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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, BHISHO**

Case no. CA&R 24/21

In the matter between:

REPORTABLE

ZANOXOLO BAYI

Appellant

and

THE STATE

Respondent

JUDGMENT REFLECTING REASONS FOR APPEAL ORDER

STRETCH J.:

[1] On 3 December 2025 my brother Bodlani AJ and I, sitting as a court of appeal, made the following order:

1. The appeal succeeds.
2. The conviction and the sentence imposed are set aside.
3. The order of the trial court, convicting the appellant on a charge of rape on 8 February 2012, is set aside and is substituted with the following order:
“The accused is found not guilty and he is discharged.”
4. The Registrar is ordered to arrange for the appellant’s immediate release from prison.
5. Reasons for this order will be handed down in due course.

[2] What follows then, are the reasons for the order.

[3] On 8 February 2012 the appellant was convicted in the Zwelitsha regional court on a charge of raping a minor female. Because the complainant was under the age of 16 years at the time of the alleged rape, the appellant was sentenced to life imprisonment, in terms of the relevant minimum sentence legislation, on 10 May 2012.

[4] On 18 October 2012 he sought leave to appeal from the regional magistrate against his conviction and against the sentence imposed. Leave was refused. According to the appellant’s affidavit in support of an application to reinstate his appeal (insofar as such an application was necessitated in the circumstances), he was advised to petition the judge president for leave to appeal. On 28 November 2012 he signed an affidavit in support of his petition to the judge president. According to the appellant the petition was filed on 29

November 2012 under case no. CA & R 06/2012.¹ In March 2014 the appellant was informed that a notice of appeal had been filed on his behalf on 10 March 2014. According to him he was not informed of the outcome of his petition but was later advised (correctly so) that he had an automatic right of appeal in any event.²

[5] During September 2014 the appellant was informed by his attorneys, Legal Aid South Africa (LASA), that a transcript of the proceedings in the regional court had been requested. Thereafter LASA advised him from time to time that the transcript had still not become available. In 2016 LASA informed him that the transcript had been received, but that it was incomplete. Various attempts to obtain a complete transcript fell on deaf ears. In August 2021 the Zwelitsha criminal clerk advised the appellant that reconstruction of the record was problematic. Her letter read as follows:

‘In the above mentioned [sic] case it was impossible to find the charge sheet as the court building was under construction for more than two years. The strong room was also under construction and the charge sheets was [sic] not stored in a secure place.

The case is a partial transcript as most of the cse [sic] was recorded on the cassettes [sic] which was [sic] in use during 2009 until 2010. Some of the cassettes [sic] could not be found.

¹ The high court criminal appeals clerk has no record of this file.

² A person sentenced to life imprisonment by a regional court during 2012 did not have an automatic right of appeal at that specific time. This was because the law was in a transitional phase during that period. An automatic right of appeal did exist before 1 April 2010. Between 1 April 2010 and 22 January 2014, the automatic right of appeal was inadvertently removed by an amendment to the Criminal Procedure Act 51 of 1977, by the Child Justice Act 75 of 2008, which meant that all persons (except children) had to apply for leave to appeal. See *S v Alam* 2011 (2) SACR 553 (WCC). After 22 January 2014 the Judicial Matters Amendment Act 15 of 2023 came into effect and retrospectively restored the automatic right of appeal for persons sentenced to life imprisonment, effective from 1 April 2010. The appellant’s case thus ultimately benefited from the automatic right of appeal once the law was corrected.

I reconstructed the charge sheet from earlier transcripts and the old court book of the presiding magistrate, Mr Maqubela. On the original charge sheet his notes was [sic] secured with staples and reconstruction of the missing evidence is a problem.’

