



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

Case No: AR 283/23

In the matter between:

SIMUKELO ERNEST MVUNA

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from the KwaZulu-Natal, Southern Circuit, Local Division, per Hurt J (sitting as court of first instance)

1. The appellant's appeal against the sentence imposed in respect of count 1 succeeds.
2. The sentences imposed on counts 2, 3, 4 and 5 are confirmed.
3. The sentence imposed in respect of count 1 is set aside and replaced with the following:

‘In respect of count 1, the accused is sentenced to 20 years imprisonment.’
4. The sentence is antedated to 9 December 2005.
5. The sentences imposed in respect of counts 2, 3, 4 and 5 are to run concurrently with the sentence imposed in respect of count 1.
6. The effective term of imprisonment is 20 years.

JUDGEMENT

E Bezuidenhout J (Mngadi J and Marion AJ concurring)

[1] The appellant was convicted of one count of murder, one count of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977, one count of theft, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition on 8 December 2005.

[2] On 9 December 2005 the appellant was sentenced to life imprisonment on count one, 15 years imprisonment on count two, 3 years imprisonment on count three and 3 years imprisonment on counts four and five. Counts four and five were taken together for the purpose of sentence.

[3] On the same day, the appellant applied for leave to appeal against both conviction and sentence, which application was refused.

[4] It is common cause that the entire record of the proceedings, save for the judgments on conviction and sentence, cannot be reconstructed. We were informed that the compact discs containing the record of the proceedings was only found in a carton box together with other discs a substantial period after the trial had been concluded and after many previously unsuccessful searches. The compact discs had deteriorated to such an extent that transcription was impossible. The trial judge had in the meantime retired, had no notes available and was too sickly to attempt a reconstruction. The proceedings in respect of the application for leave to appeal were also unavailable. An attempt was made by Van Zyl J to reconstruct at least the application for leave to appeal and the court's judgment therein to enable the appellant to petition the Supreme Court of Appeal for leave to appeal.

[5] On 9 March 2021, Van Zyl J gave a short judgment after hearing evidence from the erstwhile prosecutor as well as the appellant's counsel in the trial and found

that it was not possible to reconstruct the reasons for the judgment for the refusal of leave to appeal.

[6] The appellant filed his petition application with the Supreme Court of Appeal on 21 April 2022, seeking leave to appeal against his sentence as well as condonation for the late filing of the application. At this stage, the appellant had already served 17 years in prison. It appears that the appellant and his family have struggled over many years to obtain the record of the proceedings, but to no avail. On 14 July 2022, the Supreme Court of Appeal issued an order granting condonation and granting leave to appeal to the Full Court of the KwaZulu-Natal Division of the High Court. The order did not state whether it was against sentence only but it is assumed that this was what was intended, in light of the relief sought in the notice of motion.

[7] The appellant's counsel, Mrs Anastasiou-Krause, raised a point *in limine* in her heads of argument, namely that a proper consideration of the appeal is impossible as the record is insufficient and that a failure of justice has accordingly occurred.

[8] Counsel for the appellant referred us to a number of authorities, which I will deal with below. Appellant's counsel submitted that it is imperative that when considering what would be a just sentence in the circumstances, the court should be able to consider the evidence of the State witnesses as well as the appellant, especially when determining if the sentence was disproportionate to the facts of the case.

[9] It was also submitted that the appellant could not have a fair appeal when it is unknown what was submitted in mitigation and aggravation of sentence. It was submitted that the appellant's conviction and sentence cannot stand and should be set aside.

[10] Counsel for the State, Mrs Marais-Myeni, submitted in her heads of argument that the record available was sufficient to enable an adjudication of the appeal against sentence. Before us, she however conceded that the two available

judgments are inadequate to determine the facts of the case or the basis and reasoning for the sentence imposed. She furthermore agreed that there is no indication that the court considered any of the usual factors a sentencing court is obliged to consider. I will return to this point below.

[11] The judgment on conviction by the trial court comprises six and a half pages. It contains no discernible description of the facts of the matter. Reference was made to a complainant in the housebreaking count having testified but on this particular count the appellant was only convicted of theft. The complainant's evidence was not summarised. Reference was also made to a trial-within-a-trial during which evidence of a confession and a pointing out by the appellant was presented. Both the confession and pointing were ruled to be admissible. According to the judgment, the 'brief reasons' for the ruling was given after the conclusion of the evidence in the trial-within-a-trial, which is also not before us.

