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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**A121/2022**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:

**31/7/2023**

In the matter between:

**MPHUHU LOUIS MASHILOANE**

**Appellant 1**

**(Accused no 2 in court a quo)**

**AVINGO KEKS MMELA**

**Appellant 2**

**(Accused no 3 in court a quo)**

In re:

**CASE NO: CC131/2006**

**THE STATE**

and

**C MASEMOLA AND TWO OTHERS**

**Accused**

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**JUDGMENT**

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**COWEN J (MOLOPA-SETHOSA J AND HOLLAND-MUTER J CONCURRING)**

## Introduction

1. Two appellants are appealing their convictions and sentences imposed in early 2007 – over 15 years ago – by our brother, Judge Ismail, sitting with an assessor, Mr Rudolf. The first appellant is Mr Mphuhu Louis Mashiloane, the second accused in the trial. The second appellant is Mr Avingo Mmela, the third accused. The first accused, a Mr Aubrey Masemola, was acquitted.
  
2. On 13 February 2007 the appellants were convicted on six charges and, on 20 February 2007, sentenced to custodial sentences as follows:
  - 2.1. Count 1 – Robbery with aggravating circumstances, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 - fifteen years;
  
  - 2.2. Count 2 – Attempted murder – five years;
  
  - 2.3. Count 3 – Kidnapping – five years;
  
  - 2.4. Count 4 – Rape read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 – Life imprisonment;
  
  - 2.5. Count 5 – Contravention of section 3 of the Firearms Control Act 60 of 2000 (FCA) – three years;<sup>1</sup>
  
  - 2.6. Count- 6: Contravention of section 90 of the FCA – one year.<sup>2</sup>

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<sup>1</sup> Section 3 reads:

**3 General prohibition in respect of firearms and muzzle loading firearms**

(1) No person may possess a firearm unless he or she holds for that firearm-

(a) a licence, permit or authorisation issued in terms of this Act; or

(b) a licence, permit, authorisation or registration certificate contemplated in item 1, 2, 3, 4, 4A or 5 of Schedule 1.

(2) No person may possess a muzzle loading firearm unless he or she has been issued with the relevant competency certificate.

**<sup>2</sup> 90 Prohibition of possession of ammunition**

No person may possess any ammunition unless he or she-

(a) holds a licence in respect of a firearm capable of discharging that ammunition;

3. The appellants remain incarcerated still serving their life sentences for rape. The other sentences have already been served. Both the life sentence and the fifteen-year sentence for robbery were imposed under the minimum sentencing legislation.<sup>3</sup>
4. The appeal was argued before us on 30 January 2023 in respect of one main issue, whether the convictions can be upheld in circumstances where the appeal Court does not have the benefit of a full record of the trial.<sup>4</sup> Mr Mojuto appeared for the appellants and Mr Lalane appeared for the State. In brief, Mr Mojuto submitted that this is a case where the appeal cannot be decided in the absence of an adequate record and the convictions and sentences must be set aside. Mr Lalane asks the Court to uphold the convictions and sentences on the record to hand.
5. Section 35(3) of the Constitution enshrines the right of every accused person to a fair trial, which includes the right of appeal to, or review by a higher court.<sup>5</sup> As we are reminded in *Schoombee*:<sup>6</sup> 'Established jurisprudence indicates that, without a trial record, there can be no appeal – and with no appeal, there can be no fair trial.' More fully, the Constitutional Court held:

[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

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(b) holds a permit to possess ammunition;

(c) holds a dealer's licence, manufacturer's licence, gunsmith's licence, import, export or in-transit permit or transporter's permit issued in terms of this Act; or

(d) is otherwise authorised to do so.

<sup>3</sup> The Criminal Law Amendment Act 105 of 1997.

<sup>4</sup> The trial Court has a duty to keep a record of proceedings whether in writing or mechanical or cause such record to be kept, in terms of section 76(3)(a) of the Criminal Procedure Act 51 of 1997 (CPA).

<sup>5</sup> Section 35(3)(o).

<sup>6</sup> *Schoombee and another v S* [2016] ZACC 50; 2017(5) BCLR 572 (CC); 2017(2) SACR 1 (CC) (*Schoombee*) at para 3 (footnotes omitted). The Constitutional Court followed *Schoombee* in *Phakane v S* [2017] ZACC 44; 2018 (1) SACR 300 (CC); 2018 (4) BCLR 438 (CC) (*Phakane*).

inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside.

[20] If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is 'part and parcel of the fair trial process'. Courts have identified different procedures for a proper reconstruction, but have all stressed the importance of engaging both the accused and the State in the process. Practical methodology has differed. Some courts have required the presiding judicial officer to invite the parties to reconstruct a 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. This would reflect the accused's position on the reconstructed record. In addition, a report from the presiding judicial officer is often required.

[21] The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty. 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 required 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. At the same time, a 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.'

6. In *Chabedi*, the SCA dealt with an incomplete record emphasising that what is required is not a perfect but an adequate record.<sup>7</sup> The SCA held:

'[T]he 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

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<sup>7</sup> *S v Chabedi* [2005] ZASCA 5; 2005(1) SACR 415 (SCA) (*Chabedi*).

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.'

7. The Constitutional Court cited this dictum with approval in *Schoombee* concluding"

'[29] 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. This principle is practical and sensible and just.'

8. The appeal before us brings into stark focus the multiple interests that can be prejudiced when the complete record of a trial is not to hand. The crimes for which the accused were tried in this case, and for which the Constitution guarantees a fair trial are serious (rape, attempted murder, robbery with a firearm, kidnapping, amongst others) and attracted an effective life sentence, which is still being served. The consequences for the appellants are profound. The appellants have waited far too long for their appeal to be determined with the result that by the time the appeal came before us, and save for the life sentence for rape, they had already served their sentences. But it is not only the appellant's interests that are at stake. The interests of the victims of these crimes, of society and of the interests of justice more broadly are also brought to the fore. Our society is afflicted with violence generally and gender-based violence specifically, with life-altering and painful consequences for victims. The process of trial itself is known to be traumatic for victims and especially rape victims who have to relive the experience and endure secondary trauma. It is in this context that this long delayed appeal must be adjudicated.

### **The trial history**

9. The events that resulted in the prosecution and conviction of the appellants took place in the early hours of 24 December 2004 in Mamelodi, Gauteng. They are summarised in the indictment and the summary of substantial facts, both of which are to hand. The two complainants are a woman and a man, Ms W[...] L[...] M[...] and Mr Vusi Moses Manyika.

