



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

APPEAL NUMBER: A118/2021

In the matter between:

FANIE JOHANNES KHANYE

APPELLANT

and

THE STATE

RESPONDENT

HEARD ON: **28 FEBRUARY 2022**

CORAM: **NAIDOO, J et CHESIWE, J**

JUDGMENT BY: **NAIDOO, J**

DELIVERED ON: **28 FEBRUARY 2022**

- [1] The appellant was convicted during 2011, in the Villiers Regional Court, for the rape of a minor child. He was sentenced on 4 December 2011 to life imprisonment. The appellant approaches this court in terms of his automatic right of appeal, and the appeal lies against both his

conviction and sentence. Ms S Kruger appeared for the appellant and Mr EB Ontong for the respondent.

[2] The Appellant's grounds of appeal against the conviction and sentence are, in essence, that the court *a quo* erred in:

- 2.1 finding that the state had proved its case, and
- 2.2 not evaluating the evidence in a balanced manner;
- 2.3 attaching too much weight to the factors in aggravation (of sentence), and the interests of society;
- 2.4 not attaching any weight to the appellant's personal and mitigatory circumstances.

[3] The court in this matter is faced with the difficult situation that almost no appeal record is before us in order to decide this matter. An affidavit was filed by Ms Petunia Esterhuizen, the clerk stationed at the Heilbron Magistrates Court, and who is responsible for compiling and preparing appeal records before they are enrolled for hearing. She avers that she was unable to prepare the full transcripts in this matter as the recordings relevant to the trial could not be traced. The charge sheet was retrieved from the electronic court management system, but even that appears not have recorded some of the court appearances, including the one for the day that sentence was handed down. It bears the details of the charge so one is able to glean that the date of the commission of the offence was 5 September 2010. Ms Esterhuizen further avers that she was unable to obtain the original charge sheet or even make copies of the relevant court books as these were destroyed in a fire at the Heilbron Magistrates Court on 16 February 2015.

- [4] Ms Esterhuizen indicates that she made several enquiries and searched diligently for the recordings in this matter, but in spite of even being assisted by colleagues in her search, she was unable to trace the relevant recordings. She approached the magistrate who presided in the matter, but was advised that he retired from service and was no longer in possession of his trial notes. The attorney who represented the appellant no longer works for the Legal Aid office and the latter were unable to find any file or trial notes relating to this matter. The prosecution, likewise, informed her that they have no trial notes of this matter and would not be able to assist with the reconstruction of the record. She is, therefore, unable to prepare a complete or accurate record of the proceedings in the trial court.
- [5] I pause to mention that the recordal of court appearances in the copy of the charge sheet that has been filed, is in the handwriting of the magistrate, and has not been typed for the benefit of this court. It is difficult, if not impossible, to read the magistrate's handwriting, so the charge sheet is of no assistance. The face of the charge sheet also does not record how the accused pleaded, whether he was found guilty or not guilty, and what sentence was handed down, as is customary with charge sheets in the Magistrates' Court. The copy of the medico-legal examination report by the relevant doctor (the J88 form), bears the details of the complainant, showing she was eight years old at the time of examination on 7 September 2010 and shows extensive injuries to her genital area. The doctor's conclusion was that there was definite penetration and goes on to describe the injuries in support of this conclusion. Therefore, such of

the record that has been placed before us does not contain the plea proceedings, the evidence led before the trial court, any rulings made or the judgment and sentence handed down by the trial court

[6] There is, therefore, nothing before this court which would enable it to hear this appeal, properly evaluate the grounds of appeal and make a determination in regard to the correctness/fairness or otherwise of the appellant's conviction and sentence. It is clear however, that he was convicted and sentenced as indicated earlier, has been serving his sentence since 4 December 2011, and has served just over 10 years and two months of that sentence.

[7] It is well established in our law that the failure by the state to furnish a complete or adequate record of trial proceedings, and a failure to reconstruct the record, affects the appellant's right to fair trial, causes him prejudice and may result in a failure of justice. The appellant and the respondent referred to the matter of *Phakane v The State 2018(1) SACR 300 (CC)* where portions of the record in the trial court were incomplete or missing and could not be reconstructed. On appeal to the Full Court of the relevant High Court, the latter ruled that, the absence of the transcript relating to the evidence of the main state witness, did not preclude it from being able to fairly hear the appeal. It upheld the conviction and reduced the sentence handed down by the trial court.

- [8] Zondo J in Phakane, in undertaking a detailed analysis of the effect of the missing evidence, said at para 38:

“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.”

The decision in *S v Joubert 1991(1) SA 119(A)* was referred to in Phakane. The court in Joubert said at para 126, citing the case of *S v Marais 1966 (2) SA 514 (T) at 517A – B*:

'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.'

- [9] An accused person's fair trial and fair appeal rights were, therefore, protected even in pre-Constitutional times. The impact of an incomplete record on the right of the appellant to a fair appeal was also considered in *S v Chabedi 2005(1) SACR 415 (SCA)*, where the court said at paras 5 -6:

“[5] 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....

[6] 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.”

[See also *S v Schoombee* 2017(2) SACR 1 (CC); *S v Nkhahle* 2021 (1) SACR 336 (FB)]

[10] As I indicated earlier in this judgment, there is almost nothing before this court upon which a determination can be made. It is most unfortunate that this situation has arisen, particularly as a very young child was seriously violated. The fact that the incident happened eleven and a half years ago and the appellant was convicted over 10 years ago does not assist matters. People have moved on, retired or have disposed of their notes. The fire at the Heilbron Magistrates’ Court appears to have destroyed much, including the records relevant to this matter. There is no indication or explanation of when the appellant lodged his Notice of Appeal, and one is left wondering why it took him so long to do so. When asked by the court for further information in this regard, Ms Kruger advised that the Bloemfontein office of Legal Aid only became aware of this matter in November 2021, when they received the file. Prior to that, their Bethlehem office had been dealing with this matter. Ontong was also asked what efforts were made to obtain the record in this matter. He advised that he called for the docket and, after some difficulty, he obtained the docket, and was able to see that there were three witnesses. He then made attempts to

obtain the transcribed record from the transcribers, but in the end that also came to naught. He then decided that it would re-traumatise the complainant to argue for a re-trial after so many years. In any event, the appellant asks that, in view of the impossibility to reconstruct the record, his conviction and sentence be set aside, and the respondent (the state) is in agreement .

[11] The appellant's right to a fair appeal have been compromised and rendered nugatory, and where the appeal court is unable, as a result of an incomplete record, to determine the appeal, the conviction and sentence must be set aside. In the circumstances, the following order is made:

11.1 The appeal is upheld

11.2 The conviction and sentence imposed on the appellant are set aside.

NAIDOO, J

I concur.

CHESIWE, J

On behalf of appellant: Adv S Kruger
Instructed by: Legal Aid South Africa
Bloemfontein Local Office

On behalf of respondent: Adv. EB Ontong
Instructed by: The Office of the DPP
BLOEMFONTEIN