



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

**CASE NO:A121/2008**

**Date: 2014/08/27**

DELETE WHICHEVER IS NOT APPLICABLE

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

2 Aug 2014  
DATE

[Signature]  
SIGNATURE

7/8/2014

In the matter between

**PHILLIP MATETETSI  
LUCAS LEHOKO  
BILLY KHOSANA  
JOHN LEMPE  
LEONARD SELEPE  
PHILLEMOM MDUMO**

1<sup>st</sup> Appellant  
2<sup>nd</sup> Appellant  
3<sup>rd</sup> Appellant  
4<sup>th</sup> Appellant  
5<sup>th</sup> Appellant  
6<sup>th</sup> Appellant

and

**THE STATE**

Respondent

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**JUDGMENT**

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**NAIR AJ**

[1] This is an appeal against conviction and sentence. Fifteen accused appeared before the Regional court in Vereeniging on charges of Count 1 : Murder: Count 2 : Attempted Murder, and 3 and 4 : of assault with intent to do grievous bodily harm.

- [2] All pleaded not guilty on the 25th January 1999. On the 18th July 2000, accused five, seven and thirteen were found not guilty and discharged in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977.
- [3] On 24 July 2002, accused 1, 2, 6, 8, 9, 10 and 14 were convicted on count 1. Accused 1, 2, 4, 6, 8, 9, 10, 12, 14 and 15 were convicted on count 2. Accused 8 was convicted on count 3. Accused 9 was convicted on count 4.
- [4] On the 9th September 2002, the accused were sentenced as follows, on Count 1; accused 1 and 2 each to seven years imprisonment. Accused 6, 8, 9, 10, and 14 each to 13 years imprisonment. Count 2 accused 1, 2, 6, 8, 9, 10 and 14 each to 7 years imprisonment and accused 4, 12 and 15 each to 5 years imprisonment. Accused 8 and 9 were cautioned and discharged in respect of counts 3 and 4 respectively.
- [5] Altogether ten accused appealed against their convictions and sentence but accused 9 and 12 and 14 are now deceased. Accused 4 and 15 have served their sentences in full. This appeal is therefore in respect of appellants 1, 2, 6, 8 and 10.
- [6] An application for bail pending appeal was made on 25 September 2002 but was refused. After almost 3 years the appellants realized that the appeal had not been heard. This was apparently due to the fact that the record was sent to the magistrate on 20 February 2003 to

reconstruct. It remained under his control for that purpose until 6 December 2005 when the applicants applied for bail pending appeal.

[7] On the 11th April 2006, appellants 8, 9, 10, 14 applied for bail pending appeal once again because the record was not yet ready. Bail was fixed pending appeal in an amount of R2000.00. on 19th April 2006 appellant 6 was granted bail of R2000.00.

[8] On 6 June 2006, the learned magistrate indicated that he did not have any further reasons for the conviction and sentence. This was ten years after the incident and almost 4 years after his judgment.

[9] According to the heads of argument submitted by the appellant, supplemented by his address to the court, the cassettes containing the evidence of the trial up to and including the defence case were lost. This is not in dispute.

[10] The learned magistrate states on the record at page 2 lines 2-7 "...seen that we do not found the tapes the only option now is for the Magistrate to take his handwritten notes to read them into the court record in an effort to reconstruct the case. Therefore today the court then is beginning with its effort to use its handwritten notes to reconstruct the case."

[11] According to the appellant's heads, the Magistrate sat in his office and then read his notes into the record. The clerk of court did not

contribute to the reconstruction and did not depose to any affidavits confirming the truthfulness thereof. No explanation was tendered for the loss of the cassettes and what steps were taken to trace the cassettes. According to the heads of argument, the attorney who acted for most of the accused withdrew as a result of a conflict with the Magistrate over a recusal application. The matter was postponed between judgment and sentence so that the record could be typed for the new attorney. The state prosecutor, interpreter, stenographer and the defense were not afforded an opportunity to contribute to the correctness of the reconstructed record.