10. The summary of substantial facts details the alleged events as follows:

1. 'The accused and one other male were driving around in a Mazda vehicle in the late hours of 24 December 2005<sup>8</sup> when they came upon the complainants who were walking in the street in Mamelodi.
2. They stopped and accosted the complainants with a firearm, telling them to lie down. Shots were fired and a cell phone and cash money was taken from Mr Manyika.
3. They thereupon forced Ms M[...] into their vehicle and fired further shots at Mr Manyika, leaving him at the scene.
4. They drove with Ms M[...] to a certain hostel and took her to a room where all four of them raped her one after the other.
5. She was then taken away from the scene in the said motor vehicle by the accused and dropped at another place in Mamelodi.
6. The accused acted at all relevant times with a common purpose.'

11. These events gave rise to the following charges, reflected in the indictment.

- 11.1. In respect of count 1, the accused are said to have unlawfully and intentionally assaulted Ms W[...] L[...] M[...] and Mr Vusi Moses Manyika, and, using a firearm, forcibly and violently removed from Mr Manyika's possession, a Nokia 1110 cell phone and cash, thereby robbing him.
- 11.2. In respect of count 2, the accused are said to have attempt to kill Mr Manyika by shooting at him with a firearm.

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<sup>8</sup> The evidence reveals the timing of the events to be around 01h00 on 24 December 2005.

- 11.3. On count 3, the accused are said to have unlawfully and intentionally deprived Ms M[...] of her liberty by forcefully taking her by car to a hostel and keeping her there for some time.
- 11.4. On count 4, they are said to have had sexual intercourse with her without her consent.
- 11.5. On count 5, they are said intentionally to have been in unlawful possession of a firearm, specifically a Vektor Norfolk with no serial number and without holding a licence or permit.
- 11.6. On count 6, they are said, intentionally and unlawfully to have possessed seven rounds of ammunition without being in possession of a firearm capable of discharging it.
12. The appellants (and the first accused) were arrested on 24 December 2005, a few hours after the events in question took place. The trial commenced 11 months later, on 29 November 2006 before Judge Ismail and assessor Mr Rudolf.<sup>9</sup> The trial ran for a total of six days, including sentencing. The trial Court convicted the appellants on 20 February 2007 and sentenced the appellants on 27 February 2007. Adv Thenga – from the prosecution services - represented the State. Adv Pitso represented accused no 1, Mr Masemola, who was acquitted. Adv Phahlane (now Judge Phahlane)<sup>10</sup> represented the appellants.
13. It appears to be common cause that both appellants applied for leave to appeal some three years later. An application from Mr Mmela, the second appellant, dated 2 November 2010<sup>11</sup> is on record. There is no application of the first appellant, Mr Mashiloane, from that time on record.<sup>12</sup> It appears from Mr Mmela's

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<sup>9</sup> The fact that an assessor Mr Rudolf sat as an assessor in the trial appears from two affidavits before the Court, from Adv Thenga and Adv Phahlane.

<sup>10</sup> In this judgment, we refer to our sister Judge Phahlane as Adv Phahlane as this correctly depicts her role in the trial.

<sup>11</sup> According to an unsigned affidavit from the Registrar of the Gauteng High Court, Pretoria, the second appellant applied for leave to appeal on 2 December 2010.

<sup>12</sup> In the judgment granting condonation and leave to appeal, the presiding Judge refers to both appellants' applications of 2010. According to information contained in a complaint from the first

condonation application before Judge Ismail, that he had instructed his representative at the time of conviction and sentencing to apply for leave to appeal but that did not happen for unknown reasons. He filed his own application for leave to appeal from prison in 2010.

14. There is very little information to hand about what ensued for several years thereafter, save that there were efforts during this time – including in 2015 – to locate the transcripts of the trial. The appeal came before Deputy Judge President Ledwaba on 3 May 2017 and was postponed *sine die* for the record to be transcribed or reconstructed.

15. On 12 November 2018, and in circumstances where the recording could not be retrieved or found, the Office of the Chief Justice requested Judge Ismail to reconstruct the record. By that stage, Adv Thenga had resigned from the prosecution services (in 2016). However, the DPP, Adv Marika Jansen Van Vuuren assisted and located the relevant file, unfortunately largely empty. On receipt of the request, Judge Ismail's office sought to ensure the process ensue as swiftly as possible.<sup>13</sup> In the result, on 10 April 2019, Judge Ismail convened a meeting in his chambers. Present were the presiding Judge, Adv Thenga, Adv Phahlane, Adv Pitso and DPP Jansen Van Vuuren. The process culminated in the supply of affidavits from Adv Thenga and Adv Phahlane. There is no affidavit from Adv Pitso, which is not explained.

16. In his affidavit, Mr Thenga explained that he had considered the file supplied by the DPP and ascertained that the only notes that were contained in it were related to the accused's plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 (CPA). He supplied the plea explanation, as well as the file cover. He confirmed that he attended the meeting on 10 April 2019, during which Judge Ismail enquired if he has any recollection of the matter or any notes. He stated that he does not, save for the plea explanation and file cover. In the result he could not be of any further assistance with reconstructing the

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appellant to the Public Protector about delays in reconstructing the record, he applied for leave to appeal on 31 March 2011.

<sup>13</sup> It appears, however, that there was a short delay at this stage due to the process required to ensure legal representatives instructed by Legal Aid received payment.

record. Adv Phahlane explained in her affidavit that she had been instructed by Legal Aid to represent the appellants in the trial. She confirmed that she attended the meeting in chambers on 10 April 2019. She confirmed that she has no notes taken from the trial proceedings nor any records or copies of the docket. She also has no recollection of the matter and accordingly could not assist with the reconstruction of the matter.

17. On 29 April 2019, Judge Ismail reported to Deputy Judge President Ledwaba advising of the outcome of the meeting and noted that Adv Pitso had confirmed that his client was acquitted. The letter advises that there are unfortunately no notes of the matter including from Judge Ismail himself.

18. On the information before us, the reason the record was not and cannot be transcribed is that the recording machine used in the trial was damaged and the recordings are inaudible. Efforts were made to salvage the records, including from the service providers, but these were largely unsuccessful: only two days of evidence have been salvaged. This matter is one of several affected by the faulty machine from that time. Of course, while in this case, it is the Courts' recording system that failed, and there is no suggestion that the appellants are to blame, there is a systemic risk that records can go missing due to corruption or other involvement of accused persons.

19. The appellants applied for leave to appeal before Judge Ismail on 19 January 2022. Mr Majuto appeared for the appellants and Ms Janse van Vuuren appeared for the State. Both appellants applied for condonation, which was not opposed.<sup>14</sup> Given the circumstances relating to the record, the DPP did not oppose the applications for leave to appeal. On 26 January 2022, Judge Ismail granted leave to appeal to the appellants, on both conviction and sentence, primarily because of the absence of a complete record.

## **The trial record and evidence**

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<sup>14</sup> Only the application of Mr Mmela is on record before us. However, it is apparent from the record of the hearing of the application for leave to appeal and the judgment that both appellants applied for condonation.

