IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A622/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

DATE: **08/12/2022**

SIGNATURE: 

In the matter between:

J SCHWARTZ **Appellant**

and

THE STATE **Respondent**

DATE OF HEARING: This matter was enrolled for hearing on 11 **AUGUST 2022**, and determined on the basis of the papers or record and written and oral argument submitted on behalf of the parties.

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **8 DECEMBER 2022**

JUDGMENT

N V KHUMALO J (E van der Schyff concurring)

Introduction

[1] The Appellant is appealing against his conviction on charges of rape and indecent assault on 19 August 2008 and sentence of life imprisonment imposed on 31 August 2008 by the Regional Magistrate, Pretoria. The Complainant is the Appellant's 15-year-old niece with whom the Appellant was residing at the time.

[2] The Appeal is in terms of Section 309 (1) (a) of the Criminal Procedure Act 51 of 1977 (the Act) as amended, an automatic right to appeal having vested on the Appellant immediately on the date a life sentence was imposed by the regional magistrate. The appeal was however lodged 9 years after the Appellant's sentence. He is therefore also seeking condonation of his late appeal.

[3] The Appellant was legally represented in both the trial and sentencing proceedings. On appeal he is granted legal assistance by state appointed Counsel from Legal Aid South Africa.

[4] The record of the court *a quo* proceeding is incomplete and the matter has come before the appeal court on two occasions whereupon the appeal hearing could not proceed due to the incomplete record. The main reasons for the unavailability of a complete record was conveyed by the Clerk of the Court on 27 November 2017 and 30 April 2019 to be as a result of the fact that, the Magistrate, Mr Patterson and the

State Attorney no longer work at the Pretoria Magistrate Court and the store room of the company responsible for transcribing the record burnt down. Magistrate Patterson's complete, typed but uncertified trial court notes and reasons, experts' reports, witness statements and affidavit are inter alia, available. No further steps are indicated to have been taken to facilitate the tracing of the whereabouts of Mr Patterson and the state prosecutor to establish his availability to either certify his notes and embark on the reconstruction of the record.

[5] The Appellant in his application for condonation has to deal, besides the reasons for the delay, with the evidence led in the trial in order to indicate the prospects of success in his appeal, which would under the circumstances be primarily a major aspect, inter alia, to consider if his appeal should be heard given the lengthy period of delay and the offences for which he has been convicted.

[6] Furthermore in his notice to appeal, the Appellant alleges that the court *a quo* erred in making the following findings, that:

[6.1] The state proved the guilt of the Appellant beyond reasonable doubt;

[6.2] That there are no improbabilities in the state's version;

[6.3] The state witnesses gave evidence in a satisfactory manner;

[6.4] That the evidence of the state witnesses can be criticized on matter of detail only where the evidence was contradictory in material aspect;

[6.5] That the minor differences between the evidence of the Appellant and the defence witnesses were sufficient for rejection of Appellant's evidence and

[6.6] to have been found guilty on hearsay evidence and not given a chance to testify on his defence, as a result not treated fairly in that context and therefore not given an opportunity to prove his innocence.

[7] He denies to have raped or indecently assaulted the Complainant who was younger than 15 years old at the time.

[8] A record that will enable the court to satisfactorily decide both aspects of his application, that is condonation of his extreme delay and grounds of appeal is therefore crucial.

[9] The Appellant has as a result argued that he is prejudiced by the turn of events and for that reason his release justified. Mr Du Plessis, counsel who appeared on behalf of the Appellant referred to a flurry of authorities in support of a contention that the Appellant is entitled to be released, *inter alia*, the matter of *S v Sebothe and Others*[1] that propagates the narrative that where there is no record of the proceedings and it is impossible to reconstruct the record, as there would be no fair hearing of the Appeal in terms of s 35 (3) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), the conviction and sentence should be set aside. Counsel advocating for the release of the Appellant. The matter of *S v Chabedi* [2] is also mentioned in relation to the inadequacy of the record for purpose of proper consideration of the Appeal. It is argued that as to what is available the record is not adequate.