[6] The appellant in his affidavit, stated that he was visited in prison by one Mr Erasmus from LASA in August 2022, who had indicated that the record was still incomplete but that he would nevertheless proceed with prosecuting the appeal. On 24 March 2023 the appeal was set down before Mbenenge JP and Dawood J. There is nothing in the court file reflecting what transpired on that day. It is clear however, from markings on the court file cover that the names of these two judges and the date of 24 March 2023 had simply been erased and substituted with 3 December 2025, without the high court appeals clerk having bothered to reflect the high court history of this matter, neither on the cover of the court file, or by way of any entries or documentation in the file itself.

[7] On 5 June 2025 the appellant instructed his present attorneys,³ who set the matter down for hearing for 3 December 2025. On 21 November 2025 this court issued an urgent directive which reads as follows:

1. This appeal has been set down for 3 December 2025 in Bhisho.
2. The record is substantially incomplete:
 - (a) there is no judgment on conviction.
 - (b) the appellant’s evidence has not been transcribed.
3. The respondent (whose heads of argument are out of time), has taken a point in limine that the appeal should be struck from the roll because:

³ Mr Erasmus from LASA had passed away in the interim.

- (a) the record is incomplete despite previous directives directing the appellant to comply;⁴
 - (b) There is no record of leave to appeal having been applied for and granted.⁵
- 4. There is no record in the court file of previous directives ordering the appellant to complete the record. It appears that the matter was before Mbenenge JP et Dawood J as far back as 24 March 2023, but what happened then has been erased from the court file cover and substituted with 3/12/2025. The high court appeals clerk (Ms F Menze) is not available for comment. She has, in any event, given wrong instructions to her colleague, that this is a LASA matter, and has been of no assistance whatsoever.⁶
- 5. What is in the court file is a detailed explanation by the appellant regarding the delay in this matter, supported, inter alia, by a letter from LASA (the appellant's erstwhile representative), to the clerk of the regional court (dated almost ten years ago) pointing out that the following is absent:
 - (a) the recalled evidence of S[...] F[...];
 - (b) the accused's evidence;
 - (c) the judgment on conviction (annexure A).
- 6. Annexure B is the curt response of the criminal clerk Zwelitsha, almost six years later, stating that recording cassettes are missing and "reconstruction of the missing evidence is a problem".
- 7. As for the second point in limine, not only is leave to appeal not required against a life sentence imposed by the regional court, but this was pertinently pointed out in annexure A (dated **11** years ago).

⁴ Copies of the alleged directives were not attached to the application for the matter to be struck from the roll. Nor is there any evidence of what transpired before Mbenenge JP and Dawood J two years ago.

⁵ See fn 1. The applicant did not require leave as correctly pointed out by Mr Erasmus from LASA.

⁶ To date this court has not been approached by the high court appeals clerk. Nor has it been explained why the checklist for criminal appeal records (which ought to be completed by the high court appeals clerk) wrongly reflects that heads of argument had been filed, that a transcript of the record of proceedings in the trial court with all the exhibits had been filed, that the judgment of the court a quo had been filed, and that there was a court order/judgment granting leave to appeal.

8. The appellant's legal team must approach Mr Nabela (who represented the appellant on trial and whose number is 083 321 7912) and obtain confirmation in writing as to whether the missing portions referred to in annexure B can be reconstructed.
9. My registrar has ascertained that the first prosecutor (Mr Kwaaiman) is deceased, the second one (Mr Mtwezi) was transferred to Mthatha, and the whereabouts of the third one (Mr Nkohla) are unknown.
10. It is of vital importance then, that something in writing is obtained from the magistrate and the appellant's erstwhile lawyer Mr Nabela. This must be emailed to my registrar by 28 November 2025.
11. This appeal may not be removed from the roll. Nor will it be struck from the roll as suggested by the respondent. The delay in dealing with this matter effectively to ensure that justice is done, is through no fault of the appellant, who has been in custody as a sentenced prisoner for almost **14** years.

