IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A50/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED: YES/NO

2/12/2022

In the matter between:

CLEVER NJINI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MOSOPA, J

INTRODUCTION

[1] The appellant was convicted in the Pretoria Regional Court on two counts of rape, read with the provisions of section 51 and Schedule II of Act 105 of 1997. He was sentenced to a period of fifteen (15) years imprisonment for each count of rape and the sentences were ordered to run concurrently, thus the effective sentence being a period of fifteen (15) years imprisonment.

[2] The appellant was legally represented throughout his trial. This is an appeal against conviction only, with leave from this court.

DEFECTIVE RECORD

[3] Mr. Kgagara, on behalf of the appellant, raised an issue relating to the incomplete record, in that the evidence of Mr. Alpheus Thabo Mola, Ms. Precious Chauke, Dr. Constance Akbo, and the address by both the appellant and the State's counsel are missing from the record.

[4] The appeal bundle does not include a notice of appeal and it is not clear if this issue formed part of the notice of appeal. The notice of leave to appeal and the petition to this Court forms part of the appeal bundle, and the issue of the incomplete record is not raised in either of those documents.

[5] The powers of the Court on hearing appeals is regulated by section 19 of the Superior Courts Act 10 of 2013 ("SC Act") and specifically, section 19(d) which provides as follows:

> *"[19] The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law –*
> *(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."*

[6] Based on what is provided *supra*, it appears that this topic does not form part of the subject of appeal, but was only raised by Mr. Kgagara in his heads of argument, and later during the hearing of the matter. In its heads of argument, the State dealt with this issue at length and later during the hearing of the matter. Thus we allowed counsel to address us on the issue and it is deemed to form part of the subject of the appeal, and a decision ought to be taken with regard to the point raised by the appellant.

[7] When it was discovered that the transcribed record is incomplete, the presiding Magistrate provided the "court notes" for purposes of reconstructing the missing portion of the transcribed record. These notes were sent to both the prosecutor in the matter and the attorney representing the appellant in the court *a quo*, to verify the correctness of such notes and indicate whether they agree or disagree with the correctness thereof. The parties were requested to confirm the correctness of the transcribed record by way of an affidavit. In the email dated 16 April 2020, the prosecutor, BL Monyoko, agreed with the correctness of the presiding Magistrate's notes. The attorney from Legal Aid South Africa, Ms. LS Els, also confirmed the correctness of the Court's notes in the letter dated 26 June 2020.

[8] It is trite that legal representatives' addresses do not constitute evidence and for the purposes of the determination of the objection raised in respect of the incomplete record, it will not be considered. These are basically arguments made at the end of the presentation of evidence and are simply meant to assist the court in assessing the evidence before it. It further become apparent that not the entire evidence of witnesses was missing, as suggested by Mr. Kgagara, as certain parts were transcribed and the presiding Magistrate only reconstructed the missing part of the record, the same also applies to the evidence of the appellant

[9] In argument, Mr. Kgagara contended that the correctness of the Court's notes was not confirmed by the attorney who represented the appellant in the trial in the court *a quo* and the procedure which was followed in the reconstruction of the record is flawed, insofar as that even the appellant himself did not participate in the

reconstruction. Further, that the reconstruction process did not take place in open court.

[10] It is trite that an accused's right to a fair trial includes the right to appeal. When a court of appeal is not furnished with a proper record of proceedings and consequently the matter cannot be adjudicated, the accused person's right to a fair trial is encroached upon (see ***S v Sethobe and Others 2006 (2) SACR 1 (T)***).

[11] The methodology to be adopted in the reconstruction of an incomplete record was described as follows, in the matter of ***S v Schoombie 2017 (2) SACR 1 (CC)*** at para 20, where the Court stated:

> *"If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is "part and parcel of the fair trial process". Courts have identified different procedures for a proper reconstruction, but have all stressed the importance of engaging both the accused and the State in the process. Practical methodology has differed. Some courts have required the presiding judicial officer to invite the parties to reconstruct a record in open court. Others have required the clerk of the court to reconstruct a record based on affidavits from parties and witnesses present at trial and then obtain a confirmatory affidavit from the accused. This would reflect the accused's position on the reconstructed record. In addition, a report from the presiding judicial officer is often required."*

[12] The methodology adopted *in casu* is criticized by Mr. Kgagara on the basis that the appellant did not participate in the process and the attorney who participated in the reconstruction process is not the attorney who represented the appellant in the trial court. It is not clear why Ms. Els was invited to participate in the reconstruction on behalf of the appellant, but what is clear is that both her and Ms. Moloi, who represented the appellant at trial, are employed by Legal Aid South Africa.