[1] 2006 (2) SACR
[2] 2005 ZASCA 5; 2005 (1) SALR 415 SCA

Adequacy of the record for the purpose of the Appeal

[10] It should be noted that the required standard of reconstruction is not that a perfect record be produced by the reconstruction process, but a record on whose basis the appeal could be properly adjudicated or a record adequate to ensure the exercise of the appellant's constitutional right of appeal. Essentially, what is material is not the absence of defects in the record but the presence of defects serious enough to render impossible a proper consideration of the appeal, which depends, among others, on the nature of the issues to be determined in the appeal and the nature of the defects in the record.[3]

[11] The record may have been "improperly and imperfectly reconstructed"; incomplete or defective,[4] but as long as it is adequate in ensuring that the appellant exercised his constitutional right of appeal.[5]

[12] In *Chabedi* at par 5 and 6 the court held that:

> "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.
>
> 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

[3] Schoombee at par [28] and footnote 35 above.
[4] Schoombee at pars [27]- [28], partly relying on the finding in S v Chabedi at pars [5]-[6], which finding in S v Chabedi was further affirmed by the SCA decision of S v Machaba and Another 2016 (1) SACR 1 (SCA); ([2015] ZASCA 60) at pars 4-5 and the Constitutional Court decision in S v Phakane at par [39].
[5] Schoombee at pars [27]- [28].

abstract. It depends amongst others on the nature of the defects in a particular record and on the nature of the issues to be decided on appeal."

[13] In addition, s 235 (1) of the CPA reads: "It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded".

[14] Taking into account the Appellant's grounds of appeal, the fact that the part of the record that is missing is alleged to constitute the defence's case, the transcribed notes not certified, presently the record is not adequate for the purpose of appeal. Moreover, there is already a discrepancy in two of the statements the Appellant makes in relation to his evidence in his grounds of appeal. He alleges that the court *a quo* erred when it found;

[14.1] that the minor differences between the evidence of the Appellant and the defence witnesses were sufficient to reject the Appellant's evidence.

[14.2] him guilty based on hearsay evidence and not to have been given a chance to testify on his defence, as a result not treated fairly in that context and therefore not given an opportunity to prove his innocence.

[15] Consequently the parties cannot proceed with the appeal and deal with those contentions without the recorded evidence in the Appellant ‘s case. The reconstruction of an adequate record becomes vital so that justice can be administered fairly in a fair appeal.

Obligation to reconstruct the missing part of the record

[16] The parties differ in their perspective on who is responsible for facilitating the reconstruction of the record and whether or not each party has fulfilled his obligations in facilitating the finalisation of the missing part of the record.

[17] According to Rule 51 (3) of the Uniform Rules of the High Court provides that the ultimate responsibility for ensuring that all copies of the record of appeal are in all respects properly before the court shall rest on the Appellant or his attorney.

[18] The Counsel for the Appellant contends that although the duty lies with the Appellant to place an adequate record of the proceedings before the court of appeal, the state is the custodian of the trial records and has the duty to provide a record to the court of appeal. The matter of *Nyumbeka v S*[6] being the point of reference.

[6] 2012 (2) SACR 367 (WCC)

Counsel argues that no wrong can be attributed to the Appellant for not placing a proper record before the honourable court of appeal as in that case it was held in par 22 that:

> "whilst the preparation of a record for review and an appeal is primarily the function of the clerk of the court, it is ultimately the function of the magistrate to see to it that a proper record is sent to the high court. The clerk of the court, unlike the one in this case, should see to it that it is done timeously and within the periods that are prescribed by law and should follow up after having checked the register, as to why reviews are delayed. Here they have also failed in their duty in terms of s 165 (4) of the Constitution to give effect to an order of court."

