



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	YES
Circulate to Magistrates:	YES

Appeal No: **A98/2022**

In the matter between:

EVANS UNCLE PHELEMBE

Appellant

and

THE STATE

Respondent

CORAM: JP DAFFUE, J et JJ MHLAMBI, J

HEARD ON: 21 NOVEMBER 2022

DELIVERED ON: 25 NOVEMBER 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 13:00 on 25 November 2022.

ORDER

1. The appellant's appeal against his convictions and sentences is upheld.
2. The order of the court a quo is set aside and substituted with the following:
'The accused is acquitted on both counts of robbery with aggravating circumstances.'

JUDGMENT

- [1] This court is yet again confronted with an appeal that cannot be adjudicated due to an incomplete record.
- [2] On 4 February 2016 the appellant was convicted in the Regional Court held in Villiers on two counts of robbery with aggravating circumstances and sentenced to 8 years' imprisonment in respect of each count.
- [3] It appears from the annexures to the charge sheet that two separate offences were allegedly committed on 15 January 2015 and 31 January 2015 respectively. In the first instance a Volkswagen Polo motor vehicle valued at R89 000.00 was robbed and in the second instance a BMW motor vehicle valued R65 000.00.
- [4] The following documents form part of the appeal record:
- a. the original J15 with annexures and some notes of the presiding Magistrate pertaining to postponements;
 - b. the identification parade form indicating that the appellant was identified by one witness based on identification by way of photographs presented to him and another witness;
 - c. the appellant's criminal record appearing from the J69, indicating that he was convicted and sentenced in respect of housebreaking with the intent to steal and theft in 2010.
- Save for these documents and the application for leave to appeal as well as the judgment of a different Magistrate, granting leave to appeal, there is no record of the trial proceedings.
- [5] The presiding officer, Regional Court Magistrate Aucamp, retired a few years ago and we have been informed during the hearing of the appeal that he had passed away in the meantime.

[6] Ms Petunia Esterhuizen, employed as an administration officer by the Department of Justice, stationed at the Magistrate's Court in Heilbron, deposed to two affidavits. She is responsible to receive all notices and pleadings concerning appeals as well as to ensure that transcripts are prepared and appeal records completed. She mentioned the following:

- a. none of the trial records in this matter could be traced;
- b. a call was logged to Helpdesk, but no recording was found to be converted from the Digital Court Recording System (DCRS) to the Court Recording Transcription (CRT);
- c. enquiries made to the presiding officer were not helpful in that he had retired by that time and did not have any trial notes anymore;
- d. the legal representative who appeared for the appellant on behalf of Legal Aid SA did not work for Legal Aid SA anymore and no trial notes or file could be found;
- e. the prosecutor did not have any trial notes and was not able to assist with the reconstruction of the record.

[7] Mr WH de Villiers of the Bethlehem Justice Centre who appeared for the appellant during the application for leave to appeal deposed to an affidavit in support of the appellant's application for condonation. Attached to his affidavit is a progress report on Heilbron appeals dated 11 October 2019. According to this report a total of 18 appeals from the Heilbron, Villiers and Frankfort courts were affected as a result of incomplete records. In the one case, that of Bongani Elliot Mnguni, the same note was made as in the case of the present appellant. I shall refer to *Mnguni's* case again. The note in both instances reads as follows:

'FEEDBACK RECEIVED FROM HELPDESK. "Kindly note we still busy with your other case retrievals as we dealing with high numbers of cases from different provinces, your patience will be highly appreciated,"'

It is apparent that a serious problem is not only experienced in the Regional Court sitting in Heilbron, the neighbouring towns Frankfort and Villiers, but throughout the country.

[8] In *Mnguni v S*¹ my colleague Reinders and I dealt with the appeal of Mr Mnguni. Judgment was delivered in that matter on 29 November 2021. In that case we were able to adjudicate the appeal on the merits notwithstanding an incomplete record which distinguishes that matter from this case. As in this case, Ms Esterhuizen also deposed to an affidavit in that case to explain the problems experienced in Heilbron.

