

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal Case No: AR400/2019

In the matter between:

MPUMELELO SACKY SHANGASE

APPELLANT

and

THE STATE

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 14H00, 27 January 2023

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (McLaren J, sitting as the court of first instance):

- 1 The appeal against conviction and sentence is upheld. The conviction and sentences imposed are set aside.
- 2 The matter is remitted to the Director of Public Prosecutions for further consideration.

JUDGMENT

HENRIQUES J (POYO DLWATI JP and PLOOS VAN AMSTEL J concurring)

Introduction

[1] The appellant and his co-accused, who were legally represented, were convicted of murder and housebreaking with the intent to rob and robbery with aggravating circumstances on 24 June 2010 in the KwaZulu-Natal High Court, Durban before McLaren J. On 28 June 2010, the appellant was sentenced to 25 years' imprisonment for murder and 15 years' imprisonment for the latter offence. The sentence of 15 years' imprisonment was ordered to run concurrently with the sentence of 25 years' imprisonment imposed for murder, resulting in an effective term of imprisonment of 25 years. In April 2015, the appellant successfully applied for leave to appeal his conviction and sentence before D Pillay J. It is this appeal which serves before us.

[2] At the time of hearing the application for leave to appeal, the record was incomplete and only consisted of the judgment and sentence of the court *a quo*. There was no record of the evidence of the witnesses. Since being granted leave to appeal, the appellant has unsuccessfully attempted to have the record transcribed. After several attempts, an affidavit was deposed to by a Registrar, H Bridgelal, (criminal section) of the Office of the Chief Justice, Durban which indicated that despite several attempts, the record of the proceedings could not be retrieved from the court machine or the server as it was part of the "crash" system of recordings. Consequently, a transcript of the court proceedings could not be obtained.

[3] Subsequently, an attempt was made to reconstruct the record pursuant to an order issued on 31 July 2020. McLaren J was asked to reconstruct the record from his notes and bench books together with the representative of the respondent and the appellant's legal representative.

[4] McLaren J subsequently submitted a memorandum in which he indicated that he was unable to assist in the reconstruction of the record as he was not provided

with his bench books which could not be located. The prosecutor, in addition, could not assist as her notes were incomplete as well as that of the defence counsel. It was subsequently confirmed by a representative of the Director of Public Prosecutions that the record could not be reconstructed.

The current record on appeal

[5] At present before us, the appeal record consists of the judgment on conviction and sentence, the indictment, the summary of substantial facts, certain of the exhibits and the application for leave to appeal.

The circumstances which gave rise to the convictions and sentences

[6] In respect of the charges preferred, the deceased died on 15 April 2009 as a result of a home invasion. The respondent led evidence to prove that the appellant and others had planned to commit a robbery and hired a vehicle to take them to the deceased's home. The appellant and the other assailants were armed with firearms and knives in order to carry out the robbery and the deceased, who was with his family in the house, was robbed and stabbed. The deceased subsequently succumbed to the injuries he sustained during the course of the robbery. It is common cause that the appellant was convicted on the basis of a confession he had made to one Captain Eva.

Issue on appeal

[7] The issue on appeal is whether the appeal record which serves before us is sufficient for a determination of the appeal.

Legal Position

[8] There are a number of decisions which deal with the sufficiency of an appeal record. In *Phakane v S* [2017] ZACC 44; 2018 (1) SACR 300; 2018 (4) BCLR 438 (CC), the Constitutional Court emphasised the appellant's right to a fair appeal as entrenched in s 35(3) of the Constitution which provides for every accused person to have a fair trial which includes a right of appeal or review to a higher court. In *Phakane* when the matter first served before the court *a quo*, the Full Court had a complete appeal record save for the evidence of one of the State witnesses. The court took the view that the appeal could be determined fairly despite the incomplete

record and confirmed the conviction but upheld the appeal on sentence. The appellant then sought leave to appeal this decision to the Constitutional Court. The Constitutional Court had to decide whether the State's failure to deliver a complete trial record where the missing evidence could not be reconstructed infringed on an appellant's right to a fair appeal entrenched in s 35(3) of the Constitution.

