IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR351/2017

In the matter between:

HENRY KHALANGAYE MATHUNJWA **APPELLANT**

and

THE STATE **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be on 29th May 2023 at 10:00

Coram: Chetty J (M E Nkosi J concurring)
Heard: 12 May 2023
Delivered: 29 May 2023

ORDER:

(1) The appeal against conviction and sentence is upheld.

CHETTY J:

[1] The appellant was charged in the Regional Court in Durban, KwaZulu-Natal in terms of s 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007, on two counts of rape. The complainants were girls aged five and two years' old respectively. The appellant was

the uncle of the complainants' mother, and to whom the complainants referred to as their grandfather.

[2] It is alleged that the appellant raped both complainants in the vicinity of their homes in Lamontville, Durban in October 2010. The appellant was legally represented at his trial and pleaded not guilty to the charges. He denied knowledge of the charges against him. After considering the evidence of one of the complainants, who was five years' old at the time of the offence, and who testified with the assistance of an intermediary, as well as the evidence of the mother of the two complainants as well as that of their aunt, the court a quo convicted the appellant on both counts. It should be noted that the appellant did not testify in his defence. In her judgment, the learned magistrate found that the five-year-old complainant was an excellent witness. She testified as to the appellant not only having raped her, but also having raped her two-year-old sister in her presence.

[3] The court a quo found that on a totality of the evidence, as well as the 'strong medical corroboration', the version of the appellant was rejected as being false beyond reasonable doubt.

[4] In considering whether any substantial and compelling circumstances existed in order to deviate from the mandatory minimum of life imprisonment for the offences in question, the court a quo took into account that the appellant was 64 years' old; that he was HIV-positive at the time of the commission of the offences; that he knew of his medical condition, and; that he had four children, two of whom are adults with the remaining two children living with their mother and dependent on a social welfare grant.

[5] At the time of sentencing, it had not been established whether the complainants had become HIV-positive. What was established is that the complainants' mother took them to a clinic, but this appears from the record only to have been done on 8 November 2010, some weeks after the alleged offences had been committed.

[6] The court a quo took into account the personal circumstances of the appellant and those of the two minor complainants. Despite the sentence of life imprisonment

applicable in the case of rape of a minor, the court for some inexplicable reason found that the appellant's age was a reason to deviate from the minimum sentence in respect of the five-year-old minor. On this count, the court imposed a sentence of 15 years' imprisonment, and in respect of the second complainant, aged two, the court sentenced the appellant to life imprisonment.

[7] An application for leave to appeal was brought against conviction and life sentence approximately four months after the court a quo imposed sentence. Counsel for the appellant contended that the court a quo failed to consider the contradictions in the evidence between the five-year-old complainant, and that of Neliswa Mathenjwa, her aunt. It was further contended that the court a quo failed to take into account contradictions in the evidence of the five-year-old complainant and her mother, Precious Mathenjwa. In addition, it was contended that there were improbabilities in the evidence of the complainants' mother that the court should have considered in determining whether it was reasonably possibly true that the appellant was being falsely implicated, for reasons that the complainants' family wished to evict him from the area in which he resided. In so far as sentence is concerned, it was submitted that the court a quo erred in considering the appellant's HIV-positive status as being an aggravating factor rather than a substantial and compelling circumstance. On this basis, the court a quo granted the appellant leave to appeal against both his conviction and sentence.

[8] Magistrates' courts rule 67(5) places an obligation on the clerk of the court to prepare a copy of the record of the case, including a transcript thereof as soon as leave to appeal has been granted by the magistrate. Uniform rule 51(3) provides that the ultimate responsibility for ensuring that all copies of a record on appeal are in all respects properly before the court, rests on the appellant or his/her legal representative, provided that where the appellant is not represented the responsibility rests on the Director of Public Prosecutions. In *S v Chabedi* 2005 (1) SACR 415 (SCA) Brand JA said the following:

'[5] 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 rehearing by the court of appeal. If the record is inadequate for a 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. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible. . . .

[6] *The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends,* inter alia, *on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.'* (my italics)

[9] The record of appeal before us is comprised of the plea by the appellant, the evidence-in-chief by the five-year-old complainant, and her cross-examination. The proceedings commenced on 22 March 2011, and continued on 23 March 2011. The manuscript notes recorded by the magistrate reflect that proceedings continued on 24 March 2011. However, this aspect of the evidence has not been transcribed. The record reflects a resumption of proceedings on 1 April 2011. It is conceded by both the State and the appellant's counsel that the record, as it stands, is incomplete and does not contain the evidence of the complainants' mother and the complainants' aunt, to whom the five-year-old complainant made the first report.

[10] This matter was first set down as an appeal on 16 March 2018, on which occasion the court adjourned the matter sine die with directions that the record be reconstructed to ensure that the evidence of Precious Mathenjwa, Nelly Mathenjwa and the appellant is transcribed. It is not apparent from the record whether the appellant gave evidence at the trial. It is recorded that the presiding magistrate enquired from the appellant's counsel whether she intended calling a witness, to which the response was that the defence was going to be closing its case. I can only assume that when the matter came before this court on 16 March 2018, the court was of the view that the appellant had also testified, and that his evidence was also missing.

