IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Reportable

Case No: KS 48/05

In the matter between:

GEORGE ROBERTSON **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Robertson v The State* (Case no KS 48/04 (29 September 2023)

Heard: 27 February 2023 and 31 July 2023.

Delivered: 29 September 2023

Coram: Phatshoane DJP, Williams J and Nxumalo J

Judgment

Order:

1. The appeal is upheld.

2. The appellant's convictions and sentences are set aside.

Phatshoane DJP

[1] This appeal, the prosecution of which has a bit of chequered history, has its origin in this division. The appellant, Mr George Robertson, and his two co-accused stood trial before Kgomo JP on two counts: murder (count one) and robbery with aggravating circumstances (count two). The appellant was convicted on both counts on 24 April 2006 and sentenced the

next day to life imprisonment for murder and 10 years' imprisonment for robbery with aggravating circumstances.

[2] The appellant's application for leave to appeal against his conviction and sentence was heard on 21 September 2017, some 11 years later. In considering the application for leave, Kgomo JP condensed the basis of the conviction and sentence as follows:

'The applicant was convicted and sentenced as follows by me on 24 April 2006

1.1 Count 1: Guilty of murder with the direct intention to kill his father, Mr Werner Rolf Heinze, on 22 July 2004. The evidence demonstrates that he had been planning to kill his father for two years prior to his execution. His father reduced the applicants benefits because he stole from his business. No substantial and compelling circumstances were established and I sentenced him to life imprisonment.

1.2 On Count 2: the applicant was convicted of robbery with aggravating circumstances because, having murdered his father, he stole his vehicle and set it alight. I sentenced him to 10 years imprisonment for this deed.'

[3] The trial court was uncertain whether what purported to be an application for leave to appeal was in fact so because it had been launched on 06 October 2006 but it bore no High Court registrar's stamp. Nevertheless, the trial judge assumed that the application was regularly done in order to put the matter to rest. In respect of the appellant's application for condonation of the late filing of the application for leave, the trial court remarked that 11 years and four months is an inordinate period of delay. It noted that no explanation had been given as to why the applicant [appellant] allowed the case to fall through the cracks.

[4] The general rule, albeit not necessarily invariable, is that an appeal court will decide whether the judgment appealed is right or wrong according to the facts in existence at the time it was given, not in accordance with new facts or circumstances subsequently coming into existence. Evidence of facts subsequently arising will be allowed in circumstances that can be described as exceptional and peculiar.[1] For an accused person to introduce new evidence on appeal s 316 (5) of the Criminal Procedure Act 51 of 1977 (the CPA) details the procedure as follows:

"(5) *(a)* An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.

[1] *Mulula v The State* (074/14) [2014] ZASC 103 (29 August 2014) para 11

(b) An application for further evidence must be supported by an affidavit stating that—

(i) further evidence which would presumably be accepted as true, is available;

(ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and

(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

(c) The court granting an application for further evidence must—

(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and

(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness."

[5] The following salutary remarks on s 316(5), by the authors in Du Toit: Commentary on the Criminal Procedure Act,[2] are apposite:

"Although the judge hearing the evidence is not competent to set aside the verdict or sentence of the trial court, he would be entitled to express an opinion on the issue or issues affected by the new evidence and to furnish the court of appeal with the reasons for such an opinion, including his comments on the demeanour of the witnesses (*S v Tsawane & another* 1989 (1) SA 268 (A) 273G–J).

Section 316(5)*(c)*(ii) compels a court that grants an application for further evidence to record its findings or views about that evidence. The court must specifically record its findings regarding the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness. This arrangement contributes to the sound administration of justice because the trial judge's views on the quality of the evidence could be invaluable to a court of appeal.

When a court of appeal decides that an appellant must be allowed to present the evidence that he seeks to introduce, the court has to make yet another decision: should this evidence be admitted on appeal in the form of affidavits already before that court, or should the matter be remitted to the trial court for that purpose? Remittal to the trial court will have the obvious disadvantage of additional delay in the finalisation of the case."

[6] In this Court some letters and correspondence are attached to counsel for the State's heads of argument. A summary of the contents of this correspondence is set out in paras 70-76 of the majority judgment and posit that the delay in prosecuting the appeal is not attributable to the appellant. It is not for the appellant to simply refer to correspondence without serving and filing an affidavit explaining the delay which he believes has an impact on his fair trial rights. In my view, it is even more problematic for a court to rely on such correspondence, as providing a

[2] Jutastat e-publications, RS 70, 2023 ch31-p17-18.

basis for the conclusion that the accused's fair trial rights had been infringed, and consequently setting aside the conviction and sentence without a recordal of the court's findings concerning the cogency of such further evidence as envisaged in s 316(5)*(c)* of the CPA.

[7] In *S v Jaipal,*[3] underscoring the extent of the principle of fairness, the Constitutional Court said:

> "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 instill 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."

See also *Attorney-General, Eastern Cape v D*[4] where Leach J said:

> "..(I)t is in my view a misconception that the fundamental right to a fair trial focuses exclusively on the rights and privileges of the accused as those rights must be interpreted and given effect to in the context of the rights and interests of the law-abiding persons who make up the bulk of society and, in particular, the victims of the crime."

Also compellingly persuasive are the following remarks by the Full Bench in *S v Taeke*[5]: "(I)nasmuch as the interest of society are not served by subjecting an appellant or accused to an unfair trial or an unfair appeal process, they are also not served by an appellant or accused being wrongly discharged on the basis of the record of proceedings being unavailable, due to the failure on the part of some of the role players to take reasonable steps towards reconstruction of the record."

Notwithstanding the above, in order to bring this matter to a close, I would also, like the trial court, accept that the appeal is properly before us for consideration.

[8] The trial court reasoned that the application for leave had no merit and dismissed it. The appellant successfully petitioned the Supreme Court of Appeal for leave to appeal against his conviction and sentence which leave was granted on 19 November 2019 to the Full Court of this Division.

[9] The striking feature of the appeal is that the record is incomplete. It is clear from the written notes provided by the trial court that a running record had been kept through-out the trial. In

[3] 2005 (1) SACR 215 (CC) at para 29.
[4] 1997 (1) SACR 473 (E) 476B-C.
[5] *2022* (1) SACR 436 (GP) para 27.

the judgment appealed against the trial court quoted various excerpts from the transcribed record. What is bizarre is that none of the parties is in a position to account for the transcribed record, which had been in the hands of various counsel that represented the parties in the trial court. The record had simply vanished in respect of a matter which, accepting counsel' submissions, had always been active.

[10] On 25 October 2021 the Full Court directed that the record be reconstructed which process retired Judge President Kgomo attended to on 14 March 2022 with the assistance of the appellant, his representative from Legal Aid South Africa, Mr Steynberg and State's representatives, Mr De Nysschen and Mr Hollander. During the reconstruction proceedings the trial court recorded the following concerning his hand-written notes:

> "The notes are exceedingly cryptic and hardly any full sentences.
>
> Due to the effluxion of time and faded memory, I am unable to make any complete sense and join the dots from the cryptic notes.
>
> The said notes are partly recorded in English and partly in Afrikaans. My recollection is that almost all witnesses testified in Afrikaans. This was confirmed by counsel on 14 March 2022 during the reconstruction process. This means that I translated portions of the evidence into English as the witnesses testified and the trial went along.
>
> My typed notes comprise only 21 pages, which is the best indication of how cryptic my notes are. . .
>
> …The point made is that the disparity between the number of pages of my cryptic notes and transcribed record of evidence is stark.
>
> By virtue thereof that a running record was provided there was no need to rely on my handwritten notes as my judgment reflects quotations from several pages of the transcribed record.
>
> In the circumstances my considered view is that my handwritten notes are too unreliable to rely on."

