



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 679/2023

In the matter between:

PHENYO SETHOSA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Sethosa v The State* (679/2023) [2024] ZASCA 172 (12 December 2024)

Coram: NICHOLLS, MOLEFE, KGOELE JJA and KOEN and DOLAMO AJJA

Heard: 07 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 12 December 2024.

Summary: Criminal Procedure – appeal against conviction and sentence – leave to appeal refused by the Regional Court – petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 refused by the High Court – special leave to appeal against

the dismissal of the petition granted by this Court – incomplete record of appeal – reconstruction required – remittal of the petition for reconsideration.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Bhoola and Ramlal AJJ sitting as court of appeal):

- 1 The appeal against the dismissal of the petition by the high court succeeds to the extent set out below;
- 2 The order of the high court dismissing the petition filed by the appellant is set aside and replaced with the following:
 - ‘(a) The applicant’s legal representative is directed to immediately take steps to properly reconstruct the missing record of the proceeding that took place, *inter alia*, on 16 February 2021, 19 July 2021, and 5 November 2021, in consultation with all relevant role players including the regional magistrate, according to the guidelines in:
 - (i) *Muravha v Minister of Police* 2024 (4) SA 84 (SCA);
 - (ii) *S v Leslie* 2000 (1) SACR 347 (W);
 - (iii) *S v Schoombee and Another* 2017 (2) SACR 1 (CC).
 - (b) The clerk of the Regional Court, Johannesburg, the applicant, and the State are directed to arrange a sitting of the regional court to reconstruct the missing parts mentioned in paragraph (a) above. The clerk of the regional court, the State, and the applicant are further directed to furnish affidavits to accompany the reconstructed record, setting out precisely what steps were taken to reconstruct the same and whether they are satisfied with its content.
 - (c) The reconstructed record should be finalised on or before 28 February 2025.

- (d) The reconstructed record shall thereafter be placed before two judges of the Gauteng Division of the High Court, Johannesburg, for a consideration of the complete record on petition by a court, differently constituted to that which previously considered the petition, on or before 31 March 2025.
- (e) The appeal shall lapse upon expiration of the time frames specified in paragraphs (c) and (d) above unless the Gauteng Division of the High Court, Johannesburg, extends the timeframes.
- (f) In the event of any portion of the record not being capable of reconstruction, it is directed that the regional magistrate, the clerk of the regional court, the legal representative of the applicant, the applicant, and the State are to furnish affidavits explaining why the record could not be so reconstructed.
- (g) The appeal record is remitted to the clerk of the Regional Court, Johannesburg, to be dealt with as indicated above.’

JUDGMENT

Kgoele JA (Nicholls, Molefe JJA and Koen and Dolamo AJJA concurring)

[1] The appellant, Mr Phenyio Sethosa, was convicted of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) by the Regional Court, Johannesburg (the regional court). As a result of the fact that s 51(2)(b)(i) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLA) were applicable, he was sentenced to 10 years’ imprisonment, the regional court having found that no substantial and compelling

circumstances existed. His application for leave to appeal against both the conviction and sentence was dismissed by the regional court. The appellant subsequently obtained special leave from this Court against the refusal of the petition, which he lodged with the Gauteng Division of the High Court, Johannesburg (the high court).

[2] In the heads of arguments filed with this Court, the State, the respondent opposing the appeal, raised a point in *limine* that the appeal record was incomplete. The respondent bemoaned the fact that the recordings of the following court appearances were not transcribed and or included in the bundles prepared for this appeal:

2.1 15 January 2021, which comprised of the evidence of the medical doctor who conducted the medico-legal examination and formal admissions made by the appellant.

2.2 16 February 2021, which comprised of the application for a discharge in terms of Section 174 of Act 51 of 1977 (the CPA).

2.3 19 July 2021, which comprised of the reasons why the appellant ended the mandate of his initial legal representative when the new one appeared on his behalf.

2.4 5 November 2021, which comprised of an application by the new legal representative of the appellant to recall the complainant, which was granted by the regional court on limited grounds.

[3] While preparing for the hearing of this appeal, it became apparent to this Court that the respondent's observation was correct. On the other hand, the appellant was conspicuously silent on this preliminary point until it was raised during the hearing by this Court. The problem was exacerbated by the fact that the appellant's counsel could not positively answer the crucial questions posed to him by this Court during

the hearing on this issue. As a result of the unsatisfactory response received from the appellant's counsel, this Court issued the following directives on 7 November 2024:

'1. It is ordered that the [applicant] should, through his attorney, provide an affidavit to the Registrar of this Court by no later than 15 November 2024 setting out:

1.1 Whether the full record of the proceedings in the regional court was submitted to the two high court judges when they considered the petition for leave to appeal against conviction and sentence.