20. The record in this trial is limited and much is left to speculation including who ultimately testified. A version of the State witness list, the transcript of nearly two days of evidence, three affidavits made in terms of section 212 of the CPA and the trial Courts' orders (but not judgments) on conviction and sentence are to hand.
21. According to the State witness list, testimony from ten witnesses was contemplated including both complainants, Ms M[...] and Mr Manyika. Various police officials were to testify, specifically a Sergeant Ferdinand Phayane, a Sergeant Komana Makgatsane Livy, an Inspector ME Motloutsi and a Captain Koena Simon Jameese. Two medical persons are listed: Dr CG Kleynhans from Mamelodi Hospital and GM Moshime from Stanza Bopape Clinic in Mamelodi. Two further witnesses are listed: Miriam Manyanthe and Marabe Frans Kgaphola. Notably, however, the witness list was updated and expanded. On 30 November 2006, a Danele Tebogo Mosehli testified and further additional witnesses were cautioned on 1 December 2006, including a Mr Masheshu, a Kibatso Gapula and a Sergeant Mabaso.<sup>15</sup> What is also known is that one of the witnesses who testified is a section 204 witness.<sup>16</sup> However, that witness' identity has not been confirmed.
22. As indicated above, Adv Thenga supplied a copy of the accuseds' plea explanations. Only accused no 1, Mr Masemola, who was acquitted, provided a plea explanation. The appellants, Mr Mashiloane and Mr Mmela exercised their right to remain silent. According to Mr Masemola's plea explanation, on the day of the incident, he and a Tshepo were driving a taxi in Mamelodi, belonging to a Selaelo. At about 1 am they went to a tavern, Marga's Tavern, to see the driver. Tshepo went inside and Mr Masemola remained in the car. Mr Mashiloane and Mr Mmela approached him: Mr Mashiloane had a firearm. They forced him to give them the car keys and to take them to the hostels, where they resided. He knew them as violent people and he acceded. On the way to the hostel, they came across a lady and a guy. Mr Mashiloane, who was driving and had the

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<sup>15</sup> The latter is a deponent to one of the section 212 affidavits, dealing with DNA evidence. There is no suggestion that there was no proper warning of additional witnesses, each of whom appear to have been included on an updated list.

<sup>16</sup> Section 204 of the CPA which deals with incriminating evidence by a witness for the prosecution.

firearm, stopped and ordered the man to lie down. He ordered Mr Masemola to search the guy and found a cellphone and ten rands. He ordered the lady to get into the car and started shooting in the direction of the guy. Four shots were fired. They drove to the hostel with the woman and then Mr Mashiloane and Mr Mmela raped the woman, more than once each. Mr Masemola was left in the car. He wanted to run away but there was someone watching him. After they were finished they ordered Mr Masemola to enter the room and ordered him to rape the woman but he refused. They then took the woman to where they found her in the same car, driven by Mr Mashiloane. They then left Mr Masemola. Mr Masemola went to a person who drives the car, a Tebogo, and they decided to go to the tavern to report to the taxi owner, Selaeto. He also intended to report the matter to the police but he was arrested with Tebogo.

23. There is no record of any evidence from 29 November 2006 when the trial commenced. However, it is apparent from the transcript from 30 November 2006 that one of the early witnesses was Marabe Frans Kgaphola. His role and the import of his testimony is not known. However, he appears to have testified that accused no 1 had the car keys to the relevant vehicle on 23 December 2005.
24. The available transcript commences after lunch (14h06) on 30 November 2006, during the evidence in chief of a Danele Tebogo Mosehli, (the Tebogo mentioned by accused no 1, Mr Masemola, in his plea explanation).<sup>17</sup> The evidence commences at a point where the witness had explained that he did not know why he had been arrested until he arrived at the police station in the morning of 24 December 2006. The substance of his evidence as transcribed concerns his discussions in the police cell with accused no 1, who related to him what happened while in the cell. According to Mr Mosehli, it was with the assistance of accused no 1 (Mr Masemola) that the police located and arrested Mr Mashiloane and Mr Mmela. Accused no 1 confirmed to the police that Mr Mosehli was not present during the incident. From the transcript to hand, Mr Mosehli's testimony appeared relevant centrally to identifying the vehicle in question which was a white Mazda 323 vehicle that he had used as a taxi. The registration number

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<sup>17</sup> The witness is not listed on the witness list.

commenced with FYJ. He testified that accused no 1 took the vehicle on 23 December between 6 and 7pm and that when he did so, he was with Mr Mashiloane and Mr Mmela. They drove away together. He also recounted a summation of what accused no 1, Mr Masemola, informed him as to what happened, while they were in the cells. The summation is substantially but not wholly consistent with the plea explanation. The two main points of difference concern first, accused no 1's involvement in the search of Mr Manyika (on this version, accused 1 conducted the search, albeit coerced to do so, and found the phone and cash) and second, accused no 1 allegedly also went to find Ms M[...] after the incident to take her home as he was not pleased with what had happened to her.

25. Two further witnesses testified on 30 November 2006, Ms Miriam Manyanthele and Mr Manyika. Mr Manyika was cross examined on 1 December 2006: the transcript of that day is also to hand.

26. Ms Manyanthele testified about what transpired early in the morning of 24 December 2005. She was at home. They were preparing for her brother's wedding celebration the next day. Someone knocked on the door about 01h00 or 01h30am. It was a woman who was crying, she recognised her as 'Vusi's girlfriend'. She asked where Vusi was and she said he had been shot at B1. She noticed that the woman's belt was torn and asked about it. She was told that she had been raped by four boys. She called her aunt and her child, they arranged transport and took her to the police station. Her clothing was smeared with dirt, which looked like sperm. The woman did not know the people who had raped her. There was no material cross examination and this evidence – which related to Ms M[...] – was uncontroverted.

27. Mr Vusi Manyika, the complainant on counts 1 and 2, testified thereafter. He explained what happened on the night in question. He had called Ms M[...] that evening and they had agreed that he would fetch her after she had finished work, which was just before midnight. They met at a street corner and they proceeded together. They went to his cousin's place, because there were wedding celebrations at his home and he had keys to his cousin's place. But they could

not open the gate, and when he suggested that they climb over the fence, Ms M[...] did not want to and they argued. He thought it wise to then take her back home and on the way, a vehicle appeared with bright lights. As the vehicle approached, the lights went out, he looked back in the direction of the car and noticed that a person was outside the car with a firearm, which the person cocked and pointed in Mr Manyika's direction. He did not know the person but there was visibility in the street from an Apollo light (a tall floodlight) which was located about 13 to 15 metres away. The man with the gun ordered Mr Manyika to lie down and he insulted his mother, mentioning her private parts. He saw the vehicle registration number. During the incident he could see the driver, who was wearing a woollen hat with some stripes on it. He could not confirm how many people were in the vehicle.