[11] The recorded discussions during the reconstruction proceedings provide useful guidance on the status of the record before us. What follows is the summary of the deliberations:

> "MR DE NYSSCHEN: I am of the view that the only way to prosecute or adjudicate this appeal before the full bench, is if the applicant or appellant accepts Judge's summary of the evidence in the judgment…not the findings…We can rely on that summary by Judge as the basis for evidence

adduced by the state, evidence adduced by the defence and if we do that , then this matter is arguable, together with the exhibits that we need to have.'[6]

"MR DE NYSSCHEN: But the evidence of these witnesses [the evidence of witnesses whose summary appeared in the judgment of the court a quo] basically just from the outline, if I could say that, greatly circumstantial, but that evidence together with the pointing out or pointing out *cum* confession by this accused, that gives the full picture.

Now we have documents that De Waal testified about [in a trial-within-a-trial]. It was already disputed, there was a trial-within-a-trial and the Court made a finding. *Nothing more can be said from any record than that that was summarised by you, judge, and as a guarantee of correctness, we have the document [exhibits] and the type version of De Waal, together with the version of Lourens'.*[7] (My emphasis)

'MR STEYNBERG: Thank you, judge for the opportunity to take instructions from Mr Robertson. What I can place on record is the summary of what the witness testified, he is satisfied that the summary thereof is correct, that that was what the witnesses testified as contained in the judgment . . .

. . .The only thing that he is not satisfied with, which I want to place on record, he is saying there were much more evidence (sic) presented than what is contained in the notes, but what we have here is what was testified.

So we can also place on record that what judge said in the judgment on the sentence with regard to his personal circumstances …that is also a true reflection.[8]

"MR DE NYSSCHEN: Yes, I appreciate the effort done by my colleague from Legal Aid, now we have a basis, we have a record and the matter can be argued. If everything is taken together, Volumes 1 and 2 as well as the summary, or not the summary the reconstruction by Judge, then we have more than enough to argue the matter.'[9]

[12] Discernible from the above exchange and on the transcribed record of the reconstruction phase is that the appellant and the State had agreed that the following documents constituted the record of appeal: (a) the summary of the evidence by the trial court; (b) all the exhibits

[6] At page 36 of vol 3 of the record.
[7] Page 40 of Vol 3 of the record.
[8] Page 44-47 of Vol 3 of the record.
[9] Page 48 of Vol 3 of the record.

which were handed in evidence during the trial; and the (c) excerpts of the transcribed record of the proceeding quoted in the trial court's judgment.

[13] On 27 February 2023 the appeal was argued before us. The documents referred to in the preceding paragraph constituted the entire record including the typed (handwritten notes) by the trial court, the judgment on the merits, the sentence, leave to appeal and the transcribed record of the reconstruction process. At that stage the appellant argued that the record was insufficient for a proper appraisal of the appeal. This much was conceded by the State. Having heard argument, we reserved judgment.

[14] In the course of preparing the judgment, the office of the registrar brought it to our attention that some of the records of the proceedings had been located and were dispatched for urgent transcription. On 22 March 2023 the parties were notified that the judgment would be held in abeyance in order to afford them the opportunity to peruse the transcribed record and to assess whether it would be necessary for the appeal to be reargued on the record that would have been made available. With the record having been availed the parties agreed on 12 May 2023 that the appeal be reargued. The appeal was reheard on 31 July 2023. Both parties persisted in their submission that the record was inadequate for the proper appraisal of the appeal.

[15] An accused person has a right to a fair trial which includes a right of appeal to, or review by, a higher court.[10] The failure of the State to furnish an adequate record of the trial proceedings where the evidence cannot be reconstructed has the effect of rendering the fair trial rights of an accused nugatory.[11] In *S v Joubert*[12] the Appellate Division endorsed the following view expressed in *S v Marais*[13]

> "If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice."

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[10] Section 35(3)(o) of the Constitution of the Republic of South Africa, 1996.
[11] *S v Phakane* 2018 (1) SACR 300 (CC) para 38.
[12] 1991 (1) SA 119 (A).
[13] 1966 (2) SA 514 (T) at 517A-B.

[16] Central to this appeal is the question whether the record, in its present form, is sufficient for the proper appraisal of the appeal. As the Constitutional Court observed in *S v Schoombee and Another*[14] it does not follow that the record should in all instances be complete or be a perfect recordal of everything that was said at the trial. All that is required is for it to be adequate. In *Schoombee*[15] the Court held:

> "In *Chabedi* the SCA, though dealing there with an incomplete record, explained that a defective record need not be perfect. It need only be adequate:
>
> '(T)he 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*. . . . 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.'
>
> Where adjudication of an appeal on an imperfect record will not prejudice the appellants, their convictions need not be set aside solely on the basis of an error or omission in the record or an improper reconstruction process. This principle is practical and sensible and just."

[17] I agree with the majority judgment that the consideration of the question whether the record is adequate for the proper appraisal of the appeal ought to be determined on casuistic basis. The record before us is incomplete and certainly imperfect. However, the answer to the question whether the record is adequate or otherwise, for purposes of consideration of the appeal, lies inter alia on the nature of the issues to be decided on appeal. In conformity with the principle laid down in *Schoombee* and *Chabedi*[16] that question cannot be decided in vacuum. The appellant did not file a Notice of Appeal, following the granting of leave by the SCA, which would have served as a guidance on issues arising for consideration. In what appears to be an application for leave to appeal directed at the trial court, the appellant's grounds of appeal on the conviction were twofold. First, he contended that the trial court erred in finding that the State proved its case beyond reasonable doubt and that his version could not reasonably possibly be true. Secondly, he argued that the State case was grounded on the evidence of untruthful witnesses "ongeloofwaardige getuies onder eed". His grounds of appeal on the sentence were threefold: First, he argued that the trial court erred by imposing a severe

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[14] 2017 (2) SACR 1 (CC) para 28; (2017 (5) BCLR 572; [2016] ZACC 50).
[15] *Ibid* paras 28-29.
[16] *S v Chabedi* 2005 (1) SACR 415 (SCA) para 5.

sentence of life imprisonment which was inappropriate and excessive. Secondly, he contended that the court erred by placing too much emphasis on the seriousness of the offence and the interest of the society but downplayed his personal circumstances. Lastly, that the trial court erred in not considering a lighter punishment other than life imprisonment.

[18] What professed to be the appellant's grounds of appeal were also, to a limited extent, traversed in his application for condonation of the late filing of his leave to appeal which served before the trial court. A reproduction of the relevant parts is necessary and are couched in these terms:

> "APPLICATION FOR CONDONATION IN TERMS OF SECTION ……, ACT 51 / 1977: REGISTRATION NO. 200600121: NAME OF INMATE: GEORGE ROBERTSON
>
> 5. State whether you appeal against sentence and conviction or one only?
>
> Condonation:
>
> I was found guilty because of the assumptions of the witnesses only, and not even one witness had testified about the incident and had only testified about things they had heard. There were also highly contradictions amongst them about the statements they had made and did not testify the same they had said in [their] statements; and that the Judge was aware of it and still did not argue with that and just proceeded. I had made a confession the day I was arrested because the cops had made a deal with me; and said that if I made this confession it will help me to get a lighter sentence and that they will release my mom because she was also arrested with me for the same charges; and it was later withdrawn against her and I did not agree with that confession I had made. But at the trial it was handed in for evidence and the person I had mention who was with me when the incident took place in that confession was acquitted and the person who was not mentioned was convicted and sentenced to 18 months with me and not the one whom I had mentioned. There was only circumstantial evidence and nothing had led to me without that confession I had made and I did not agree with it.
>
> Sentence:
>
> The Judge was also too heavy to give this sentence of Life +10 years and I'm a first offender and had two (2) kids who without a father and the mothers of them are unemployed, and also my mom is becoming old and she's also unemployed and there's no one to look after her and that I feel that the sentence was too harsh and the Judge did not take my status into consideration when he had sentenced me.'