[8] On the afternoon before the appeal was heard, the appellant's counsel filed a document described as a confirmatory affidavit. I digress to point out that statements on oath should be filed by the instructing attorneys and not by counsel briefed to argue the appeal. It does not, in any event state what is being confirmed and is difficult to understand. It seems to suggest that counsel had been running around doing the work of an attorney. Be that as it may, it is entirely out of time and did not deal with what this court required in its directive. This court required, by no later than 28 November 2025, confirmation in writing from the regional court magistrate and from the lawyer who represented the appellant at his trial, not only that the evidence recorded was capable of reconstruction, but that the magistrate was able, almost 14 years down the line, to rewrite his judgment on conviction in the same format and

reflecting the same substance in which it was originally produced. Mr Silevana⁷ stated in his affidavit that the magistrate had required the transcribed evidence, which the magistrate had been furnished with on the day preceding the hearing of the appeal. If the magistrate still happened to have had a draft of the final judgment on conviction, it would have been simple for him to confirm this. I fail to understand why he would have required a transcript of the evidence to do so. There was also no explanation as to why the magistrate did not previously mention that he was able to assist. The letter of the Zwelitsha appeals clerk which was written in August 2021 suggests quite the contrary. This is nothing short of iniquitous. The appellant, who had been serving a sentence for just short of 14 years, was totally reliant on lawyers and the executive arm of the Department of Justice on the other side of the prison walls, to preserve and promote his common law and constitutional rights to justice. It was also not for this court to carry out the duties of the parties and the duties of the high court appeals clerk in attempting to ensure that the matter was ripe for hearing. Having nevertheless attempted to do so in the interests of justice, I find it discourteous and contemptuous for the relevant parties to simply ignore the compliance date set forth in this court's directive, and thereafter to fail to read the directive with any modicum of the understanding expected from lawyers and officers of the court.

[9] This is not the first time this court has been constrained to deal with the shockingly lackadaisical attitude of the high court appeals clerk. The Eastern Cape Registrar is once again urged to take urgent steps to ensure that staff members who hold highly responsible positions in the Registrar's office are

⁷ the appellant's counsel

properly trained and effectively monitored, especially when they do not appear to take their responsibilities seriously.⁸

[10] On the morning of the appeal, what purported to have been a reconstruction of the magistrate's judgment on conviction, was delivered to my registrar. For the sake of completeness, what follows, is a verbatim reproduction of this document. It reads as follows:

‘In this matter the appellant who was convicted by the Zwelitsha Regional Court on the 08th of February 2012 and was sentenced to life imprisonment. The record sent to the Registrar did not have the evidence of the appellant and the court judgment. Fortunately, my notes are still available.

THE RECONSTRUCTED JUDGMENT

- The accused id charged with Rape read with the provisions of Section 51(1) of Act 105 of 1997 the complainant was Q[...] F[...] and the accused pleaded not guilty he was legally represented and denied the allegations against him.
- The complainant Q[...] F[...] was 7 years old at the time she testified that she was with S[...], she was called by a certain man who there after Rape her, she experienced pain between her legs. This man took off her panties. There was something that was put between her legs by this man. She pointed at her Vagina, under cross examination she confirmed that this man was assaulted by a group of people and was then apprehended. This man did not take off his clothes.
- The next witness to testify was S[...] F[...] who was older than the complainant, she was 10 years.⁹ She testified that Ma BABBY caused Q[...] to lay down and she was asked by this man to hold his trousers. This man knelt between Q[...]

⁸ See *S v Gabani* 2021 (1) SACR 562 (ECB) where the full court of this Division expressed its displeasure at the ongoing decline of service delivery in the office of the Bhisho high court registrar and that of the appeals clerk in the Mdantsane magistrates court, which falls within the same geographical jurisdiction as the Zwelitsha regional court. Copies of that judgment were made available to the registrar and the court manager of the Bhisho high court, as well as the deputy director-general, court services and the regional head of the department of justice in the Eastern Cape. Clearly to no avail.

⁹ It is clear from what had been transcribed that Sesethu is a boy, not a girl.

thighs he inserted his hands in Q[...] private parts the community was then called, and the person ran away.

