



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

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

Appeal number: A86/2018

In the Appeal between:

MA MOMPATI

Appellant

and

THE STATE

Respondent

CORAM: REINDERS J *et* OPPERMAN, J

HEARD ON: 30 JULY 2018

JUDGEMENT BY: OPPERMAN, J

ORDER: 30 JULY 2018

Criminal procedure - appeal - record of trial proceedings - record incomplete

- [1] The appellant lodged an appeal in terms of section 309(1)(a)¹ of the Criminal Procedure Act 51 of 1977 (CPA) against conviction and sentence. He was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, Act No. 105 of 1997 and accordingly noted the appeal without leave in terms of section 309B of the CPA.
- [2] The matter was removed from the roll. The sole cause for the termination of the matter in this manner; the incompleteness of the record, demands mention and judgment.
- [3] On 1 September 2017 the appellant, a 30-year-old man, was convicted of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007. On the same day, as mentioned above, he was sentenced to imprisonment for life.
- [4] The factual charge against the appellant, of which he was convicted and that is the source of the appeal, is grave. He allegedly committed an act of sexual penetration with the complainant RJ (10 years old) by penetrating her anally and vaginally and thus raped her.

¹ Section 309(1)(a):

Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: *Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).* (Accentuation added)

[5] Before the matter could proceed we were confronted with the incompleteness of the transcribed record of proceedings. The operator indicated in the introduction to the transcribed record that:

- “4. On JAVS system only 2 channels working and voices only picked up on 1, prosecutor only one clearly audible.
- 5. CD 1, 2, 3 – a lot of background static audible, audio really bad.
- 6. CD 1- Audio at some places seem to be missing.”

[6] As result, amongst others; the plea explanation is not known to this court.

“PROSECUTOR PUTS CHARGES TO THE ACCUSED

CHARGE 1: Rape

COURT: Sir do you understand the charged preferred against you?

ACCUSED: Yes your worship.

COURT: Do you plead guilty or not guilty?

ACCUSED PLEAD GUILTY TO CHARGE

ACCUSED: I plead guilty your worship.

COURT: Thank you sir

MR RWAXA: [Inaudible] Your Worship I do not understand because he says he did not hear well Your Worship or understand I do not know well Your Worship.

COURT: [Inaudible] that the interpreter is too far from you at this point in time. I will ask her to raise her voice, do you want to plead guilty or not guilty?

ACCUSED PLEAD NOT GUILTY TO CHARGE

COURT: [Inaudible]

MR RWAXA: [Inaudible] that the accused is pleading [Inaudible] about the offence Your Worship. (Accentuation added)

COURT: Thank you lady.”

[7] The rest of the record, specifically the judgement of the court *a quo*, presents with references to “inaudible” and at moments that might be of relevance and importance to the adjudicator of the matter on appeal.

[8] The flaw of an incomplete record might not be fatal. The premise is whether an appeal can be adjudicated fairly. In **Phakane v S** 2018 (4) BCLR 438 (CC) the test was reiterated in that:

“[20] An issue that arose in the appeal was whether, in the absence of the missing evidence, the Full Court could determine the appeal fairly. If it could not do so, this would mean that the applicant's right to a fair appeal entrenched in section 35(3) of the Constitution had been infringed. Section 35(3) reads:

"Every accused person has a right to a fair trial, which includes the right -
(o) of appeal to, or review by, a higher court."

If the Full Court could determine the appeal fairly, the applicant's right to a fair appeal would not have been infringed.”

[9] The above said, it may not be expected from a court of appeal or review to guess or suppose words or phrases on the transliterated record if the record can be cured. The lack of diligence and carelessness in the keeping and submission of proper records is of concern and the impact thereof underestimated. The consequences are often devastating to the administration of justice. On 17 December 2017 and in the matter of **Phakane v S** 2018 (4) BCLR 438 (CC) Cameron, J remised:

“[47] Our sad duty in this case is to vacate Mr Phakane's conviction of murdering Ms Boshomane, his girlfriend, on the ground that the trial court record before the Full Court, which heard his appeal and dismissed it, was materially incomplete and that his constitutional right to an appeal was thus violated.

[59] This hardly reduces the sadness of this case. Even if we were to convict Mr Phakane of assault, any sentence we imposed for it would be far less than he has already served on the murder conviction, which we must now set aside. His time already served in prison means that he must be released anyway. A competent conviction of assault would make no practical difference to Mr Phakane. And it would bring no justice to his victim, Ms Boshomane, nor to her mother and her loved ones.”

[10] It starts with the recording of the evidence up and until the submission of the record for appeal or review. Officers of the court; that includes stenographers, must ensure that equipment is fully functional and that recordings are effective at all times during the proceedings. Statements by the typist that only one microphone was functioning, that: “audio really bad” and “audio at some places seem to be missing” may not be the norm. The administration of justice as prescribed in the Constitution of the Republic of South Africa, 1998 deserves more reverence.

[11] An appeal is typically judged within the four corners of the record. The following are general principles in law in this regard:

- 11.1 The new section 309B(4)(a)² provides that the clerk of the court must arrange for the transcription of the record.
- 11.2 The preparation of the record is the duty of the clerk of the court in terms of Magistrates' Courts Rule 67(10)³. Rule 66(4)(c)⁴ provides that the original copy of the transcript shall be certified as correct by the person making such a copy. That person is usually the transcribing typist.
- 11.3 "Correct" implies complete. If there is not a certification that the record as a whole is correct the clerk of the court must place the matter before the magistrate with a request to construct it appropriately.
- 11.4 In **S v Three** 1997 (2) SACR 534 (EC) it was held, and I support the directive, that the proper administration of justice was frustrated by sending an incomplete record to a higher court. In the case of incomplete records, the magistrate should attempt to reconstruct it before the matter is sent on review. If this was not possible the magistrate should mention this fact

² 309B (4) (a) 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 relevant documents to the registrar of the High Court concerned: Provided that instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the High Court concerned may nevertheless call for the production of the whole record.

³ Rule 67(10):

Upon an appeal being noted as provided in sub-rule (9) the registrar or clerk of the court shall prepare a copy of the record of the case, including a transcript thereof if it was recorded in accordance with the provisions of rule 66(1), and then place the record before the judicial officer who shall within 15 days thereafter furnish to the registrar or clerk of the court a statement in writing of his or her reasons for dismissing the summons or charge.

⁴ Rule 66(4)(c):

The original copy of the transcript of any shorthand notes referred to in paragraph (a), shall be certified as correct by the person making such copy and shall be filed with the record of the case.

when the matter was sent on review, together with reasons for the failure to reconstruct same.

11.5 Uniform Rule 51(3)⁵ states that the ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the court shall rest on the appellant or his attorney. This applies even when the attorney acts *pro deo*.⁶

[12] In conclusion the court ordered on 30 July 2018 that the matter be removed from the roll in order for the record to be properly completed.

[13] The Registrar of this Court must bring the judgement to the attention of the President of the Regional Court: Free State, the Chief Magistrates Bloemfontein and Welkom as well as the Regional Head, Regional Office: Department of Justice and Correctional Services, Free State, Bloemfontein.

M. OPPERMAN, J

⁵ Uniform Rule 51(3):

The ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the court shall rest on the appellant or his or her legal representative: Provided that where the appellant is not represented by a legal representative, such responsibility shall rest on the director of public prosecutions.

⁶ S v Ngxitho 1979 (1) SA 1037 (NC).

I concur.

C. REINDERS, J

On behalf of the appellant: Adv. S. Kruger
Instructed by:
Legal Aid
BLOEMFONTEIN

On behalf of the respondent: Adv. R. Hoffman
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN