IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A59/2019

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: YES/~~NO~~

25/05/2023
Date

Signature

In the matter between:

TSHEPO LEHABA First Appellant

THABO MOFEKENG Second Appellant

And

THE STATE Respondent

JUDGMENT

SETHUSHA-SHONGWE AJ (TOLMAY J Concurring)

INTRODUCTION

[1]. The appellants, appeared in the Regional Court on a charge of theft. The appellants were found guilty on the 2nd June 2017 and sentenced to (3) three years imprisonment, on 17th October 2017 in terms of Sections 276(1)(i) of the Criminal Procedure Act 51 of 1977.

[2]. The appellants then applied to the Regional Magistrate Court for leave to appeal against their conviction and sentence. On 20th October 2017, that application was dismissed. Dissatisfied with the dismissal, the appellants petitioned the High Court for leave to appeal. On 30 October 2018, the High Court granted the leave to appeal.

Proceedings before this Court

[3]. The trial record is incomplete. The matter was referred back to the Regional Court for the reconstruction of the record.

[4]. A period of 5 five years has elapsed from the time of the conviction to the granting of the leave to appeal. It is not in disputes that it was not due to fault of the appellants who had timeously filed for leave to appeal and petition.

[5]. Counsel for the respondent correctly pointed out the difficulties the court is faced with in light of the incomplete record, in helpful supplementary heads of argument and during her argument at the hearing.

[6]. It transpired before the Regional Court, that the trial magistrate's notes had been destroyed. The prosecutor in the trial was no longer working for the National Prosecuting Authority (NPA) and had left the country. Mr Van Heerden who represented the appellants was the only person in possession of trial notes. Mr Van Heerden's notes were not read into the record in their totality.

[7]. The reconstructed record was incomplete because the evidence in chief and cross-examination of the state witnesses and the audio version thereof were missing and could not be located. The trial prosecutor's notes in the case docket could not be located. The prosecutor in the record reconstruction, read into the record the following statements:

(a) A1 and A4 two statements from Mr Mosia

(b) A3 and A5 are statements from Mr Khanye

(c) A10 statement of Mr Du Toit

(d) A11 statement of Mr Oelofse.

[8]. Mr Van Heerden's notes on the evidence in chief of the state witnesses were not read into the record. However, Mr Van Heerden was permitted to add the questions and answers emanating from his cross-examination of each witness. Additionally, Mr Van Heerden agreed to hand in statements of the witnesses but did not specifically confirm that the evidence of the witnesses corresponded with the contents of their respective statements.

[9]. Furthermore, from the appellant's records, it was found that evidence in chief of the first appellant was not transcribed. Mr Van Heerden only read into the record his notes relating to the evidence in chief of the Appellant. Additionally, the cross-examination of the first appellant starts from page 92 of the record, which is in the middle of the cross-examination. The beginning part of the cross-examination is missing.

[10]. The transcribed record is not properly bound, for instance, pages 13, 17 and 19 were meant to have been bound into the record between paginated pages 61 and 66 of the record. The notes of Mr Van Heerden that are bound into the record from pages 297-309 appear to be incorrect sequentially and it was difficult to consider them properly.

[11]. Further, Respondent's counsel submitted correctly that the Court's judgment does not summarise the witnesses' evidence in chronological order, making it difficult to know evidence of each state witness was.

[12]. As such both counsel submitted that the record containing the evidence of the trial was incomplete. Further the procedure followed in the reconstruction was incorrect.

ISSUE

[13]. The issue to be determined is whether the appellants right to a fair trial has been infringed in the light of the incomplete record.

DISCUSSION

[14]. The issue of reconstruction of trial records has been the subject of numerous judgments over the years. In *S v Chabedi*,[1] ***Brand JA*** stated the following:

> *"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 proper consideration of the appeal, it will as a rule lead to the conviction and sentence be 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 record of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbal in record is impossible"*

[15]. In *S v Sebothe and Others*,[2] the full court of this division added a reference to the Constitution as follows:

> *" [8] The constitution of the Republic of South Africa, 1996, provides, inter alia, through section 35 that an accused person has a right to a fair trial, which includes a right to appeal or review. If the appeal court or the review court is not furnished with a proper record of proceedings, then the right to a fair hearing of the appeal or review is encroached upon and the matter cannot be properly adjudicated. In that regard, the only avenue open to protect the right of the accused or appellant is to set aside those proceedings if it is impossible to reconstruct the record."*

[16]. The fact that the record has been "improperly and imperfectly reconstructed" does not in itself warrant the setting aside of the proceedings. In *Schoombee and Another*,[3] The

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[1] 2005(1) SACR 415 (SCA) page 417.

[2] 2006(2) SACR 1 (T) at para 8.

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

Court held that the Judge's notes in the trial court were full and detailed and contained a complete narrative of the evidence including cross-examination.[4] The Court concluded that the appellants had a fair trial including a fair appeal based on the reconstructed record. Because the reconstructed record was sufficient to ensure the appellants' fundamental right to appeal was exercised.[5]

[17]. It has long been recognized in our criminal law jurisprudence that an accused person's right to a fair trial includes the right to appeal.[6] A proper trial record of court proceedings is a critical component of this privilege.[7] When a record is insufficient for proper consideration of an appeal, the conviction and sentence will, as a rule, be set aside.[8] The reconstruction itself is part and parcel of the fair trial process. There are different procedures to be followed in the reconstruction of a trial record. The state and the accused have to be involved, though practical methodology may differ. Some courts have required the presiding officer to invite parties to reconstruct the record in open court. Others have required the clerk of the court to reconstruct a record based on affidavits from parties and witnesses present at trial and then obtain a confirmatory affidavit from the accused. To allow the accused an opportunity to reflect on the reconstructed record. Further, a report from the presiding officer is often required. *In casu*, and in my view, proper procedure was not followed in the reconstruction of the record.

The above remarks by the Court were bolstered by the Court in *Klaas Lesetja Phakane and The State*[9]

CONCLUSION

[18]. *In casu,* crucial and material parts of the evidence in chief of the appellant and portions of his cross-examination are missing which, in my view, encroaches on the right

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[4] Id at para 27.

[5] Id.

[6] Section 35(3)(o) of the Constitution.

[7] Davids v S [2013] ZAWCHC 72 at para 13. See also *Molaudzi v S* [2014] ZACC 15; 2014 (7) BCLR 785 (CC) at para 5.

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

[9] Phakane v S (CCT61/16) [2017] ZACC 44; 2018 (1) SACR 300 (CC); 2018 (4) BCLR 438 (CC)

to a fair hearing on appeal. The discrepancy or omission in the record is vital and fatal. Referring the matter back again for proper reconstruction will be a futile exercise. The magistrate has lost his notes. The prosecutor's notes are not in the case docket and the prosecutor has since resigned. I further found that proper procedure in the reconstruction of the record were not followed.

[19]. Five years has elapsed from the date of conviction and sentence, the appellants are out on bail ,therefore they will not suffer any prejudice if appeal is set aside.

ORDER

[20]. The following order is made.

20.1. The appeal is upheld and the conviction and sentence are set aside.

N.C. SETHUSHA-SHONGWE
Acting Judge of the High Court

I agree and It is so ordered

R.G. TOLMAY
Judge of the High Court

Appearances

Counsel for the Appellants	: Adv. M. van Wyngaard
Instructed by	: BMH Inc Attorneys

Counsel for the Respondent	: Adv. A. Coetzee
Instructed by	: Director of Public Prosecutions: Pretoria
Date of the hearing	: 13 April 2023
Date of judgment	: 25 May 2023

Judgment transmitted electronically