[9] Of crucial importance in the trial court was the evidence of a witness, a Mrs Manamela, whose evidence could not be transcribed or reconstructed. The Constitutional court, at paragraph 38 of the judgment, held 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 rights to a fair appeal nugatory or illusory.'

[10] Reference was also made to the decision in *S v Joubert* [1990] ZASCA 113; 1991 (1) SA 119 (A) in which the Appellate Division held the following:

'If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure 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 of justice.'

[11] The importance and necessity of the record of the proceedings in a trial court being available on appeal was also succinctly dealt with by the Supreme Court of Appeal in the decision of *S v Chabedi* 2005 (1) SACR 415 (SCA) paras 5-6, where Brand JA held the following:

'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...

The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter alia*, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.'

[12] In *S v Schoombee and Another* 2017 (2) SACR 1 (CC), the Constitutional Court had to consider whether the right of an accused person to participate in a reconstruction process was part and parcel of his rights to a fair appeal. In this matter, the appellants had not participated in the reconstruction process and the reconstruction was based solely on the trial judge's notes. At paragraph 19, the Constitutional Court once again emphasised that it was:

'...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".'

At paragraph 20, the court held:

'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".'

Further, at paragraph 21, the court held:

'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.' (Footnotes omitted.)

[13] The Constitutional Court confirmed the principle that in circumstances 'where the adjudication of an appeal on an imperfect record will not prejudice the appellants, their convictions need not be set aside solely on the basis of an error or omission in the record or an improper reconstruction process'. It held that on the facts of the matter the record was detailed and specific and the appellant, by not challenging the

reconstructed record when the matter first served before the Full Court, could not do so before it and rely on the imperfect record as a basis for their convictions and sentences to be set aside. It held that the record was adequate for a just consideration of the issues which the appellants had raised on appeal.

The current appeal record

[14] Turning now to the facts of this matter, the appellant was convicted on the evidence of a confession made to Captain Eva and other circumstantial evidence. The admissibility of the confession appears to have been challenged at a trial-within-a-trial and at the end thereof the presiding judge ruled it admissible. His judgment goes into some detail as to the reasons why he ruled it admissible and why, at the end of the main trial when he revisited his ruling in relation to the admissibility thereof, he did not deviate from such initial ruling. There is however no proper record of the evidence of any of the witnesses who testified both in the trial-within-a-trial and in the main trial in relation to the admissibility of the evidence. Without that, this court cannot comment on the reliability of such evidence or the court's reasoning behind it.

[15] The appellant is entitled to a fair trial which extends to a fair appeal and without a complete and proper record this court cannot properly exercise its judicial powers on appeal. Although the judgment is very detailed and some of the exhibits form part of the record, in the absence of the evidence this court simply cannot ensure that the appellant has a fair appeal hearing. The respondent is cognisant of the legal principles in the line of cases I have referred to and has correctly, in my view, indicated that the proceedings would not be in accordance with justice should this court decide the appeal in the absence of a properly constructed record.

Conclusion

[16] In the result the following orders will issue:

- 16.1. The appeal is upheld. The convictions and sentences are set aside.
- 16.2. The matter is remitted to the Director of Public Prosecutions for further consideration.



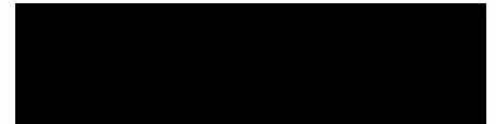
HENRIQUES J

I agree,



POYO DLWATI JP

I agree,



PLOOS VAN AMSTEL J

CASE INFORMATION

Date of Hearing: 27 January 2023

Date of Judgment: 27 January 2023

For Appellant: Adv T Botha

Instructed by: JH Slabbert Attorney
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For Respondent: Adv AJ Meiring

Instructed by: The Director of Public Prosecutions
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