[19] The grounds of appeal are bad if, inter alia, they are so widely expressed that, they leave the appellant free to canvass every finding of fact and every ruling of law made by the trial court,

or if they specify the finding of fact or ruling of law appealed against so vaguely as to be of no value either to the court or to the respondent.[17] Apparent from the preceding paragraphs the grounds of appeal appear to have been settled by the appellant himself. They are inelegantly phrased in general terms. There is no direct or specific attack on the trial court's factual and credibility findings. This in itself presents considerable difficulties in distilling the material issues arising for determination. This also appears to have been an issue which the trial court had to grapple with when considering the appellant's application for leave to appeal. This is so because in the trial court's judgment refusing leave to appeal it said:

> "It appears from the correspondence that the applicant claims that the record could not be transcribed. However, this is not correct in my judgment: Eg, at para 20, para 38 ([there is] reference to pp 213-219), para 39 (record pp 246 and 247)...*Nothing is stated as regards what material evidence that has not been dealt with in the judgment is missing or what prejudice has been suffered*." (My emphasis)

[20] It did not end there. During the reconstruction process the trial court enquired:

> "Court: Mr Steynberg, you want to consider and take further instructions? I know that on the leave to appeal somewhere I state that from what was before me, the accused has not stated what material portions of the record, that has gone missing…
>
> He has not said for instance so and so and so's evidence is missing and if it is missing, what is material about that…"

[21] An imperfect record such as the present would, in my view, require piecing the evidence together and all available material. Having done so, to carefully consider the issues arising for consideration and assess whether the nature of the defect would prejudice an accused in the event the appeal is evaluated on the basis of the record in question. We have not received any assistance from the appellant and his counsel who argued in general terms that the record is incomplete for the proper disposal of the appeal; that the appellant's constitutional right to an appeal has been frustrated and that he is entitled to have his conviction and sentence set aside on appeal. Insofar as the State conceded that the record is insufficient, the trite principle is that the courts are not bound by legal concessions wrongly made.[18] As I shall show, having regard to the general issues raised by the appellant in his application for leave to appeal in the trial court, I am of the view that this Court is in a position to fairly assess the appeal on the record in its current imperfect form.

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[17] *S v Van Heerden* 2010 (1) SACR 539 (ECP) para 4; *Songono v Minister of Law and Order* 1996 (4) SA 384 (E).
[18] *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) ([2017] ZACC 5) para 34.

[22] A perusal of the trial court's handwritten notes suggest that at least 26 witnesses testified during the trial. On the record, that had been made available during May 2023, about 13 witnesses' evidence was transcribed. More importantly, the trial court's judgment largely pivots on the evidence of at least 9 of these 13 witnesses whose evidence forms part of the record. To this must be added that the sentencing phase was fully transcribed. It is so that the evidence of the appellant and his co-accused in the main trial could not be retrieved. This ought not to be an impediment in the consideration of the appeal. I say this because the trial court's finding of guilt, in its considered judgment, was not based on the appellant's evidence in the main trial but on the available circumstantial evidence presented by the State and the evidence presented during the trial-within-a-trial with regard to the appellants' pointings-out-cum-confession. The appellant's evidence during this compartmentalised hearing was fully transcribed. On the trial court's cryptic typed notes, during the main trial, the appellant confirmed what he had already testified to during the trial-within-a-trial. In my view, insofar as the record before us is imperfect, it can hardly be argued that consideration of the appeal would yield to a total disregard of the evidence presented by the appellant in the main trial, when it had little bearing on his conviction. Regard being had to what was agreed to during the reconstruction phase, which bears repeating: "If everything is taken together, Volumes 1 and 2 as well as the summary, or not the summary the reconstruction by Judge, then we have more than enough to argue the matter", the sudden about turn, when the record has been amplified by an additional transcript of the proceeding, albeit incomplete, is incredible.

[23] It bears emphasis that during the reconstruction phase both parties agreed that the summary of the evidence by the trial court was a true reflection of what the various witnesses testified to. The trial commenced on 13 September 2005. The plea proceedings forms part of the record. What follows is evidence that can be distilled from the transcribed record before us including the summary provided by the trial court in its judgment.

[24] Ms Betty Van Wyk is the appellant's co-accused 2's girlfriend. She completed leading her evidence but was later recalled. Her evidence, pursuant to being recalled, is incomplete as there had been a mechanical break-down in the recording. In essence, she testified that two years prior to the deceased's murder, the appellant in the presence of Ms Van Wyk and accused 2 expressed a wish to find people who could murder his father. The appellant went on to state that he would execute his plan because if he were to find accomplices then the community would instantly discover who had slain his father.

[25] Mr Eugene Limburgh's evidence is on record. He was a reaction officer in the employ of Echotech Security. On 22 July 2004, the night the deceased was murdered at his factory (Sutures Manufacturing, Kimberley), Ms Mercia Jones, a control room/radio operator of Echotech, alerted him of an alarm that had gone off at Sutures approximately before 20h00. Mr Limburgh drove to the scene where he found the main gate open but did not notice anything untoward. He reported back to Ms Jones. Ms Jones, whose evidence is on record, confirmed Mr Limburgh's testimony and said that the alarm went off at 19h25 as shown on a print-out of an 'Event-log query on site Sutures Manufacturing' which was handed in evidence and forms part of the record.

[26] Mr Gregory Krull, a production manager at Sutures, deactivated (disarmed) the alarm at the office on the morning of 23 July 2004, when reporting for duty, because the alarm went off. He noticed that the safe door, with its keys hanging on, was slightly open. Mr Krull and other workers discovered the deceased body wearing the same clothing he wore the previous day. The police were summoned. Mr Krull's evidence forms part of the record.

[27] Mr John Jenkins's evidence could not be retrieved. However, on the summary of evidence, he knocked off duty at Spur Restaurant after 24h00 on the morning of 23 July 2004 accompanied by his co-worker Ms Mercia Miller, whose evidence forms part of the record. They alighted from a vehicle next to Roodepan Caltex Garage. Jenkins escorted Ms Miller to her home in Eagle Street. Thus, Ms Miller did not see the appellant and accused 2. Later, Mr Jenkins saw the appellant who was seated in the Kombi (behind the steering wheel) and accused 2 standing next to a public phone but later boarded the same Kombi. The trio knew each other very well and visibility was not the issue. Jenkins greeted them and went his way. He identified the Kombi on the photos 1 and 2 of exhibit 2. He also saw it drive to Ms Moira McGulwa residence, not far from the garage.

[28] Ms McGulwa's evidence was not transcribed but forms part of the summary of the evidence recorded by the trial court. Ms McGulwa testified that between 02h00 and 03h00 on 23 July 2004 one Richard knocked at her door looking for her husband. She did not wake her husband but peeped through a window and saw the appellant and accused 2, both whom she knew very well, standing next to the deceased's kombi, which she also knew very well because her husband, who is a mechanic, once repaired the Kombi and the deceased used to collect some of his workers next to Ms McGulwa's residence. The appellant confirmed, during the trial-

within-a-trial, having been at Ms McGulwa's home, albeit he intimated that it was around 20h00 on 22 July 2004 not in the early hours of 23 July 2004.

[29] Further on the whereabouts of the appellant and his co-accused on the night and the morning on which the deceased was murdered the trial court relied on the evidence of Ms Frieslaar, the appellant's ex-girlfriend. Her evidence forms part of the record before us. She testified that on 23 July 2004 at about 02h00 her cousin Ms Victoria De Klerk informed her that the appellant wanted to see her outside. She refused because she had a month-old baby with the appellant and had terminated her relationship with him. The appellant called her from a public phone and asked to meet her outside the house. She refused. She overheard a vehicle hooting outside and some shouting. It drove off. She received another call from the same public phone. Recognizing the number, she did not answer the call.