- The next witness was N[...] F[...] she is Q[...] Aunt Q[...] and S[...] informed her that Ma babby had raped Q[...]. There was blood in Q[...] panty and private parts.
- The medical report indicated that there were fresh tears and bruising in the child's private part the vagina was bleeding and there were tears all round.
- The accused testified in his defence that he only knew the last state witness, he did see the children but did not molest anyone, after he past by the children he heard one person saying that he must be apprehended that person was carrying a stick and he decided to run away. He testified that he was the only one on the street he denied raping anyone he was just at the scene with these children briefly that is the evidence that was lead.
- In its judgment the court was aware that the witnesses were young children and the cautionary rules were applied I am an able¹⁰ to recall what I said in my judgment safe to say that the cautionary rules and the owners to the criminal court were taken to account.
- What is common cause is that the child was sexually assaulted the J88 indicated beyond reasonable doubt. The injuries were fresh.
- The accused was with the children, and he even said that he was the only person there at the scene with the children.
- The children made a report of Rape to a third witness and according to the accused he heard one person saying he must be apprehended. It is clear that when the children made their report, they mentioned his name it is clear that the injuries were caused by the accused.
- The court was mindful of the short coming of the evidence given by the children who were very young.
- Taking all the evidence to account it is clear that the accused was at the scene with the children. The court consequently was satisfied that the case was proved beyond reasonable doubt.
- I must also mention that I did not have enough time to reconstruct the judgment and also the evidence of the accused does appear in my notes at page 14 and 15.

¹⁰ Presumably this should read "unable".

S.P. Maqubela
MAGISTRATE
ZWELITSHA MAGISTRATE'S COURT
2025 -12-03

[11] I shall now traverse the merits of the appeal. It is so that the testimony of the appellant had not been reconstructed and/or transcribed. For reasons which will follow, I do not deem it necessary. It suffices to say that based on the evidence of the three prosecution witnesses, the appellant was entitled to a discharge at the close of the case for the prosecution. Counsel for the respondent did not contend otherwise at the appeal hearing. As I have said, when the appeal was heard, the appellant had been incarcerated as a sentenced prisoner for just short of 14 years, and any further delay would effectively have amounted to him having been denied any form of justice.

[12] In the absence of the appellant's evidence, and having traversed the purported reconstruction of the judgment on conviction, this court had before it, what can only be described as a mishmash of diametrically opposed and mutually exclusive information which, to some extent, did not even constitute evidence, and which did not pass muster in supporting a conviction in a criminal case. Indeed, to my mind the evidence was of such a poor quality that it fell short of even discharging a civil onus.

[13] I say that the testimony of the complainant and her cousin, S[...] F[...], did not constitute evidence for the following reasons: The complainant, Q[...] F[...], who was seven years old when she gave evidence, testified through an intermediary, Ms Lindelwa Mdudu, purportedly in terms of the provisions of section 170A of the Criminal Procedure Act 51 of 1977.

[14] Section 170A(11) reads thus:

‘Subject to subsection (13), any person who is competent to be appointed as an intermediary in terms of subsection (4)(a) *must* (emphasis added), before commencing with his or her functions in terms of this section, take an oath or make an affirmation subscribed by him or her, in the form set out below before the judicial officer presiding over the proceedings:

‘I, do hereby swear/truly affirm that, whenever I may be called upon to perform the functions of an intermediary, I shall, truly and correctly to the best of my knowledge and ability –

- (a) perform my functions as an intermediary; and
- (b) convey properly and accurately all questions put to the witnesses and, where necessary, convey the general purport of any question to the witness, unless directed otherwise by the court.’

[15] The effect of this subsection is that an intermediary should not only be required to take the oath/affirmation as a witness before the court questions her on her competence as envisaged in subsection 170A(12) of the Criminal Procedure Act, but it is mandatory for her, once she has been qualified as an intermediary, to take the oath/affirmation provided for in subsection (11). It appears from the incomplete transcript with which we had been furnished, that although Ms Mdudu was sworn in as a witness, she was not required to take the prescribed oath/affirmation provided for in s 170A(11) of the Criminal Procedure Act.

