

S v Dos Santos 2018 (1) SACR 20 (GP)

KEY CONCEPTS	
Trafficking in Persons for Sexual Purposes	Sexual exploitation of child
Court record destroyed	Sentencing in trafficking cases
Appeal without complete record	

Introduction

The appellant, a 28-year-old Mozambican national, was convicted in the regional court on 3 counts of trafficking in persons for sexual purposes and 1 count of living from the earnings of sexual exploitation of a child. Her convictions for the first three counts were taken together for the purposes of sentencing and she was sentenced to life imprisonment. For her conviction on living on the earnings of sexual exploitation of a child, she was sentenced to 12 months' imprisonment. The appellant appealed against the life sentence.

Incomplete court record

Counsel for the appellant submitted in limine that the appeal record was incomplete and that the appeal could not for that reason be heard. The defects in the appeal record were as a result of destruction by a fire of the court building. Not all the documentary evidence, notes of the practitioners and presiding officer and electronic recordings could be recovered. The prosecution, the regional magistrate and the appellant's legal representatives tried to reconstruct the record and have only been successful to an extent. Further reconstruction is not reasonably possible. Parts of the evidence-in-chief of the complainants, their cross-examination and the judgement on conviction remain missing.

The law requires that an appeal record must be adequate for consideration of the appeal. It does not have to be a perfect record of everything said at the trial. In determining whether defects in an appeal record are so serious that a proper consideration of an appeal is not possible, the nature of the defects in the record and what is available will have to be examined. In *S v Schoombee and Another* 2017 (2) SACR 1 (CC) (2017 (5) BCLR 572; [2016] ZACC 50) paras 28 – 30 the court stated:

“It is long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal. An adequate record of trial court proceedings is a key component of this right. When a record is inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside.

If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is part and parcel of the fair trial process. Courts have identified different procedures for a proper reconstruction, but have all stressed the importance of engaging both the accused and the state in the process. Practical methodology has differed. Some courts have required the presiding judicial officer to invite the parties to reconstruct a record in open court. Others have required the clerk of the court to reconstruct a record based on affidavits from parties and witnesses

present at trial and then obtain a confirmatory affidavit from the accused. This would reflect the accused's position on the reconstructed record. In addition, a report from the presiding judicial officer is often required.

The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty. When a trial record is inadequate, both the State and the appellant have a duty to try and reconstruct the record. While the trial court is required to furnish a copy of the record, the appellant or his/her legal representative carries the final responsibility to ensure that the appeal record is in order. At the same time, a reviewing court is obliged to ensure that an accused is guaranteed the right to a fair trial, including an adequate record on appeal, particularly where an irregularity is apparent."

The adequacy of the record for the purposes of this appeal against sentence must be assessed accordingly.

Applicable legislation

The following protocols and legislation are applicable:

- the Palermo Protocol (UN Convention against Transitional Organised Crime) demonstrates the political will of member states to act as part of a global response to the global challenge against cross-border crimes and was signed by South Africa;
- section 70 and 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act); and
- Prevention and Combating of Trafficking in Persons Act 7 of 2013.

The appellant was convicted and sentenced before the Prevention and Combating of Trafficking Act came into effect.

Facts of the case

The regional court magistrate's full judgment on sentence formed part of the record as well as the evidence presented after conviction for the purposes of sentence by both the state and the appellant. This includes a written psycho-social report by a probation officer which tallies with the evidence of the appellant, which forms part of the appeal record. According to the appellant, she met the complainants on the beach near Maputo where they worked as prostitutes. They told her that they wanted to work as prostitutes in South Africa and she agreed to accommodate them in Pretoria. The appellant had a hair salon where she also sold clothing. It is clear that she knew the complainants from Mozambique as she commuted regularly between Pretoria and Mozambique. After a trip to Mozambique, when she was in Pretoria, one of the complainants phoned her and said that they were near Komatipoort. The appellant asked a friend to bring them to Pretoria. They stayed with her in her flat, but the flat was too small so she decided to rent a 3 bedroomed house near to her flat. A brothel was kept at that house.

