



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **KAP 08/15**
DATE HEARD: **29/05/2017**
DATE DELIVERED: **02/06/2017**

In the matter between:

PASEKA WILLIAM SELALETSI

Appellant

and

THE STATE

Respondent

Coram: Pakati J et Snyders AJ

JUDGMENT

SNYDERS AJ:

1. The appellant, Paseka William Selaletsi, was convicted in the Regional Court at Warrenton on 17 March 2011 of assault with intent to do grievous bodily harm, pointing of a firearm and rape. He was sentenced to 12 months imprisonment on Count 1, 2 years imprisonment on Count 2 and 15 years imprisonment on Count 3. The Court ordered that the sentences run concurrently.
2. The appellant appealed against the conviction and sentence, after leave to appeal was granted by the trial court.
3. It is common cause that the appeal record is incomplete in the following respects:

- 3.1 The entire plea proceedings are not transcribed;
 - 3.2 The testimony of the complainant, who was a single witness, was not transcribed; and
 - 3.3 The examination – in – chief and a portion of the cross – examination of the appellant did not form part of the record.
4. An attempt was made by the clerk of the court to rectify the record. To this end, trial notes by the Magistrate were transcribed. Unfortunately, this attempt fell short, as all of the Magistrates notes could neither be deciphered, nor did the notes give a true reflection of the proceedings. This could be seen when the Magistrate's notes were compared to parts of the record that were indeed transcribed.
 5. I will firstly deal with the process to be followed to reconstruct a record and thereafter the impact an incomplete record has on appeal proceedings.
 6. Section 76 (3) (a) of the Criminal Procedure Act, 51 of 1977 ('the CPA'), stipulates that a trial court shall keep a record of proceedings, whether in writing or mechanical. Rule 51 (3) of the Uniform Rules of Court places the burden on the appellant or his attorney to ensure that an appeal record is properly placed before an appeal court. Section 35 (3) (o) of the Constitution of the Republic of South Africa, 1996, affords an accused person a right of appeal to a higher court as part of the right to a fair trial.
 7. In *S v Gora and Another*¹, a practical approach was followed by the Magistrate in re-constructing the record. He called counsel to his chambers to re-construct the record. He later convened the court. All the parties, including the appellants, were present. Counsel was given an opportunity at such proceedings to confirm the Magistrate's trial notes, to object or amend

¹ 2010 (1) SACR 159 (WCC) at para 19

any part thereof. In my view, this was the correct method to follow. The following remark in *S v Yekiso*² demonstrates the duty of a presiding officer once it becomes apparent that the record is lost:

“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; to arrange a date for the parties to reassemble, in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate is to place it on record that the parties have reassembled for the purpose of the proposed reconstruction; the parties are 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. Once this process has been followed, none of the parties can cry foul that his rights have been trampled on.”

8. In the present appeal however, the clerk of the court stated under oath that the Magistrate had since resigned from the department and left the province. Added to this, the prosecutor had since passed away and the defence attorney had left the Legal Aid Board and was untraceable. The defence attorney also had no written notes on the matter. The interpreter would not be in a position to assist as she merely interpreted and took no notes. A further factor that impedes re-construction of the record is the 7 year delay between the conviction and when the application for leave to appeal was heard. It is clear that reconstruction of the record herein is impossible and blame cannot be attributed to the appellant.
9. The SCA, in *S v Chabedi*,³ has stated that the record of proceedings in the trial court is of cardinal importance on appeal, as it forms the whole basis of the rehearing by the court of appeal. Thus, if the record is inadequate, it will lead to the conviction and sentence being set aside.

² Unreported judgment by Yekiso J (WCC case number SS106/08) at para 21

³ 2005 (1) SACR 415 SCA at para 5

10. 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 recordal of everything that was said at trial.⁴

11. The SCA⁵ thus created a two pronged test to determine if the record is adequate. The test is thus whether the defects are so serious that a proper consideration of appeal is not possible by looking at:

11.1 the nature of the defects in the particular record; and

11.2 the issues to be decided on appeal.

12. I have dealt with the defects of the record above. I cannot deal with the defects in isolation, as the issues to be determined on appeal will give insight into whether the defects are so serious that the matter cannot be considered.

13. In this matter, the appellant avers that his conviction should be set aside as the state did not prove its case beyond reasonable doubt. He also alleged that the sentence was inappropriate and induced a sense of shock. No assistance was given by the Magistrate in his judgment. The acceptance of the complainant's testimony as a single witness was not explained. The testimony of the witnesses was not properly evaluated having regard to the probabilities and improbabilities thereof. No rationale was given for rejecting the appellant's version as not reasonably possible. In *S v Moleka*⁶, the SCA held:

"I find it necessary to emphasise the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily, but base their decisions on rational grounds. Of even greater

⁴ *S v Chabedi* at para 5

⁵ *S v Chabedi* at para 6 and 8

⁶ 2012 (1) SACR 431(SCA) at para 12

significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person. The giving of reasons becomes even more critical, if not obligatory, where one judicial officer interferes with an order or ruling made by another judicial officer. To my mind this underpins the important principle of fairness to the parties. I find it unjudicial for a judicial officer to interfere with an order made by another court, particularly where such an order is based on the exercise of a discretion, without giving any reasons therefor".

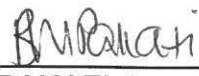
14. Although both counsel addressed the merits of the appeal, I cannot adjudicate thereon in the absence of the complete record. The nature of the defects in the record are such, that I cannot make a finding on the issues to be decided. Further to this, in the absence of a record of the proceedings, it is clear that there cannot be a fair trial at appeal stage.

15. Whereof I make the following order:

THE APPEAL SUCCEEDS AND THE CONVICTIONS AND SENTENCES ARE SET ASIDE.


 SNYDERS AJ
 NORTHERN CAPE DIVISION

I concur.


 PAKATI J
 NORTHERN CAPE DIVISION

On behalf of Appellant:	Adv D Van Tonder (Legal Aid SA)
On behalf of Respondent:	Adv C Jansen (DPP)