

Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: A201/2022

Before: The Hon Mr Justice M I Samela

The Hon Ms Justice Nziweni

Hearing: 17 February 2023

Judgment: 17 February 2023

In the matter between:

NOWA KHWETLA NOGWAZI

Appellant

v

THE STATE

Respondent

JUDGMENT

NZIWENI J (SAMELA J concurring):

Introduction

- [1] The appellant, Nowa Khwetla Nogwazi and his erstwhile co-accused were arraigned in the Regional Court on two counts of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, Act 51 of 1977. From what we can glean from the incomplete trial record, the provisions of the Criminal Law Amendment Act 105 of 1997 (the CLAA) applied to the two counts.

- [2] After hearing the evidence, the trial court convicted the appellant as charged. On 08 July 2008, the appellant was sentenced to twenty years imprisonment. The sentence reads as follows:

“Accused is sentenced to 20 (twenty) years imprisonment.

Counts taken together for purpose of sentence. Accused 2, Mr. Nowa Kwetcha not to be considered for parole before serving four fifths of his sentence. As in terms of the Criminal Amendment Act, Act 105 of 1977 this sentence should not run concurrently with any sentence that accused 2 might be serving.”

- [3] After the imposition of the sentence the appellant did not immediately file an application for leave to appeal until 01 March 2016. The applications for leave to appeal and for condonation were only heard on 03 December 2021. The court *a quo* granted leave to appeal and condoned the late filing of the application. Additionally, at the leave to appeal hearing, the court stated that, it was unable to decide whether another court would come to a different conclusion. The court then granted leave to appeal the matter. Our gleaning of the record generally reveals that the interests of justice was a substantial motivating factor in the court *a quo*'s decision to grant leave to appeal.

- [4] It is common cause in this case that the appeal record is incomplete. Despite numerous attempts the parties were unable to reconstruct the record. A joint written submissions was made by counsel for both parties, in respect of the incomplete and inadequate trial record. In response to our request for additional argument on the point; counsel are in agreement that a complete record is unattainable. They both agree that the record in its current state is sufficient for this Court to consider the grounds of appeal.

- [5] The terrible state of the record and the judgment make it extremely difficult to determine exactly what is missing. However, based upon the record before us, it is evident that a substantial portion of the record is missing. Particularly, when it comes to the portion dealing with the merits of the matter.

[6] Moreover, it is evident from reading the remaining record that the missing portion is material as it amongst others, contained the testimony of state witnesses. The only available evidence which in a way implicates the appellant on record is the evidence of Mr Loyiso Mkiva. However, the problem with Mr Mkiva's testimony is that:

1. It is not clear from the record as to which count is his testimony applicable to.
2. His implication of the appellant as an assailant was elicited from a leading question by the prosecutor.
3. To further complicate matters, the judgment does not give details as to how the evidence of Mkiva was dealt with.

[7] We agree with the contention made on behalf of the appellant that the judgment of the court a quo is insufficient to assist this Court in respect of conviction. Logically it follows that, without a complete record, it is impossible for this Court to assess all the evidence which was presented to the trial court and to consider the sufficiency of evidence.

[8] As far as the record regarding the conviction is concerned, it does not contain sufficient evidence to indicating why the appellant was found guilty on the two counts.

[9] Thus, under these facts, we find no merit in respondent's contentions, that this record suffices for proper consideration on the appeal. Furthermore, it is not correct that there was no application for leave to appeal the conviction. The application for leave to appeal, clearly evinces that it was strenuously contended on behalf of the appellant that the conviction cannot stand under the prevailing circumstances. At this point, I wish to recite what is stated on the application for leave to appeal when it comes to conviction. Under the heading "Ad conviction," the following appears:

“It is respectfully submitted that no record could be reconstructed and that no proper Leave to Appeal application could be submitted.”

- [10] The appellant contends that his conviction should be reversed because the record of the trial proceedings could not be reconstructed so as to allow this Court to determine whether the trial court properly convicted him.
- [11] In the circumstances, the argument that the record is adequate for adjudication of the appeal on sentence cannot be sustained. It is difficult to comprehend how sentence proceedings may survive in the face of an incomplete record. Particularly, when the complaint is that the evidence on the incomplete record is inadequate to support the verdict. Without conviction the sentence proceedings cannot survive, the appeal process.
- [12] It is trite that an aggrieved litigant has a right to appeal against the judgment, to the appellate court. The case law is replete with authorities that state that, the absence of a proper record on which to decide an appeal, infringes upon the right to fair trial. It is now settled that a right to appeal is integral to the right to fair trial.
- [13] There is no evidence in this matter to show that the lack of a complete record was due to the fault on the part of the appellant.
- [14] In the circumstances, the convictions and sentence imposed against the appellant stand to be set aside. Finally, it needs to be stated that, safe keeping of court record is paramount. Court records plays a critical role and is essential in the administration of justice. It is also important to underscore that failure to preserve court record is far reaching in its implications. The victims of crime get affected as the perpetrators of crime cannot be held accountable for their actions. Accordingly, we align ourselves with the submissions made by Ms Kortje on behalf of the State that; substantial justice cannot be served if court records are not being protected.
- [15] In the result, I would propose the following order:

The appeal is upheld and the convictions on both counts and sentence in respect of the appellant are hereby set aside.

C.N. NZIWENI

Judge of the High Court

M. I. SAMELA

Judge of the High Court