Annexure

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A186/2013

DATE: 2014-11-03

THE HIGH COURT
PRETORIA
CC26/07

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE : 24/8/2015
SIGNATURE

In the appeal of

KLAAS LESETJA PHAKANE — Appellant

and

THE STATE — Respondent

JUDGMENT

MOLEFE J: [10:11]

[1] The appellant appeals against his conviction of one count of murder and also against his 20 years' imprisonment sentence which was imposed upon him on the 15 October 2009.

[2] The Trial Court dismissed an application for leave to appeal against his conviction and resultant sentence. On petition to the Supreme Court of Appeal, leave was granted to the appellant on

22 December 2014, to appeal to this court in respect of both conviction and sentence.

[3] The appellant was accused of unlawful and intentional killing of his girlfriend, Matilda Chuene Boshomane on or about 20 August 2006. The post-mortem report indicates that the body was found on 31 August 2006 and that the cause of death was *"unascertainable due to decomposition"*.

[4] In convicting the appellant on the charge of murder the court *a quo* relied on the evidence of Martha Manamela, (Manamela) who was the appellant's estrange girlfriend and who has children with the appellant. The evidence of Manamela was that the appellant made a confession of having killed the deceased to her and also discussed the disposing of the deceased body with her. Manamela, advised the appellant to throw the body where the deceased family would find it. Manamela also observed the appellant in a position of a blood stain curtain later that day. There was another piece of cloth which the appellant said he used to clean and carry the body of the deceased to the veldt.

Incomplete Record

[5] The appeal was previously enrolled and set down for hearing on 20 November 2013. The appeal was however postponed *sine die* as counsel representing the appellant discovered that the following evidence did not form part of the court record:

a) Plea Proceedings;

b) Evidence of Manamela and Manamela's statement of the witness which was handed in as EXHIBIT "C";

c) Warning statement of the appellant and handed in as EXHIBIT "D" and seemingly containing a confession made to the Peace Officer.

The audio recordings of the aforesaid evidence could not be traced after the discovery that the record is incomplete.

[6] Subsequent to the remand of the appeal, and upon enquiry to the Registrar of the High Court and to the Honourable Deputy Judge President, Justice Ledwaba, it was confirmed that the Presiding Judge in the court a quo Justice Seriti, could not assist in the reconstruction of the missing portions of the evidence. The respective State and defence counsel could not be located to assist in an attempt to reconstruct the missing portions of the record.

[7] In view of the fact that the primary source of the evidence (the audio recordings) and the secondary recourses (i.e. the Police statements, counsel and court notes), are untraceable, it was agreed that no further reconstruction could be done. It was directed that the appeal be enrolled and set down for hearing before the full court of this division.

[8] Appellant's counsel, Advocate HL Alberts submits that it is evident that reconstruction of the missing evidence which procedure has been set out in ***S v Lesley* 2000 (1) SACR 347**

(W) cannot be done. Counsel argues that as such, the appeal should be proceeded with in line with the procedure as set out in ***S v Chabedi* 2005 (1) SACR 415 (SCA)**.

[9] In **Chabedi, Supra** more particularly in paragraphs [5] and [6] Brand JA wrote the following:

[5] "On appeal the record of the proceedings in the trial court is of cardinal importance. After all, the record must form the whole basis of the hearing 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 a perfect recordal 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 verbatim record is impossible. (See e.g. ***S v Collier 1976 (2) SA 378 (C) at 379 A-D*** *and* ***S v S 1995 (2) SACR 420 (t) at 423 b-f)***.

[6] The question whether defects in the record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract.

It depends, *inter alia,* on the nature of the defects in the particular record and on the nature of the issues to be decided on the appeal."

[10] In ***S v Sebothe* and Others 2000 (2) SACR 1 (T)** at paragraph [87] 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 finished 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 properly be adjudicated.*

In that regard, the only avenue open to protect the rights of the accused or the appellant is to set aside those proceedings if it is impossible to reconstruct the record."

[11] Appellant's counsel relies on Section 35 supra and referred the court to *S v Zondi* 2003 (2) SACR 227 (W) wherein it was held as follows with regard to the persons responsible for recording, safekeeping and reproduction of court proceedings.

"However, the administrative, logistical and financial implications of primary responsibility for preparing

an appeal record on the appellant would probably, in the majority of cases, negate her or his constitutional right to an appeal since the State, through its officials, employees and/or sub-contractors not only records all court proceedings, but also has custody of all relevant recordings, notes, transcripts, as also all exhibits.