[16] Although the jury is still out on whether failure to comply with subsection (11) is an irregularity which renders the evidence given via the intermediary inadmissible and not in accordance with justice, it is but one of the bouquet of problems in this matter. It is evident from the wording of the subsection that the

legislature intended the taking of this oath/affirmation to be compulsory, and that failure to do so constituted an irregularity. Whether such irregularity has the effect of vitiating the proceedings, seems to have been something which has thus far been dealt with on a case-by-case basis.

[17] The matter which we dealt with at the appeal hearing is a complex one. There were several contributing factors, apart from the incomplete record, which were independently and singularly fatal, in my view, with respect to the conviction. Had this been the only irregularity, this court would have been constrained to give serious consideration to whether the irregularity was indeed fatal. But it was not. In the premises I was of the view, in the circumstances, that the irregularity was serious and was all the more reason why the conviction could not stand.¹¹

[18] It gets worse. The second witness, S[...] F[...], who was purportedly an eyewitness to whatever may have happened to the complainant, was ten years old when he testified. He gave evidence through a different intermediary, one Ms Zandile Linjani/Mlinjana. This time it appeared (according to an annexure to the reconstructed charge sheet) that although subsection (11) had been substantially complied with, she was not sworn in as a witness before she was questioned on her suitability and her competency as an intermediary. Section 162(1) of the Criminal Procedure Act states:

‘Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath’

¹¹ See *S v Motaung* 2007 (1) SACR 476 (SE) at 479-480 where Jones J was at pains to stress the importance of the intermediary’s role in the process of presenting evidence to the court in a fair and proper manner, and the extent to which the procedure made inroads into the fundamental rule that the accused is entitled to be confronted by his accuser in open court. Insisting on the oath would be one way of reducing the impact of the inroad.

[19] It is trite that a failure to administer the oath/affirmation to a witness renders the evidence of the witness inadmissible. The statutory provision is peremptory.¹² The effect of not administering the oath to this intermediary before she placed her credentials on record, as required by section 170A(12)(b), to my mind, meant that she was never qualified as an intermediary. The intermediary must be competent to act as such. The purpose of this is twofold. Firstly, so that she falls within a class or category which makes her eligible for the appointment. Secondly, she must be found to be competent after the enquiry by the judicial officer, referred to in subsections 12(a) and (b), has taken place. The effect of the second intermediary not having been sworn in, was that whatever she conveyed to the court on behalf of the witness S[...] F[...], must be regarded as pro non scripto. At the end of the day it seems that the only evidence which was not tainted by irregularities was that of the complainant's aunt, who was not present when the complainant was sexually assaulted.

[20] But even if I am not correct with respect to my interpretation of the law pertaining to intermediaries, the trial court was also faced with several inconsistencies and seriously problematic areas with respect to the evidence and the demeanour of the complainant (Q[...] F[...]) and the other two witnesses, S[...] and N[...] F[...]. I mention but a few:

- (a) Q[...] testified that she met a man and he “raped” her. When she was asked what he did before he raped her, she simply repeated “he raped me”. When asked what he did first, she repeated “he raped me”. When asked what he used to rape her, she did not reply. When the presiding officer came to her assistance by asking her whether anything was placed between her legs,

¹² See *S v B* 2003 (1) SACR 52 (SCA) at [14]; *S v Gallant* 2008 (1) SACR 196 (E) at [4]; *S v Matshivha* 2014 (1) SACR 29 (SCA) at [10]

she said yes, but was unable to say what this “thing” was used for. She was also unable to describe this “thing” or to say where it was situated on the body of her assailant. When asked if he did not take off his clothes, she said yes. When asked what she meant by “yes” she gave no reply. When asked whether she knew her assailant, she said no. When asked whether it was her first time to see him, she said yes. The complainant, who was testifying from another room via a closed-circuit television (CCTV), was, significantly, also not brought into court to identify her assailant.