[12] The entire reconstructed record is punctuated at different stages with comments by the learned magistrate regarding the process of reconstruction. At no point does he mention that he is in the company of any of the parties.

[13] As far as the unilateral reconstruction is concerned, on page 236 of the record whilst the court is reading in the reconstructed judgment the Magistrate states the following:

“Die hof gaan voort met die uitspraak. Die problem is dat die masjien, die dame wat die masjien opereer is nie vandag by die werk nie en die hof ordinans is besig om die hof in daardie verband te help, Dit is hoekom daar problem is en dat die masjien stop en dat hy nou die nuwe cassette insit maar die hof waardeur dat hy die hof help so dat die hof kan aandag gee aan hierdie

uitspraak en nie dat die hof moet derselfde tyd die masjien kontroleer.”

[14] The issue of re-construction of court records has been the subject of numerous judgments over the years.

[15] In *S v Chabedi* 2005 (1) SACR 415 (SCA) page 417 Brand JA states the following on the issue :

*“On appeal, the record of the proceedings in the trial court is of cardinal importance. After all , that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be 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.”*

[16] In *S v SEBOTHE AND OTHERS* 2006 (2) SACR 1 (T) in para [8] 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 s 35, that an accused person has a right to a fair trial, which includes a right to appeal or review. If the appeal Court or the review Court is not furnished with a proper record of proceedings, then the right to a fair hearing of the

appeal or review is encroached upon and the matter cannot properly be adjudicated. In that regard, the only avenue open to protect the right of the accused or the appellant is to set aside those proceedings if it is impossible to reconstruct the record.

[17] In *S v Gora and another* 2010 (1) SACR 159 (WCC) it was stated:

“That the case underlined that the reconstruction process is part and parcel of the fair trial process and includes the following elements: the accused must be informed of the missing portion of the record, of the need to have it reconstructed and of his right to participate in the process. It was further held that once it becomes apparent that the record of the trial is lost, the presiding officer should direct the clerk of the court to inform all the interested parties, being the accused or his legal representative and the prosecutor, of the fact of the missing record and arrange a date for the parties to re-assemble in an open court in order to jointly undertake the proposed reconstruction.”

[18] In *S v Khoza* 2010 JDR 1100 (KZP) 2010 JDR 1100 p1 Van Zyl J and Gcaba AJ stated that

” the state of the present appeal record is also symptomatic of a malaise which is increasingly manifesting itself in this Court. It

has become the exception during criminal appeal hearings when there is not at least one, and often more, appeal matters which cannot be finalized because of defects or omissions in the appeal records. This necessitates the return of the records to the courts of origin for rectification or reconstruction, resulting in unnecessary delays, inconvenience, a waste of this Court's resources and potential prejudice to the appellant involved.

Responsibility for the preparation and furnishing of a complete and accurate appeal record lies with the Clerk of the Court where the appeal originates. This much is clear from the provisions of section 309(2) of the CPA which provides that "An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court".

[19] In *S v Banyane; S v Moila* 1999 (1) SACR 622 (W) Nugent J (as he then was) remarked with reference to the Rules of the Magistrates' Courts that Rule 67 placed an obligation upon the Clerk of the Court to prepare a transcript of the record where an appeal was noted and that the clerk was not absolved of that obligation, even where the appeal was noted out of time. Accordingly, in my view the primary responsibility for preparing and providing a complete and satisfactory criminal appeal record for use by this Court, lies with the Clerk of the Court where the appeal originates."