[12] The judgment further contained a very basic summary of the evidence of the appellant's girlfriend, who noted that he had a different cell phone than what he previously had, which he informed her, he had bought. The police subsequently found it at her home. The last witness whose evidence was mentioned was that of a police witness who was a ballistic and firearm expert, who testified about the possibilities of a revolver being discharged 'without the wielder intending such a shot to be discharged'. The purpose of this evidence was probably to counter a version of an accidental discharge, however, there is nothing contained in the record that confirms this possibility.

[13] The court discussed the appellant's evidence in much more detail, concentrating on the appellant's evidence in respect of how he came to making the confession and pointing out, which according to the appellant involved severe assaults and a gun being held to his head. The court found that the appellant had been toying with everyone and his contentions were described as being 'nonsense'. The court also rejected as false an exculpatory statement made by the appellant in the confession to the effect that the firearm was discharged accidentally.

[14] As mentioned above, the entire judgment on conviction comprised of six and a half pages, of which the last four pages concentrated almost entirely on the appellant's case.

[15] The judgment on sentence comprises one and a half page. The submissions made by the appellant's counsel are not available. The judgment is short enough to repeat here. It reads as follows:

'Yes, stand up, please, Mr. Mvuna. Your counsel has done his very best to persuade us that because you co-operated with the police just after your arrest, we should assume that you are remorseful for your crimes. But the impression that we have gained through this trial is that Mr Stuart for the State is perfectly correct when he said that you have adopted an arrogant attitude. You have lied about the way the police treated you. You have no compunction in accusing them of grossly improper conduct. And you have stuck to your lying defence, even up to the very last stages of the trial when you tried to dupe the advocates by taking them into Port Shepstone to point out a shop that does not exist.

In your greed to get more money, you have left a man dead, who had done nothing to you at all. And you had the nerve to walk into another man's house and steal his revolver when he was no more than a few metres from his door.

In 1997, the People's Parliament decided that the only way that it could deal with the rash of violent crime, that had broken out, was to pass an Act which would contain certain mandatory sentences. The Act provides that people who commit murder in the course of a robbery must be sentenced to life imprisonment, unless there are special circumstances. The object of that Act is to take people, who are able to commit an offence of that type, out of the community for a very long time, so that they could no longer constitute a danger to peaceful citizens.

In addition, any person committing robbery with aggravating circumstances in terms of the Act is obliged to serve a sentence of 15 years imprisonment unless there are special circumstances present. Although your Council has endeavoured to persuade us that there are substantial and compelling circumstances present in this case, we remain unpersuaded. Even your relative youth cannot assist you in this case, because we have formed a clear impression that you in fact are not remorseful for what you have done and that there is no prospect of you being rehabilitated in the shorter term.'

[16] The court referred to the minimum sentence legislation, and also to the issue of substantial and compelling circumstances, but no mention is made of what those substantial and compelling circumstances were according to the appellant's counsel

and which were deemed unpersuasive. Included in the bundle of documents provided to us for the purpose of the appeal is a copy of the indictment. It contains no reference to the Criminal Law Amendment Act 105 of 1997 (the Act). As there is no record of the proceedings, it is unknown as to whether the provisions of the Act were even brought to the attention of the appellant before the trial proceeded.

[17] The courts have over time dealt extensively with the situation where the trial record was incomplete and could not be reconstructed.

[18] In *S v Collier*¹ Burger J held as follows:

‘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 are apparently not of vital importance are not recorded. . . . In my opinion the Court of appeal should deal with the case on the best available record unless it appears that evidence placed before the lower court does not appear on the record, that such evidence is material to the adjudication of the appeal and that the issue as to the missing evidence cannot be settled by way of admissions or in some other manner. Where material evidence is not on record and the defect cannot be cured, the appeal should succeed.’

[19] In *S v Chabedi*² the court held:

‘[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.’

¹ *S v Collier* 1976 (2) SA 378 (CPD) at 378H-379D.

² *S v Chabedi* [2005] ZASCA 5; 2005 (1) SACR 415 (SCA) (*Chabedi*).

[20] In *S v Schoombee and another*³ the court held that '[i]t is 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.'⁴ The court also quoted and approved what was held in *Chabedi* quoted above, in respect of the setting aside of the conviction and sentence if the record is inadequate for a proper consideration of the appeal. The court further held that although an appellant has the final responsibility to ensure that the appeal record is in order, the 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.'⁵ The court however cautioned that where 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.⁶ The court ultimately held that the record was 'amply adequate for just consideration of the issues the applicants raised on appeal',⁷ despite serious lapses in how the record was reconstructed when the court failed to ensure that the reconstruction process involved both parties.

