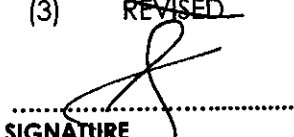


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

28/10/16
CASE NO: A 614/2011

(1)	REPORTABLE: YES <input checked="" type="checkbox"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES <input checked="" type="checkbox"/> NO
(3)	REVISED <input checked="" type="checkbox"/>
	
SIGNATURE	28/10/2016
	DATE

In the matter between:

ABRAM ABATLOANE MPHOSI

APPELLANT

AND

THE STATE

RESPONDENT

J U D G M E N T

MALI J

- [1] The hearing of this appeal against conviction and sentence has a lengthy history. On 8 December 2010 the appellant and his co-accused in the Gauteng Regional Court, held at Atterdgvilleville were

each sentenced to 10 years imprisonment on one count of robbery with aggravating circumstances.

[2] On 18 January 2011, the appellant successfully applied for leave to appeal against his conviction and sentence. The appellant thereafter applied for bail pending appeal which was also granted.

[3] It is common cause that the hearing of the appeal has been postponed at least three times, due to the incomplete record.

[4] Despite numerous attempts to reconstruct the missing parts of the record, on 4 August 2014 the Presiding officer, in the trial court advised as follows:

"The record was returned from the High Court with the following query;

'The cross examination of Mr Kgomosotso does not form part of the record as well as closing of the state's case. The record resumes on paginated page 63 with the evidence of the first accused.'

My understanding of the above statement is that there is a portion of this case which was not transcribed but instead the portion of the evidence in another case was included in this case.

I am unable to obtain my notes on this case. Mr MAAGA, the prosecutor has since passed away. Mr Somo, the defence counsel

has relocated to Kwa-Zulu Natal. The interpreter is no longer working in my court; I have no idea where she is at this moment. The responsible stenographer Mr Walter Mothlaseli was assisting for that period as my resident stenographer was off sick. It is impossible therefore for me to remember the missing part of the record.

However, in my judgment, I dealt thoroughly with the evidence. There is also the confession which in my opinion implicates the accused."

TJ NDWANDWE

REGIONAL MAGISTRATE: PRETORIA"

LAW

[5] It is trite that where it is impossible to reconstruct a case record, the conviction and sentence should be set aside. **S v Joubert**¹ and **S v Mcophle**².

[6] The right to a fair trial includes the right to a fair appeal. **S v Jaipal**³ referred to the earlier cases on a right to a fair trial at page 227 - 228 "...in the words of Kentridge, AJ in **S v Zuma and Others** 1995(1) SACR 568 (CC):

"The right to a fair trial conferred by [s35(3)] is broader than the list of

¹ 1991(1) SA 119 (AD)

² 2007(1) SACR 34 (E)

³ 2005(1) SACR 215 (CC)

specific rights set out in paras (a) to (i) of the subsection ...It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In S v Rudman and Another; S v Mthwana 1992(1) SA 343 (A), the Appellant Division while not decrying the importance of fairness in criminal proceedings, held that the function of a court of criminal appeal in South Africa was to enquire:

'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.

A Court of appeal, it was said (at 377),

'does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'

That was an authoritative statement of the law before 27 April 1994. Since that date, section 35(3) has required criminal trials to be conducted in accordance with just and those notions of basic fairness and justice. It is now for all courts hearing criminal trials or criminal

appeals to give content to those notions."

- [7] In **S v Dzukuda and Others; S v Tshilo**⁴, Ackermann, J referred to the concept of a substantive fairness mentioned in Zuma and said:

"Elements of this comprehensive right as specified in paras (a) to (o) of ss(3) The words "which include the right" preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis as our constitutional jurisprudence on a section 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial to refer to specified and unspecified elements of the right to a fair trial, the specified elements being those detailed in ss(3)."

"At the heart of the right to a fair criminal trial and what infuses is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important

⁴ 2000(2) SACR 443 (CC) at 455 para [9]

aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused".

[8] In **S v Zondi**⁵ it was held as follows:

"It is the appellant who asserts and exercises her or his right by noting and prosecuting an appeal; On first principles therefore, it is the appellant who has the duty of placing an adequate record of the proceedings in the court a quo before the Court of appeal in order to enable it to consider and decide the appeal. And, indeed, subrule 51 (3) of the Uniform Rules of this Court provides that:

'The ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the Court shall rest on the appellant or his attorney.'

However , the administrative, logistical and financial implications of placing the 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 subcontractors, not only records all

⁵ 2003 (2) SACR 227 (W) at paragraph 11-12

court proceedings, but also has custody of all relevant recordings, notes, transcripts, statements and other documentary information , as also exhibits. The provision 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 Siwaxa 1967 (3) 240 (E) at 241 in fin-242, save an appellant unnecessary expense."

- [9] It was submitted on behalf of the appellant that the appellant's right to fair trial as prescribed by section 35 (3) of the Constitution has been encroached. Failure to provide an Appeal court with a proper record of the proceedings which is the subject of the appeal is tantamount to encroachment of the appellant's right to fair trial. The appellant's right should be protected by setting aside the conviction and sentence if the record cannot be reconstructed.

- [10] It is further submitted that the court should make a determination as to whether the record before court is adequate for a meaningful hearing of the appeal. This is because the trial court relied on the evidence of Mr Kgomosutsu, the same witness whose cross examination has not been mechanically recorded. This can be gleaned for paragraph 4 above.

- [11] Counsel for the respondent conceded the appellant's argument, but not without stern reservations. Counsel submitted that the ultimate responsibility of ensuring that all copies of the record on appeal are in

all respects properly before the Court shall rest on the appellant or his attorney. The Counsel's submission disregards the administrative hindrances highlighted in **ZONDI** *supra*.

[12] The court concludes that without the missing parts of the record it is impossible to hear the appeal therefore the appeal must succeed.

[13] In the result I order as follows

13.1 The appeal against conviction and sentence succeeds.

13.2 The conviction and sentence is set aside.

I agree

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W. PIENAAR

ACTING JUDGE OF THE HIGH COURT

It is ordered

A handwritten signature in black ink, featuring a large loop and a horizontal stroke, written over a horizontal line.

N.P. MALI

JUDGE OF THE HIGH COURT

Counsel for the Appellant: Adv H. Steynberg
Instructed by: Legal Aid South Africa, Pretoria

Counsel for the Respondent: Adv J. Kotze
Instructed by: Director of Public Prosecutions Pretoria

Date of Hearing: 24 October 2016
Date of Judgment: 28 October 2016