28. The testimony continued as follows. The man with a gun (who Mr Manyika confirmed he could see) kept repeating: Keep down, lie down, and he fired one shot aiming the gun at his face. He was about 4 to 5 metres away. The bullet missed and hit the ground. While he was lying on the ground, he heard the door of the vehicle opening. He had heard a voice saying: 'just alight or get out of the car'. Someone came to search him and they found his cell phone and R10 which were taken from him. He was then ordered to stand up. He was confused and at that time, Ms M[...] was already in the vehicle. He tried to talk to them, but the man became aggressive saying 'get away, get away' and the man fired two more shots. He was not hit by a bullet. He got to a corner and turned around to see where they were going. He saw them getting into the vehicle. The incident took, in total, about six minutes.

29. He then ran to a friend's place, Pule. Under cross examination he testified that this was just after 01h00 in the morning. He reported the incident to Pule and they tried to call his number but his phone was switched off. They then went back to the scene of the crime and a police van appeared, which they stopped. The police asked what the problem was and he explained what happened. He furnished the registration number of the vehicle and they got into the police van and drove around looking for the vehicle, a white Mazda.

30. Pule and he then went to his home and there were many people on the street. They told him that Ms M[...] had been raped and was at the police station. The young man who took Ms M[...] to the police station then fetched him and he proceeded to the police station where Ms M[...] was making a statement. While at the station, they were informed that the vehicle had been found. An inspector then arrived with one boy, who Ms M[...] identified at the time, and who Mr Manyika identified in Court as accused no 1. Under cross examination by Adv Pitso, he confirmed that accused no 1 refuted his complicity at the time saying: 'I am not the one, I am not the one.' Sometime thereafter, approximately four to five hours later, the inspector came back with two other men. Mr Manyika was able to identify one of the two men as accused no 2, Mr Mashiloane, the person with the firearm. He was still wearing the same red T-shirt, although he was no longer wearing a black woollen hat. On questioning from the presiding Judge he confirmed that he had had an opportunity to see the person during the events. The inspector then brought a phone to him and asked if it was his and he confirmed that it was.
31. They then took Ms M[...] to Mamelodi hospital. After about an hour, Ms M[...] was seen by a doctor. [This was Dr Kleynhans.]<sup>18</sup> Thereafter, they proceeded to the scene of the rape, the hostel, which looked like a hall or a room. There was no bed, the place was filthy, dirty. They then proceeded to the scene of the alleged robbery and the inspector asked Mr Manyika to point out the relevant positions. While inspecting the area, the inspector picked up a cartridge.
32. They then took Ms M[...] home to report the matter to her parents. The inspector asked her to provide them with the trousers that she was wearing which she did. They then went to Mr Manyika's parental home.
33. Under cross examination, Ms Phalane put the version of Mr Mashiloane and Mr Mmela to Mr Manyika. Mr Mashiloane would say that he was at the tavern (ie Marga's Tavern) with Mr Mmela but they left at about 12h45 or 01h00 in the morning and went home to the hostel to sleep. They say that they did meet Ms

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<sup>18</sup> According to Dr Kleynhans' section 212 affidavit.

M[...] at the tavern and that she voluntarily went with Mr Mmela to the filling station for something to eat. When they returned, they agreed that they would have sexual intercourse in the car and that happened. They said that the first time that they saw Mr Manyika was when he arrived at the hostel with the police and it was then that Mr Manyika identified him as the person who pointed at him with a gun. Mr Manyika confirmed under cross examination that on the evening of 23 December 2005, and before Ms M[...] met him, she had been helping her brother to sell liquor at another tavern.

34. At the end of proceedings on 1 December 2005, the matter was postponed until 5 December 2005. There is no transcript of any evidence from that day or thereafter. However, it appears that the State intended then to call four or five witnesses including Ms M[...] and Sgt Mabaso, the latter to testify about forensic evidence. It is not apparent from the record to hand whether any of the accused testified.

35. The absence of any transcript of evidence from Ms M[...] is, of course, troubling. Her evidence would have been material to the convictions on all counts, but not least on the kidnapping and rape counts. And if she was raped as the trial Court concluded, the giving of evidence itself would likely have been traumatic for her.

36. In this regard, the prospective evidence of Dr Kleynhans can be partly gleaned from his affidavit in terms of section 212 of the CPA. He is a registered medical practitioner practicing as a senior medical practitioner in Mamelodi and in the service of the State. His affidavit states that on 24 December 2005 he examined Ms M[...] and recorded his findings on a J88 form. Although stated to be attached, the J88 form is not on record rendering the affidavit of limited value. At the least, however, it confirms that Ms M[...] attended the hospital for an examination shortly after the alleged events, in accordance with the testimony of Mr Manyika, in turn consistent with the evidence of Ms Manyathela.

37. The prospective evidence of Sgt Mabaso is also apparent from an affidavit made in terms of section 212 of the CPA. According to that affidavit, Sgt Mabaso is a Sergeant in the South African Police Service attached to the Biology Unit of the

Forensic Science Laboratory. He is an Assistant Forensic Analyst and a Reporting Officer. He explains that during the course of his duties on 14 September 2006, he received a docket with its contents. He evaluated the samples and subjected them to DNA analysis. The results show the presence of male gender markers in two vaginal swabs, which are the result of a mixture of genetic material. They show too that blood from two of three control blood samples can be read into the mixture profile obtained from the two vaginal swabs. The affidavit records that the DNA analysis with regard to the trouser is still in process. It is not possible from the affidavit alone to identify the two male persons whose DNA is linked with the vaginal swabs. However, visible handwritten notes link the DNA to that of the appellants and one speculates that it may have been their DNA in view of their foreshadowed defence. Moreover, it is evident from the transcript to hand that the evidence of Sgt Mabasa was to be disputed and his oral testimony was thus necessary.

38. There is a further section 212 affidavit to hand, being from a Zwelabo Solomon Sindane who is a Superintendent in the South African Police Service. He was a Senior Forensic Analyst attached to the Ballistics Section of the Forensic Science Laboratory. Superintendent Sindane explains that on 23 January 2006 he received a sealed exhibit from the matter containing (a) a 9mm parabellum Calibre Vektor Model CP1 Semi Automatic Pistol, with a serial number BDH775 and a magazine, (b) seven 9mm parabellum calibre cartridges unmarked and (c) one 9mm parabellum calibre fired cartridge. He examined the pistol and found that it functions normally without obvious defect, is self-loading but not capable of discharging more than one shot with a single depression of the trigger. He concluded, *inter alia*, that the fired cartridge case (c) was fired in the firearm mentioned in (a).

39. There is no judgment available either on conviction or sentence. Only the orders granted are available. However, it is not wholly clear what steps were taken to retrieve the recordings / transcripts of the dates when judgment was delivered: specifically, 13 and 20 February 2006.