[13] Despite the fact that parties were requested to confirm the correctness of the Magistrate's notes by way of an affidavit, both the State and the appellant's attorney deemed it fit to respond thereto by way of an email (from the State) and a letter (from

the appellant's attorney). Ms. Els' letter is under the guise that it is under oath, but it is not commissioned by a commissioner of oaths, and it cannot be said to be an affidavit. It is not clear as to why both parties opted to respond in this manner. Once the record has been reconstructed and the parties have agreed on the correctness and accuracy thereof, the matter must be proceeded with. It is only in instances where the parties do not agree to the correctness of the record, that the matter has to be tried *de novo*.

[14] Ordinarily, it is expected that the legal representative who represented the appellant in the trial matter will participate in the process of reconstructing the missing record. No explanation was provided as to why Ms. Els was allowed to confirm the correctness of the Magistrate's notes, despite not having represented the appellant at his trial. Most importantly, this Court was informed by Ms. Makgwatha, on behalf of the State, that Ms. Moloi, who represented the appellant at trial, is still in the employ of Legal Aid South Africa. Mr. Kgagara, who is representing the appellant in these proceedings, is also employed by Legal Aid South Africa. Mr. Kgagara did not deny that Ms. Moloi is still in the employ of Legal Aid South Africa, and thus, for purposes of determining this matter, it is accepted that she is.

[15] In the letter confirming the correctness of the Magistrate's notes, Ms. Els falls short of explaining what informed her that the notes were correct. Legal representatives are expected to execute their duties with a great measure of honesty. Even if Ms. Els did not represent the appellant at his trial, she cannot confirm the correctness of the Magistrate's notes without consultation. The process to reconstruct the record was not done in open court, however, it is not the only methodology prescribed for reconstructing a trial record (see ***Schoombie*** *supra*). It is this Court's view that the fact that Ms. Moloi is still employed by Legal Aid South Africa means that she was also consulted in the confirmation of the correctness of the Magistrate's notes. Moreover, the prosecutor who prosecuted the appellant's trial matter also confirmed the correctness of the Magistrate's notes. It is unfortunate that the appeal court did not have the benefit of the leave to appeal judgment, as it appears that an *ex tempore* judgment was delivered on 12 July 2016, but we were informed that the transcribed record of proceedings on 12 July 2016 could not be found.

[16] In the matter of ***S v Gora and Another [2009] JOL 24264 (WCC)***, the High Court held that the constructed record of the proceedings from the lower court was sufficient to properly adjudicate the appeal matter, in an instance where the attorney who represented the appellant at trial had resigned and a new attorney was called upon to participate in the construction of the court record.

[17] The same record, which is alleged not to have been properly constructed, was used by the appellant to petition this court for leave to appeal the trial court's judgment refusing the appellant leave to appeal his conviction and this petition was successfully granted by this Court.

[18] It is trite that it is required of the trial court to furnish a copy of the record, but the appellant or his legal representative *"carries the final responsibility to ensure that the appeal record is in order"* (see ***S v Sibelwana (2012) ZAWCHC*** at para 9; Rule 51(3) of the Uniform Rules of Court.).

[19] It is not the contention of Mr. Kgagara that the reconstructed record is not adequate for proper consideration of the appeal, but for the reasons stated *supra*. The appellant or his legal representative failed to ensure that a proper record is placed before the appeal court, and by enrolling the matter for hearing after having not raised objections to the purported "reconstructed record", they have waived their rights to challenge the process adopted in reconstructing the record and the adequacy of the record.

[20] When dealing with an incomplete record, the Court in the matter of ***S v Chabedi 2005 (1) SACR 415 (SCA)*** stated:

> *"[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...

[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."

[21] The objections to the reconstructed record does not meet the requirements set out in ***Chabedi*** (*supra*), as the appellant failed to show whether they will suffer any prejudice if the appeal is allowed to proceed on the reconstructed record. Furthermore, the Magistrate's notes were detailed, with both the questions and answers reflected, including the questions which were asked by the trial court. In my considered view, the legal objection raised by Mr. Kgagara ought not to succeed. The conviction of the appellant cannot at this stage be set aside on the basis that a proper procedure was not followed in the reconstruction of the record.

