



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
(4)

21/02/2024

DATE

SIGNATURE

Case Number: A611/2017

In the matter between:

XOLANI SEYISI

Appellant

and

THE STATE

Respondent

REASONS FOR THE ORDER

KJ MOGALE AJ

Introduction

[1] This is the third time this appeal is brought before the Criminal Court of Appeal in this division.

[2] The appellant in this matter was sentenced to a period of ten (10) years imprisonment, following his conviction on a charge of murder, by the Pretoria Regional Court on 08 June 2009. Leave to appeal to this court was granted with leave of the court *a quo*.

ISSUES

There is a concession from both the state and the respondent's legal representative that the appeal record cannot be reconstructed and remains incomplete. Moreover, that the appeal should succeed, and the conviction and sentence should be set aside.

BACKGROUND

[3] The chronology outlined by the appeal court is significant. Reading from the order of Millar J dated 03 February 2022, in the same matter, that served before him and Noncembu AJ, the order was made in the following terms:

3.1. The appeal be postponed sine die

3.2. The matter be referred to the Regional Court Pretoria

3.3. The Clerk of the Court to transcribe the evidence of Fundisile Tshwili

3.4. The evidence of Fundisile Tshwili and Christiaan Tshwili was not recorded. The Magistrate, the State Prosecutor as well as the appellant's legal representative reconstruct the evidence of the witnesses in the presence of the appellant.

The Proceedings before Mosopa J and Greyvenstein AJ

[4] The matter was before Mosopa J and Greyvenstein AJ on 31 January 2023. Reading from the Judgment of Mosopa J, the order was summarized as follows:

4.1. The appeal is postponed sine die.

4.2. The Clerk of the Court is to reconstruct the evidence of Fundisile Tshwili and Christiaan Maxwell Tshwili, and Magistrate Booysen, the State Prosecutor, Mr. J.A

Maaga who dealt with the matter, as well as Adv. Westebaar, who represented the appellant in his trial, participated in the reconstruction of the missing evidence of the witnesses in the presence of the appellant to give effect to the order of Millar J and Noncembu AJ dated 03 February 2022.

4.3. The Clerk of the Court, Pretoria Magistrate's Court, is to provide a complete update on the progress of the matter on or before 31 May 2023.

4.4. Until such time that the process mentioned in paragraph 3 of this order is finalised, the matter may not be set down for hearing; in the alternative, if the Clerk of the Court does not provide an update on 31 May 2023, the Clerk of the Court must give full reasons for his/her failure to do so, within 5 days after the lapse of such period

The Present Appeal

[5] Once again, the matter is on the roll on the same issue. The order of Mosopa J and Grayvenstein AJ had not been complied with. For the matter to be set down for hearing, the appeal record needs to be reconstructed as ordered.

[6] It is common cause that according to various decisions of this court and other courts, the reconstruction process must give effect to an accused's right to a public trial before an orderly court. Once it becomes apparent that the record of the trial is lost, the presiding officer should direct the clerk of the court and inform all the interested parties, being the accused or his legal representative and the prosecutor, of the fact of the missing record, arrange a date for the parties to reassemble in open court, to undertake the reconstruction jointly. When the reconstruction is about to commence, the magistrate is to place it on record that the parties are to reassemble for purposes of the proposed reconstruction; the parties are to express their views on record, that is an aspect of reconstruction of the recollection of the evidence pending the trial and

ultimately to have such reconstruction transcribed. This is to ascertain that the accused receive a fair trial.

[7] The most important function which the court of appeal is required to perform is to dispense justice. Our criminal jurisprudence has long established that an accused's right to a fair trial encompasses the right to appeal. An adequate record of the trial court proceedings is critical. *S v Gora and Another 2010 (1) SACR 159 (CC)*, *S v Chabedi 2005 (SACR) 415 (SCA)* at para 5-6, and *S v Schoombie 2017(2) SACR 1 (CC)* at para 19 the following was said: "*after all the records form.....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.*"

[8] The appeal record cannot be reconstructed. The record is inadequate for the proper consideration of the appeal. The appeal against the conviction and sentence succeeds. Both the conviction and sentence are set aside.

[9] Consequently, the following order is hereby made:

1. The appeal against the conviction imposed is upheld, and the appellant is found not guilty and discharged.
2. The sentence imposed is set aside.
3. The appellant is released immediately.

COURT

K.J MOGALE

ACTING JUDGE OF THE HIGH

GAUTENG DIVISION

PRETORIA

I agree, and it is so ordered.

J.S NYATHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA

Appearances:

For the Appellant: Adv. B Kgagare

Instructed by: Legal Aid South Africa, Pretoria

For the Respondent: Adv. C Praise
The Director of Public Prosecutions,
Pretoria

Delivered: This Judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and uploading to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 21 February 2024.

Date of hearing: The matter was heard in an open court. The matter may be determined accordingly. The matter was set down for a court date on 13 February 2024.

Date of Judgment: 21 February 2023