REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: [redacted] / NO
(2) OF INTEREST TO OTHER JUDGES: [redacted]/NO yes
(3) REVISED. ✓

6 Aug 2014 DSMolefe
DATE SIGNATURE

Case Number: A 333/2013

In the matter between: 6/8/2014

NORDIED SPEKKIES WILLIAM **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MOLEFE J:

[1] In this matter the appellant was convicted of murder which he committed on 3 March 2006 in Eesterust, in the district of Pretoria. He was sentenced by the High Court of this division on 8 October 2007 to 18 years imprisonment.

[2] The matter is on appeal against conviction and sentence before this court today. The appellant's counsel[1] submits that the court should set aside the conviction and sentence for the reason that the record of the trial could not be transcribed and reconstructed. The state supports this view.

Background

[3] On 24 October 2007 the appellant filed an application for leave to appeal against sentence and the matter was placed on the roll for hearing on 16 May 2011. The record of the trial proceedings was unavailable and the court ordered that all the relevant parties should reconstruct the portion of the record where the personal circumstances and mitigating factors were placed on record.

[4] On 26 April 2013, Deputy Judge President van der Merwe granted the appellant leave to appeal against both conviction and sentence as an intervention. This was after the appellant's counsel had placed on record that the reconstruction of the sentencing procedure was impossible due to the following facts:

4.1 the advocate who represented the appellant during the trial was deceased;

4.2 the prosecutor who represented the State during the trial was deceased;

[1] Advocate L Augustyn

4.3 the presiding Judge honourable Sithole AJ had no notes on sentence available and no recollection of the mitigating factors nor personal facts placed before him before he sentenced the appellant;

4.4 there were no notes in the court file to assist with the reconstruction.

All parties were in agreement that due to the fact that no record could be reconstructed, the conviction and sentence should be set aside and the trial should start *de novo.*

[5] The appeal was heard on 15 May 2013 before a full court and the Honourable Rabie J ordered that the Registrar must assist all the parties to produce an adequate record of the proceedings. With the assistance of the registrar affidavits were obtained from all the parties involved as no record could be reconstructed.

[6] Appellant's counsel submits that due to the missing record which cannot be reconstructed, the conviction and sentence should be set aside. Appellant's counsel in this regard relies on ***S v Gora and Another 2010 (1) SACR 159 (WCC)***, wherein it was held that:

> "*In terms of s 35(3) (o) of the Constitution of the Republic of South Africa, 1996, the right of an accused person to a fair trial includes the right of appeal to a higher court*".

And further:

> *"[51] The most important function the court of appeal is required to perform is to dispense justice. Justice is dispensed through the mechanism of a fair trial. Inasmuch as an appeal is part of a fair trial and cannot be adjudicated without an original record or at least a properly reconstructed record, it stands to reason that as far as their appeal on sentence is concerned the appellants cannot be given a fair trial".*

[7] Respondent's counsel[2] submits that the approach proposed by the appellant would best serve the interest of administration of justice and agrees that the conviction and sentence should be set aside.

[8] I do not agree with both counsels' submissions. In ***Chabedi* 2005 (1) SACR 415 (SCA)** and more particularly at para [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, 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*

[2] Advocate C Mnisi

proceedings are often still kept by hand, in which event a verbatim record is impossible (see, eg, S v Collier 1976 (2) SA 378 (C) at 379A – D and S vS 1995 (2) SACR 420 (T) at 423 b –f).

[6] The question whether defects in a 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 appeal."

Ad Conviction

[9] On 24 October 2007, the appellant filed an application for leave to appeal only against sentence. Due to lack of record, the court ordered the reconstruction of the portion of the record where only the personal circumstances and mitigating factors were placed on record.

[10] When the appellant appeared before Deputy Judge President van der Merwe on 26 April 2013 in an application for leave to appeal, the appellant indicated that he was not applying for leave to appeal against conviction. He informed the court that he took responsibility for his action and must be punished for his deed. It was common cause that the murder conviction was conceded by the appellant and that the appeal was not against conviction.