[20] *S v Zenzile* [2009] JOL 24341 (WCC) Yekiso J found :

“What emerges from the background material set out in the preceding paragraphs is that the cassette in which is recorded the whole of the evidence in the State's case is missing; that the clerk of the court filed an affidavit stating that the missing portion of the record could not be found despite diligent search; the magistrate reconstructed the missing portion of the record using his notes made during the course of trial as a source for such reconstruction; that the record was reconstructed entirely in the magistrate's chambers; there is no indication, on basis of the record forwarded to this Court, if the accused was informed of the missing portion of the record and of the need to have the missing portion of the record reconstructed; there is no indication, on basis of the record before the court, whether the accused was informed of his rights arising from the need to have the missing portion of the record reconstructed.... What the magistrate should have done, in circumstances such as in the matter before us, once he had been informed by the clerk of the court that a portion of the record could not be found despite diligent search, is the following: to direct the clerk of the court to inform all the interested parties, being the accused or his legal representative and the prosecutor of the fact of the missing record; arrange a date for the parties to re-assemble, in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate to place it on record that the parties have re-assembled for purposes of the proposed reconstruction; the parties to express their views, on record, that each aspect of reconstruction accords with their recollection of the



evidence tendered at trial; and ultimately to have such reconstruction transcribed in the normal way. Once this process has been followed, none of the parties can cry foul that his rights have been trampled on.”

[21] In David’s v S Jol 28983 (WCC) A 571/12 Bozalek J held :

“Reconstruction of a missing record is part and parcel of the fair trial process. The accused must be informed of the missing portion of the record, of the need to have it reconstructed and of his right to participate in the process. Once it becomes apparent that the record of the trial is lost, the presiding officer should direct the clerk of the court to inform all the interested parties and arrange a date for the parties to re-assemble in an open court in order to jointly undertake the proposed reconstruction.

[22] In S v M Sibelewana WCC A401/2011 Judge Steyn held at page 10 as follows :

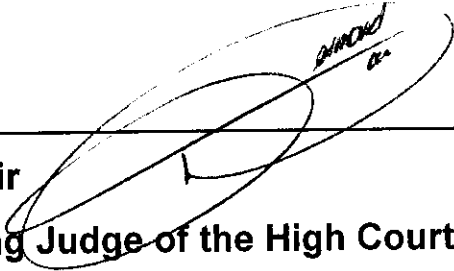
“The appellant or his representative carries the final responsibility to ensure that the appeal record is in order, but the courts have commented that the responsibility for ensuring that all copies of the appeal record are in all respects correct before the court is not limited to the appellant and his attorney. As noted , the presiding officer, the clerk of court, the operators of recording machines, all have duties in regard thereto. However, the attorney is entrusted with the final responsibility of ensuring that the appeal record is correct.”

[23] From the record it would appear that the appellant, the trial attorney and the trial prosecutor, did not timeously or at all, make any contribution to reconstruct the record. Be that as it may, in the light of the seven-and-a-half year delay since the trial it is most improbable that the prosecutor, attorney, and the accused would be able to make any meaningful contribution to reconstruct the record and thus a referral back to the Magistrate's Court for further reconstruction would not only be futile but would add to the already excessive delay.

[24] The Clerk attempted as is evident from an affidavit filed to assemble all the role players to construct the record. This was after the Registrar had requested that this be done. According to her affidavit dated 13th February 2013, the Magistrate has since retired and has misplaced his notes. The prosecutor has no recollection of the case and the attorney who conducted the defence for the greatest part thereof has left the practice where he worked when the matter was handled by him.

[25] In *S V Zuma and Others* 1995 (1) SACR 568 (CC) at para 16, Kentridge AJ highlighted that in the present constitutional era it was one of the functions of the Court of Appeal hearing a criminal appeal to enquire into the fairness of the trial and to ensure that the accused's right to a fair trial was fulfilled, particularly where, as in the present matter, an irregularity appeared ex facie the record of the proceedings." This, in my view, incorporates the accused right to contribute to and challenge a reconstructed record.

[26] Having regard to the manner in which this matter was reconstructed and especially in light of the constitutional imperative that an accused is entitled to a fair trial which extends to his right to appeal, I am of the view that the proceedings are not in accordance with justice and all convictions and sentences are set aside. The matter is remitted to the DPP for further consideration.



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**D Nair**  
**Acting Judge of the High Court**

I agree,



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**CP Rabie**  
**Judge of the High Court**

**Case number** :  
**Heard on** :  
**For the Appellant** :  
**Instructed by** :  
**For the Respondent** :  
**Instructed by** :  
**Date of Judgment** :