[30] Ms Victoria De Klerk's evidence could not be retrieved but was summarized by the trial court. She confirmed that someone wanted to see Ms Frieslaar around 02h00 in the early hours of the morning of 23 July 2004. She saw two people she could not identify and they drove a two-colored kombi. She heard Ms Frieslaar uttering the words "are you mad" to the person with whom Ms Frieslaar spoke to on her phone. She also heard Frieslaar saying it was George [the appellant].

[31] Captain Louwrens discovered that the telephone number that Ms Frieslaar scrolled from her cellphone corresponded with the number of the telephone booth that Jenkins pointed to him at the Caltex Garage Roodepan. The call was received by Frieslaar at 02H37.

[32] Inspector Kalagadi Piet Mangope's evidence which the trial court summarised was fully transcribed. He was not cross-examined. At approximately 04h00 in the early hours of 23 July 2004 he and Constable Jenine Topken noticed a fire near Midlands road in the vicinity of the railway tracks and went to investigate. He found a completely burnt-out kombi "wat klaar heeltemal gebrand het" and thus unsalvageable.

[33] A report was made in the Diamond Fields Advertiser (DFA), a local newspaper, concerning the deceased death. Mr Jenkins sought information from Ms McGulwa because he had seen the Kombi at her home. He also reported to Capt Louwrens who was the contact person according to the report. Capt Louwrens, on the summary of evidence in the judgment, confirmed that Mr Jenkins provided him with information on 28 July 2004. In that way, the appellant and accused 2 were apprehended.

[34] Insp Piet Hugo's evidence was also fully transcribed. He accompanied Capt Louwrens to the appellant's residence. He testified that Capt Louwrens explained to the appellant his constitutional rights when he effected his arrest. W/O Hugo says he took the appellant to the cells where he also explained to him his rights. He also furnished the appellant with a copy of a form titled "NOTICE OF RIGHTS IN TERMS OF THE CONSTITUTION." In addition, he was resolute that he explained to him the contents of the notice in Afrikaans. More importantly, he explained, inter alia, that he had a right to consult with an attorney. If he was unable to afford one, he had a right to make an application for legal Aid and would be provided with a legal representative at the state expense; he had a right to contact his family and to remain silent. He enquired from the appellant if he understood these rights and he replied positively and signed the document in question.

[35] The appellant made some pointings-out and a confession to Supt De Waal. During the trial his counsel had objected to the admission of the pointings-out-cum-confession because the appellant alleged that the investigating officer, Capt Louwrens, had prior to the pointings-out-cum-confession, unduly influenced him by making a promise to release the appellant's mother, who had been arrested on the same charges, in the event the appellant cooperated with the investigation. This resulted in a trial-within-a-trial being held to determine the admissibility of the pointings-out-cum-confession. The evidence of Supt De Waal during the trial-within-a-trial could not be retrieved. However, the evidence of Magistrate Padayachee, who confirmed the statement made to Supt De Waal by the appellant, which encapsulated the confession in terms of s 217(1)(a) of the CPA, and that of the appellant in the trial-within-a-trial was retrieved and is fully transcribed.

[36] The full written annotations made by Supt De Waal in respect of the pointings-out-cum-confession forms part of the record. These were recorded in part in the trial court's judgment as follows:

> "14. Accused 1 [the appellant] then proceeded to point out the scene of the murder and further explained that: The deceased was his biological father. He was familiar with the surroundings of the scene of the murder (the deceased's business called "Satures Manufacturing – Kimberley"). He says on the late afternoon of Thursday the 22nd July 2004 he was in the company of his friend Greg (accused 3). He persuaded an initially reluctant accused 3 to assist him to murder his father after he told accused 3 "oor my probleem".

The two of them waited to ambush the deceased when he walked from the factory to his residence. When dusk was setting in without the deceased making an appearance they went within close proximity of the factory and continued the observation. They noticed that the residence lights were on and soon thereafter saw the deceased leaving the residence for the factory. When the deceased eventually left the factory:

> "Toe storm Greg hom… Toe hardloop ek om na die agterkant van die fabriek om te kyk of daar nie mense uitkom nie. Met die tyd toe ek weer omkom toe sien ek hy lê plat op die grond. Toe is Greg besig om sy hande vas te maak. Met daardie tyd toe kom ek ook om toe trek ek Greg van hom af. Toe vat ek die sleutels by my pa. Toe gaan ek om na die ander fabriek toe.
>
> Ek het oopgesluit, toe gaan die alarm af. Toe gaan ek in om die kluis oop te maak. Nadat ek die kluis oopgemaak het, toe raak ek bang vir die alarm, toe draai ek by die deur van die kluis terug. Toe hardloop ek weer om na die woonstel toe, want toe is ek bang die "securities" van die alarm mense gaan oorkom. Toe gaan haal ek die kombi uit die garage uit en met die tyd wat ek die kombi uittrek toe sien ek my pa lê nog altyd. Hy het 'n swart plastiek sak om sy kop gehad toe ry ek met die kombi Roodepan toe. Greg het eerste weggehardloop toe ek na die huis gegaan het. Toe gaan soek ek vir Greg toe kry ek hom hy is by die huis en besig om te was. Na hy klaar gewas het toe gaan ons na 'n vriend van my, Oupa. Toe is hy nie by die huis nie.
>
> Toe sê die vrou hy is in Bloemfontein. Na daai toe loop ons. Toe vra ek vir Greg, wat se plan kan ons maak met die kombi, waar kan ons dit bêre. Toe sê hy ons kan sien oom ek ken hom nie,… in Prieska bel. Ons het met die kombi na 'n telefoon hokkie by die garage in Roodepan gegaan. Dit was buite werking. Na daai toe ry ons na die treinspoor toe. Toe vra ek hom wat se plan ons nou met die kombi kan maak. Hy sê toe hy ken nie. Toe sê ek vir hom die beste plan om net die kombi uit te brand. Toe stem ons saam daaroor. Toe draai ons die "petrolkap" af en steek (dit aan die) brand. Na die kombi gebrand het toe loop ons huistoe."

[37] The majority judgment takes issue that the trial court recorded, in its judgment, that: "He [the appellant] persuaded an initially reluctant accused 3 to assist him to murder his father after he had related his problems to accused 3 whereas in his confession to De Waal the appellant made no mention of having asked accused 3 to assist him to murder the deceased. As appearing in Supt De Waal's annotations, the appellant confessed, inter alia, as follows:

"Hy (accused 3) het nie tevore geken wat is op my "mind" nie. Ek het vir hom laat weet en gesê wat ek wil doen. Na ek klaar vir hom gesê het oor my probleem het ek hom gevra of hy kan saamgaan met my. Hy het eers getwyfel om saam met my te gaan. Agterna toe dwing ek hom om saam met my te gaan."

Apparent from the above notes is that the appellant told accused 3 "what he[appellant] wanted to do". Accused 3 was initially reluctant but the appellant forced him to accompany him. Ex facie his confession, it is axiomatic, that he wanted to murder his father and solicited accused 3's assistance. In my view, the trial court cannot be faulted in having paraphrased the

statement as it did. At the end of the trial-within-a-trial the trial court admitted evidence pertaining to the pointings-out and Supt De Waal's notes as having been made freely and voluntarily without any undue influence and as confirmed before Magistrate Padayachee.

[38] The evidence-in-chief of Dr T Berlin, who conducted a post-mortem on the body of the deceased, was transcribed and forms part of the record and so is his full report which was handed in evidence. The summary of Dr Berlyn's chief autopsy findings is outlined in his report and the trial court's judgment as follows:

'SUMMARY OF CHIEF AUTOPSY FINDINGS

These are 3 factors contributing to the death of this patient:

(1). Asphyxia (due to suffocation/drowning in own blood)

(2). Cerebral oedema with subarachnoid and subdural haemorrhage.

