IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: CA&R 240/2019

Heard on: 3 August 2022
Judgment delivered on: 25 January 2023

In the matter between:

SIPHIWO MANGA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

MALUSI J:

[1] The appellant was arraigned in the Regional Court sitting in *East London* on one count of the rape of a child and a second count of the sexual assault of the same child. He was convicted as charged and sentenced to twelve *(12)* years' imprisonment on the first count and four *(4)* years' imprisonment on the second count. The two *(2)* sentences were ordered to run concurrently. Leave to appeal against both conviction and sentence was granted on petition to the Judge President.

[2] The charges arose from an incident which occurred on 8 January 2013 at the police barracks in *East London*. It was alleged the appellant digitally penetrated the complainant's vagina. Shortly thereafter he allegedly touched the complainant's breasts and buttocks while causing her to touch his erect penis which resulted in him to ejaculate on her hand.

[3] The appellant pleaded not guilty to both counts when the trial commenced on 14 January 2016. The *State* called the complainant and five *(5)* other witnesses. The appellant testified in his own

defence and called one *(1)* witness. He was convicted and sentenced on 7 February 2017.

[4] It appears in the course of preparing the record for the petition to the *Judge President* that the transcript of the evidence was discovered to have been incomplete. The *Clerk of the Regional Court* deposed to an affidavit that the trial preceded her working in that particular court. Consequently, she bore no knowledge about the case record. The prosecutor stated in his affidavit that his notes relating to the trial were lost. His efforts in May 2021 to trace the defence attorney who defended the appellant were in vain as no person knew where the attorney was based. The regional magistrate deposed to an affidavit in an attempt to reconstruct the missing portion of the evidence based on his contemporaneous notes taken during the trial.

[5] The regional magistrate's reconstruction is particularly terse considering the number of witnesses it covered. It is rendered in a narrative style instead of the more preferable question and answer format. The cross-examination of the complainant was covered in five *(5)* questions raised by the defence attorney. The evidence of the complainant's mother and her colleague was conflated as though

it was the evidence of a single witness. The cross-examination of the complainant's mother was summarised, but perfunctorily. There is no indication whether her colleague was cross-examined at all. Both the evidence of the boyfriend to the complainant's mother and that of another resident in the police barracks were summarised in a most cursory manner, effectively amounting to a single sentence for each witness. It was stated that the medico-legal report *(J88 form)* was admitted as an exhibit with the appellant's consent. It was not indicated whether the doctor who compiled the report testified as a witness.

[6] The evidence in chief tendered by the appellant was reconstructed effectively in four *(4)* sentences. His version of what transpired between him and the complainant during the incident was not provided at all by the regional magistrate.

[7] Every accused person has a right to a fair trial as provided in *s35(3) of the Constitution*. The *Constitutional Court* has stated that:

"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 trial court proceedings is a key component of this right. When a record 'is inadequate for a proper consideration of an

appeal, it will, as a rule, lead to the conviction and sentence being set aside."[1] (Footnotes omitted).

[8] It has been held that where it is clear from the record that material evidence was unavailable so that a fair assessment of the record was not possible, the matter must be set aside.[2] In each case it must be determined whether the defects in the record are so serious that the appeal could not be properly considered. The factors to be considered, among others, are the nature of the defects in the record and the issues that fall to be decided.[3]

[9] The test is whether the record as reconstructed is substantially correct, complete or adequate and not whether it is a perfect recordal of the trial.[4] Where missing portions of the evidence that cannot be reconstructed contain material evidence and the parties cannot come to an agreement by making the relevant admissions, the proceedings must be set aside.[5] Where it is clear from the record that so much material evidence is missing to render impossible a fair assessment of the record, then the proceedings had to be set aside.[6]

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1 *S v Schoombee & Another* 2017 (2) SACR 1 (CC) at para 19.
2 *S v S* 1995 (2) SACR 420 (T) at 424g-h.
3 *S v Chabedi* 2005 (1) SACR 415 (SCA) at para 6.
4 *S v S* 1995 (2) SACR 420 (T) at 423c-d; *S v Booysen* 1996 (2) SACR 393 (E) at 394h; *S v Chabedi* 2005 (1) SACR
415 (SCA) at para 5.
5 *S v S* 1995 (2) SACR 420 (T) at 424b-c, *S v Collier* 1976 (2) SA 378 (C) at 379c-e.
6 *S v S ibid* at 424g-h; *S v Leslie* 2000 (1) SACR 347 (W) at 353c-e.

[10] The procedure regarding the reconstruction process is settled in our law. The accused is entitled to participate in the process and be informed what is recorded as reconstruction of the lost evidence.[7] The reconstruction must be done in open court with both the defence and the state participating.

[11] A reconstruction, even if imperfect or done procedurally improperly, is not necessarily fatal to a consideration of an appeal. The decisive factors are whether the appellant will not be prejudiced and the adequacy of the record.

[12] The issue to be determined on appeal is whether the regional magistrate, on the evidence before the trial court, correctly found that the appellant had committed the offences. This requires an evaluation of the evidence. The question to be decided is whether the record is complete or adequate for this exercise to be performed.

[13] It is common cause that except for the complainant's evidence in chief, the rest of the state case has not been mechanically transcribed. Part of the appellant's evidence in chief has been transcribed. Part of it was reconstructed. The extent of the missing

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[7] *S v Leslie supra* at 354c; *S v Gora and Another* 2010 (1) SACR 159 (WCC) at paras 16-18.

portion is impossible to determine due to the manner it was reconstructed. Clearly a substantial portion of the evidence led during the trial was reconstructed.

[14] It is manifest in paragraphs 5 and 6 above that the reconstruction was wholly inadequate. The magistrate repeatedly stated that the matter was *'simple'.* This appears to have informed his approach to the reconstruction. The regional magistrate, with respect, adopted no more than a cursory approach to the reconstruction of the record. This is highlighted by the fact that the summary of the state case in the judgment is more substantial than the reconstructed evidence of that portion of the trial. This inadequacy is compounded by the fact that the appellant's evidence and his witness have not been summarised in the judgment.

[15] The inadequate reconstruction has been aggravated by the procedural failures. The regional magistrate appears to have done the reconstruction from his notes with neither the state nor the defence being involved. The prosecutor deposed to an affidavit approximately three *(3)* weeks after the reconstruction but makes no comment on the reconstructed evidence. He only states that he

could not find his notes. There is no evidence that the appellant was asked to participate or comment on the reconstructed evidence. All indications are that the reconstruction was not done in open court.

[16] After a detailed and anxious consideration of the record, I come to the conclusion that the record is wholly inadequate. It will be prejudicial to the appellant for the appeal to be considered on the basis of such an inadequate record. It is trite that all the evidence must be considered before a court comes to a decision. In circumstances where it is impossible to consider material and substantial portions of the evidence, it will be unfair to the appellant to determine the appeal.

[17] The outcome of this appeal is not based on a consideration of the merits of the matter. The above findings amount to a technical irregularity or defect as contemplated in *s324(c)* read with *s313 of the Criminal Procedure Act 51 of 1977*. This is a serious case as it involves allegations of the sexual violation of a child. The Director of Public Prosecutions has a discretion to decide whether to charge the appellant *de novo* before another magistrate.

[18] In the result it is ordered that:

18.1 The conviction and sentence are set aside.

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T MALUSI

JUDGE OF THE HIGH COURT

I agree:

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J G A LAING

JUDGE OF THE HIGH COURT

***Appearances*:**

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For the Respondent:	Adv Hendricks *instructed by*
	Director of Public Prosecutions
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