[9] In *S v Nkhahle*² my colleague Loubser and I were also confronted with an incomplete appeal record due to mechanical recording of proceedings being defective. In that case a reconstruction of the record was impossible due to a lack of notes being kept by all relevant parties to the criminal trial. I wish to reiterate what I said then:³

‘[16] It becomes more and more prevalent, from my own experience dealing with reviews and appeals in this division, but also reading judgments from other divisions, that courts of appeal are confronted with missing and/or incomplete records. Something needs to be done urgently.’

I continued as follows:⁴

‘The only comment I allow myself to make in this regard is that it would be a travesty of justice if more and more convicted criminals are allowed to walk free because of incomplete or lost records. Regional magistrates deal with serious criminal cases and may even impose life imprisonment. Record-keeping should be prioritised.’

Also, in *S v Sekoto*⁵ a conviction and sentence were set aside due to an incomplete record.

[10] I am not the only judge in this country that experiences these kind of problems. The Constitutional Court has held as long ago as 2016 in *S v Schoombee and Another*⁶ ‘that the loss of trial court records is a widespread problem’. Something has to be done sooner than later.

¹ [2021] ZAFSHC 323 (29 November 2021); *Mnguni v S* (A173/2020).

² [2020] ZAFSHC 246 (7 December 2020); 2021 (1) SACR 336 (FB).

³ *Ibid* para 16.

⁴ *Ibid* para 17.3.

⁵ Review number: R272/2016.

⁶ [2016] ZACC 50; 2017 (2) SACR 1 (CC) para 38 and also paras 19 – 21.

- [11] I made certain suggestions pertaining to record-keeping and custody of records in *Nkhahle*⁷ which I do not intend to repeat. It is time that everyone concerned in the judicial system should take cognisance of this serious problem and follow the suggestions in *Nkhahle*.
- [12] Mr Strauss, who appeared on behalf of the State, conceded that the appellant's appeal against his convictions and sentences should succeed in the circumstances. This court has no other option than to issue such an order. The record is not only inadequate for a proper consideration of the appeal, but there is no record at all. In *S v Chabedi*⁸ the Supreme Court of Appeal confirmed the well-known principle that the record of proceedings in the trial court is of cardinal importance insofar as it forms the whole basis of the rehearing by the court of appeal.
- [13] I again raise my concern about granting applications for condonation as of right to convicted criminals. Section 309B(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA), dealing with appeals from the lower courts, stipulates that a convicted person shall apply for leave to appeal within 14 days after passing of sentence or within such extended period the court may allow on good cause shown. In this case the appellant was convicted and sentenced on 4 February 2016. On his own version he only applied in October 2017 to Legal Aid SA for assistance with an application for leave to appeal, to wit 20 months after finalisation of his case in the Regional Court. Hereafter the appellant was informed of the problems experienced with incomplete records. If the application for leave to appeal was made on the same day or within the time stipulated by the CPA, the notes of the presiding officer, the prosecutor and the Legal Aid attorney would still be available in order to assist with compilation of a proper record. Also, on assumption that the proceedings were properly recorded, the recording would hopefully be available as well to ensure that the record could be transcribed.

⁷ Fn 2 above, paras 24 – 26.

⁸ [2005] ZASCA 5; 2005 (1) SACR 415 (SCA) para 5.

[14] The following order is granted:

1. The appellant's appeal against his convictions and sentences is upheld.
2. The order of the court a quo is set aside and substituted with the following:

'The accused is acquitted on both counts of robbery with aggravating circumstances.'

I concur

J P DAFFUE, J

J J MHLAMBI, J

On behalf of the Appellant: Mrs L Smit
Instructed by: Legal Aid SA
BLOEMFONTEIN

On behalf of the Respondent: Adv M Strauss
Instructed by: Director of Public Prosecutions
BLOEMFONTEIN