

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: A282/17

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

2024/08/26

In the matter between:

MPHO LUCAS KEKAE

Appellant

and

THE STATE

Respondent

JUDGMENT

Introduction

[1] With the evidence of the two complainants missing, this full bench court is faced with Hobson's choice. In *casu*, both counsel for the appellant and respondent concur that the appellant must be released from custody forthwith. In 2004, the appellant appeared at Brits Regional Court before Magistrate L.E Matthee, charged with six counts, namely:

- Four counts of rape read with section 51 of the Criminal Law Amendment Act 105 of 1997.
- One count of robbery with aggravating circumstances.

- One count of escaping from lawful custody in terms of s 51(1) of the Criminal Procedure Act.

[2] On 12 December 2008, he was handed the following sentence:

- On count 1, imprisonment for life in terms of section 51 (1) of Act 105 of 1997.
- On count 2, imprisonment for life in terms of section 51 (1) of Act 105 of 1997.
- On count 3, imprisonment for life in terms of section 51 (1) of Act 105 of 1997.
- On count 4, imprisonment for life in terms of section 51 (1) of Act 105 of 1997.
- On count 5, the robbery, 12 months' imprisonment.
- On count 6, the offense of escaping, 12 months' imprisonment.

[3] In 2009, the appellant brought an application for appeal before the Brits Magistrates Court. On 16 April 2009, the clerk of the court, MJ Mafore, wrote a letter apologizing for the delay in responding to his application. Acknowledging that they received the application on 27 February 2009, he stated that it was forwarded to the magistrate, who requested the appellant to draft a new application for appeal because his application was late. On 20 April 2009, the appellant dispatched an affidavit asking for condonation for the late filing of his notice of appeal. From the Department of Correctional Services, the appellant sent a letter titled application for appeal to the clerk of court in Brits on 1 August 2009. Having been approached by the appellant for legal assistance, the Legal-Aid South Africa, Ga-Rankuwa Justice Centre's Mr Modjadji dispatched a letter to the clerk of the criminal court in Brits, on

25 August 2009. In the letter, he indicated that they had received instructions from the appellant to assist him with an application to appeal and he was requesting to be furnished with the transcribed records of the proceedings.

[4] The next movement in this matter was on 12 October 2016, when a notice of motion, application in terms of section 282(b) of the Criminal Procedure Act 51 of 1977, founding affidavit and application for condonation were filed.

[5] On 15 November 2018 the appeal appeared before DJP Ledwaba and Mncube AJ. The matter was postponed *sine die* for the record to be reconstructed due to absence of the evidence of D[...] M[...], P[...] R[...] (the complainants in the rape), Dr. Mataonda Balanda, Mashundu Lucky Ramfubelo, Patricia Phiri, Terrence Phule Matlapeng and Dr. Emery Albert Tudor Van Boat.

[6] On 21 September 2023 and 5 March 2024, letters from the Magistrates Court in Brits explained that the record could not be reconstructed because the Magistrate who had handled the matter was retired and not in good health. Without the evidence of the afore-mentioned witnesses, this full bench is unable to accord the appellant his rights as enshrined under 35(3)(o).

The law

[7] Before the advent of the Constitutional democracy, the court in *S v Collier*¹ held:

“I am in respectful agreement with the practice that where the whole record or a very material part thereof has been lost prior to review or the appeal being concluded, the proceedings and sentence should be set aside. In such cases the Court of appeal or review is clearly unable to consider the case. But it seems to me wrong that the same result should follow where only some answers of a witness on matters which

¹ 1976 (2) SA 378 (C.P.D.).

are apparently not of vital importance are not recorded. It would lead to an absurd result.”²

[8] With the creation of democracy and the emergency of the culture of rights, courts are enjoined to accord due deference to the rights in the Bill of Rights. 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.”

[9] The court in *S v Phakane*³ held that:

“[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. In *S v Joubert* the then Appellate Division of the Supreme Court said:

“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

² Supra 379.

³ 2018 (1) SACR 300 (CC).

seems to me that the conviction cannot stand, because it cannot be said that there had not been a failure of justice.”

[10] Examining the importance of the missing evidence, the court referred to the matter of *Chabedi* and held:

“As to when it can be said that an incomplete record will result in the infringement of an accused’s right to a fair appeal, in S v Chabedi the Supreme Court of Appeal said:

“[T]he 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.

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.”

This passage was quoted with approval by this Court in Schoombee. [40] In the present case the Full Court did not have before it a record on the basis of which it could fairly assess whether the trial court’s conviction of the applicant was correct. The trial record available to the Full Court was simply not adequate for a proper consideration of the applicant’s appeal. Therefore, the applicant’s right of appeal was frustrated by the fact that material evidence was missing from the record.”

[10] The situation in this matter is exacerbated by the fact that the appellant has waited for nearly 15 years for the reconstruction of the missing record and for his appeal to be heard. He has been incarcerated for 20 years since his arrest. In the meantime, any likelihood of such an attempt succeeding has been thwarted by circumstances outlined in the communiqué from the trial court clerk dated 21

September 2023 and 5 March 2024, which indicated *inter alia* that the presiding officer in the trial court was on pension and not in good health.

Conclusion

[11] The missing evidence from the record is at the heart of this matter. This court must consider the evidence of the complainants to arrive at a just decision. The challenging factors that impede the reconstruction of the record imperils this appeal. In essence, the appellant's right to a fair trial, victims' rights to see justice served and society's rights to a fair administration of justice have been dealt a fatal blow.

Order

The following order is made:

1. Appeal is granted.
2. The order of the Full Court of the Gauteng Division of the High Court is set aside and replaced with the following:

“(a) The trial proceedings relating to the appellant as well as the conviction and sentence of the appellant by the trial court are hereby set aside.

(b) The appellant must be released from prison immediately.”
3. The Registrar of this Court is directed to take steps immediately to ensure that this judgment is delivered to the Head of the Kgosi Mampuru II Central Correctional Centre, Pretoria.

KHUMALO
JUDGE OF THE HIGH COURT, PRETORIA

I concur

MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 6 August 2024

Date of judgment: 26 August 2024

APPEARANCES:

COUNSEL FOR APPELLANT:

M. B. KGAGARA INSTRUCTED BY
LEGAL-AID

COUNSEL FOR RESPONDENT:

C. PRUIS INSTRUCTED BY
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