[19] Mr Du Plessis continued to argue that the responsibility is more with the state to ascertain that an adequate record is made available for the appeal court. He referred to the matter of *S v Gora*[7] to emphasise the requirements on the reconstruction of the record. Although not intending to state the whole passage he referred to, the following critical statement was quoted:

> [15] In ZENZILE (supra) the question that arose in the circumstances of that matter was to what extent did the reconstruction process and the events subsequent thereto measured to the accused's constitutional right to fairness of trial.
>
> [16] According to Yekiso, J., the reconstruction process is part and parcel of the fair trial process and include the following elements "... the accused to have been informed of the missing portion of the record; of the need to have the missing portion of the record reconstructed; of his rights to participate in

[7] 2010 (1) SACR 159 (WCC) at par [15] to [18]

the reconstruction process; his right to legal representation in such a reconstruction process and the right to have the reconstruction process interpreted for him should he require the services of an interpreter." [At paragraph 19].

[17] The reconstruction process must give effect to "the accused's right to a public trial before an ordinary court, his right to be present when being tried as well as his right to challenge and adduce evidence." [at paragraph 20].

[18] Yekiso, J. remarked as follows with regard to the duty of a presiding officer once it becomes apparent that the record is lost: "... 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" [at paragraph 21].

[20] However, Counsel seems to have disregarded the fact that in the matter of *Gora supra,* the court in relation to the facilitation of reconstruction of the record also said the following on par [13] to [15]

[13] According to the judgment in S v ZONDI 2003 (2) SACR 227 (W) at 245C-D: "Where the record of the proceeding in the court a quo is inadequate

> for a proper consideration of the appeal, both the State and the appellant have a duty to try and reconstruct the record from secondary sources."
>
> [14] In view of the aforesaid I consider that the "fair trial" requirement will have been met if the parties successfully collaborated towards properly reconstructing a sufficiently accurate record of the proceedings in order to allow the court of appeal to properly adjudicate upon the issues raised on appeal."

[21] The main fact mentioned in these authorities is the necessity for the Appellant to have been informed of the missing portion of the record; the need for the reconstruction thereof; of his rights to participate in the reconstruction process; his right to legal representation in such a reconstruction process; the right to have the reconstruction process interpreted for him should he require the services of an interpreter. The Appellant is represented by an able Counsel through Legal Aid, who would have alerted the Appellant of his rights and taken the necessary steps to make sure Appellant's participation and the correct process is followed for a proper hearing to be realized.

[22] Furthermore, the Appellant is *dominus litis,* he is liable for presentation of the full record to court. The Appellant is therefore in the circumstances responsible to ensuring and insisting that the registrar or clerk of the court not only facilitates the process of securing a record of proceedings but also the reconstruction thereof where the record cannot be located. The follow ups and insistence by the Appellant that the clerk locate the whereabouts and ascertain the availability of the magistrate and the

State Attorney, whom together with the parties will then be obligated to attend to the reconstruction of the part of the record that is missing, being necessary.

[23] The importance of collaboration by the parties in facilitating the process for reconstruction of a workable record or gathering of essential evidence for the purposes of appeal is also highlighted. All the parties being required to partake by having an input and agreeing on the reconstructed record or evidence. Except for the documentation that were made available to the parties, there is no further action that is alleged to have been taken to initiate further actions either by the clerk of the court or the Appellant's legal representatives to make possible that the information or secondary sources that are available are improved for the purpose of a proper hearing.

[24] The conduct of the clerk is moreover found wanting in this instance having seemed to have been satisfied with the information that the Magistrate is no longer at Pretoria Court. The clerk did not bother to do anything more in furtherance of the reconstruction process. There are no records of any further endeavour by the clerk to locate the exact whereabouts of the Magistrate and establish if he can avail himself for either the reconstruction or improvement of what is presently available on record.