### **Grounds of appeal and related submissions**

40. At the time the appeal was argued on 30 January 2023, only the application for leave to appeal of Mr Mmela, the second appellant, was to hand. It was only upon enquiry by the Court, shortly after the hearing,<sup>19</sup> that clarity emerged about Mr Mashiloane's application for leave to appeal. It was then explained that an amended notice of appeal was delivered on 15 November 2021 for both appellants but were left out of the appeal record when compiled. Mr Mashiloane's application was finally supplied to the appeal court on 2 March 2023 and uploaded to case-lines. Given the chronology above, I deal first with Mr Mmela's grounds of appeal.

#### Mr Mmela's grounds of appeal

41. In Mr Mmela's application for leave to appeal dated 2 November 2010, the grounds of appeal are set out in two sections. The bulk of the grounds are set out in typed form and in generic or general terms. These are then elaborated upon in an Annexure A, which is handwritten and which relate more pertinently to the case itself. I deal first with the grounds on conviction.

42. The generic or general grounds of appeal on conviction are these:

42.1. First, the trial Court erred in finding that the State proved the guilt of the appellant beyond reasonable doubt, that there are no improbabilities in the State's version, that the State witnesses gave evidence in a satisfactory manner, that the evidence of State witnesses can be criticised on matters of detail only whereas the evidence was contradictory in material respects and that the minor differences between the evidence of the appellant and the defence witnesses were sufficient to reject the appellant's evidence.

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<sup>19</sup> The following query was directed: In the main record, there is only one application for leave to appeal, reflecting the grounds of appeal. This is for Mr Mmela (appellant 2, accused no 3 in the court a quo) (See Vol 1 at pp 68-73). The judgment in which leave to appeal is granted refers to both appellants, including Mr Mashiloane (appellant 1, accused no 2 in the court a quo). A further document dated December 2022 is found on caselines at 034-1 but it is not clear to whom it relates. Clarity is requested from both parties as to what documents may be referred to glean the grounds of appeal for the respective appellants.

42.2. Secondly, the trial Court erred further in failing properly to analyse or evaluate the evidence of the State witnesses or to properly consider the improbabilities inherent in the State's version.

42.3. Thirdly, the trial Court erred in rejecting the evidence of the Appellant as not being reasonably possible true, accepting the evidence of the State witnesses and rejecting that of the defence witnesses, holding against the appellant contradictions between his own evidence and the facts put to witnesses in cross examination, holding against the appellant matters which were not put to witnesses and giving importance to minor discrepancies between the defence witnesses.

43. These generic or general grounds are elaborated upon in the handwritten Annexure A which I repeat in full (with errors in the original corrected where corrections do not alter meaning).

‘1. That not one of the complainants pointed the appellant out at the police station as one of the robbers who partook in any illegal activity.

2. That both the complainant's confirmed that the appellant intervened by trying to stop the robbery when he saw accused 1 and accused 2 was busy robbing the complainant.

3. That the complainant who was kidnapped never testified that the appellant was active involved in the kidnapping and rape her.

4. That the one complainant testified that it was accused no 2 who shot at him when he was running away and that it was not the appellant.

5. That the appellant was only found guilty on the testimony of the section 204 witness.

[The Court's attention is then drawn to dicta from *State v Khumalo en andere* 1991(4) SA 310 (A) at 237J<sup>20</sup> and *State v Hlapezula and others* 1965(4) SA 439 (A) 440D-E].<sup>21</sup>

44. In Mr Mmela's amended notice of appeal dated 15 November 2021, the following is stated (errors corrected where meaning is unaffected):

'1. None of the complainants pointed the applicant out at the identification parade held at the police station as the assailant.

2. Both the complainants in the robbery counts confirmed that the accused tried to intervene when the section 204 witness and his co-accused were busy robbing the complainants.

3. The victim of kidnapping and rape did not attest that the applicant was actively involved, or aided or even advanced the actions of the perpetrators during the kidnapping and rape ordeal.

4. The evidence of the complainants avers the applicant that is to the effects that the section 204 witness was the person who shot at them as he was running away.

5.1 The applicant contends that he was convicted on the uncorroborated evidence of the section 204 witness.

5.2 That the court failed to caution itself about the danger embedded in the evidence of self-confessed criminal.

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<sup>20</sup> The case referred to deals with the common purpose doctrine, invoked at the trial. The paragraph reference is incorrect. I was unable to locate the extract cited. The Constitutional Court dealt with the doctrine of common purpose under the Constitution in *S v Thebus and another* 2003(2) SACR 319 (CC). The law on common purpose is briefly restated at paras 18 and 19.

<sup>21</sup> 'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Secondly, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particular where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convicting description - his only fiction being the substitution of the accused for the culprit.' Though not referred to by the appellant, the then AD in *Hlapezula* then proceeds to detail the cautionary approach to dealing with accomplice evidence.

5.3 That the section 204 witness was not frank and honest to the court. He did not implicate himself but shifted the blame to the accused before court.

6. It is the applicant's contention that an appeal is part of a fair trial and it cannot be decided without the original records or properly reconstructed records.

6.1 It is further contended by the applicant that it is the duty of the trial court to keep a proper record, his is to make sure that he avails before the appeal court a proper record.

6.2 It is the applicant's contention that he was informed about the missing portion of the records, the need to reconstruct the records was communicated and his right to have legal representation during reconstruction.

6.3 The applicant further contends that all necessary steps to reconstruct the records have been taken without the likelihood of it been reconstructed or secondary evidence been placed before the Appeal court.

8. It is the applicant further contention that with the current available records / attempted reconstruction his right to fair trial will not be safeguarded.

9. It is therefore the applicant's prayer that leave to appeal to the full court be granted on urgent basis, taking into account the time spend in custody post-conviction, the earliest time taken in attempting to get the appeal before court and the frustration caused by the office of the registrar.'

45. On sentence, Mr Mmela pleads his appeal against his life sentence only in the 2 November 2010 application. The following general typed grounds are pleaded:

45.1. First, the effective term of life is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation and in effect disregards the period of time which the appellant spent in custody awaiting trial.

45.2. Second, the Court erred by not imposing a shorter term of imprisonment, coupled with community service or a further suspended sentence in view of the absence of previous convictions, the absence of planning, the age and personal circumstances of the appellant, the rehabilitation element and the mitigating factors inherent in the facts found proved.

45.3. Third, the Court is said to have erred in over-emphasising the following factors: the seriousness of the offence, the interests of society, the prevalence of the offence, the deterrent effect of the sentence and the retributive element of sentencing.

46. The following specific grounds appear from Annexure A:

‘Mitigating circumstances the court did not take into consideration during sentence.

1. That the appellant was a first offender with no previous convictions to his name.

2. The personal circumstances of the appellant, his age 25 years, that he had one child to support and the rehabilitation element.