[11] In my view, it is highly opportunistic of the appellant to take advantage of the unavailability of the record of the proceedings and to submit that the

conviction be set aside. It is necessary to refer to the matter of ***S v S 1995 (2) SACR 420 (T)***, wherein the following was stated:

> *"Waar byvoorbeeld slegs teen vonnis geappelleer word en die uitspraak op skuldigbevinding volledig is, is leemtes in die notule van getuienis op die meriete van min of geen belang nie."*

I am therefore of the opinion that the appellant was not prejudiced by the irregularity occasioned by the failure to comply with the reconstruction of the record and the conviction should be confirmed.

Ad Sentence

[12] There is a reconstructed record in mitigation and aggravation of the sentence. The reconstructed evidence in mitigation of sentences date-stamped 12 April 2012 appears on page 83 of the record and it reads as follows:

> *"The Applicant after being convicted of murder in terms of section 51 (2) lead evidence through his legal representative in mitigation, the following was placed on record as his personal circumstances:*
>
> 1. *that he was 39 years old at the time of the commission of the offence;*
> 2. *that at the time of the conviction he had been employed as a security officer for the past 20 years;*
> 3. *that his highest standard of education attained is standard 8 (grade 10);*
> 4. *that he is a first offender;*

5. *that he is a widower and his wife died in a car accident together with one of their son in 1999. The accused was suffering from stress related effect after this incident and he was admitted to Denmar hospital not long before he committed this offence;*
6. *it was put on record that the accused made an attempt on his life by taking tablets overdose just few months before the death of his girlfriend, and he was admitted for two months in hospital in 2005;*
7. *that the accused had three minor children alive at the time of his conviction;*
8. *it was submitted on record that the accused was remorseful of his action;*
9. *that the personal circumstance of the accused taken cumulatively amount to substantial and compelling circumstances.*

[13] The reconstructed evidence in aggravation of sentence prepared by advocate for the respondent, S. A. Senoge, appears on page 87 of the record and reads as follows:

"*The following were submitted as aggravating factors:*

1. *this was an attack on defenceless female person;*
2. *numerous stab wounds and fatal ones were inflicted on the person of the victim;*
3. *the accused was merciless at the time of administering stabbing wounds;*
4. *the aggravating factors outweigh the mitigation factors".*

[14] It is not always necessary to reconstruct the record in its full format. It depends on the particular case and the issues in dispute in that case. In ***S v S supra***, it was held that:

> *"Die toets bly, is die notule wesenlik korrek en volledig. Die vraag of die notule wesenlik korrek en volledig is, moet beoordeel word in die konteks van die betrokke geval en nie in vacuo nie".*

In casu, the reconstructed record in sentence is available to the appeal court to enable the court to dispense justice through a fair trial. The appeal is proceeded with on the reconstructed record and in my opinion there has not been a failure of justice. The defects in the record are not so serious that a proper consideration of the appeal is not possible.

[15] It is trite that in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the court of appeal should be careful not to erode that discretion. A court sitting on appeal cannot interfere with the discretionary function of the lower court unless the sentence imposed is unjust or there has been a gross misdirection.

[16] The 18 year term of imprisonment is in my view not disproportionate to the totality of the mitigation factors, and I did not find the trial court to have underestimated the appellant's personal circumstances.

Due to the aggravating circumstances in this case, there is no substantial and compelling circumstances to impose a lesser sentence and I consider the 18 years imprisonment to be an appropriate sentence.

[17] In the premises I make the following order:

a) The appeal is dismissed.

b) The conviction and sentence are confirmed.

D. S. MOLEFE
JUDGE OF THE HIGH COURT

H. J. FABRICIUS
JUDGE OF THE HIGH COUT

I agree.

S. STRAUSS
ACTING JUDGE OF THE HIGH COURT

I agree.