



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A10 / 20

In the matter between:

FRANK CHAZ

Appellant

and

THE STATE

Respondent

Coram: Goliath, DJP and Wille, J

Date of Hearing: Friday 8 May 2020

Date of Judgment: Delivered via email on the 2nd of June 2020

JUDGMENT

GOLIATH, DJP;

[1] Due to the current lockdown, the legal representatives agreed that this appeal could be determined on the papers filed off record, without the need for the hearing of any oral argument. This matter concerns the record of a criminal trial that has been misplaced. The appellant was convicted of - *dealing in dangerous dependence producing substances*¹ - and was sentenced on the 1st of June 2007 to a period of (10) years imprisonment, (3) years of which were suspended for a period of (5) years, subject to certain conditions.

[2] After he was sentenced, the appellant applied for and was granted leave to appeal against both his conviction and sentence. He was granted bail pending the finalisation of his appeal. On the 5th of June 2007, the appellant's erstwhile attorney of record,² communicated with the - *Cape Town Magistrates' Court, Appeal Clerk* - and requested that arrangements be made for a transcription of the court record. It was established that the proceedings were mechanically recorded and on the 25th of June 2007, the cassette recordings were sent to be transcribed. For some inexplicable reason, these cassette recordings were returned. Thereafter, these cassette recordings could not again, be located.

¹ A contravention of section 5 (b) of the Drugs and Drug Trafficking Act, 140 of 1992

² Mr Weber

[3] The trial Magistrate's documents and notes could also not be located. On the 10th of February 2010, Mr Weber informed the relevant clerk that he was experiencing difficulties in making contact with his client. Thereafter, the trial Magistrate made some enquiries about the appeal, but the issue relating to the missing record and cassettes remained unresolved. Significantly, at this time, no effort was made to reconstruct the record. During this time, Mr Weber again indicated that he was unable to contact his client in order to obtain further instructions, regarding the prosecution of his appeal.

[4] On the 19th of May 2017, a notice³ was sent to the appellant instructing him to report to the Magistrate's Court in Cape Town. In the notice, it was recorded that the appeal was never submitted to the High Court for prosecution, as the appellant's attorney of record had withdrawn and the appellant could not be located. The appellant duly appeared on the 2nd of August 2017 and was legally represented by Mr Mathewson.

[5] At this hearing, the appellant applied for the re-instatement of his bail, pending the finalization of his appeal. An enquiry was conducted by the Magistrate and as a result, it became apparent that the relevant clerk had failed to transmit a copy of the record to the Registrar of the High Court. At this enquiry, a finding was made that the appellant had abandoned his appeal and his bail was accordingly not re-instated. On the 2nd of February 2018, Acting Judge Slingers (as she then was), set aside the Magistrate's decision in this connection and released the appellant on bail, pending the prosecution of his appeal.

³ In terms of section 307(3)(b) of Act 51 of 1977

[6] Thereafter, the Judge President set aside the findings made by the Magistrate to the effect that the appellant had abandoned his appeal and ordered that the relevant clerk submit the record of criminal proceedings to the High Court within a period of (10) days from the date of his order. He further directed that the appellant formally prosecute his appeal within (14) days of the receipt of the record of proceedings.

[7] On the 14th of January 2020, an - *incomplete record* - was filed in that same did not make any reference to the merits of the case, nor did it contain an actual transcript of the proceedings. Despite a diligent search the relevant clerk was unable to file a complete and satisfactory record, of the proceedings. Further, a re-construction of the record could not be facilitated as the Magistrate's notes and documentation could not be located.

[8] As a consequence, the relevant clerk was unable comply with the duty to transmit a proper and complete the record of proceedings to the Registrar of the High Court in accordance with the order made by the Judge President. The respondent summarised the position in this connection, as follows;

'the tapes are missing, the Magistrate's notes disappeared, the prosecutor is no longer in the employ of the National Prosecuting Authority, the docket disappeared, part of the record that was transcribed disappeared, and Mr Weber, the appellant's former attorney's file, has since been destroyed'

[9] The respondent conceded that there were indeed problems in connection with the record this matter, but suggested that the appellant also shoulder some of the responsibility for what had ultimately transpired. The respondent takes the position that, the appellant failed to take the appropriate steps to prosecute his appeal and adopted a - *supine attitude* - towards the hearing of his appeal.

[10] Section 309(B)(4)(a) of the Act⁴, dictates that if an application for leave to appeal under subsection (1) is granted, the Clerk of the Court - *must* - in accordance with the rules of the court, transmit copies of the record and of all the relevant documents to the Registrar of the High Court, concerned. With reference to the duty placed on the parties in the preparation of the record of appeal, the appellant's counsel referred to the matter of *Zondi*⁵, where it was held, inter alia, as follows:

'However, the administrative, logistical and financial implications of placing the primary responsibility for preparing an appeal record on the appellant would probably, in the majority of cases, negate her or his constitutional right to an appeal since the State, through its officials, employees and/or sub-contractors, not only records all Court proceedings, but also has custody of all relevant recordings, notes, transcripts, statements and other documentary information, as also all exhibits. The provisions of Rule 67 supra which place the primary responsibility for providing a record on appeal on the State are therefore fair, practical and convenient ...'

⁴ The Criminal Procedure Act 51 of 1977

⁵ *S v Zondi* 2003 (2) SACR 227 (W) at 243

[11] In *Chabedi*⁶, the Supreme Court of Appeal held that the record of proceedings in the trial court is of cardinal importance on appeal, as it forms the whole basis for the re-hearing by the Court of Appeal. Thus, if the record is inadequate, it will lead to the conviction and sentence being set aside. This is, however, not an absolute rule. The requirement is only that the record must be adequate for the consideration of the appeal and not a perfect record of everything that was said at the trial. The Supreme Court of Appeal thus created a - *two pronged test* - to determine if a record is indeed, adequate for the purposes of the hearing of an appeal. The test is thus whether the defects are so serious that a proper consideration of the appeal is not possible by looking at the nature of the defects in the particular record and the issues to be decided on appeal.

[12] In *Sebothe*⁷, the full court added a further reference to the Constitution in the following terms;

‘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’

⁶ S v Chabedi 2005 (1) SACR 415 SCA at 417

⁷ Sebothe v S 2006 (2) SACR 1 (T) - para [8]

[13] In *Phakane*⁸, the Constitutional Court considered the issue of an inadequate record of the trial proceedings and held that in such a case, the conviction and sentence or the entire trial proceedings had to be set aside. The inability to exercise a right of appeal because of an inadequate record is a breach of the constitutional right to a fair trial and could lead to the conclusion that the proceedings have not been in accordance with justice.

[14] Given the loss of all the recorded evidence in this matter, it is clear that the record is inadequate for a proper consideration of the appeal. The nature of the defects in the record are such that the court cannot adjudicate upon the matter and make any findings on the issues to be decided. In these circumstances, it is inevitable that the appellant's conviction and sentence fall to be set aside. Both counsel are in agreement that there cannot be a fair trial in the absence of an adequate record of the proceedings. They are both *ad idem* and concede that the appellant's conviction and sentence, fall to be set aside.

[15] In the result the following order is made;

1. ***'That the appeal succeeds and both the appellant's conviction and sentence is set aside'***

⁸ *Phakane v S* [2017] ZA CC 44

2. ***‘That the Clerk of the Court is ordered to refund to the appellant the amount which he paid in order to secure his release on bail’***

GOLIATH, DJP

[Deputy Judge President]

I agree,

WILLE, J

[Judge of the High Court]