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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

**APPEAL CASE NO: AA03/2023
HIGH COURT CASE NO:CC29/2018**

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE: 25/05/2026
SIGNATURE.....

In the matter between:

JOSHUA NKGAPELE

1ST APPELLANT

MUSA JAMES TEMBE

2ND APPELLANT

and

THE STATE

RESPONDENT

Delivered:

25 May 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **25 May 2026 at 16:00**.

Date heard:

28 November 2026

Coram:

Ngobeni J *et al.* Bresler AJ, Maphellela AJ

JUDGMENT

MAPHELELA AJ

[1] The appeal before court relates to the judgment and the sentencing of the appellants and other convicted persons on the 02nd May 2019 and 03rd May 2019 respectively. The matter came before court on the 28th November 2025 for an appeal after the Supreme Court of Appeal (SCA) granted the appellants leave to appeal before this court on 14 October 2022. It is not necessary for this court to deal with the reasons given during condonation application which was then granted.

[2] The leave to appeal was granted by the Supreme Court of Appeal to be heard by a full Court of this Division. The Appellants are appealing against the convictions and the sentences granted by Judge G. Muller (court *a quo*). The appeal comes from the judgment of the court *a quo* where five (5) accused were charged and later found guilty and sentenced as it appeared clearly from the judgment. From the five accused only two filed for leave to appeal and the matter proceeded only in respect of the two appellants being the first and second appellants.

[3] In this judgment, the appellants' application will be addressed separately, only to the extent that it is not possible same will be indicated. In terms of the judgment of the court *a quo*, the appellants (the accused) and other convicted persons were arrested and detained and subsequently sentenced for a number of offenses they were charged with resulting from the commission of crimes. In this judgment I will only deal with charges relevant to the appellants before court.

[4] As a result, both the first and the second appellants were sentenced as follows by the court *a quo* after having been found guilty:

4.1 Count 1: 15 years imprisonment

4.2 Count 2: Life Imprisonment

4.3 Count 5: 5 years imprisonment

4.4 Count 8: 3 years imprisonment

4.5 Count 9: 6 Months imprisonment

[5] The appellants brought an application to appeal both the convictions and the sentences against them by the Honourable Judge Muller in the court *a quo*. Both appellants had provided different reasons for their applications which will be dealt with in detail hereunder.

[6] During the trial in the court *a quo* the first appellant decided to exercise his constitutional right to remain silent and closed his case without giving any evidence. What was clear through the entire process was that, the deceased person before passing had written a statement which indicated that he was shot by 5 people who were the occupants of a sedan motor vehicle. The vehicle was later identified as the vehicle in which both the first and second appellants were passengers. It is also common cause that the deceased's firearm as well as one other unlicensed firearm were found inside the vehicle (in which the appellants were passengers) and was also identified to have been used in the commission of the crime when the deceased was fatally wounded and later died in hospital.

[7] The police officers who chased and caught up with the Mercedes Benz vehicle (In which both appellants were passengers) also found what is called a jamming device inside the car. They then switched it off and immediately thereafter they were able to communicate with other

members of the South African Police Service (SAPS) on the radio. That is when they realized that, the device they just switched off was a jamming device which was found inside the vehicle in which the appellants were passengers. To put it clear, the device was used by the appellants and others to prevent the police from communicating with others during the chase.

[8] It is therefore correct as indicated by the first appellant that the court relied on circumstantial evidence and this is purely on the basis that the deceased who could have testified as the witness was no more. However, it must be indicated that by relying on circumstantial evidence the court is not prevented from giving the correct verdict at the end of the hearing. What is very important and came about during the trial was further that, when the police officers searched the appellants, they discovered a pair of gloves in the possession of accused 3 (Oupa Aubrey Malapile) accused 5 (Musa James Tembe). Accused number 2 (Tebele Joshua Nkgapele) was found to have been in possession of the balaclava. In any event parties have agreed and accepted the statement made by the deceased as forming part of the evidence or witnesses.

[9] It is of utmost importance to note in respect of the first appellant that in the judgment of the court *a quo*, the court indicated that the evidence against him is not disputed and the court did not deal with such in detail, and on that basis, I must indicate that the evidence against all the

accused persons including the first appellant was very much overwhelming and I find no reason why the first appellant chose to remain silent when all the evidence was implicating him.

