

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: /NO  
(2) OF INTEREST TO OTHER JUDGES: /NO  
(3) REVISED.

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DATE  
SIGNATURE

Case no. **2021/A102**

In the matter between:

**NGQULUNGA STHEMBISO NICOLAS**

**APPELLANT**

**And**

**THE STATE**

**RESPONDENT**

Coram: Dlamini J & Matsemela AJ

Date of hearing: 12 May 2022, Court 9E.

Date of Judgment: 09 August 2022

This judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and shall be uploaded onto the caselines system.

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## JUDGMENT

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### DLAMINI J

[1] The Appellant was charged in the Regional court for the Regional Division of Gauteng held at Wynberg with the following counts;

- 1.1 Robbery with aggravating circumstances, read with Section 51(2) of the Criminal Law Amendment<sup>1</sup>;
- 1.2 Attempted murder;
- 1.3 Attempted murder;
- 1.4 Unlawful possession of an unlicensed firearm;
- 1.5 Housebreaking with intention to steal and theft.

[2] The Appellant was legally represented throughout the trial. He pleaded not guilty to all the charges.

[3] On 1 February 2010, the Appellant was found guilty on counts 1-4 and was acquitted on count 5.

[4] On the same day, he was sentenced as follows;

- 4.1 Count 1, 15 years imprisonment
- 4.2 Count 2, 10 years imprisonment
- 4.3 Count 3, 10 years imprisonment
- 4.4 Count 4, 5 years imprisonment

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<sup>1</sup> Act 105 of 1997

- [5] The court ordered that the sentences in count 2 and 3 should run concurrently. Effectively the Appellant was to serve 30 years imprisonment.
- [6] On 20 May 2013, the Appellant application for leave to appeal in respect of both conviction and sentence was refused.
- [7] On 22 October 2021, this Court granted the Appellant petition for leave to appeal against both conviction and sentence.
- [8] It is common cause that the record of appeal is incomplete. The evidence of the complainant Mzikayise Ntshingila, Constable Mabunda and the Appellant does not appear from the record.
- [9] The nub of the issue is whether this court can proceed to hear this appeal on an incomplete record.
- [10] The Appellant submits that this court must consider that the missing part of the complainant evidence, constable Mabunda and the Appellant evidence are crucial to the determination of whether the state succeeded in proving beyond reasonable doubt the case against the accused. That it is the duty of the clerk of the court which convicted and sentenced the Appellant, to prepare a certified copy of the record upon leave to appeal being granted. Finally, that if the proper record for the appeal cannot be provided and it is not possible to reconstruct the record, on that basis alone, the Appellant submit that the appeal should succeed.
- [11] The respondent submits that the Appellant was correctly convicted by the trial court and no irregularities were committed. That the trial court took the evidence in totality into account and found the guilt of the appellant was proven beyond reasonable doubt. Finally the respondent avers that from the record and the available transcripts, the exhibits received by the trial court, the magistrate judgment, this court will be able to determine the appeal fairly.

[12] The supreme court of appeal in **S v Chabedi**<sup>2</sup> guides us as follows;

*“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 hearing by the court of appeal, if the record is inadequate for the 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”.*

[10] In my view the nature of the defects in this case are immense. The entire evidence in chief and cross examination of the complainant is missing. The record does not indicate exactly how the offence occurred and further how he implicates the Appellant. More critical is the absence of the evidence of the Appellant in the record. His evidence was briefly summarized by the magistrate.

[11] In fact, the magistrate delivered a very brief and short *ex tempore* judgment of not more than two pages. In this judgment, the trial court simply makes brief summaries of the evidence of the complainant, other witnesses and the Appellant.

[12] Furthermore, there were no meaningful and genuine attempts made by the state to reconstruct the record. On 29 June 2021, an attempt was made in the *court a quo* to reconstruct the record. On that day, it transpired that only the magistrate and the Appellant were the only people present during the original trial. It turned out that the Appellant’s erstwhile legal representative had resigned from the Legal Aid Board. The state prosecutor was not also not available, as he had also since resigned.

[13] As a result, all that transpired on that day is that the charges were again put to the Appellant and nothing else happened.

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<sup>2</sup> S v Chabedi 2005 (1) SACR 415 (SCA) at [5]

[14] Significantly, it should be also be noted that the Appellant was convicted on 1 February 2010. Almost 12 (twelve) years has passed since his conviction. As for the reasons stated above any further attempt to reconstruct this record, will in my view, be an exercise in futility.

[15] Having regard to all the above circumstances it is my considered view that the record is wholly inadequate for the proper consideration of the appeal.

In the result, I make the following order

1. The appeal succeeds.
2. The conviction and sentence are set aside.

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**DLAMINI J**

JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

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**MATSEMELA AJ**

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 12 May 2022

Handed down on: 09 August 2022

For the Appellant: ADV. L MUSEKWA

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