(3). Massive blood loss due to sharp injury of scalp.

All 3 factors, present on their own, could have caused death eventually.
I feel that asphyxia was the primary reason that he died, for the following reasons:

(1). Signs of asphyxia in cerebral cortex and lungs.

(2). Inhaled blood, absent of mouth trauma and presence of head wound at the back of the head probably indicate that respiration was still present when bag was placed over his head (this large volume of blood probably wouldn't have been inhaled without bag over head)

(3). Central cyanosis and protruding tongue: a tentative indication of smothering.

(4). 0,51 blood found in bag. (unlikely to have bled this much after death)

(5). No signs of brainstem herniation.

Also noted:

(1). Multiple defence – type injuries on both forearms (caused by a blunt object).

(2). Multiple sharp injuries to back of head. (caused by a sharp object eg. panga)

(3). Blunt trauma to hands (possibly sustained trying to protect head)'

[39] Due to some mechanical break-down, Dr Berlyn's cross-examination could not be retrieved. As I see it, nothing could be raised as controversial in respect of the evidence of an expert called

upon to testify on the outcome of the post-mortem that he performed, more so, by the appellant who exculpated himself from the murder. I can conceive of no prejudice on the non-retrievability of Dr Berlyn's cross-examination. Neither could the appellant point to any such prejudice.

[40] The trial court was satisfied that the witnesses whose evidence is sketched in the preceding paragraphs were honest and credible. It was also satisfied that they spoke the truth. The established principles which ought to guide an appellate court in an appeal purely upon fact were laid down in detail in *R v Dhlumayo and Another.* [19] It was there said, inter alia, that the trial judge has advantages which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong. No submissions were made to us on how the witnesses had been untruthful in their account and on how the trial court misdirected itself in assessing their credibility.

[41] The trial court was alive that there was no direct evidence that the appellant murdered the deceased and recreated the scene in its judgment which bears repeating in full:

> "[49]. . . (T)he deceased locked his factory after 19h00 and switched on the security alarm as he closed the door behind him. He was attacked by accused 1 [the appellant] and an accomplice or accomplices who inflicted the injuries reflected in the post-mortem report and Dr Berlyn's evidence. He had keys of the factory and the safe with him. The robbers robbed him of these keys but when they entered the factory the alarm was triggered at 19h26 as shown by the Echotech Electronics security computer print-out handed in by consent and the evidence of Ms MH Jones who operated the operations room on the night in question. The robbers fled empty handed because they feared being caught.
>
> [50] Certainly when Echotech Electronics Security officer, Mr Eugene Limburgh, arrived at the factory the motor gate, which had been locked earlier was open and the criminals were gone. Mr Limburg, who investigated the burglary, only checked the building where the alarm was installed, but he missed discovering the dying deceased at the adjacent building. Limburgh reacted to the triggered alarm before 20h00 on the evening of the 22nd July 2004.
>
> [51] There is no doubt on an overview of all the facts that the pointings-out and annotations thereto are consistent with the objective facts which were separately and independently

[19] 1948 (2) SA 677 (A) at 705 – 706.

established. These factors are strong pointers to the fact that the statement and the pointings-out made by accused 1 to Supt De Waal evidences the truth and are therefore some guarantee or safeguards against a wrong conviction."

[42] On the record in its present form there is overwhelming circumstantial evidence that the appellant had been in possession of the deceased vehicle few hours prior to it being found completely burnt-out. Much was made that the evidence pertaining to the pointings-out-cum-confession could not be retrieved and thus the conviction falls to be set aside. In my view the argument is unpersuasive. As already alluded to, the typed and handwritten annotations by Supt De Waal forms part of the record. The trial court made this crucial recordal in its judgment which is also evident on the trial-within-a-trial record before us:

"It was specifically recorded that neither Capt Louwrens and Supt De Waal or any police officer dictated to accused 1 what to point out or say. His counsel stated that accused 1 fabricated the pointings-out or the annotations which accompanied them. It was intimated that nothing therein was the truth. It was further stated that accused 1 was not threatened or assaulted or otherwise forced to point out certain things. Mr Jooste also stated that the rights of accused 1 were not explained to him before he embarked on pointings-out trip."

[43] The pointings-out-cum-confession which the appellant made, as the trial court found, is consistent with the evidence before us. Few instances in Supt De Waal's annotation regarding the appellant's confession merits separate attention: It was noted that he said:

"Toe storm Greg hom… Toe hardloop ek om na die agterkant van die fabriek om te kyk of daar nie mense uitkom nie. Met die tyd toe ek weer omkom toe sien ek hy lê plat op die grond. Toe is Greg besig om sy hande vas te maak. Met daardie tyd toe kom ek ook om toe trek ek Greg van hom af. Toe vat ek die sleutels by my pa. Toe gaan ek om na die ander fabriek toe. Ek het oopgesluit, toe gaan die alarm af."

True to this, the alarm was triggered at the factory on 22 July 2004 as confirmed independently by Mr Limburg and Ms Jones. The appellant went on to say:

"Toe gaan ek in om die kluis oop te maak. Nadat ek die kluis oopgemaak het, toe raak ek bang vir die alarm, toe draai ek by die deur van die kluis terug."

Mr Krull found the safe half open on the morning the deceased body was found. It cannot be a coincidence that the evidence by Krull accords with the appellant's confession that he opened the safe. The appellant further said:

> "Toe hardloop ek weer om na die woonstel toe, want toe is ek bang die "securities" van die alarm mense gaan oorkom. Toe gaan haal ek die kombi uit die garage uit en met die tyd wat ek die kombi uittrek toe sien ek my pa lê nog altyd. Hy het 'n swart plastiek sak om sy kop gehad toe ry ek met die kombi Roodepan toe."

As reflected on the summary of the evidence the appellant was seen behind the steering wheel of the deceased's Kombi on the night and morning of the deceased's death. The appellant was seen in the early hours of the morning by Mr Jenkins at Caltex Garage in Roodepan. He was also seen by Ms McGulwa at her house in the early hours with the deceased Kombi. He had also pestered his ex-girlfriend in the early hours of that morning driving the same kombi. He was unable to say during the trial-within-a- trial why several witnesses would testify that they saw him at different places in the deceased Kombi on that fateful night or morning. He added to his confession:

> "Ons het met die kombi na 'n telefoon hokkie by die garage in Roodepan gegaan. Dit was buite werking. Na daai toe ry ons na die treinspoor toe. Toe vra ek hom wat se plan ons nou met die kombi kan maak. Hy sê toe hy ken nie. Toe sê ek vir hom die beste plan om net die kombi uit te brand. Toe stem ons saam daaroor. Toe draai ons die "petrolkap" af en steek (dit aan die) brand. Na die kombi gebrand het toe loop ons huistoe."

In the early hours of 23 July 2004, after the appellant had been witnessed driving the deceased's Kombi, Insp Mangope observed a burnt-out Kombi which belonged to the deceased near some railway lines. The appellant confirmed that the location was less than a kilometre from the farm where he lived.

[44] Too much detail is set out in Supt De Waal's statement of pointings-out-cum-confession which accords with independent evidence of other State witnesses. This belies any suggestion that the confession was a fabrication. A reading of the statement shows that the appellant attempted to lessen his degree of participation. The shifting of blame from one co-accused to another to avoid conviction is not uncommon in our criminal justice system.[20] The appellant took no issue in doing the pointings out to Supt De Waal without legal representation and it is recorded that he did not require that form of assistance because he "wanted to give his full cooperation". He only recanted his confession, as a figment of his imagination, before the magistrate after he had consulted with his attorney.