3. The long time the appellant spent in jail awaiting trial from 25 December 2005 till 20 February 2007.’

#### Mr Mashiloane’s grounds of appeal

47. There is no copy of Mr Mashiloane’s 2010 (or 2011) application for leave to appeal to hand. The only document to hand is dated 15 November 2021.

48. In respect of his conviction, Mr Mashiloane makes several contentions.

48.1. Firstly, that the trial Court erred in making the following findings: 1. The State proved the guilt of the applicant beyond reasonable doubt; 2. That

the state witnesses gave evidence in a satisfactory manner especially the section 204 witness.

- 48.2. Secondly, the trial Court erred in failing to properly analyse or evaluate the evidence of the state witnesses, and to consider the improbabilities inherent in the state version.
- 48.3. Thirdly, none of the complainants pointed the applicant out at the identification parade held at the police station as the assailant.
- 48.4. Fourthly, both the complainants in the robbery counts were not sure of the identity of the second assailant save the section 204 witness.
- 48.5. Fifthly, the victim of kidnapping and rape did not attest that the applicant was actively involved, or aided or even advanced the actions of the perpetrators during the kidnapping and rape ordeal.
- 48.6. Sixthly, the evidence of the complainants is to the effect that the section 204 witness was the person who shot at them as he was running away.
- 48.7. Seventhly, the applicant conten[ds] that he was convicted on the uncorroborated evidence of the section 204 witness, that the court failed to caution itself about the danger (e)mbedded in the evidence of a self-confessed criminal and that the section 204 witness was not frank and honest to the court. He did not implicate himself but shifted the blame to the accused before court.
- 48.8. Eighthly, the applicant contends that an appeal is part of the right to a fair trial and cannot be decided without the original records or properly reconstructed records. It is further contended that it is the duty of the trial court to keep a proper record, his is to make sure that he avails before the appeal court a proper record. The applicant contends that he was informed about the missing portions of the records, the need to reconstruct the records was communicated and that his right to have legal

representative during reconstruction. Further, the applicant contends that all necessary steps were taken to reconstruct the records without the likelihood of it being reconstructed or secondary evidence being placed before the appeal court. The appellant contends that with the current available records and attempted reconstruction his right to a fair trial is not safeguarded.

49. In respect of sentence, Mr Mashiloana relies on the grounds set out in his prior application for leave to appeal, but none is provided to the Court. As indicated above, the Court directed a specific enquiry regarding Mr Mashiloane's grounds of appeal. In these circumstances, Mr Mashiloane's appeal against sentence cannot succeed. However, in view of the conclusion we reach below, we do not deal with this in our order at this stage and will deal with the appeals in totality when re-enrolled.

#### The parties' submissions

50. The parties' submissions during the hearing can be briefly stated. Adv Mojuto, on behalf of the appellants, placed full store on the absence of a complete record to determine the appeal. In short, it was submitted that this is a case where the record is so inadequate that the appeal can simply not be determined. In particular, it was emphasised that the appeal Court is in no position to assess the correctness of the trial Court's approach to the testimony of the section 204 witness. Adv Mojuto submitted that all necessary steps had been taken to reconstruct the record to no avail.<sup>22</sup> He advanced no submissions in respect of the specific grounds of appeal.

51. Adv Lalane, on behalf of the State, implored the Court to determine the appeal on the portions of the record to hand. In this regard, he submitted that there is sufficient evidence to do so.<sup>23</sup> He submitted that the following common cause facts permit this assessment:

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<sup>22</sup> Adv Mojuto relied on *Gora and Another v S* [2009] ZAWCHC 145; 2010 (1) SACR 159 (WCC) and *Davids v S* [2013] ZAWCHC 72 (*Davids*) at para 13.

<sup>23</sup> Relying on *Phakane*, supra n6. In *Phakane* (paras 38 and 39), the Constitutional Court followed *Schoombee* and *Chabedi*, referred to above at n6 and n7, dealing with the question when it can be said that an incomplete record will result in the infringement of an accused's right to a fair trial. The

- 51.1. It was not in dispute that on the day prior to the arrest accused no 1 was in the company of the appellants. This is confirmed by Mr Mosehli's evidence.
- 51.2. It was disputed during Mr Mosehli's testimony that accused no 1 confessed to him that he was with the appellants during the commission of the offences.
- 51.3. It was not disputed that it was on the basis of that confession and the resulting events that the appellants were arrested.
- 51.4. The description of the crime scenes provided by Mr Mosehli based on the confession corroborated the evidence of Mr Manyika.
- 51.5. Mr Manyika testified that it was Mr Mashiloane who was in possession of the firearm, which was also the import of the confession made to Mr Mosehli.
- 51.6. It was not disputed during Mr Manyika's evidence that when the police went to the scene where the robbery took place that the police recovered a spent cartridge.
- 51.7. The motor vehicle described by Mr Mosehli fits the description of the motor vehicle described by Mr Manyika.
- 51.8. Mr Manyika was present when Ms M[...] took the police to the hostel, which matches the description of the place of the rape in the confession made to Mr Mosehli.

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Constitutional Court concluded that the conviction in question must be set aside in circumstances where the issues on appeal could not be determined on the incomplete record. In that case, the incomplete record was held to prejudice the fair trial right specifically the right to appeal and the Court ordered that the appellant be immediately released from prison.

51.9. There is no sense in the appellants' version as put to Mr Manyika.

51.10. There is congruence in the testimony of Mr Manyika and the account in the confession made to Mr Mosehli regarding the role of accused no 1 in the robbery, more specifically whether it was accused no 1 who searched Mr Manyika on instruction of others. In this regard, Mr Manyika testified that before being searched he heard a person telling another to get out of the car.

52. In the alternative, Adv Lalane submitted that should the Court not be satisfied that the appeal can be determined on the available record this finding should be limited to counts 3 and 4, the kidnapping and rape counts. In that event, the matters should be remitted to be prosecuted again.

### **Queries from the Court**

53. After the hearing, this Court formed the view that it was not possible to determine the appeal without further interrogating whether, in all of the circumstances, the steps taken to reconstruct the record, and indeed to supply the available record, were sufficient. In *Schoombee* the Constitutional Court concluded that the record to hand was 'amply adequate for just consideration of the issues the applicants raised on appeal.' It held:<sup>24</sup>

'The loss of trial court records is a widespread problem. It raises serious concerns about endemic violations of the right to appeal. Reconstruction should not be the norm in providing appellants with their trial records. But when reconstruction is necessary, the obligation lies not only on the appellant, but indeed primarily on the court to ensure that this process complies with the right to a fair trial. It is an obligation that must be undertaken scrupulously and meticulously in the interests of criminal accused as well as their victims.'