The provisions of Rule 67 Supra which place the primary responsibility for providing a record on appeal on the State are therefore fair, practical and convenient, and, as mentioned in ***S v Siwaya 1967 (3) SA 240 (E)*** *at 241 in fin 242 save an appellant unnecessary expense."*

[12] Counsel for the appellant submits that in view of the afore mentioned the appellant's right to appeal will be violated where the court record is inadequate and insufficient to allow for a meaningful re-appraisal of his conviction and sentence through no fault of his own.

[13] It is further argued by the appellant's counsel that the conviction of the appellant rest on the missing statement Manamela made to the Police. This missing statement, which does not form part of the record is according to the appellant's counsel, the only evidence which attempted to prove that the appellant had in fact committed the *Actus Reus* which caused the death of the

deceased. It is counsel's submission that in line with the ratio in **Chabedi Supra**, the appellant's grounds of appeal are directed at this evidence. The *vacuo* caused in the absence thereof, necessitates a finding that record is inadequate for a meaningful reappraisal and as such, the appellant's conviction and sentence ought to be set aside.

[14] Respondent's counsel, Advocate MD Matjokona submits that the nature of the defect in the record cannot be regarded as inadequate for a proper consideration of the appeal and that the conviction and sentence ought not be set aside.

[15] Regarding the nature of the defects in the record presently before this court, I am of the view that although the evidence and statement of Manamela is missing the court *a quo* did not rely solely on her evidence in order to convict the appellant. The Trial Court considered the evidence in totality in order for it to make a finding that the appellant was guilty. The learned Judge also quoted the missing statement fully in his judgment. (See record volume 2 page 130, line 24; page 131 line 1-17). I am satisfied that the nature of the defects in the record are not so serious that a proper consideration of the appeal is not possible. I am therefore of the opinion that the appellant will not be prejudice by the regularity occasioned by the failure to reconstruct the record and that the record before us is adequate for a fair and meaningful adjudication of this appeal.

Ad Conviction

[16] It has been submitted on behalf of the appellant that Manamela's evidence ought to have been rejected by the court *a quo* as her evidence materially and entirely contradicted that in her initial police statement. Furthermore, it is the submission of appellant's counsel that Manamela was a single witness and appellant's estrange girlfriend. Her evidence should have been rejected if caution were to be applied due to the existence of contradictions, the possibility of bias towards the appellant and the absence of corroboration for her evidence.

[17] It is argued by appellant's counsel that the remaining evidence of the state witnesses only serves to proof that the appellant had assaulted the deceased with a belt. This evidence of assault was admitted by the appellant but only justified a conviction on the competent verdict of assault. Furthermore it is submitted on behalf of the appellant that the missing warning statement of the appellant was made to a non-commissioned officer with a rank of Inspector and that the warning statement ought to have been ruled inadmissible in terms of Section 217 of Act 51 of 1977.

[18] In my view, the court *a quo* treated Manamela's evidence with caution due to the contradictions between her evidence in court and the statement that she made to the police. The Honourable Judge Seriti at page 139 line 3 of the record stated:

"Her evidence in court differs from the statement

she made to the police, so her evidence must be approached with caution."

The court *a quo* did not err in finding that she was a credible witness as her evidence was consistent with the place where the deceased body was found.

[19] It is common cause that the appellant assaulted the deceased on many occasions. I do not see any reason why the appellant would have called his mother to report that he injured the deceased if he only assaulted her with a belt and did not injure her, according to his testimony. The appellant was the last person who was seen arguing with the deceased and the two had a history of violence between them. A week thereafter the deceased body was discovered in the veldt in a state of decomposition. In my view, the trial court did not err in its finding that the only inference that could be drawn was that the appellant was the one who killed the deceased.

[20] It is an enshrined principle in the myriad of authorities in our legal system that in the evaluation of the evidence in a matter, the court has to decide based on a totality of the evidence. The trial court had the legal responsibility to consider all these aspects and to come to a just conclusion. The requirement of proof beyond reasonable doubt should not be allowed to blur the use of common sense. The fact that the cause of death was indeterminable due to decomposition could not bar the trial court

to conclude that the deceased did not die of an unnatural death. There was also no misdirection in the trial court accepting the evidence of the state witnesses.

[21] All factors taken into account, the trial court could not be faulted in concluding that the only reasonable inference to be drawn in light of the evidence of the state witnesses and the proven facts by the trial court was that the appellant was indeed responsible for the death of the deceased. In the premises, the appeal against conviction ought to be dismissed.