[45] The appellant's contention before the trial court, that Capt Louwrens wielded undue influence upon him to do the pointings-out-cum-confession in that he promised him a lighter punishment for the offences and to release his mother from detention, cannot be sustained. Firstly, on his

[20] *S v Litako and Others* 2014 (2) SACR 431 (SCA) para 65.

own version, he had not enquired from his mother if she had committed the offence. Secondly, he testified that he thought that his mother was not guilty. If that is so, it begs the question why he would assume guilt through the confession that he made. More significantly, why would he wish to have the benefit of lighter punishment from the crime he did not commit.

[46] There were sufficient safeguards that the appellant had been made aware of his constitutional rights including the right not to incriminate himself. Insp Piet Hugo was present when the appellant was arrested. He was steadfast that Capt Louwrens explained the appellant's rights to him in Hugo's presence. Insp Hugo also did exactly that. If this was inadequate then the annotations by Supt De Waal, which were confirmed by the appellant's counsel during the trial to be correct, should dispel any notion that the appellant had not been made unaware of his rights.

[47] The argument by the appellant's counsel that the charge sheet did not specify that the appellant acted in common purpose with others is unsustainable and must falter. In *S v Msimango*[21], referred to in para 87 of the majority judgment, the regional magistrate had relied on the doctrine of common purpose, even though it was never either averred in the charge-sheet or proved in evidence. The SCA held that it was impermissible for the regional magistrate to have invoked the principle of common purpose as a legal basis to convict the appellant on count 3, as this never formed part of the State's case.

[48] The facts in *Msimango* are entirely different from those which apply to this case. Here, the appellant and his two co-accused faced the same charges. At the commencement of the trial the court pointed out to counsel for the State that the charge-sheet referred to one accused. Counsel for the State apologised that an amended charge sheet had not been provided to the Court which he read into record. It unquestionably referred to "the accused persons" instead of one accused (deurdat die beskuldigdes op of omtrent die 22ste Julie 2004….wederregtelik en opsetlik vir Werner Rolf Heinze gedood het). Similarly, Count 2 refers to the "accused persons". Discernible from the charge sheet is that there had been a possible reliance on the doctrine of common purpose. There is nothing on the record which shows that the three accused, who all enjoyed legal representation, requested the State to furnish them with further particulars. They also did not complain that none were provided upon request or that they did not understands what the actual charge was. It is less than frank for the appellant to now

[21] 2018 (1) SACR 276 (SCA).

claim, for the very first time on appeal, that he had not been charged of acting in common purpose with others.

[49] It is so that in his pointing-out-cum-confession the appellant implicated accused 3. The reason why the trial court had not applied the doctrine of common purpose, when it convicted the appellant of murder, is not far to seek. No confession made by any person shall be admissible as evidence against another person except the maker thereof.[22] In *S v Litako & others*[23] the SCA concluded:

> ". . . (T)hat our system of criminal justice, underpinned by constitutional values and principles which have, as their objective, a fair trial for accused persons, demands that we hold, s 3 of the Act notwithstanding, that the extra-curial admission of one accused does not constitute evidence against a co-accused and is therefore not admissible against such co-accused."

[50] The trial court endeavored to show, during the proceedings (as evident from the excerpts of the transcribed record detailed in the judgment), that the pointings-out-cum-confession constituted hearsay which ought to be dealt with in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988 (LEAA). The State did not heed the warning but sought to cure the non-compliance through argument. Hearsay not admitted in accordance with the provisions of the LEAA is not evidence at all.[24] The trial court had regard to the dictum in *S v Ndhlovu & others*[25] where it was said that the trial court must be asked timeously to consider and rule on the admissibility of hearsay evidence. This cannot be done for the first time at the end of the trial, nor in argument. Indeed, courts are required to constrain themselves in admitting hearsay evidence that plays a decisive or even a significant part in convicting an accused person.[26]

[51] The trial court was of the view that accused 3 had not been given a fair choice on how to meet the hearsay evidence emanating from the appellant's statement and pointings-out. He had been ambushed which seriously prejudiced him. Once the trial court had excluded the admission of the confession made by the appellant against accused 3, there was insufficient evidence to secure a conviction against accused 3. This much was conceded to by the State during the trial. On these bases, accused 3 was acquitted on both the counts of murder and

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[22] See s 219 of the Criminal Procedure Act 51 of 1977.
[23] 2014 (2) SACR 431 (SCA) para 67.
[24] *S v Ndhlovu & Others* 2002 (2) SACR 325 (SCA) para 14.
[25] *Ibid,* para 18
[26] *S v Ramavhale* 1996 (1) SACR 639 (A), at 649C – D.

robbery. Consequently, there could never have been any conceivable basis upon which the doctrine of common purpose would find application.

[52] In respect of accused 2, the appellant's cousin, the trial court accepted the evidence that two years prior to the deceased's death, he did not make common cause with the appellant to murder the deceased on that occasion when the appellant expressed his wish to eliminate the deceased. The trial court reasoned that there was no evidence that accused 2 knew between 02h00 and 04h00 that the deceased was murdered and robbed of his Kombi. He assisted the appellant, the perpertrator of the murder and robbery, to evade justice. Accused 2 knew that the appellant was not the owner of the vehicle and had no right to destroy it. He was found guilty as an accessory to theft of the vehicle.

[53] It bears emphasis, as stated earlier, that the trial court's judgment has not been subjected to any critical analysis in this appeal on the basis of its findings of fact or as to its exposition and application of the law. Having carefully considered the appellant's generally couched grounds of appeal, I am of the view that there is more than enough evidence to prove beyond a reasonable doubt that the appellant murdered the deceased and robbed him of his vehicle. The trial court's conclusion on the conviction is above reproach. The upshot of this is that the appeal against the conviction must fail.

[54] With regard to the sentence, it was contended for the appellant that the trial court put less emphasis on his personal circumstances and did not hand down a balanced sentence. It was further argued that the trial court erred insofar as it did not find any substantial and compelling circumstances to deviate from the statutory sentence of life imprisonment.

[55] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 ordains the sentence of life imprisonment, absent the appellant's substantial and compelling circumstances, in respect of the count of murder upon which he was convicted. In *S v Malgas*[27] the SCA sounded caution that the statutory prescribed sentences may not be departed from for reasons which do not withstand scrutiny. The established jurisprudence is that sentencing is a matter which falls pre-eminently within the discretion of a trial court. In *S v Pillay*[28] the Court held:

> "As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence:

[27] 2001 (1) SACR 469 (SCA).
[28] 1977 (4) SA 531 (A) 535F-G.

it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence."

[56] The appellant completed Grade 10 at school. He was 24 years old at the sentencing phase but 22 years old at the time of the commission of the offences. He was an unmarried father of two minor children and a first offender. It is trite that in cases of serious crimes the personal circumstances of the offender, recede into the background. [29] Apparent from the summary of the chief autopsy findings, already sketched, the deceased sustained serious multiple injuries at the hands of the appellant and his accomplice. From the photo album compiled by Mr Andre Mark McAnda, the official photographer of the murder scene and related places, the deceased is depicted with a plastic bag tight around his neck. His hands are tight behind his back and so too are his feet tight together. The trial court correctly concluded that this was done to restrict mobility. The multiple defense wounds on the deceased's hands points to the atrocious manner in which the murder was carried out. These are serious aggravating circumstances.

[57] From the judgment refusing leave, the appellant's erstwhile counsel had conceded during the hearing of the application for leave: '(T)hat the murder was planned and heinous and that the applicant [the appellant] had no leg to stand on'. Nothing was placed before this Court which demonstrated that the trial court did not exercise its discretion at all or exercised it improperly or unreasonably in sentencing the appellant as it did. Neither could I find any substantial and compelling circumstances that would have justified a departure from the prescribed statutory sentence. It follows that the appellant's appeal against his sentence must also fail.