CONVICTION

[22] In convicting the appellant on two counts of rape, the trial court relied on the evidence of various State witnesses and rejected the appellant's version as false beyond reasonable doubt. The evidence can be summarised as follows; the complainant, BS, was ten years old (born on 9 May 2001) at the time of the incident, and at the time of her testimony, she was eleven years old and testified through an intermediary. She testified that in July 2012 (the exact date is not specified), her mother sent her to buy Simba chips at the nearby spaza shop. She then went to the appellant's house, who was not home at the time, and remained there and watched TV with the appellant's wife. Later, she then returned to her mother to bring the Simba chips she was asked to buy to her, but when she arrived, her mother said that she had bought the wrong flavour of Simba chips.

[23] She returned to the appellant's house where she watched movies until late that night. The appellant and his wife accompanied the complainant to her parental home, but they did not enter the yard. They then said to the complainant that it was late at night, and said that she could spend the night at their house, and return home

the following morning. The complainant was taken to an abandoned house next to the appellant's house, and the appellant's wife gave her blankets to sleep with. The appellant then laid out the blankets on the floor for her to sleep on and gave her a red substance she described as Vaseline, which looked like "muthi" (traditional medicine), for her to eat and smear on her vagina, after he had undressed her. He then inserted his penis into her "private part" (vagina) and he performed some up and down movements while he was on top of her. After these actions by the appellant, the complainant felt that her vagina was wet, as if she wanted to urinate. The appellant threatened to kill her if she reported what he did to her to anyone, so when she arrived home the following day, she did not report the incident to anyone.

[24] On 17 October 2012, while the complainant was at her parental home, the appellant told her to come to his house, to fetch tomatoes. Upon her arrival at the appellant's house, he showed her a bag full of what she described as "muthi", as well as male and female dolls on which he smeared black muthi. He then laid her on the floor, undressed her skirt and panty, and inserted his penis into her vagina. On this occasion, he again made the up and down movements on top of her. As a result of the appellant's actions during this incident, the complainant was bleeding from her vagina and the blood stained her clothes. When she arrived home, she washed herself and her clothes, and she did not report this incident to anyone. She returned home without having taken the tomatoes.

[25] At the time of the second incident, the appellant's wife was not home. On 4 November 2012, the complainant told her mother about the rape incidents. She voluntarily told her mother and father, but they accused her of lying. A female friend of her mother's then assaulted the complainant for lying to them after she reported the incident. Her mother and her friend then called the complainant's friend, B[....], who was around the same age as the complainant, and asked him whether he had sexual intercourse with the complainant, since they often played together, but B[....] denied ever having had sexual intercourse with the complainant. The complainant was assaulted with a hosepipe, but even so she did not say that the appellant raped her.

[26] B[....] B[....]2 was nine years old when the incident occurred and ten years old at the time of his testimony, which was done through an intermediary. His testimony was very brief and he conceded that he used to play with the complainant. On one occasion, when he was walking to the shop with the complainant, they met the appellant, who then greeted the complainant and hugged her. There was also another incident when the appellant sent him to buy cigarettes. He denied ever having sexual intercourse with the complainant. He did not witness the incident where the complainant was assaulted.

[27] Ms. Segard Precious Chauke testified that Josephine Hlalele, another unknown woman and the complainant came to her home and told her that they were sent by the complainant's mother with regard to the allegations that B[....] was having sexual intercourse with the complainant. They did not tell her when these incidents allegedly took place. She asked the complainant to confirm whether this was true, but she denied it. Ms. Chauke then met with the complainant's parents and she told them that her child, B[....], is not capable of raping someone and she does not believe their allegations.

[28] On one occasion, when she was in the company of the complainant, they met a group of men and one of the men told the complainant that she is scarce, but she did not ask the complainant who that man was. The complainant told her that the person who raped her is the man who said that she is scarce and it was the appellant. She then took the complainant home and reported this to her mother.