- (b) The witness S[...] F[...], who is the complainant’s cousin, testified that one “Mabebi” called the complainant and caused her to lie down. Mabebi then lowered “it” and ordered the witness “to hold it”. Mabebi then knelt between the complainant’s thighs and inserted his hand into her private part. Mabebi then instructed the complainant to lick his private part, which she did. S[...] testified that he did not see Mabebi’s private part himself. When asked whether the assailant/Mabebi inserted his private part into the complainant’s, the witness replied that he inserted a finger. It is not clear whether this witness was also testifying via CCTV, but he too, appears not to have been asked to identify the accused. Indeed when it was nevertheless put to him that the accused would deny inserting his hand into the complainant’s private parts, he said that he did not witness that happening.
- (c) S[...]’s mother (N[...]) is the complainant’s aunt. She testified that the reason she knew the accused was because he had raped the complainant. She also knew him from school. After the children had reported to her that one “Mabebi” (whom she said was the accused) had raped the complainant, the accused was confronted by the community and denied the allegation against him. She said that the complainant had reported to her that the accused had had sexual intercourse with her by inserting his finger

into her vagina. She added that nothing else happened to the complainant. Upon having been prompted, she said that the accused had inserted his penis into the complainant's vagina. It appears that her son did not tell her about the complainant having been asked to lick the accused's penis. Significantly, she said that the complainant knew the accused, whereas the complainant testified that she did not know her assailant. During cross examination it was put to her that her son had testified that the accused only inserted his hand into the child's vagina. Her somewhat inappropriate response was that he never inserted a finger. He inserted his penis, and there was blood on the complainant's panty. When it was put to her that her son had said that the accused inserted his hand into the complainant's vagina, and not his penis, her response was:

‘But Q[...]’s panty, your worship, had blood, and also on her private part.’

[21] The upshot of the foregoing inconsistencies and contradictions was that the complainant did not identify her assailant and was unable to say what had happened to her, except to repeat the word rape, as if by rote. This takes us to the case which the appellant was called upon to meet. The appellant was called upon to plead to a charge of having inserted his genital organ into the complainant's genital organ. The only person who alleged this, was the complainant's aunt. However, she was not present when the complainant was assaulted. Her reason for having said so appears to have been based on an assumption because the complainant was bleeding.

[22] It is clear from the medical evidence that the complainant had been interfered with sexually, but she was not called upon to identify her assailant. It is not clear whether her witness S[...] testified in open court. But even if he did,

and even if he identified the accused, very little weight can be attached to such an identification. Firstly, it would have amounted to a dock identification and secondly, the accused was the only person in the dock.

[23] As I have said, these are but some of the problems with what is on record. The greater area of concern is the fact that the accused's evidence, the recalled evidence of S[...] F[...] and the trial court's entire original judgment, explaining how it had arrived at a guilty finding, did not form part of the record, and any attempts to properly reconstruct the record had failed dismally.

[24] In the premises the appellant found himself in the unfortunate position where he was unable to properly formulate his grounds of appeal, as he had not been provided with a full judgment in order to consider where the magistrate may have erred or misdirected himself, or where he had exercised his discretion upon a wrong principle, or where he had made incorrect findings of fact or rulings of law based on the evidence which the magistrate ought to have analysed.

[25] The document which was made available shortly before the hearing of the appeal, purporting to be a reconstruction of the judgment, did not traverse any of the areas of concern which I have raised in this judgment. It was, in any event, for all intents and purposes, not a reconstruction in the true sense of the word. This much was also conceded by the respondent, and correctly so in my view, at the hearing of the appeal.

[26] Despite the respondent having supported the conviction and the sentence imposed in heads of argument, counsel representing the respondent at the hearing of the appeal, candidly conceded that the conviction could not stand.