[58] **I would, therefore, have dismissed the appeal against the conviction and sentence.**

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Phatshoane DJP

Williams J:

[59] I have read the first judgment in this appeal and agree with the summary of the available evidence which served before the trial court, as contained in paragraphs 24 to 34 thereof. I am

[29] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 58

however of the view that a consideration of the merits of the appeal against the convictions and the sentences imposed would be an infringement of the appellant's rights to a fair trial, which includes a fair appeal, for the following reasons:

59.1 The record of the proceedings in the trial court is inadequate for the proper adjudication of the appeal; and

59.2 The inordinate delay in the hearing of the appeal.

Adequacy of the record

[60] It must be mentioned that amongst the 13 witnesses whose evidence could not be retrieved or reconstructed was that of the appellant and his co-accused who had all testified in their own defence. This in my view creates a major stumbling block in accepting the available record as adequate to adjudicate the appeal properly. It would mean that the appeal be considered solely on the evidence presented by the state (of which the record is also not complete), with a total disregard of the evidence presented by the appellant and his co-accused.

[61] The judgment of the trial court does not assist in filling this vacuum in any meaningful way. The trial court focused mainly on the pointing-out and *"confession"* made by the appellant. The only references to the appellant's (accused 1's) evidence in the main trial which I could find in the judgment are at:

(i) Paragraph 32 thereof, where it is stated that:

Accused 1 also stated in his plea-explanation and evidence that he was with accused 3 when they went shebeen-hopping from around 16H00 on the 22nd July 2004 until after 24h00 on the morning of the 23rd July 2004; nowhere, but nowhere, does he mention the presence of accused 2." ; and

(ii) At paragraph 24 thereof, that

"Accused 1 was asked: "Richard (accused 2) are you not with him most of the time. I understand you were staying at the same place – 'ek en Richard bly op een plek, maar hy is werksaam.' "

[62] Even if one could assume, from the extract of the judgment quoted in paragraph 61(i) above, that the appellant persisted with his version in his plea explanation in the main trial, it does not throw any light at all on his evidence during his cross-examination – which, I would have to assume, would have been thorough given the contradictions between his plea explanation and his statement made during the pointing-out. The evidence of the appellant has not been traversed or assessed in the trial court's judgment and there can therefore be no basis on which to state, with any amount of conviction, that the missing portion of the record does not

contain any evidence which is of material importance to the adjudication of the appeal. I am mindful of what the Supreme Court of Appeal said with regard to defective records in *S v Chabedi* (referred to in paragraph 16 of the first judgment), however in that case the record was defective in that there were many *"inaudibles"* noted in the judgments on conviction and sentence. The SCA held, at paragraph 13 of the judgment, that the consideration of the appeal was not dependent on a consideration of the magistrate's judgment on conviction to assess the evaluation of the evidence, and that the matter could be determined on the evidence as it stood. Each matter should in my view be determined on its own set of circumstances.

[63] I must at this stage mention that I do not agree with my learned colleague that counsel had effectively agreed at the reconstruction stage that the incomplete transcript of the record and the summary of the evidence of the witnesses, as contained in the judgment of the trial court, would be adequate for a proper consideration of the appeal. Mr De Nysschen, who appeared for the State at the reconstruction, contended that there was more than enough material to argue the matter. Mr Steynberg, who represented the appellant, however, specifically addressed the trial judge as follows:

> "MR STEINBERG: I personally think, Judge, due to the time that has passed, nobody can add anything that is currently contained, so it will be for the full court to decide whether . .
> COURT: To decide, ja
> MR STEINBERG: . . . it is sufficient for proper reappraisal of the appeal, but I think what we have is what have and I think on that basis it can be placed or set down for hearing."

[64] I do not think, by any stretch of the imagination, that what was stated by the appellant's legal representative can be construed as an agreement that the (incomplete) record of proceedings was adequate for the proper appraisal of the appeal.

[65] The situation *in casu* differs from that in *S v Schoombee and Another* also referred to in paragraph 16 of the first judgment. In *Schoombee* the recordings of the trial were lost and untraceable. The record of the proceedings was reconstructed on the basis of the trial court's notes. The applicants in that matter chose not to participate in the reconstruction process and proceeded to pursue their appeal against conviction and sentences on the trial court's reconstructed record. After the trial court dismissed their application for leave to appeal, they petitioned the SCA who granted leave to appeal to the full court. The full court adjudicated the

appeal on the trial court's reconstructed record, with no complaint from the applicants. Only when the appeal was dismissed and the SCA refused further leave to appeal, did the applicants approach the Constitutional Court with an application for leave to appeal on the basis that the record was radically defective in certain respects. The Constitutional Court took into account that although the trial court had failed to ensure that the reconstruction process involved both parties, the reconstructed record was detailed and specific, the applicants had reviewed this record, they took advice from counsel and chose to proceed with the appeal, thereby assenting to the substantive recital contained in the reconstructed record. In those circumstances the record was found to be adequate for a just consideration of the issues raised on appeal.

[66] In *S v Phakane* 2018 (1) SACR 300 (CC), the transcript of the evidence heard at the trial did not contain the evidence of the main state witness, a certain Ms Martha Manamela. It was accepted that her evidence could not be reconstructed. Her statement made to the police was available and the trial court had summarised her evidence in its judgment. On appeal to the full court it held that the trial court had not relied solely on the evidence of Ms Manamela to justify its conviction of the applicant of murder, but on the totality of the evidence before the court. As a result it found that the applicant was not prejudiced by the failure to reconstruct the record and that the record was adequate for a meaningful adjudication of the appeal. On appeal to the Constitutional Court, it noted several discrepancies between Ms Manamela's evidence in court (as summarised by the trial court) and the contents of her statement to the police. The trial court's judgment did not deal with these discrepancies with the result that an appeal court could not deal with whether Ms Manamela was confronted with the conflict and whether she was able to provide an explanation and whether such explanation was acceptable. The Constitutional Court held that an appeal court would not be able to properly evaluate the trial court's decision to prefer Ms Manamela's evidence to that of the applicant without knowing this and held at paragraphs 38 to 40 of the judgment that:

> "[38] The failure of the State to furnish an adequate record of the trial proceedings or a record that reflects Ms Manamela's full evidence before the trial court in circumstances in which the missing evidence cannot be reconstructed has the effect of rendering the applicant's right to a fair appeal nugatory or illusory. Even before the advent of our constitutional democracy, the law was that, in such a case, the conviction and sentence or the entire trial proceedings had to be set aside. In S v Joubert the then Appellate Division of the Supreme Court said:

"If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there had not been a failure of justice."

[39] As to when it can be said that an incomplete record will result in the infringement of an accused's right to a fair appeal, in S v Chabedi the Supreme Court of Appeal said:

"[T]he 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.

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."

This passage was quoted with approval by this Court in Schoombee.

[40] In the present case the Full Court did not have before it a record on the basis of which it could fairly assess whether the trial court's conviction of the applicant was correct. The trial record available to the Full Court was simply not adequate for a proper consideration of the applicant's appeal. Therefore, the applicant's right of appeal was frustrated by the fact that material evidence was missing from the record."

[67] I do not consider the absence of a main state witness' evidence to be of any higher importance than that of an accused who chooses to testify in his own defence, in the evaluation of the evidence which served before the trial court.

Delay in the hearing of the appeal

[68] To compound matters even further, this appeal was heard almost 17 years after the appellant was sentenced, through no fault of the appellant. It is common cause between the parties that the appellant filed a handwritten notice of appeal personally 8 days after he was sentenced. Counsel for the State, Mr Hollander, attached to his heads of argument copies of all the notices and correspondence relating to this appeal which he had in his possession. The first notice of appeal filed by the appellant bears the Registrar's stamp, dated 2 May 2006.