[29] Ms. Josephine Hlalele testified that on 2 November 2012, the complainant and her mother visited her home. The complainant's mother told her that there is a person who is having sexual intercourse with the complainant. She then took the complainant to the house, and after questioning her, the complainant denied what her mother said. Ms. Hlalele then assaulted the complainant twice with open hands, and the complainant then said that it is B[....] with whom she is having sexual intercourse. The complainant was sent to call B[....], who then told them that the complainant is having sexual intercourse with another man at Mabongo's place plot 4. B[....] again denied ever having had sex with the complainant. When the

complainant was asked about the person staying at Mabongo's place, the complainant said it was the appellant.

[30] Dr. Constance Akbo examined the complainant on 4 November 2019, and the complainant informed that she was sexually assaulted by a known male, who gave her R100.00 on the first occasion, and R50.00 on the second occasion. On examination of the complainant, Dr. Akbo found that her hymen was absent, and further that her injuries were consistent with forced penetration. Dr. Akbo also found fresh injuries which she described as cuts. An absent hymen is an indication that a child is sexually active, as it suggests penetration, and one would not expect that in a ten-year-old child. The complainant did not tell Dr. Akbo the name of the perpetrator nor whether she was familiar with the perpetrator.

[31] The appellant testified and admitted that he knows the complainant, as he used to see her at the plot they resided on, and he also worked with the complainant's mother. He has known the complainant since 2011. The complainant came to his house on 5 October 2012 to borrow R10.00, as she said that she had lost the money her mother gave her when she sent her to the shop. He denied that there is an abandoned house next to his house. He denied ever raping the complainant. He also denied ever calling the complainant to his house on 17 October 2012 to fetch tomatoes and he also denied raping the complainant on that occasion.

EVALUATION OF EVIDENCE

[32] The courts' powers to interfere with a trial court's findings of fact on appeal are limited. The court of appeal will be reluctant to upset the factual findings and the evaluation of evidence by a trial court, and will only interfere where the trial court materially misdirected itself insofar as its factual and credibility findings are concerned (see ***R v Dhlumayo and Another 1948 (2) SA 677 (A)***; ***S v Francis 1991 (1) SACR 198 (A)***).

[33] Dr. Akbo's evidence that the complainant's hymen was absent at the time of the examination, and her findings that the complainant was raped, remains unchallenged and therefore, undisputed. Despite telling Dr. Akbo that she knows

who the perpetrator is, the complainant did not tell Dr. Akbo the name. It is therefore for this Court to determine whether the trial court misdirected itself in finding the appellant guilty of raping the complainant on two different occasions.

[34] Initially, when probed about who had raped her, the complainant said it was B[....] B[....]2, who at that stage was nine years old, who raped her. Her mother and Ms. Josephine Hlalele did not believe her, which resulted in Ms. Hlalele assaulting the complainant. The complainant testified that Ms. Hlalele assaulted her with a hosepipe, and that her mother remained outside the house at that stage. Ms. Hlalele admitted that she assaulted the complainant, but said that she only assaulted her twice, with open hands on her face.

[35] It is as a result of this assault that the complainant said B[....] B[....]2 raped her. B[....] B[....]2 denied ever raping the complainant, but he testified that there were occasions when he saw the appellant give the complainant money. The complainant eventually told her mother, Ms. Chauke and Ms. Hlalele that it was the appellant who raped her.

[36] There is no evidence that the name of the appellant was suggested to the complainant. It is for this Court to also determine whether the complainant, in failing to voluntarily mention the name of the appellant as the person who raped her, when she was asked who raped her, and the trial court accepting that the appellant is in fact the perpetrator, amounts to an irregularity which this Court must interfere with.

[37] The complainant and the appellant knew each other very well and they resided on the same plot. The complainant testified that after the appellant raped her on the first occasion, he told her that he would kill her if she told anyone about the rape incident. It is because of this threat made by the appellant that she was frightened and did not tell anyone about the rape incident. On the second occasion, the appellant told her that no one would believe her if she told them about the rape incident.

[38] The complainant also testified that she saw the appellant applying “muthi” to the two dolls he had, along with the needles. The question which arises is whether

the complainant was still frightened by the appellant's threats when she alleged that B[....] B[....]2 was the person who raped her. It is clear from the evidence that B[....] denied ever having sexual intercourse with the complainant, and considering his age at the time, it is highly improbable that B[....] had sexual intercourse with the complainant to the extent that it caused vaginal bleeding.