[27] At the end of the day it is the judgment of the trial court which is under attack in an appeal.¹³ The importance of a complete and proper record of proceedings, and its connection with the right to a fair trial, was authoritatively confirmed in *S v Schoombee & another* 2017 (2) SACR 1 (CC) at [19]:

‘It 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. When a record “is inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside.”’¹⁴

[28] As stated by the authors *Du Toit et al*, it stands to reason that the record forms the foundation of the appeal process. Without a complete record, the administration of justice suffers.¹⁵ The Constitution provides through s 35 that an accused person has a right to a fair trial. This includes the right to an appeal and/or to a review.¹⁶ When a court of appeal is not furnished with a proper record of the trial proceedings, the matter cannot be adjudicated properly, and the accused’s right to a fair trial is seriously compromised.

[29] I am to some extent, fortified that the conclusion which we reached, to set aside the conviction, was not based solely on a completely inadequate record. It also took into account that what had been recorded (being in essence the State’s case) was so fraught with contradictions and inconsistencies, that no court could or should have convicted thereon, taking into account the accused’s right to remain silent, and the strict onus which rests on the prosecution before even taking into account anything which the accused may have said should he have elected to testify. It also took into account the irreversible damage caused by the

¹³ See *Qunta v Minister of Police* (unreported ECG case no CA 114/2012, 5 June 2013) at [15]; *S v Phakane* 2018 (1) SACR 300 (CC) at [41]; *Yawa v S* (CA&R 134/2022)[2024] ZAECGHC (14/2/2024)

¹⁴ See also *S v Chabedi* 2005 (1) SACR 415 (SCA) at [5]

¹⁵ *Du Toit et al: Commentary on the Criminal Procedure Act*, Supplementary Bundle, Service 69, 2022 at 30-32

¹⁶ See *Schoombee* at [19]

intermediaries not having been dealt with in terms of the prerequisites set forth in the Criminal Procedure Act.

[30] Finally, it appears from the history of this matter, taken together with what had been submitted to us and the disadvantages which come with the effluxion of time, that finalisation of this matter could no longer be delayed. It is so improbable that this record was ever going to be reconstructed into a format acceptable to an appeal court, that any prospect of this happening could and was safely dismissed. Even if it was capable of reconstruction, the evidence of the State witnesses which was already before us, left much to be desired. It was not in dispute that the missing portions which contained evidence (least of all the evidence of the accused himself), and findings (least of all the judgment on conviction), were of material importance to the adjudication of the appeal. In the premises we found that the appeal ought to succeed and that the conviction and the sentence had to be set aside.¹⁷ These then, are the reasons for the urgent order which we made on 3 December 2025.

[31] It is once again directed that copies of this judgment be made available to the following parties for their consideration:

- (a) The Registrar and the Court Manager of the Bhisho High Court
- (b) The Deputy Director-General, Court Services, Pretoria
- (c) The Regional Head, Department of Justice, Eastern Cape

¹⁷ See *S v Phakane* 2018 (1) SACR 300 (CC) at [41], where the crucial evidence of a witness was missing. In the matter before us, the presiding officer said in no uncertain terms that he wanted to recall the “crucial” witness, Sesethu Faniso, after Sesethu’s mother (who was the last State witness) was the only witness to introduce the presence of blood. The record does not reflect whether Sesethu was in fact recalled. As was held in *Phakane*, it is probable that the court found it important to deal with this issue of the presence of blood. An explanation was required, and the presiding officer, and the court of appeal for that matter, needed to assess the explanation. Without a full record, and without a judgment, this court of appeal cannot judge this issue which ultimately renders the appellant’s right to a full appeal nugatory and illusory, as was held in *Phakane*, where the court of appeal set aside the whole trial [at 38 and 41].

- (d) The appellant's legal representative for onward transmission to the appellant.

I.T. STRETCH
JUDGE OF THE HIGH COURT

I agree:

A.BODLANI
ACTING JUDGE OF THE HIGH COURT

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Date heard: 3 December 2025

Date of order: 3 December 2025

Date judgment handed down in East London: 3 February 2026