54. In light of our concerns, the Court made further enquiries on several issues.

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<sup>24</sup> Supra n 6 at para 38.

55. The first enquiry was directed shortly after the appeal was argued, in the following terms:

55.1. First, the Court enquired as to the basis of the first appellant's application for leave to appeal, which - contrary to the argument advanced - was not apparent from the record supplied. I have already dealt with that query and the response above.

55.2. Second the parties were requested to make submissions on the adequacy of the efforts to reconstruct the record and the implications thereof for the appeal. The parties were referred to *Schoombee* and the cases there cited and attention drawn to the following:

55.2.1. The duty to reconstruct is not only on a Court but on a convicted person and no hearing was conducted that involved the appellants themselves.

55.2.2. No hearing was convened in open court to reconstruct the record.

55.2.3. The adequacy of enquiry whether the appellants were in possession of the judgment.

55.2.4. The adequacy of enquiry from the assessor.

55.2.5. Any other relevant factor.

56. The appellants responded on 2 March 2023. On the second issue, Adv Mojutu explained that they were represented by Adv Phahlane during the process of reconstruction of the record. Adv Mojutu submitted that the course pursued in this instance to reconstruct the record, whereby counsel delivered affidavits indicating that they could not assist with the reconstruction of the record, suffices. It can be assumed, it was submitted, that counsel first consulted with her clients. She would thus have known if her clients were in possession of any copy of the

judgment. Counsel submitted further that he could not ascertain whether there was any assessor involved and submitted that it was unlikely.

57. The respondent confirmed that when the reconstruction was conducted, the appellants were not present and that the assessor was not asked to assist. The respondent stated that the reconstruction was conducted in open Court. The respondent submitted that given the delays to date, there would be no purpose in referring the matter back to the Court a quo.

58. These responses did not adequately address the queries made. Moreover, certain of the responses provided were inaccurate in light of the information on record, speculative or given without instructions. It is clear from the affidavits of both Adv Thenga and Adv Phahlane that there was an assessor in the matter, Mr Rudolf. It is clear from all the accounts of the meeting of 10 April 2021 that the reconstruction was conducted in chambers and not in open court. And it is apparent from the response of appellants' counsel that he had not taken instructions before providing his response.

59. In view of the seriousness of the potential repercussions of the appeal for the administration of justice, and the divergent rights and interests that the criminal justice system must protect, the Court requested counsel to address these matters further. The further enquiry, sent in April 2023, was formulated as follows:

1. According to the affidavit of Mr Hitler Albert Thenga, at Record: Vol 2, p88 to 92, at para 4 (p89) there was an assessor in the above matter, being a Mr Rudolf. It appears from the record that no enquiries were made of Mr Rudolf whether he has any notes of the evidence in the matter, of the judgment, of a copy of the judgment or other recollection of the matter. The parties' representatives are requested to obtain the contact details of Mr Rudolf and ascertain from him whether he has any records from the matter or recollection of the matters identified below.

2. The appellants' representative is requested to ascertain from his clients whether either or both of the appellants obtained a copy of the judgment at the time of its delivery or at any time thereafter and if so to supply it. If not, to explain on what basis each appellant prepared his grounds of appeal. In this regard, it is noted that the response to the previous enquiries is speculative and not based on instructions.

3. The parties' representatives are requested to obtain instructions from their clients or ascertain from the previous legal representatives or the complainants as to their recollections as to:

3.1. who testified on behalf of the State (including any testimony from persons who proffered affidavits in terms of section 202 of the Criminal Procedure Act)

3.2. who testified on behalf of the appellants, and

3.3. to identify the section 204 witness.

60. Despite follow-up, the appellants' counsel responded only on 28 June 2023. Adv Mojutu then advised that the office of Legal Aid South Africa has sought to locate Mr Rudolf with no success. This included a query through the office of the Registrar. Adv Mojutu confirmed that consultations have now ensued with the appellants, who confirmed that they did not receive a copy of the judgment at any time and the applications for leave to appeal were prepared from memory. The first appellant has no recollection of who testified for the State or the accused. The second appellant recalls only the complainant (reference in the singular). He recalls that accused no 1 testified as did his cousin. He does not know who the section 204 witness is. Legal Aid directed a further query to Adv (now Judge) Phahlane but received no response.

61. There has been no response to the further queries from the respondent.

62. Before finalising this judgment, the appeal Court made a further enquiry, this time of the presiding Judge (through the Judge President of the Gauteng Division) to ascertain whether he had any way of locating Mr Rudolf and to remove any doubts regarding access to a copy of or notes of the judgments.<sup>25</sup> Shortly thereafter, the Judge President confirmed that the presiding Judge had responded and advised that he had attempted to locate Mr Rudolf at the time but without success and he confirmed that he is indeed unable to assist with any notes of the judgments.

## Analysis

63. The question that arises is whether the incompleteness of the record and the apparent inability to reconstruct the missing portions or the judgments, means that the appeal cannot be determined. This cannot be decided abstractly but requires a consideration of first, whether there is sufficient information on record to determine each of the grounds of appeal, and second, if not, what the impact is on the convictions in respect of the various counts.

64. In the present case, the grounds of appeal relied upon are asserted, in the main, at a very high level of generality with the result that not all grounds are asserted with sufficient clarity and specificity independently to ground an effective appeal.<sup>26</sup> We do not at this stage determine which grounds are (independently) ineffective. However, save for the generalised grounds of appeal, an analysis of the grounds of appeal of both appellants in respect of conviction, shows that – at least centrally – the grounds fall within three categories. In each category there are more specific alleged errors.

65. First, there is a challenge to identification evidence. In this regard, the second appellant, Mr Mmela, relies on the fact that the complainants did not point him out at the police station. Both appellants rely on the absence of a pointing out during an identification parade. The first appellant, Mr Mashiloana also relies on the

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<sup>25</sup> In this regard, the report of the presiding Judge stated he had no notes, but it was not wholly clear whether this extended to the judgments.

<sup>26</sup> *Tyhala v S* [2021] ZAECGHC 119 at para 7 and 10. See too: *S v Horne* 1971(1) SA 630 (C); *S v Swanepoel* 1971(3) SA 299 (E); *Songono v Minister of Law and Order* 1996(4) at 385C-E.

contention that the complainants in the robbery counts were not sure of the identity of the second assailant save the section 204 witness.

66. Second, there is a challenge to whether the State sufficiently proved the appellants' active involvement in the robbery and rape or dissociated from these activities. In this regard, the first appellant says that Ms M[...] did not attest that he was actively involved, or aided or even advanced the actions of the perpetrators during the kidnapping and rape ordeal. He also says that the complainants testified that the section 204 witness was the person who shot at them as he was running away. The second appellant relies on several factors in this regard. He says both the complainant's confirmed that he intervened by trying to stop the robbery when he saw accused 1 and accused 2 robbing the complainant. Further, he says Ms M[...] did not testify that he was actively involved in the kidnapping or raped her. In the original grounds, he relies on the fact that Mr Manyika testified that it was Mr Mashiloana who shot at him when he was running away and not Mr Mmela. In his supplemented grounds he says that the complainants' evidence was that the section 204 witness shot at him as he was running away.