[10] One other very important aspect is that when the accused, including the appellants, were arrested by the police, none of them did disclose the fact that they only asked for a lift from the occupants and or driver of the vehicle (Mercedes Benz). There was no evidence before the court *a quo* that any of the passengers in the vehicle was not travelling with other occupants. It does not make any sense that someone who has asked for a lift decided to remain silent to the extent of spending some time in jail without disclosing such to the law enforcement. It is not clear and what the purpose would have been for someone who was simply given a lift in a vehicle and when the police stop the vehicle which is alleged/suspected to have committed a crime and the unlawful weapons found in the vehicle, decided at the scene of the incident not to disclose his status in the vehicle at the time of arrest.

[11] It is very important to note that in as far as a person has the right to remain silent and to the extent of not giving evidence on charges brought against them, they do so at their own risk more so, if there is already evidence linking them to the crime committed. The right to remain silent does not prevent and or bar the court from proceeding with leading evidence of other witnesses to prove a case against a silent party. It is up

to a party who chose to remain silent to properly follow the hearing and make an informed decision whether to continue maintaining the right to remain silent and get proper legal advice.

[12] From the vehicle in which the appellants and other convicted and sentenced were passengers, the police found two firearms as well as other materials like pair of gloves which were suspected to have been used in the commission of crimes, and balaclavas. The other firearm belonged to the deceased and was taken from him during the day and the other was found to have been unlicensed, a jamming device was also found in the car and none of the accused denied the knowledge of all the material at the time of arrest. This statement put all the accused persons at the scene of crime and the knowledge of the shooting and murder unless if there was any evidence to the contrary, which is not the position.

[13] Both appellants denied the knowledge and possession of the firearms found in their vehicle and any involvement in criminal activities which included the killing of the deceased. I have earlier indicated that at the time of the arrest, none of the parties have raised any issue with the police indicating that they requested a lift and or the reason why they were found in the car suspected of having committed a crime. One of the firearms found in the vehicle belonged to the deceased which he was dispossessed earlier that day by five occupants in a Mercedes Benz

vehicle which is linked to the same vehicle the appellants were found in. The appellants and other accused persons were charged with unlawful joint possession of firearms and later found guilty of murder and unlawful possession of firearm.

[14] The appellants submitted the following as common cause in their heads of argument:

14.1 That the deceased in connection with count one (1) and two (2) were on the 12th December 2016 at around 10h00 in the morning, was shot and robbed of his firearm, a 9mm Parabellum Caliber Norinco Model 213 Semi-Automatic Pistol with serial number 4[...];

14.2 That the deceased informed the police that the people who robbed and shot at him were driving in a black Mercedes Benz sedan and they were 5 occupants;

14.3 That the deceased died the following day on the 17th December 2013 and the cause of death being gunshot wound through the lower abdomen and also lacerated femoral vessels internal bleeding shock and death;

14.4 Through the legal representative the hearsay evidence of what the deceased told Mr Risabi and the photo album of the scene was not objected to by the two appellants;

14.5 That the same day of the 12th December 2019 after 13h00 the six occupants of a black Mercedes Benz were arrested by the Police which included the two appellants;

14.6 None of the two appellants' version was put to the witness Mr Risiba;

14.7 That the 6th person arrested pleaded guilty to possession of firearms and possession of ammunition in connection with what was found inside the black Mercedes Benz upon arrest of the six occupants.

[15] Despite the parties agreeing on paragraph 14.7 above, it is very important to note that during the appeal, parties cannot reach an agreement by what is not in the record of appeal. In other words, if the issue was not dealt with during the trial in the court *a quo*, it is not for this court to consider despite the agreement between the parties. Even if for a minute one must accept the concession as indicated, I see no reason why this court should consider that as a reason to discharge the applicants. The deceased made it very clear that there were five (5) people in the vehicle.

[16] As stated in the case of *S v Boesak 2001(1) SA 912 (CC)* where the court made it very clear that "*silence in the face of a prima facie case leads to conclusive evidence that the accused has committed the offence*". There

is no doubt that the evidence before this court put the first appellant at the scene of crime and being an active participant thereof. I therefore find no compelling reasons why the judgement in the court *a quo* should be overturned on this basis.