[69] It appears from a handwritten application for condonation and leave to appeal, dated 27 October 2006, that the first notice of appeal had gone missing in the Registrar's office and that the court officials directed the appellant to lodge another notice of appeal.

[70] On 30 May 2008 the Registrar wrote a letter to the Mangaung Correctional Services Centre, apparently responding to a letter written on behalf of the appellant and dated 22 May 2008, informing that the court had requested the record to be typed and that a date for hearing will be allocated in due course

[71] On 24 October 2008, Ms Segone from Legal Aid South Africa, wrote a letter to the appellant stating that they were still awaiting a date for hearing of the matter.

[72] On 19 January 2010 the Registrar once more wrote a letter to the appellant, apparently responding to correspondence from the appellant dated 11 January 2010, stating that the contractors were still busy preparing the record.

[73] A similar letter to the above was sent by the Registrar on 25 October 2010 responding to a letter from the Correctional Centre dated 18 October 2010. It also stated that the Registrar would approach the presiding Judge for a date.

[74] On 15 May 2012 the Deputy Information Officer from the Department of Justice, Ms Raswisi, responded to an application for access to information in terms of the Promotion of Access to Information Act, 2000 received from the appellant, confirming receipt of his request for information and detailing the requirements for such access.

[75] On 14 March 2016 the appellant directed a letter to the Registrar of the Supreme Court of Appeal complaining about the delay of the appeal and requesting assistance.

[76] On 16 March 2016 the office of the Public Protector wrote a letter to the appellant acknowledging his complaints relating to the delay of his appeal, dated 14 April 2015 and 4 March 2016 respectively.

[77] The application for leave to appeal was eventually heard on 21 September 2017, 11 years after he had filed his application for leave to appeal. The reconstruction process was

embarked upon some 3½ years later after the SCA granted the appellant leave to appeal and directed that the appeal be heard by the full court

[78] In these circumstances the blame for the delay in the hearing of the appeal cannot be laid at the door of the appellant. No explanation could be given for the delay in the prosecution of this appeal despite the appellant's endeavours over the years to have his appeal heard. The delay is not only regrettable, but for the appellant who has been incarcerated since his arrest during 2004, the inordinate delay in finalising this matter has infringed upon his right under s 35 (3) (d) of the Constitution to have his trial begin and conclude without unreasonable delay.

[79] In S *v Carneiro* 2019(1) SACR 675 (SCA), in a matter where it took a total of 13 years to dispose of an appeal, where the appellant had been out on bail for most of this time, the SCA held at paragraph 12 of the judgment as follows:

> "In my view the inordinate delay may well have vitiated the appellant's right to a fair trial and appeal and rendered it unconstitutional. However in the light of the fact that the state and the appellant did not raise this, but argued solely on the merits of the conviction, it is unnecessary to make a finding on the constitutionality of the process."

[80] *In casu*, the issue of the delay rendering the appellant's right to a fair trial unconstitutional was raised on appeal and must be dealt with. I disagree with my learned colleague that s316 (5) of the CPA is of any relevance *in casu*. S 316 (5) relates to evidence which should have been presented during the trial as is obvious from s 316 (6) which reads as follows:

> "(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question."

The narrative of the appellant's attempts to have his appeal heard, which I may add the parties agree to, does not constitute *"further evidence"* in terms of subsection (5).

The delay in this appeal in my view constitutes a gross violation of the appellant's right to a fair trial and must result in the appellant's conviction and sentence being set aside.

The trial-within-a-trial / Statement made by the appellant

[81] Though I am of the view that the convictions and sentences should to be set aside for the reasons mentioned above, I do need to deal to some extent with the evidence presented in the trial-within-a-trial since Mr Steynberg addressed us, as an alternative argument, on the nature of the statement made by the appellant and because it is obvious from the judgment that the

trial court relied heavily on the pointing-out and *"confession"* in convicting the appellant, specifically in relation to the charge of murder.

[82] A portion of the record of the trial-within-a-trial proceedings forms part of the incomplete record which came to light after our initial hearing of the matter. This portion of the record does not contain Superintendent De Waal's evidence, to whom the appellant had made the pointing-out and accompanying statement. It is also does not contain Captain Louwrens' evidence. He was the investigating officer whom the appellant alleged had induced him to make the pointings-out and the statement with promises to release the appellant's mother from custody. Only Magistrate Padayachee's evidence, to whom the appellant was taken to confirm his statement, and the appellant's evidence in the trial-within-a trial form part of the transcribed record of those proceedings. Counsel had however agreed at the reconstruction that the exhibits handed up during the trial, which included the completed pointing-out form and De Waal's written notes, containing the statement made by the appellant, form part of the record.

[83] From these exhibits, which would have been received in evidence during the testimony of De Waal, the first issue that I have is that paragraph 14 of the trial court's judgment (reproduced in paragraph 36 of the first judgment) does not correctly reflect, in one important respect, what De Waal had noted as the appellant's statement to him. The learned trial judge stated in paragraph 14 of his judgment that *"He (*appellant*) persuaded an initially reluctant accused 3 to assist him to murder his father after he told accused 3 'oor my probleem'. ". . .* De Waal's note in this regard reads as follows: *"Hy (*accused 3*) het nie tevore geken wat is op my "mind" nie. Ek het vir hom laat weet en gesê wat ek wil doen. Na ek klaar vir hom gesê het oor my probleem het ek hom gevra of hy kan saamgaan met my. Hy het eers getwyfel om saam met my te gaan. Agterna toe dwing ek hom om saam met my te gaan."*

[84] Nowhere in the statement taken by De Waal does the appellant mention that he had asked accused 3 to assist him to <u>murder</u> the deceased.

[85] This aspect is important when it comes to a consideration as to whether the appellant had in fact confessed to murder. Nowhere in the statement does the appellant say that he had assaulted the deceased in any way. The closest he got to the deceased was to remove the keys from his pocket. In fact he also stated that he pulled accused 3 from the deceased, which is indicative of a disassociation with the actions of accused 3. Without admitting an intention to

kill the deceased nor the *actus reus*, the statement made by the appellant cannot constitute a confession to murder. Which brings me to the further point argued by Mr Steynberg with regard to common purpose and which appears to have been misunderstood in the first judgment.

[86] The argument by Mr Steynberg was that even if one had to accept, for purposes of argument, the truthfulness of the content of the statement made by the appellant, it cannot support a conviction of murder in the absence of him having been charged with murder based on the doctrine of common purpose – which would impute the conduct of accused 3 (or an accomplice or accomplices as found by the trial court) to the appellant.

[87] I agree with Mr Steynberg in this regard. In *S v Msimango* 2018(1) SACR 276 (SCA), the Supreme Court of Appeal found that where the charge sheet was silent on the possible reliance on the doctrine of common purpose, it was impermissible to invoke common purpose as a legal basis to convict the appellant as it would be contrary to the provisions of s 35(3) (a) of the Constitution which affords an accused person the right to be informed of the charge against him with sufficient detail to answer it.

[88] The only other evidence available to us which could possibly connect the appellant to the murder of the deceased, is that of the state witness Ms Betty Van Wyk who testified about the appellant's expressed wish, two years prior to the murder, to kill the deceased. This incident, so remote in time to the murder of the deceased, in my view does not constitute sufficient circumstantial evidence to dispel any reasonable doubt as to the guilt of the appellant as far as the murder charge is concerned.

In the circumstances I make the following order:

1. The appeal is upheld.

2. The appellant's convictions and sentences are set aside.

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Williams J

Nxumalo J concurs in the judgment of Williams J

APPEARANCES:

FOR THE APPELLANT:	Mr H Steynberg Instructed by Legal Aid South Africa, Northern Cape.
FOR THE RESPONDENT:	Adv Q.H. Hollander Instructed by the Director of Public Prosecutions, Northern Cape.