67. Thirdly, there is a challenge to the Court's reliance on the testimony of a section 204 witness, whose identity has not been provided to the appeal Court. This includes a complaint by both appellants that they were convicted on that witness' sole and uncorroborated evidence. It also includes a complaint that the evidence was unsatisfactory and the Court did not sufficiently caution itself on the dangers of the evidence.

68. Considered in context of what is known about the trial and the evidence supplied, these central appeal grounds are both narrow and, in the nature of things, do not require a full transcript of the record to determine. Indeed, some can be determined even on the information to hand. Others may well be determinable with limited further information. Whether this applies to all grounds is, at this stage, unclear.

69. As appears above the appeal Court made certain enquiries to obtain further information, with limited outcome. However, on a careful consideration of the record to hand and the grounds of appeal asserted, we remain unable satisfactorily to assess whether the appellants' right to appeal can be duly exercised and if not, whether that impacts upon the entire trial or only certain of the counts for which the appellants were convicted. We are of the view that further steps must be taken in the reconstruction and reporting process before this assessment can be duly made.

70. Various cases have addressed the process of reconstructing a record, where necessary,<sup>27</sup> and the process followed in this case is not precluded. The presiding Judge was, moreover, faced with the unenviable task of reconstructing a record many years after the trial was finalised and was only alerted to the appeal process at a late stage. Importantly, however, while it is not wholly clear, it seems unlikely that the portions of the record that are in fact to hand were available to those who attended the meeting of 10 April 2021 in the chambers of the presiding Judge. Furthermore, even assuming at least Mr Mmela's initial application for leave to appeal was to hand, both applications were thereafter materially supplemented, as set out above. What is thus clear is that the process of reconstruction was not and (it appears) could not have been focused on what might reasonably be reconstructed for purposes of determining the appeal in light of the issues to be decided on appeal.

71. Nevertheless, in my view, given the nature of the offences, the grounds of appeal and the parts of the record to hand, this is a case where the reconstruction process must ensue in open Court with a view to collating as much information about the trial as reasonably possible having regard to the grounds of appeal and the parts of the record to hand.<sup>28</sup> In context of this case, the process needs to include all involved as far as possible (including the assessor, the accused, the complainants, the prosecution services and investigators, and where possible,

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<sup>27</sup> See eg the cases referred to in *Schoombee*, supra n 6. Counsel referred to others.

<sup>28</sup> In order to give effect to the right to a public trial and to ensure accountability for the complainants and the public more generally. *S v Zenzile* [2009] ZAWCHC 59.

witnesses).<sup>29</sup> Enquiries can also be addressed to the Legal Aid office itself. The Legal Aid office instructed Adv Phahlane and would likely have archived the file which, in turn, may contain relevant documents, and possibly a copy of or detailed or material notes of the judgment.

72. In context of this case, and even assuming no participant has any relevant record or adequate notes, the following enquiries can helpfully be made and reported on:

72.1. Who testified on behalf of the State?

72.2. Who was the section 204 witness?

72.3. Who testified on behalf of each of the appellants? Did the appellants testify?

72.4. Can the appeal Court accept that the affidavits on record were admitted in terms of section 212 of the CPA? Which of the deponents thereto also furnished oral testimony?

73. Moreover, a few directed enquiries of known witnesses may yield highly material information, specifically Dr Kleynhans, Sgt Mabasa and the complainants, especially Ms M[...].<sup>30</sup>

73.1. An enquiry to Dr Kleynhans may yield a copy of the J88 form he completed and which was meant to be attached to his affidavit.

73.2. An enquiry to Sgt Mabasa may reveal whether he testified in accordance with the section 212 affidavit, and in doing so, whether he linked the DNA found in the vaginal swabs to the appellants as suggested in the handwritten notes?

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<sup>29</sup> While they may now be outdated, various addresses and other details are on record.

<sup>30</sup> The witnesses and the appellants would have to confirm what is elicited on oath.

73.3. Ms M[...] may still be in possession of material documents relating to the forensic evidence and the J88. Assuming she testified as foreshadowed, she may be able to confirm what might otherwise be assumed that the version on the rapes Adv Phahlane put to her was substantially in accordance with the version put to Mr Manyika (in other words that the appellants had consensual sex with her in the vehicle). Mr Manyika may also have records.

74. I am satisfied that the provision of limited further information about the trial that may well be elicited would permit a fair and sensible consideration of the appeal in a manner that both protects the appellants' fair trial rights and ensures that the administration of justice, the public interest and the complainants' interests are also protected. More specifically, it would enable a fair consideration of whether the grounds or some of the grounds can be dealt with on the limited evidence to hand and in respect of at least certain counts including the rape counts.

75. I am mindful that there has already been a substantial delay in finalising this appeal. This consideration must weigh heavily, not least because – while most of the sentences have been served – the appellants are still serving life sentences for rape. I am mindful too that, on the information to hand, the appellants are not responsible for the absence of a complete record nor for the fact that their applications for leave to appeal were only heard in 2021, with the real potential to generate a miscarriage of justice.<sup>31</sup> There are, however, countervailing considerations. The further enquiries required and information that is sought is limited and potentially highly material even on the incomplete record,<sup>32</sup> specifically to the rape convictions. Furthermore, the appellants took three years to prosecute their appeals and indeed, material grounds of the appeals were advanced only recently, in November 2021. Moreover, the appellants have provided their responses to the Court's queries about who testified at trial and the identity of the section 204 witness in minimalist terms. Finally, there is no reason why the appeal cannot be finalised in the near future should all parties co-operate

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<sup>31</sup> Cf *Davids* supra n21.

<sup>32</sup> Cf *Phakane* supra n6.

to this end. Provision is made in our order for an expedited re-enrolment for further hearing.

76. The following order is made:

76.1. The appeal is postponed *sine die*.

76.2. The matter is remitted to the trial Court to convene a hearing in open Court in order to take further steps to reconstruct the record and to prepare a more detailed report on the trial process in accordance with this judgment.

76.3. The appeal may thereafter be re-enrolled for further hearing on an expedited basis before this Court on request to the senior Judge (Judge Molopa-Sethosa) and the Deputy Judge President.

JUDGE SJ COWEN

I agree.

JUDGE LM MOLOPA-SETHOSA

I agree.

JUDGE J HOLLAND-MUTER

Appearances:

Appellants: Adv JM Mojuto instructed by Legal Aid South Africa.

State: Adv Lalane, Directorate of Public Prosecutions