REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A275/2018
DPP REF. NO: PA 35/2018

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

---06-2022 PD. PHAHLANE
DATE SIGNATURE

In the matter between:

WILLIAM MBATHA
APPELLANT

And

THE STATE
RESPONDENT

JUDGMENT

PHAHLANE, J

[1] This is an appeal against both conviction and sentence imposed by the Cullinan Regional Court on 19 May 2016. The appellant who was legally represented during the trial proceedings was convicted for possession of drugs (ie. 8.01 grams of dagga) and unlawfully receiving R2400,00; a cell phone charger; and a USB cable. He was

sentenced to six months with an option of a fine of R400,00 on the count of possession of drugs and two years imprisonment, one of which was suspended for a period of five years, in relation to the other count.

[2] It is common cause that the appellant was incarcerated and serving sentence for a previous conviction at Zonderwater prison and was placed in a single cell in F section. On 24 April 2015, Messrs. Harrison and Nkosi, and several other members of the Correctional Services conducted a search in the appellant's cell. It was alleged that a cell phone charger; one USB cable; R2400.00 in cash; and 8.01 grams of dagga were found in the intercom speaker that was in the appellant's cell.

[3] The appellant disputed the allegations and testified that he was not present in the cell when the search was conducted, and that the items found were not in his possession or received by him. In convicting the appellant, the trial court held that the appellant stayed alone and had the keys to his cell, and that it was not possible that another prisoner would hide money and other items in the appellant's cell. The trial court further held that it could not find any motive for the wardens to falsely implicate the appellant.

[4] It was apparent from the reading of the record that the transcribed record was incomplete because some parts of the record were not transcribed. In its judgment, the trial court referred to the evidence of the appellant but did not refer in detail to the crucial evidence of the appellant which relates to certain aspects which the appellant referred to when he testified.

[5] When this matter came before court on 28 April 2022, the court was informed of the steps taken by the appellant's attorney of record to ensure that a complete record is before court to enable it to properly adjudicate on the matter. An affidavit in that regard was filed, and this court requested parties to make further attempts as regards the missing portions of the transcribed record. The matter was then postponed to the 13th of June 2022 and both parties have since filed supplementary heads of argument to make further submissions.

[6] It appeared that the Learned Magistrate who presided over the matter is deceased and both parties are *ad idem* regarding the fact that another magistrate will be unable to reconstruct the record and refer to the crucial aspect of what the original presiding officer had to refer to as his/her reasons for conviction and sentence. The appellant contends that he will be prejudiced by being incarcerated whilst not being able to prosecute his appeal, having regard to the fact that all attempts by his legal representative to reconstruct or have the record transcribed were not fulfilled.

[7] It was submitted on behalf of the appellant that failure by the trial court to deal with the appellant's evidence and the concomitant effect of such evidence not being transcribed, impacts on the appellant's right to a fair trial. On the other hand, the respondent submitted, and correctly so, that another magistrate cannot make decisions on behalf of the original presiding officer on a record which is already incomplete.

[8] It is trite that where an accused has the right to appeal and a missing or incomplete record makes it impossible to consider and adjudicate such appeal, the conviction or sentence will often be set aside. The principle was enunciated by the Supreme Court of Appeal in ***S v***

Chabedi[1] when it held that "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".[2] The principle was reaffirmed in ***Davids v S***[3] where the court stated that:

> *"The inability to exercise the right of appeal because of a missing record is a breach of the constitutional right to a fair trial, and in such circumstances will generally lead to the conclusion that the proceedings have not been in accordance with justice and must be set aside".*

[9] In ***S v Sebothe***[4] the court stated that:

> *"The constitution of the Republic of South Africa 1996 gives a right to appeal or review and provides inter alia through section 35 that an accused person has the right to a fair trial which includes a right to appeal or review. If the appeal or review court is not furnished with the proper record of the proceedings, then the right to a fair hearing of the appeal or review is encroached upon and the matter cannot properly be adjudicated. In that regard, the only avenue open to protect the right of the accused or the appellant is to set aside those proceedings if it is impossible to reconstruct the record."*

[10] Having considered the circumstances of this case and the submissions made on behalf of the appellant and respondent, I am of the view that in the absence of sufficient evidence and the record, the appellant must be given the benefit of doubt.

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[1]. 2005 (1) SACR 415 (SCA) at para 5.

[2]2. [2013] ZA WCHC 72 at para 13.

[3]. 2006 (2) SACR 1 (T) at para 8.

[4]

[11] In the circumstances the following order is made:

1. The appeal is upheld
2. The conviction and sentence imposed by the trial court is set aside.

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PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

_____

V. TLHAPI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

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Date of hearing	:	13 JUNE 2022
Date of delivery	:	