[39] In convicting the appellant, the trial court considered the fact that the complainant was a single witness and the fact that she initially said that it was B[....] who raped her, but later said that it was the appellant. The trial court, after evaluating her testimony, found that there is no reason why the complainant would falsely implicate the appellant as the person who raped her twice. Further, given the complainant's rural background, the complainant believed the appellant when he gave her the red substance to eat and told her that no one would believe her, and as a result, she did not immediately report the rape incident to her parents.

[40] Section 208 of the Criminal Procedure Act 51 of 1977 ("CPA") provides for the conviction of an accused of any offence on the single evidence of any competent witness. Such evidence must be treated with utmost care and should be clear and satisfactory in every material respect (see ***R v Mokoena 1932 OPD 79*** at ***80***). The trial court considered these factors and found the complainant to be a credible and honest witness. There is no requirement for corroboration of the evidence of a child witness, but her evidence that she was raped was corroborated by Dr. Akbo, who found that the complainant's hymen was absent, as proof that she was forcefully penetrated.

[41] The imaginativeness and suggestibility of child witnesses are only two elements against which a trier of facts should guard, and a trial court is required to indicate in the reasons furnished for its decision that it has fully appreciated those dangers and duly taken account of such safeguards, as they may be in the circumstances of the case (see ***R v Manda 1951 (3) SA 158 (A)***). The trial court found the evidence of the complainant to be trustworthy and that the complainant could not have imagined that the appellant had two dolls and gave her a red substance to consume.

[42] The complainant remembered the dates on which the two rape incidents occurred, even though in respect of the first incident, she was only able to recall the month and the year. It is rare for a child of her age to be able to simply recall those dates and explain, in detail, what happened to her on those two dates. The complainant was cross-examined at length by Ms. Moloi on behalf of the appellant, but she stuck to her evidence and never contradicted herself.

[43] The appellant conceded the fact that in July 2012, when he came from work, he found the complainant at his house in the company of his wife, watching television. He confirmed the child's evidence that on that day, she had been sent by her mother to buy Simba chips at the spaza shop. The appellant denies that he raped the complainant, as well as denying the existence of the abandoned building where the complainant testified that the rape took place. He further denies that the complainant slept over, in that abandoned building, but insisted that his wife accompanied the complainant. The complainant's mother testified that on the day she sent the complainant to buy Simba chips, she did not return home and she only found the complainant at home when she returned from work the following day.

[44] Despite the trial court's attempts to assist the appellant in securing the attendance of his wife so as to testify on his behalf in respect of the rape incident, the appellant refused to accept such assistance, and he insisted that it would be too costly for him to transport his wife from Zimbabwe to the Republic to do so. I am alive to the fact that there is no obligation on the appellant to call a witness to testify in his defense, as the onus rests on the State to prove the guilt of an accused person beyond reasonable doubt.

[45] The fact that the complainant initially implicated B[....] as the person who raped her can be attributed to the fact that she was fearful of the threats the appellant made to her. It is so that the complainant did not voluntarily divulge the name of the appellant as the person who raped her and she only did so after she was assaulted. The name of the appellant was not suggested to the complainant, and she mentioned his name on her own. B[....] testified about a certain "Mdala" who was having sexual intercourse with the complainant, but he did not suggest that

“Mdala” is the appellant. Despite the assault on the complainant, she still persisted in saying that B[....] is the one who raped her.

[46] It is only once the assault on her stopped, that she informed her mother and their neighbours that was the appellant who raped her. She mentioned the name, firstly, far from the person who assaulted her and secondly, to the person who had not assaulted her. Simply put, when she mentioned the appellant as the person who raped her, it was not in the presence of the person who assaulted her.

[47] It is therefore our considered view that the trial court did not misdirect itself in finding that the appellant raped the complainant on two (2) separate occasions, and there is no need for this Court to interfere with that finding.

ORDER

[48] As a result, the following order is made:

1. The appeal against conviction is hereby dismissed.

MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

I agree,

S MAGARDIE
ACTING JUDGE OF THE
HIGH COURT, PRETORIA

APPEARANCES

For Appellant:	Mr. MB Kgagara
Instructed by:	Legal Aid SA
For Respondent:	Adv MJ Makgwatha
Instructed by:	The DPP
Date of hearing:	18 October 2022
Date of delivery:	Electronically transmitted