

**IN THE HIGH COURT OF SOUTH AFRICA
(North Gauteng High Court, Pretoria)**

Case No: A1038/2011 – SP44/2011

In the matter between:

19/2/2014

JOHANNES MALOSE MAGONGOA

Appellant

and

THE STATE

Respondent

JUDGMENT

DE KLERK AJ

[1] The present appeal was noted by the Appellant against his conviction and sentence in the Regional Court Pretoria on the charge of murder.

[2] The Appellant pleaded not guilty on the charge.

[3] The Appellant relied on a defence of “non-pathological criminal incapacity”. Consequently the Appellant was

referred for psychiatric evaluation in terms of Sections 77 and 78 of the Criminal Procedure Act.

[4] The Appellant admitted that the cause of death, as recorded in the post mortem report, was a stab to the neck.

[5] The Appellant admitted during his testimony that he inflicted the wound to the neck of the deceased who was his wife. In this regard the Appellant testified as follows: "While we were busy scuffling, I was in possession of a knife, then we were rolling scuffling on the ground, then the time her head reached the side of my hand where the knife was I pulled that knife and that knife was already in her neck and cut her neck... on the neck it was accident. I did not mean to stab her."

[6] The Magistrate in his judgment accepted the Appellant's version that he found the deceased in their room in the company of another man. The Magistrate however rejected the Appellant's version that the stab wound to the neck was

an accident. In this regard the Magistrate remarked as follows in his judgment: "It is simply not reasonably possibly true if you look at all the wounds together that it could have been by accident. The accused's explanation of the head moving towards the knife and then ended up in the neck, is simply according to me not it is just inherent improbably it cannot be reasonably possibly true as a result of such a movement that such a gaping wound will appear in the neck of the deceased. This is a deep big stab wound it is not just... I cannot imagine for one moment how that would have been inflicted by the action described by the accused."

[7] According to the psychiatric report which was handed into Court as an exhibit, the Appellant at the time of the alleged offence, did not suffer from a mental disorder or a mental defect that affected his ability to distinguish between the rightful or wrongful nature of his conduct.

[8] Consequently the Appellant was convicted on the charge and sentenced to 10 years imprisonment.

[9] Leave to appeal was granted in respect of the conviction as well as the sentence.

[10] On 14 May 2012, when the appeal first came before this Court, Ledwaba J and Louw AJ ordered that the record of the proceedings be properly reconstructed on or before 16 August 2012 and postponed the matter *sine die*.

[11] The missing parts of the record are the evidence of Dr Gauche, Kate Madiba and Linkie Madiba.

[12] On 18 June 2013 the Magistrate, Prosecutor and the Appellant's legal representative endeavoured to reconstruct the missing parts of the record. The evidence could not be reconstructed.

[13] The Magistrate with regard to the testimony of Kate and Linkie Madiba stated that he had summarised their evidence in his

judgment and that the credibility of their evidence was not challenged during cross-examination.

[14] The Magistrate submitted that their evidence was not of a material nature and did not take the case further with regard to the aspects which are in dispute.

[15] Same was summarised as follows: "On that particular evening the accused arrived at their premises, apparently he sat there briefly with them which is outside their place. He then went to his room and after a few minutes (2 to 3 minutes) they heard the deceased crying and was shouting for some help at that stage. The witness Linkie Madiba went out to investigate. She found the accused blocking the door. She could not see whether the deceased was inside or not. She then subsequently returned to her house and just after that everything was quiet. Apparently the accused also left and they phoned the police. They also went and investigated but they could not open the door as it was locked and they waited for the police but they never arrived..."

[16] The Magistrate with regard to the testimony of Dr Gauche stated that he merely confirmed the testimony of Dr Plomp and De Wet and that his evidence was accordingly also not of a material nature.

[17] The State Prosecutor and the accused's legal representative were given the opportunity to comment but they had no objection.

[18] The proceedings were transcribed and forms part of the record.

[19] The Appeal is now again before the Court.

[20] As formulated in the heads of argument which were delivered on the Appellant's behalf, he now contends that his conviction should be set aside because the record of the trial proceedings is incomplete and attempts to reconstruct it proved futile.

[21] The Appellant contends that “further due to the nature of the defence raised by the Appellant without the evidence of Kate and Linkie Madiba, the Appeal Court does not have the adequate record of proceedings before itself to enable it to consider and decide the appeal matter”.

[22] In support of the Appellant’s argument reference is made to the decision of *S v Sebothe and Others 2006 (2) SACR 1 T*. I am of the view that same is distinguishable from this case. *In casu* only a portion of the record had gone missing.

[23] The other case referred to by the Appellant to wit *S v Zondi 2003 (2) SA RC 227 W* does not support the Appellant's contention that the conviction should be set aside because of the incomplete record.

[24] It was held in the *Zondi* case in this regard that “an appeal does not necessarily require consideration of a complete record of the entire proceedings in the Court *a quo*, but

merely such a part thereof as may be required to enable the Appellant Tribunal to properly consider the particular grounds of appeal in the context of the trial proceedings".

[25] The State, in its heads of argument, submits that the trial record is sufficient for the matter to be adjudicated upon.

[26] In *S v S 1995 (2) SACR 420 T* the Court remarked that the test in these cases was whether the record was materially correct and complete and that this question had to be answered in the context of the case in question and not in *vacuo*. The question of whether a defect was material in an appeal depended on the issues in dispute on appeal as determined by the notice of appeal.

The Court held further that an accused convicted in a Magistrate's Court had a right of appeal which could not be frustrated by the State's defective recording of the evidence where it was clear that the missing portions contained material evidence which could not be reconstructed, and the

parties could not solve the problem by means of appropriate admissions, the proceedings had to be set aside... the Court remarked that it was not inclined to set aside the proceedings, on the basis of mere speculation that the parts of the record in the instant case marked "inaudible" possibly contained answers which strengthened the Appellant's case and that an indication to the effect should be contained in the record itself or in an affidavit made by the accused or his legal representative. "

[27] The Grounds of Appeal were set out as follows by the Appellant:

"A. AD CONVICTION:

1. The learned Magistrate erred in finding that the Applicant had the intention to kill the deceased.
2. The learned Magistrate erred in finding that the Applicant intentionally inflicted the wound that caused the death of the deceased.

3. The learned Magistrate erred in finding that the only reasonable deduction from the circumstantial evidence was that the Applicant intentionally caused the death of the deceased.
4. The learned Magistrate erred in rejecting the version of the Applicant in the absence of contradictory evidence."

[29] The Appellant, as is evident from the Grounds of Appeal, did not persist with his defence of "non pathological criminal incapacity".

[30] The evidence of Linkie and Kate Madiba were not material to the grounds of appeal namely that the Appellant did not intentionally inflict the wound that caused the deceased death and that the Magistrate erred in rejecting the version of the Appellant. The Court has already accepted his version of the presence in the room of a third party.

[31] I am satisfied that the missing evidence is not as such to affect the accused's defence in any material way to his prejudice.

[32] There is an acceptable record of the proceedings and the appeal can be considered on its merits.

[33] On consideration of the case as recorded and in the light of what was stated herein before it seems to me clear that the appellant is guilty.

[34] There is furthermore no reason why the Court should interfere with the sentence imposed by the Magistrate.

[35] In the result, the conviction and sentence are confirmed.

ISMAIL, J., concurred.

Signed at _____ on this _____ day of _____ 2014.

Judge De Klerk AJ

The Honourable Judge of the
High Court of Pretoria