[11] The matter again came before the court on 31 May 2019, where it was adjourned as the previous order had not been complied with. A similar adjournment was granted on 21 February 2020.

[12] As matters stand, the record is incomplete and no compliance with the previous orders by this court has been achieved. However, it should be noted that attempts

have been made by the appeals clerk at the regional court, as well as the appellant, to locate the exhibits and the original recordings of the proceedings. All of these attempts have come to naught. The appeals clerk has stated under oath that the record could not be reconstructed and that the national office of the Department of Justice was unable to retrieve the missing portions of the record that were mechanically recorded.

[13] It is submitted on behalf of the appellant that it would be unfair and an infringement of his rights to a fair trial to proceed to determine this appeal in the absence of the remaining portions of the evidence. See S v *Mantsha* 2006 (2) SACR 4 (C). In this regard it was contended that without a copy of the transcript, the appellant is unable to highlight contradictions in the evidence of the State witnesses, which have a bearing on whether the appellant's version can be said to be reasonably possibly true. In addition, the record does not contain the J88, nor a sketch of the injuries that may have been evident to the doctor who examined the complainants, albeit approximately two weeks after the incident. Such evidence would be critical in determining whether the evidence of the two minor complainants can be safely relied on to secure a conviction. As the Constitutional Court stated in *Schoombee and another v S* 2017 (2) SACR 1 (CC), para 20, the 'reconstruction. . . is "part and parcel of the fair trial process"'.

[14] It is clear from *S v Chabedi* that the issue is whether, having regard to the defects in the preparation of the record, and the issues raised by the appellant, the record as it stands is sufficient for the court to make a fair determination on the merits. As stated earlier, the evidence of the appellant and two State witnesses who were called to corroborate the version of the five-year-old complainant cannot be transcribed. No fault can be attributed to the appellant or his representatives who have attempted to obtain a transcript of the missing parts of the record. The magistrate who presided in the matter is no longer in the service of the judiciary, and is reported to have emigrated.

[15] In this matter, the mother of the two minor complainants (relying on the court a quo's judgment alone) appeared to have failed her children. She left them locked up in an outbuilding, without any care for their well-being. She went out to a party on a

Saturday evening and only returned on the Monday morning. It is during this period that the complainants were allegedly raped. The complainants' interests are again met with a disservice by the failure of the criminal justice system to ensure that records are safely and properly kept, until all avenues by an accused person are exhausted. However, the criminal justice system should not protect the interests of the accused only. There must also be fairness to the public, represented by the State, and to the victims of crime and their families. The Constitutional Court in *S v Jaipal* 2005 (1) SACR 215 (CC) para 29 noted that:

'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime'.

The failure to produce a complete record of the trial leaves the complainants with no recourse in respect of events which leave indelible scars on them.

[16] In light of these circumstances, it is not possible for the appellant to exercise his constitutional right to a fair trial, including his right to appeal, given the absence of the crucial portions of the record. Counsel for the State therefore submits, and with which submission this court agrees, that the appeal be upheld and that the convictions and sentences imposed on the appellant be set aside. It has been further contended that the matter be remitted to the Director of Public Prosecutions for further consideration.[1]

[17] In the result I propose the following order:

The appeal is upheld and that the convictions and sentences imposed on the appellant are set aside.

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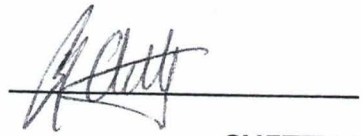
[1] See s 324 of the CPA which deals with 'Institution of proceedings de novo when conviction set aside on appeal'. See *S v Quali* 1989 (2) SA 581 (E) at 584C:

'In my view therefore the proper course in the present matter is merely to set aside the conviction. It will be open in my view to the prosecuting authority to determine whether or not to prosecute the accused de novo.'

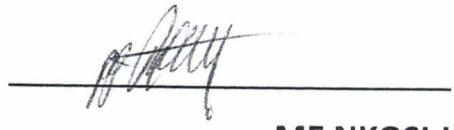
See also *S v Zondi* 2003 (2) SACR 227 (W)para 20 – 24:

[24]. In the premises, I am of the opinion that the appellant's submission should be rejected and that he is not entitled to an acquittal in the event of the record being found to be inadequate for purposes of considering and determining the appeal and incapable of further reconstruction. In that event there will have been a technical irregularity or defect in the proceedings as contemplated in s 324(c) of the Criminal Procedure Act and the proceedings in the court a quo should in that event be set aside on that ground and the conviction and sentence rescinded.



CHETTY J

I agree



ME NKOSI J

Appearances

For the appellant:	P Marimuthu
Instructed by:	Legal Aid South Africa
For the respondent:	TV Chetty
Instructed by:	Director of Public Prosecutions, Pietermaritzburg
Date of Hearing:	12 May 2023
Date of Judgment:	29 May 2023