2014 (2) SACR 612 (GP) at para 9: "Case law abounds that the reconstruction process must give effect to the accused's right to a public trial before an ordinary court, his right to be present when being tried, as well as his right to challenge and adduce evidence. "

- [5] magistrate should have done, in circumstances such as in the matter before me, 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. " Mohapi v Minister of Justice and Correctional Services [2016] ZANWHC 5 at para 8:

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- [6] S v Sibeledwana [2012] ZAWCHC 150 at 9: "[T]he clerk of the court must obtain an affidavit to prove the loss of the record if that is the situation. Thereafter the clerk must obtain affidavits from witnesses and others who were present at the trial in order to prove the evidence that has been adduced. Eventually he will then submit a reconstructed record to the accused to establish whether he agrees with it or not. The accused's response is confirmed by means of an affidavit. A report concerning the correctness of the record must also be obtained from the presiding magistrate."

- [7] Id. See also Gora above n 12 at paras 14 and 50.

- [8] See Ngidi v S [2010] ZAKZPHC 10 at para 5, explaining that "it is the duty of each and every presiding officer to ensure that a complete record be sent to the court dealing with the appeal".

- [9] Sibeledwana above n 14 at 10

[10] See *S v Zuma* 11995] ZACC 1[1995] ZACC 1; ; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 16, noting that in the constitutional era, criminal trials must be conducted in accordance with "notions of basic fairness and justice" and that it 'is now for all courts hearing criminal trials or criminal appeals to give content to those notions'. See also *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo*

[2015] ZACC 39; 2016 (4) BCLR 443 (CC) at para 36, concluding in the context of a review of a CCMA award that "it was improper of the Labour Court to dismiss

the review without a proper record of the arbitration proceedings in the face of evidence that no record existed".

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