[17] The appellant's counsel has set-out the principle to follow for conviction on possession in the case of *S v Makhubela 2017(2)SACR 665 (CC)46* where the Constitutional Court confirms the approach by the Supreme Court of Appeal where the following is stated, : *"In convicting the applicants for unlawful possession of firearms and ammunition on the basis of the doctrine of common purpose, the trial court departed from the settled jurisprudence. The test for establishing liability for the possession of firearms and ammunition was established in S v Nkosi 1998 (1) SACR 248 (W). "*

[18] *In S v Mbuli (422/2001) [2002] ZASCA 78;2003(1)SACR 97(SCA) (7 June 2002)* at paragraph [71] where the following was indicated by the Court,[71] *"What is prohibited by both those sections is the existence of a state of affairs (I.e. having possession of an armament, or a firearm, as the case may be) and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (or joint) possession of the offending article. Their contravention of the relevant section in those circumstances does not arise from an application of the*

principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned share common state of mind but the nature of that state of mind will differ in each case. Perhaps Olivier JA had in mind the principles of joint possession, rather than the doctrine of common purpose, when he said in S v Khambule 2001 (1) SARC 501 (SCA) at par 10 that 'there is no reason in principle why common intention to possess firearms jointly could not be established by inference, but I do not agree with the further suggestion that a mere intention on the part of the group to use weapon for the benefit of all of them will suffice for a conviction. In my respectful view Marais J set out the correct position (apart from a misplaced reference to common purpose) when he said the following in S v Nkosi 1998 (1)SACR 248 (W) at 286 h-I:

[19] *"The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the state has established facts from which it can properly be inferred by a court that:*

- (a) *The group had the intention(animus) to exercise possession of the guns through the actual detentor and*

(b) *The actual detentor had the intention to hold the guns on behalf of the group”.*

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentor, or common purpose between the members of the group to possess all the guns.

[20] There is no doubt that the court *a quo* did not mislead itself in accepting this evidence and finding that the appellants were acting in common purpose with all the other persons who have already been found guilty and sentenced. The appellants in their own admissions, conceded and agreed that the court should accept the evidence of the deceased through Mr Risiba. There is no evidence before court which suggested otherwise.

[21] In this case I am of the view that the court *a quo* did not mislead itself in finding the appellants guilty of the crimes and sentenced as such. The evidence before court pointed out to the fact that the appellants together with other occupants of the vehicle were involved in the commission of crimes which also included murder. In my view there are no compelling circumstances which this court is bound to look at in order to set the judgement and the sentencing of the court *a quo* aside.

[22] The second appellant's counsel emphasized the fact that because there are no records of the proceedings of the court *a quo* the second appellant will be prejudiced and gave a number of case law why he believes that

the second appellant must be released. Note must be taken that not the entire transcripts of the trial are missing, the only missing part of the records relates to when the second appellant was giving evidence.

[23] The Constitutional court in the matter of *S v Schoombie and Another v S (CCT154) [2016] ZACC 50,2017(2) SACR 1 (CC)* (15 December 2016) stated the following, "*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*".

[24] What is very important point raised in this case is, it was pointed out that the records must be amply adequate for just consideration of the issues the applicants raised on appeal. In the current case, the court is able to deal with the appeal despite the missing part of the records, and the second appellant is not able to narrate as to why he will be prejudiced by the missing records. It cannot be a general statement that the missing records justify the release of the appellant, otherwise this will surely result in the miscarriage of justice.

[25] In *State v Chabedi [2005] ZASCA 5, 2005 (!) SACR 415 (SCA)* the court said the following with regard to the incomplete record:

"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...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 issue to be decided on appeal".

[26] The flaw of incorrect records might not be fatal. The premise is whether an appeal can be adjudicated fairly. In *Phakane v S (CCT61/16) [2017] ZACC 44; 2018(4) BCLR 438 (CC)* (5 December 2017) the test was reiterated in that:

[20] *"An issue that arose in the appeal was whether, in the absence of the missing evidence, the full court could determine the appeal fairly. If it could not do so, this would mean that the applicant's right to a fair appeal entrenched in section 35(3) of the Constitution had been infringed. Section 35(3) reads that, "Every accused person has a right to fair trial, which include the right of appeal to, or review by a higher court"*

[27] The court in this case went further and stated that, [47] *"Our sad duty in this case is to Vacate Mr Phakane's conviction of Murdering Ms. Boshomane, his girlfriend, on the ground that the trial court record, the full Court which heard his appeal and dismissed it, was materially*

incomplete and that the constitutional right to a fair appeal was thus violated”.