1.2 An explanation as to what steps were taken to rectify the missing transcript of the evidence, once the [applicant's] attorney was made aware of the defective records by the respondent.

1.3 The respondent is to provide a confirmatory affidavit as to whether the record can be remedied without reconstruction.'

[4] The supplementary affidavits filed by both parties, pursuant to the directives, revealed that the clerk of the regional court confirmed that the only transcribed recording available from the list was that of 15 January 2021. The said transcribed record was attached to the appellant's supplementary affidavit. It also became apparent from the affidavits filed that there have been no attempts to reconstruct the missing parts for which no transcribed recordings were available. Furthermore, the supplementary affidavit filed by the appellant's legal representative stated that the record submitted to the high court to consider the petition was precisely the same. In other words, an incomplete record of appeal was presented to the high court to consider the petition.

[5] The record of proceedings in the trial court is of cardinal importance as it forms an integral part of the hearing by the court of appeal. The importance of a proper record of the proceedings and its connection with the right to a fair trial was succinctly confirmed in *S v Schoombee and Another*¹ as follows:

¹ *S v Schoombee and Another* 2017 (2) SACR 1 (CC) para 19; *S v Chabedi* 2005 (1) SACR 415 (SCA) para 5.

“It is long established in our criminal jurisprudence that an accused’s right to a fair trial encompasses the right to appeal. An adequate record of the trial court proceedings is a key component of this right.”

[6] It is trite that the appellant bears the duty to furnish this Court with a complete record of appeal.² Furthermore, the Constitutional Court reaffirmed this position. It held that while the trial court is required to furnish a copy of the record, the appellant or his or her legal representative carries the final responsibility to ensure that the appeal record is in order.³ Similarly, the entire record of proceedings in the regional court is, in my view, required for consideration of a petition by the high court.

[7] It appears that the high court merely disregarded the missing parts of the transcribed record when coming to its decision. The respondent maintained that the missing parts are necessary to consider the appeal. This proposition is correct, and it is bolstered by the fact that the appellant, having recovered a portion of the missing records as indicated above (the transcribed record of 15 January 2021 attached to the supplementary affidavit), now wants to persuade this Court to receive such record to hear the merits. However, it would be improper for this Court, and also not in the interest of justice, to consider the evidence that was not before the high court when the petition was considered.

[8] Without a complete record of the proceedings, or in the absence of it, a proper reconstruction of the missing parts, this Court is unable to make an informed decision as to whether the proceedings before the high court, when it considered the petition, were in accordance with justice and, furthermore, whether its decision on

² Rule 8 of Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa.

³ *S v Schoombee and Another* above para 21, quoting *S v Sibeletwana* [2012] ZAWCHC 150 at 10.

the merits should stand. The appellant's legal representative should ensure that steps are taken to reconstruct the parts of the proceedings that did not serve before the regional court. Once that is done, the application must be laid before the high court to reconsider the petition, having regard to the complete record of the regional court's proceedings. Procedurally, an appropriate order would be to set aside the high court's decision and remit the matter back to enable the high court to reconsider the petition afresh.

[9] The following order is made:

1 The appeal against the dismissal of the petition by the high court succeeds to the extent set out below;

2 The order of the high court dismissing the petition filed by the appellant is set aside and replaced with the following:

‘(a) The applicant's legal representative is directed to immediately take steps to properly reconstruct the missing record of the proceeding that took place, *inter alia*, on 16 February 2021, 19 July 2021, and 5 November 2021, in consultation with all relevant role players including the regional magistrate, according to the guidelines in:

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(b) The clerk of the Regional Court, Johannesburg, the applicant, and the State are directed to arrange a sitting of the regional court to reconstruct the missing parts mentioned in paragraph (a) above. The clerk of the regional court, the State, and the applicant are further directed to furnish affidavits to accompany the reconstructed record, setting out precisely what steps

were taken to reconstruct the same and whether they are satisfied with its content.

- (c) The reconstructed record should be finalised on or before 28 February 2025.
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- (e) The appeal shall lapse upon expiration of the time frames specified in paragraphs (c) and (d) above unless the Gauteng Division of the High Court, Johannesburg, extends the timeframes.
- (f) In the event of any portion of the record not being capable of reconstruction, it is directed that the regional magistrate, the clerk of the regional court, the legal representative of the applicant, the applicant, and the State are to furnish affidavits explaining why the record could not be so reconstructed.
- (g) The appeal record is remitted to the clerk of the Regional Court, Johannesburg, to be dealt with as indicated above.’

A M KGOELE
JUDGE OF APPEAL

Appearances

For appellant: AJC Kriel

Instructed by: BDK Attorneys, Johannesburg
Symington & De Kok Attorneys, Bloemfontein

For respondent: AM Williams

Instructed by: Director of Public Prosecution, Bloemfontein.