The appellant's evidence was rejected, but differed only from that of the complainants in respect of the alleged prostitution in Mozambique and their collection at Komatipoort. The balance of the evidence that led to the appellant's conviction (which she did not challenge on appeal) was based on circumstantial evidence. The incomplete record was, therefore,

not so serious that a proper consideration of the appeal was not possible. The aspects of the case relevant to sentence were fully recorded.

The evidence of the complainants was accepted. They met the appellant in Mozambique where she promised them work in her hair salon and an opportunity to study while working there. She arranged for them to come to SA and the appellant herself collected them from Komatipoort. They worked at the hair salon for a few days. They were forced to smoke cannabis and to have sexual intercourse with several men daily. They were not paid for doing so.

The appellant operated the brothel for financial gain. There was no evidence that she was in need and seems to have led an affluent life.

Appeal before High Court

The appellant had also been charged with over 60 counts of rape, but was acquitted of this. Counsel for the appellant challenged the correctness of the sentence for life imprisonment by submitting that the regional magistrate erred by taking into account the commission of the rapes when the appellant had been acquitted of these charges. Counsel for the appellant argued that the rapes should not be taken into account for purposes of sentencing.

The High Court did not agree. The crime of trafficking defined by s70(2) of the Act includes the commission of an act that constitutes the 'supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person.' The regional court took into account the sexual intercourse the complainants were forced to have while in Pretoria and concluded that they had been trafficked for sexual purposes as defined in s70(2)(b) of the Act. The appellant was convicted and sentenced for trafficking of persons for sexual purposes and not for having committed rape.

The appellant committed these crimes for financial gain or pure greed. Appellant was not only instrumental in securing the presence of the complainants in SA but was also responsible for keeping them under threat of prosecution as illegal immigrants. They were vulnerable and exploited by the appellant as they had no permission to be in SA, were of a tender age and were desperate for work and an income. They were forced to perform sexual acts against their will, on some occasions up to 8 times a day on the instructions of the appellant.

As far as the complainants were concerned (and the other females kept by the appellant who did not testify), they were not allowed to leave the house unaccompanied by the appellant. They received little food, no money and very little clothing. Some arrived only with the clothes they were wearing, they were photographed scantily dressed or nude and the photographs were used to advertise them on the Internet. Soon after they started

working as prostitutes, the appellant told them that she had received complaints from clients that they were not performing as expected. She showed them pornographic videos, demonstrated to them by performing sexual intercourse on her boyfriend and threatened them with assault should she receive any further complaints. The appellant carried a whipping chain on her belt which she used to assault the complainants. The complainants were under constant threat, lived in fear and were subjected to treatment described as inhumane.

As far as the appellant is concerned, she is one of eight children of Mozambican nationals who have been residing in South Africa since the early 1990s. She had 3 children, two of whom live in Mozambique with her aunt and the other child lives with its paternal grandmother in Cape Town. There is no evidence that the appellant's personal circumstances constitute a mitigating factor or compelling reason to interfere with the imposed sentence.

Further, the High Court considered the following factors:

- the abuse of the young victims was a result of an elaborate and organised criminal enterprise;
- several persons participated in the facilitation of the crimes;
- the desperate young females in Mozambique were lulled into believing they would enjoy a better life in SA;
- they were easily misled and taken from their homes under false pretences;
- there exists an illicit infrastructure to transport these young females across the border into SA under escort;
- transport of the complainants to and from SA demonstrate involvement of corrupt government officials;
- these circumstances create a climate that lends itself to the commission of the crimes under consideration, and collectively constitute compelling reasons for imposing harsh sentences in appropriate cases.

The High Court was of the opinion that no compelling reasons exist to interfere with the imposed sentence of life imprisonment, and the appeal was dismissed.