[25] The criticism is similarly justified to be cast against the Appellant who as he argued that the State is responsible for the reconstruction of the record and therefore had to take the lead, failed to indicate what steps he has taken personally, to fulfil his role as the *dominus litis* to ensure that the record of proceedings in the trial court is located or reconstructed, except for filing of a notice to appeal. He instead only reported on the documentation and information received from the clerk of the court in

relation to the relocation of the Magistrate and the State attorney who handled the prosecution of the matter.

[26] Moreover, the Appellant has indicated in his statement that he was furnished with the record on 25 November 2017 in prison. He was satisfied with the contents thereof. Mr Du Plessis could not provide any answers when he was asked by the court if he had any knowledge of such a record and if Appellant has been consulted regarding the whereabouts and the adequacy of the record. He in fact confirmed not to have discussed that with the Appellant, which settles the narrative that not much was done on the part of the Appellant in terms of ensuring that an adequate record is before the court, following even the two postponement. The Appellant cannot play a passive role and thereafter claim an advantage or to be entitled to be released due to no record of proceedings being unavailable.

The importance of the prosecution of the appeal

[27] The court of appeal has to be put in circumstances were it will be able to properly consider the appeal and condonation application, specially the main factor of prospects of success through the efforts of all parties. The objection however to the Appeal proceeding for the reason that the record is incomplete and the Appellant will not be afforded a fair trial in the context of the prosecution of his appeal and therefore calling for the convictions and sentences to be set aside, is premature.

[28] The hearing of the appeal and proper consideration thereof in this matter is not only crucial but will ensure that the rights of all the parties involved are protected. The

exercise of caution is required as not only is the Appellant convicted of a very serious crime, sentenced to the highest penalty, the parties are related and the fact that it has also taken the Appellant (9) nine years to bring up the appeal subsequent the automatic right to appeal vesting on him on 24 August 2008 muddies the circumstances.

[29] It becomes imperative that the court be properly appraised of all the factors that needs consideration when hearing the appeal. As the court must be satisfied that all has been done for the proper adjudication of the matter and that the decision to be made would be in the interest of justice taking into consideration the rights of the parties involved. The right to a fair trial conferred upon the Appellant is recognised but not as an absolute right, since the right of a victim of a crime to get justice and of the society to be protected from transgressors is also paramount, remaining always at stake which then in the context of a fair trial should be evenly balanced.

[30] This court consequently cannot deal with the merits of the Appellant's contention which he raises on the ground that the record is incomplete. His objection is essentially similar to the sentiments that the appeal ought not to continue and for the reason of an incomplete or inadequate record of trial proceedings or record, this court should, instead, set aside the trial proceedings which led to Appellant's conviction and sentence on the basis that the right in terms of section 35 (3) of the Constitution will be violated.

[31] In *Schoombee supra* it was held that where a trial record has gone missing, the trial court ought to seek reconstruction of the trial record, as the reconstruction of the

trial record is “part and parcel of the fair trial process”.[8] All parties to participate in the reconstruction process, as maintained in *Gora supra* wherein it was held that protection or realisation of the right to fair trial would have been achieved when the parties have successfully collaborated towards a proper reconstruction of a sufficiently accurate trial record for a proper adjudication of the issues in the appeal.[9] The Appellant as the party that in terms of the Rules of Court carries the final responsibility to place the record of appeal before the appeal court is to play an active role by monitoring and overseeing the process.

[32] The parties have therefore to be finally granted an opportunity to engage with each other and the clerk of the court in facilitation of the reconstruction of the record or improvement of the collateral information evidence presently available. They have to properly engage the clerk of the court and seek her endeavours to locate Mr Patterson whom in all probability is not aware of the circumstances of this case and how crucial this case is. The effect thereof is regrettably for the matter to be postponed again. Since the matter has already been postponed for the same purpose and seeing the importance of the rights that are affected, it is fitting and necessary to issue a directive regarding the steps to be taken by the parties; see *Mohapi v Minister of Justice and Correctional Services & others,*[10] to accompany an order for reconstruction of the record, with a schedule to be followed by the role-players in order to ensure a speedy finalisation of the matter.[11] Moreover in order to ensure that the