[21] In *Phakane v S*⁸ the court had to determine the question as to whether the State's failure to deliver a complete trial record to the full court in circumstances where the missing evidence could not be reconstructed had infringed the applicant's right to a fair appeal as entrenched in section 35(3) of the Constitution. The appellant had appealed against both sentence and conviction in this matter. It appeared that the record of the trial proceedings was available but incomplete in that one of the main State witness' evidence was missing and could not be reconstructed. The full court nonetheless proceeded to deal with the appeal, as the trial court had not relied solely on her evidence to convict the appellant. The full court found that the nature of the defects in the record were not so serious to the point that a proper consideration of the appeal was not possible. It dismissed the appeal against conviction but upheld the appeal against the sentence imposed.

³ *S v Schoombee and another* [2016] ZACC 50; 2017 (2) SACR 1 (CC); 2017 (5) BCLR 572 (CC) (*Schoombee*).

⁴ *Schoombee* para 19.

⁵ *Schoombee* para 21.

⁶ *Schoombee* para 29.

⁷ *Schoombee* para 37.

⁸ *Phakane v S* [2017] ZACC 44 (*Phakane*).

[22] Zondo J held as follows:⁹

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

[23] There is however one further aspect that requires discussion. The appellant has not applied for leave to appeal to the Supreme Court of Appeal against his conviction. It was submitted by his counsel that by the time they had been able to attend to the reconstruction of the leave to appeal record, the appellant had already served almost 17 years of his sentence and the appellant did not see the use of applying for leave against conviction in these circumstances, which is perhaps understandable. In all the cases referred to above, the appellants were appealing against both conviction and sentence, which lead to the setting aside of both conviction and sentence when the records were incomplete.

[24] Section 322 of the Criminal Procedure Act 55 of 1977 (the CPA) deals with the powers of a court on appeal. The relevant portions read as follows:

‘(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may-

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

⁹ *Phakane* para 38.

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

(2) Upon an appeal under section 316 or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial.’

[25] It therefore appears that only when a person is appealing against conviction, is a defect in the record, which results in a failure of justice, sufficient to justify the setting aside of the conviction and sentence. The appellant’s point *in limine* can therefore not succeed, as we do not have the power to set aside the conviction in the absence of the appellant having been granted leave to appeal against his conviction. It was held in *S v Langa en andere*¹⁰ that section 322(2) of the CPA does not empower an appellate division to accede to the request of an appellant, to whom leave has been granted to appeal against his sentence, to be allowed to argue in respect of the correctness of the conviction and to appeal against it. As far as the appellant’s remedy is concerned, it was suggested that the appeal could be adjourned in order to allow an appellant to apply for special leave or to petition the Supreme Court of Appeal. In the present matter, bearing in mind that the appellant has been in custody for almost 19 years and that a further application will only cause further delays, I believe that we have no option but to deal with the sentence, which we are compelled to do on a record that is almost completely deficient.

[26] As far as sentence is concerned, Terblanche in *A Guide to Sentencing in South Africa*¹¹ deals with the sentencing judgment, where a court has to give reasons for the sentence it imposes. The author states that the judicial officer imposing sentence should provide an explanation for the sentence he decides upon, as it has long been recognised to be in the interests of justice to do so and is

¹⁰ *S v Langa en andere* 1981 (3) SA 186 (A).

¹¹ SS Terblanche *Guide to Sentencing in South Africa* 3ed (2016) at 161.

important in the maintenance of public confidence in the administration of justice.¹² In respect of the failure to refer to relevant aspects when giving reasons the following was stated:¹³

‘Failure by a sentencer to properly explain a sentencing decision can, on appeal, be regarded as an irregularity, justifying the setting aside of such decision. The question is whether, if a relevant aspect is not mentioned in the sentencing judgment, an inference can be drawn that the presiding officer did not consider that aspect.

The answer to this question usually depends on the circumstances of the case and the context of the judgment.’ (footnotes omitted)

[27] The author also discussed the three basic elements which a court will consider, namely the seriousness of the crime, which is described as ‘an extremely important ingredient of any sentence’, the criminal, which would entail the offender’s age, marital status, level of education, presence of dependents, employment and health and lastly, the interests of society.¹⁴

[28] It is trite that a court of appeal will only interfere in a sentence imposed if it is vitiated by an irregularity or misdirection, or is startlingly or shockingly inappropriate.

