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

Case No. AR201/24

In the matter between:

PHELELANI ZULU Appellant

and

THE STATE Respondent

ORDER

On appeal from: The Regional Court for the Regional Division of KwaZulu-Natal held at Nqutu (Mr A J Ferreira sitting as court of first instance).

1. The appeal is upheld.
2. The conviction and sentence by the court *a quo* are set aside.

EX-TEMPJUDGMENT

Singh J (S Hadebe AJ concurring)

Introduction

[1] The appellant was convicted of one count of robbery with aggravating circumstances in the Nqutu Regional Court. On 25 March 2019, the appellant was sentenced to 20 years imprisonment. On 08 April 2024, the court *a quo* granted the appellant leave to appeal against his conviction and sentence.

[2] On 26 February 2025, the appeal was adjourned *sine die.* An order for the reconstruction of the record was made. It was further ordered that in the event of the record not being capable of reconstruction, the court *a quo* was to furnish a memorandum as to why the record could not be reconstructed. In addition, the State, the appellant, the appellant's legal representative and the Clerk of the Court were directed to furnish affidavits explaining as to why the record was not capable of reconstruction.

[3] A sitting of the court *a quo* was convened on 17 April 2025, together with the prosecutor, Clerk of the Court and the appellant. In a detailed memorandum, the court *a quo* stated that it had minimal recollection of the matter. This was confirmed on affidavit by the Clerk of the Court who also stated that there was no sound when the recordings were played. The prosecutor, who dealt with the matter in the court *a quo,* also deposed to an affidavit, stating that she had neither records nor recollection of the matter and that she was unable to assist with the reconstruction of the record. *Ex facie* the transcript, it is apparent that there is no original charge sheet, none of the appearance sheets have been signed by the court *a quo* nor is the basis upon which the appellant was convicted and sentenced clear. The only available record was the proceedings when the application for leave to appeal was heard.

The parties submissions

[4] The appellant, in his written heads of argument, submits that the court is required to read the entire record in order to determine the appeal. The appeal record in its current state will not afford the appellant his full right of appeal, given that the court *a quo*'s judgment on conviction and the reasoning as to sentence is not capable of being assessed by this court in hearing the appeal. The appellant therefore submits that the appeal must be upheld and that the conviction and sentence by the court *a quo* must be set aside.

[5] The State, in its written heads of argument, concedes that the record is incapable of reconstruction and that the appeal must accordingly be upheld and the conviction and sentence be set aside. It further submitted that in terms of s 324(c) of the Criminal Procedure Act 51 of 1977 ('the CPA'), the matter ought to be remitted to the court *a quo* to start *de novo* before another presiding officer. The basis of this

submission was that there was no sound in the recordings. In support of this submission, the State relies on *Muravha v Minister of Police*[1] where it contends that the Supreme Court of Appeal ('the SCA') approved the approach of remittal where the record is incapable of reconstruction.

The issue to be considered

[6] There is only crisp issue to be considered in this matter and that is the submission made by the State that the matter be remitted to the court *a quo* for a new presiding officer to hear the matter *de novo.*

The Law

[7] In light of the aforesaid issue, it is necessary to consider the various authorities regarding an incomplete court record.

[8] The legal principles pertaining to the hearing of an appeal on a reconstructed record, has been settled by various authorities over the years. In *S v Chabedi*[2]*,* the SCA stated:

'. . . :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.'

[9] The SCA in *Chabedi* went on to say:

'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.'[3]

[10] In *S v Collier* [4], the court stated:

'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 issues as to the missing evidence cannot be settled by way of admission or in some other manner. Where

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[1] *Muravha v Minister of Police* [2024] ZASCA 11, 2024 (4) SA 84 (SCA) (*Muravha*)
[2] *S v Chabedi* 2005 (1) SACR 415 SCA, para 5 (*Chabedi*)
[3] *Ibid* para 6
[4] *S v Collier* 1976 (2) SA 378 (C) at 379 D (*Collier*)

material evidence is not on record and the defect cannot be cured, the appeal should succeed.'

[11] I turn now to consider the reliance placed by the State on s 324(c) of the CPA. Section 324(c) reads as follows:

'Whenever a conviction and sentence are set aside by the court of appeal on the ground –

(c) That there has been any other technical irregularity or defect in the procedure,

Proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, upon any other charge as if the accused had not previously been arraigned, tried and convicted.'

[12] The equivalent provision in the repealed Criminal Procedure Act 56 of 1955, ('the repealed CPA') was s 370(c) and was worded in precisely the same terms as s 324(c) of the CPA. In considering s 370(c) of the repealed Act, in *S v Naidoo*[5], Holmes JA stated that the said section:

'Empowers a re-trial where a conviction and sentence have been set aside on appeal on the ground of a technical irregularity or defect in the procedure. This Court, interpreting that sub-section in consonance with the common law, has held that an irregularity is technical within the meaning of the sub-section if it is of such a nature as to preclude a valid consideration of the merits on appeal. In other words, if it is impossible for the court of appeal to give a valid verdict on the merits.'

[13] The court in *Naidoo* had to determine whether there was an irregularity before the court *a quo* and it considered the nature and degree of the irregularity.

[14] I turn now to consider the decision in *Muravha* relied on by the State. In *Muravha,* which concerned civil proceedings, portions of the record relating to certain witnesses were available while certain portions were missing. The SCA remitted the matter for hearing *de novo* on the basis that the appellant, who was unsuccessful in the trial court, had done everything within his power to secure it. In these circumstances, the SCA held that the appellant would suffer prejudice if the matter was not reheard.

Application of the law to the facts

[5] *S v Naidoo* 1962 (4) SA 348 (A) at 353 H (*Naidoo*)

[15] Taking into account the decisions of *Chabedi* and *Collier,* it is settled that the stance where the record is incomplete is that the appeal must be upheld and that the conviction and sentence of the court *a quo* must be set aside.

[16] In relation to the contentions by the State, that the matter be remitted to the court *a quo* to commence *de novo,* taking into account *Naidoo*'s case, there is nothing before this court to suggest that there was any technical irregularity or defect in the proceedings before the court *a quo.* There is simply no trial record at all. The lack of sound is not a technical defect or irregularity. In my view, s 324(c) of the CPA would only find application, if there was a technical defect or irregularity in the actual proceedings before the court *a quo.* No such thing can be gleaned from the incomplete record before this court.

[17] I am also of the view that *Muravha*'s decision was a matter pertaining to a civil trial and a remittal to the trial court for the proceedings to commence *de novo* was to the advantage of the appellant, who was unsuccessful before the trial court. In that case, it was therefore understandable that it was in the appellant's interest that the matter be remitted to the trial court.

[18] In *casu,* the appellant enjoys his constitutional right to a fair appeal, which has been compromised due to the lack of an adequate record. It would, in my view, be unfair to remit the matter for hearing to the court *a quo* for the matter to start *de novo* as the lack of record ought not to be laid at the doorstep of the appellant. The lack of record has not been due to his actions. He is not the custodian of the record. It will therefore not be in the interests of justice for the matter to be remitted. The reliance on s 324(c) of the CPA by the State must therefore fail. Furthermore, if the proceedings were to commence *de novo,* the appellant may successfully plead *autrefois convict*.

[19] In the circumstances, I propose the following order:

1. The appeal is upheld.
2. The conviction and sentence by the court *a quo* are set aside.

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SINGH J

I agree

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S HADEBE AJ

CASE INFORMATION

Date of Hearing	:	22 May 2026
Judgment Delivered	:	22 May 2026
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