[8] *Schoombee & another v S* at [20], citing with approval from *S v Gora* at par 16.
[9] *S v Gora* at pars [14] and 50, cited with approval in *S v Schoombee* at par 15.
[10] *Mohapi v Minister of Justice and Correctional Services and Others* (M249/15) [2016] ZANWHC 5 (5 February 2016).
[11] *Ibid* at pars [7]- [8].

reconstruction process is not flawed and there is maximum chance that the matter is fairly adjudicated upon as and when it is again before the court.

[33] As a result the following order is made:

1. The Appeal is postponed *sine die*.

2. The Appellant's legal representative shall, within 15 days from date of this order, consult with the Appellant on the whereabouts of the record that Appellant confirmed in his statement to have received from his mother, and thereafter report to the clerk of the court and the Respondent.

3. The State, that is the Respondent herein, and Legal Aid South Africa, the Appellant's legal representatives shall bring this order to the attention of the clerk of the trial Court within 10 court days from the date of this order;

4. The clerk of the trial court shall locate the whereabouts of the Regional Magistrate Patterson who presided over the trial proceedings of the trial Court, and the prosecutor/state attorney whom he must inform of this matter and the urgent need for the reconstruction of the record;

5. The clerk of the trial court shall, within 30 days of receipt of the order send a notice confirming to the Appellant and Respondent's legal representative his endeavours in locating the Magistrate and the prosecutor and his facilitation of an arrangement of a date by Mr

Patterson for a meeting in an open court to be attended by the Appellant assisted by his legal representative and the State Attorney or Prosecutor for purposes of jointly undertaking the reconstruction process;

6. Within thirty (20) days from the date of being served with this order and or being notified of this matter, the presiding officer, Mr Patterson shall fix a date or dates for the reconstruction proceedings, where after the clerk of the court shall invite the Appellant, the Appellant's previous and current legal representatives, the prosecutor and applicable interpreter to attend court in order to jointly undertake the reconstruction of the record.

7. The clerk of the trial court shall bring the contents of this order also to the attention of the Pretoria Regional Court President within 10 ordinary days from the date of receipt of this order;

8. The reconstruction proceedings envisaged in terms of this order shall be recorded;

9. All parties are to express their views (and the views are to be recorded) regarding;

    9.1. whether in their recollection each aspect of reconstruction accords with the evidence tendered during the trial; and

9.2. the reconstructed record as per documents filed by the magistrate and if not accepted indicate in detail what has been erroneously omitted or added and if agreed such to be added or omitted as per the outcome of the discussion, inputs and or interpretation.

10. The record is also to be reconstructed to the extent necessary and capable of reconstruction;

11. Alternatively, where a meeting of all the parties is not feasible the Appellant and the other parties can submit their input on the reconstructed record by way of an Affidavit, which is to be within 10 days of receipt of the notice informing them of the missing part of the proceedings in the reconstructed record

12. The clerk of the Trial Court shall ensure that all the inputs forming the reconstructed record are transcribed within 30 ordinary days of the date of the completion of the reconstruction proceedings;

13. Upon receipt of the transcribed record, the clerk of the Trial Court shall provide a copy of the record to the appellant's legal representative currently on record within 15 ordinary days from date of receipt thereof, for purposes of enrolment of the appeal, upon which the Appellant will follow due process for the enrolment of the appeal.

N V KHUMALO

Judge of the High Court

I agree

E VAN DER SCHYFF

Judge of the High Court

Appearances:

For the Appellant	:	Mr Du Plessis Legal Aid South Africa Pretoria Justice Centre, Pretoria francoisv@legal-aid.co.za
For the Respondent	: :	M Marriott Director of Public Prosecutions Gauteng Division, Pretoria MMarriott@npa.gov.za