[28] The honourable court continued to indicate that, *“The failure of the state to furnish 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.”*

[29] Reference is also made to the case of *S v Mthembu 2012(1)SACR 517 (SCA)* at paragraph [17], where Ponnann JA and Petse AJA (writing for the court) with due reference to two earlier SCA decisions which is *S v Legoa 2003 (1) SACR 13 (SCA)*; and *Sv Ndlovu 2003(1)SACR 331 (SCA)* stated that:

“a fair enquiry does not occur in vacuo, but... is first and foremost a fact-based enquiry”. The effect of an incomplete record on appeal, which applies equally to reviews, which impacts such fact-based enquiry, was aptly stated in *S v Chabedi 2005 (1) SACR 415 (SCA)* on paragraph 5 that:

“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 perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of the proceedings are often still kept by hand, in which event a verbatim record is impossible...”

[30] What becomes very clear from the reading of the judgement dealing with this issue is that non-availability of the records does not entitle the setting aside of the conviction and sentence. Each court must assess the facts before it, that is whether it is impossible for the court to deal with the appeal without the records and or part of the record. Should the court have enough evidence before it, it will not make any sense to release the appellant without properly assessing the application before it with the available records and or evidence before it at the time. It is therefore clear that, it is not only about the availability of the records, but whether, the court is in a position to be able to reconstruct evidence and or work on the available part of evidence to reach a fair verdict and or judgement in the case.

[31] The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty together with the state. When a trial record is inadequate, both the state and the appellant have a duty to try and reconstruct the record. While the trial court is to furnish a copy of the record, the appellant or his/her legal representative carries the final responsibility to ensure that the appeal record is in order and available. At the same time, a reviewing court is obliged to ensure that the accused is guaranteed the right to a fair trial, including the adequate record on appeal, particularly where an irregularity is apparent. The loss of trial records is a widespread problem. It raises serious concerns about the endemic violations of the right to appeal. Reconstruction should not be the norm in providing the appellant with their trial records. But when reconstruction is necessary, the obligations lie not only on the appellant, but indeed primarily on the court to ensure that the process complies with the right to a fair trial. It is an obligation that must be undertaken scrupulously in the interests of criminal accused as well as their victims.

[32] One cannot emphasize enough why it is extremely important that the parties seeking an appeal must have done all that which is necessary to making sure that all the records are there for purposes of the appeal. It must never be used as a play point in that if the records are not found, a party will be free to go home. I must not be heard as suggesting that convicted persons are guilty more so when an appeal is underway. I must

agree with the decision of the Constitutional court (Phakane *supra*) that there must be an obligation from both sides to try and find the records and or to reconstruct them. In the current case I am not too convinced that both the parties and in consultation with the court has done enough to find these records. There is no explanation why the large part of the records is available but sections dealing with the second appellant's testimony. It is only fortunate that the court in this instance is capable of dealing with the appeal on the available records.

[33] All the available evidence regarding what had happened at the time of the commission of the crime is available. The appellant did not give any different ground in respect of an appeal which is not on record considering the type of crime he was found guilty of and the fact that he acted in common purpose during the commission of the crime with others.

[34] Under the circumstances I find no reason for setting aside the convictions and sentences on the basis that the records relating to the second appellant's testimony during the trial proceedings are not complete. This court was, be that as it may, able to assess the appellant's application for appeal in line with the provided records and case law and on that basis and based on the available evidence, the court is of the view that the appellants failed to make a case for the appeal to succeed.

[35] This Court is sitting as a court of appeal. The first appellant decided not to give any evidence during the trial proceedings and cannot try to give such during the appeal process. There are no compelling reasons for this court to grant an order as prayed for by the first appellant. Under the circumstances I am of the view that the application for appeal in respect of the first appellant stand to be dismissed.

[36] Under the circumstances both the first and the second appellants failed to show the court that the court *a quo* has misdirected itself when giving judgement during the trial proceedings. There are no compelling reasons or submissions made to this court to justify this court to interfere with the judgement of the court *a quo*. On that basis I am of the view that the appellants' application should fail.

[37] In the result, the court makes the following order:

37.1 The appeal is dismissed in respect of both the first and second appellants.

T.C MAPHELELA

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION: POLOKWANE

I agree, and it so ordered

J.T NGOBENI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

I agree

M. BRESLER

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

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