[29] As mentioned above, it is clear that the indictment contained no reference to the minimum sentence legislation contained in the Act. In *S v Khoza and another*¹⁵ the court held as follows:

‘The following principles can be distilled from these judgments. As a general rule, fair-trial rights require that an accused person should be informed at the outset of the trial of the provisions of the Minimum Sentences Act (or other provisions relating to an increased sentencing regime) that the state intends to rely upon or which are applicable. The accused person should generally be so informed in the indictment or charge-sheet; by notification by the presiding officer or in any other manner that effectively conveys the applicable provisions to the accused person before or at the commencement of the trial. This is of particular importance when the accused person has no legal representation. This, however, is not an absolute rule. Each case must be determined on its own particular facts and circumstances,

¹² Ibid at 162.

¹³ Ibid.

¹⁴ Ibid at 163-171.

¹⁵ *S v Khoza and another* [2018] ZASCA 133; 2019 (1) SACR 251 (SCA) para 10.

bearing in mind the oft-quoted dictum in *S v Jaipal* 2005 (1) SACR 215 (CC) (2005 (4) SA 581; 2005 (5) BCLR 423) para 29. There it was stated that the right to a fair trial also requires fairness to the public as represented by the state and this has to instill public confidence in the criminal justice system. Substance must prevail over form. In the final analysis, the determination of whether fair trial rights were infringed in these circumstances turns on the question of prejudice to the accused.'

[30] We have to assume that the appellant was not informed of the provisions of the Act at the commencement of his trial and the issues of the so-called minimum sentences only came to the fore once sentence was being considered. The court in our view committed a misdirection by proceeding to sentence the appellant in accordance with the Act when no such provisions were contained in the indictment. The court also committed an irregularity by failing to properly explain the reasons for its sentencing decision. On the face of it, the court failed to pay due regard to the age of the appellant. Although we are hamstrung by the cryptic information contained on the record, we assume that the appellant was a first offender as the sentence of 15 years imprisonment imposed in respect of count 2 is the prescribed sentence for a first offender. The offences were committed on 25 November and 5 December 2004 respectively. According to copies of the contents of the court file, the appellant was in custody throughout the trial. It appears that he was arrested around 10 December 2004. He was therefore in custody awaiting trial for about a year. As mentioned above, the appellant was 23 years old. It appears that courts have taken the youthfulness of accused into consideration in even the most serious of crimes.

[31] In *S v Mnyakeni*¹⁶ the two appellants were convicted of murder and robbery with aggravating circumstances. The court found that the two appellants committed a horrible and senseless crime. A person lost his life for a few items with a limited value. The court considered that the appellants' showed no remorse and acted in a callous manner. However, both appellants were young men, first offenders and lived in poverty. The effective sentence of 35 years imprisonment was reduced to 15 years imprisonment.

¹⁶ *S v Manyakeni* 2013 JDR 1400 (GNP).

[32] In *S v Dithlake*¹⁷ the appellants were also convicted of murder, robbery with aggravating circumstances and possession of an unlawful firearm. The deceased was shot and his motor vehicle, cellphone, firearm and other items were taken and his body was dumped alongside the road. The sentence of life imprisonment imposed on the count of murder was found to be excessive taking into account the youth of the appellants. They were first offenders and aged between 21 and 27 years and had been in custody awaiting trial for two years. The sentence was reduced to 20 years imprisonment and the sentences imposed on the other counts were ordered to run concurrently with it.

[28] Bearing in mind the specific circumstances of this appeal and what has been held above, we are accordingly of the view that the sentence imposed in respect of count one warrants interference. The following order is therefore granted:

1. The appellant's appeal against the sentence imposed in respect of count 1 succeeds.
2. The sentences imposed on counts 2, 3, 4 and 5 are confirmed.
3. The sentence imposed in respect of count 1 is set aside and replaced with the following:

'In respect of count 1, the accused is sentenced to 20 years imprisonment.'
4. The sentence is antedated to 9 December 2005.
5. The sentences imposed in respect of counts 2, 3, 4 and 5 are to run concurrently with the sentence imposed in respect of count 1.
6. The effective term of imprisonment is 20 years.

E Bezuidenhout J

Mngadi J

¹⁷ *S v Dithlake* 2013 JDR 0991 (GNP).

Marion AJ

Date of hearing: 02 August 2024

Date of judgment: 23 August 2024

Appearances:

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