Ad Sentence

[22] As to the sentence, the appellant was convicted of a murder offence which fell within the ambit of Section 51(2) of the Criminal Law Amendment Act 105 of 1977, read with Part 2 of Schedule 2 of the said Act. The minimum prescribed sentence of this offence is 15 years imprisonment, for a first offender.

[23] The court *a quo* held that there existed no substantial and compelling circumstances which justified the imposition of a lesser sentence than the prescribed minimum. The court *a quo* justified a sentence higher than the prescribed minimum and impose a sentence of 20 years' imprisonment. This imposition of a higher sentence than the prescribed minimum was based on the fact that the appellant went ahead with the commission of the offence despite having been reprimanded prior to the commission of the offence. An attempt was even made by one

of the state witnesses to calm him down, a day prior to the murder when the appellant was insulting the deceased.

[24] Appellant's counsel submits that it is important that the circumstances which justify the imposition of a sentence higher than that prescribed by the legislature should be expressed and should form part of the sentence. Counsel in this regard relies on ***S v Mathebula and Another* 2012 (1) SACR 374 (SCA) at paragraph 10** where it was held as follows:

> *"It is not proper for an appeal court to have to speculate about the reasons which motivated the regional magistrate to impose a sentence higher than the minimum sentence prescribed. Such an approach cannot be countenanced as it is subversive to the principles of openness.*
>
> *It is trite that judicial officers can only account for their decision in court through their judgments. It is through judgments which contain reasons that judicial officers speak to the public. Their reasons are therefore the substance of their judicial actions."*

[25] Both counsels for the appellant and the respondent conceded that there existed no substantial and compelling circumstances that justified deviation from the prescribed minimum sentence. However, counsel for the appellant submits that there are factors which militate against the increased prescribed minimum

sentence by 5 years imprisonment namely: that the appellant was a first offender; the incident of assault which led to the death of the deceased was due to loss of control during an argument; and that appellant did not exhibit or form a direct intent to murder and that his form of intent is limited to *dolus eventualis*.

[26] I agree with the court *a quo* when it correctly held that murder is the most serious offence that can be committed against any individual. However, I am not persuaded that the accumulative facts in *casu* justified an imposition of a higher sentence than the prescribed minimum sentence. In my opinion, the court *a quo* accorded undue weight to the appellant having been reprimanded against assaulting and insulting the deceased prior to the commission of the offence. Circumstances in this case are not so exceptional that they justified the deviation from the consistent and standardised sentence as prescribed by the Legislature.

[27] Having weighed all the circumstances of this case against the legislative benchmark explicitly set by the Act and endorsed in **S *v Malgas* 2001 (1) SACR 469 (SCA)**, I am of the view that the appropriate sentence for the appellant is a term of imprisonment of 15 years.

[28] In the result, I would grant the following order:

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ORDER

a) The appeal against conviction is dismissed.

b) The appeal against sentence is upheld.

c) The sentence imposed by the court *a quo* is set aside and replaced with 15 years' imprisonment.

d) In terms of Section 282 of the Criminal Procedure Act 51 of 1977, the sentence is antedated to the date of sentence being 15 October 2009.

RUSSOUW AJ: I agree.

DAVIS AJ: I agree.

MOLEFE J: And it is so ordered.

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Annexure "E"

CASE NO: A186/2013

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

PRETORIA 03 November 2014

BEFORE THE HONOURABLE MADAM JUSTICE MOLEFE
AND THE HONOURABLE MR JUSTICE DAVIS (AJ)
AND THE HONOURABLE MR JUSTICE ROSSOUW (AJ)

In the appeal of:

KLAAS LESETJA RHAKANE — Appellant

And

THE STATE — Respondent

HAVING HEARD counsel(s) for the appellant(s) and respondent and having read the record of appeal and other documents filed of record:

IT IS ORDERED

a) THAT the appeal against conviction is dismissed.

b) THAT the appeal against sentence is upheld.

c) THAT the sentence imposed by the Court a quo is set aside and replaced with 15 years imprisonment.

d) THAT in terms of section 282 of the Criminal Procedure Act 51 of 1977, the sentence is antedated to the date of sentence being 15 October 2009.

1. The High Court
Private Bag X67
PRETORIA, 0001

Lower Court No: CC26/07

Your record is attached

2. The Commanding Officer
South African Criminal Bureau
Private Bag X308
PRETORIA, 0001

CR NO: NONE
FP NO: NONE

DOCKET NO: NONE
MR NO: _____.

3. The Station Commander
South African Police
Private Bag