CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 154/16

In the matter between:

PHILLIP DANIËL SCHOOMBEE First Applicant

FREDERICK JOHANNES MASSYN Second Applicant

and

THE STATE Respondent

Neutral citation: *Schoombee and Another v The State* [2016] ZACC 50

Coram: Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J

Judgment: The Court

Decided on: 15 December 2016

Summary: lost trial record — improper reconstruction process — right to a fair trial on appeal — adequacy of record

leave to appeal refused — failure to involve accused in reconstruction — duty of State and appellant — record adequate for fair trial and appeal

ORDER

On appeal from the Supreme Court of Appeal (dismissing an application for leave to appeal from the Full Court of the High Court of South Africa, North West Division, Mahikeng):

The application for leave to appeal is dismissed.

JUDGMENT

THE COURT (Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring):

Introduction

[1] This case concerns a lost record of a criminal trial. The applicants, Mr Phillip Daniël Schoombee and Mr Frederick Johannes Massyn, were convicted of murder in the North West High Court, Mahikeng (High Court), on 2 March 2007. They were both sentenced to life imprisonment and are currently serving their sentences. The trial Court (Hendricks J) on 4 August 2011 refused leave to appeal, but on petition the Supreme Court of Appeal (SCA) on 1 March 2012 granted them leave to appeal to the Full Court of the High Court.

[2] When the applicants sought to appeal, they discovered, after much searching, that the record of their trial proceedings had been lost. Instead, the Registrar of the High Court provided them with a "reconstructed" record. This had been prepared by the trial Judge on the basis of the notes he had taken during the proceedings. After some hesitation, the applicants proceeded to appeal on this record. The first applicant,

who at the close of the State's case had changed his plea of not guilty to guilty, appealed only against his life sentence. The second applicant appealed against his convictions of murder and of assault as well as his life sentence. The Full Court dismissed both their appeals on 7 February 2013.[1] The SCA on 17 May 2013 refused further leave to appeal.

[3] Before this Court, the applicants seek direct access to challenge a different aspect of the proceedings. The applicants do not press the challenges to the evidence and sentence they raised before the Full Court. Instead, more radically, they now say the criminal process against them was fundamentally flawed, and the first applicant's sentence and the second applicant's convictions and sentence must be set aside. This is because the reconstructed record that served before the Full Court was inadequate. This, they say, was a violation of their constitutional right to a fair trial.[2] Established jurisprudence indicates that, without a trial record, there can be no appeal – and with no appeal, there can be no fair trial. On this basis they now come before us.

[4] The application was lodged in this Court on 6 July 2016. The Director of Public Prosecutions for the High Court (DPP) did not file opposing papers. The Court on 10 August 2016 directed him to respond to specific questions about the course of the proceedings and the lost record.[3] He did so. In addition, the Court requested further information from the applicants' attorneys. This included the guilty plea the first applicant submitted to the trial Court in terms of section 112(2) of the

[1] *Schoombee v S* [2013] ZANWHC 11 (Full Court judgment) (Gura J; Leeuw JP and Landman J concurring).

[2] Section 35(3) of the Constitution.

[3] The directions issued on 10 August 2016 read as follows:

> "1. The State is directed to file an answering affidavit responding to the Applicants' application for leave to appeal, addressing amongst others:
>
> a) Whether the applicants' decision to proceed with their appeal to the Full Court on the basis of the reconstructed record as supplied by the trial judge is relevant to their contentions before this Court;
>
> b) Whether it is still practically possible to undertake a comprehensive reconstruction of the trial record.
>
> 2. The State's answering affidavit must be filed by no later than 2 September 2016.
>
> 3. Further directions may be issued."

Criminal Procedure Act[4] when the State closed its case, as well as both applicants' application for leave to appeal to the trial Court. The Court also obtained the full version of the trial Judge's reconstruction of the trial proceedings. With this in hand, the Court has now decided the application without written submissions or oral argument.

Background

[5] On the night of 3 to 4 October 2004, a terrible assault took place in the vicinity of Paladium and Leyds Streets, Rustenburg. The assailants were white. Those they assaulted were black. One of those assaulted died a cruel death. He was Mr Molatlhegi Motshegwa.[5] The person assaulted was Mr Jacob Mokwakwa.

[6] The Full Court describes the events in detail.[6] In short, the applicants encountered two men walking home from a bar. An altercation ensued. The first applicant's guilty plea avers that the deceased threatened to stab the second applicant. The applicants then chased the deceased in a bakkie. The second applicant, the passenger, exited the vehicle. He threatened and struck the deceased. The first applicant, the driver, then ran him over – not once, but twice, the second time by reversing over his prostrate body.

[4] 51 of 1977. Section 112(2) provides:

> "If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement."

[5] The deceased's name is nowhere mentioned in the trial Judge's reconstruction, the leave to appeal judgment or the Full Court judgment. We have taken the deceased's name from Mr Schoombee's handwritten guilty plea and a news article recounting the assault, available at http://www.news24.com/SouthAfrica/News/No-bail-for-racial-killer-20041017.

[6] Full Court judgment above n 1 at paras 3-25.

[7] Both applicants were charged with murder. The second applicant was additionally charged with assault with intent to commit grievous bodily harm for the attack on Mr Mokwakwa.

[8] In 2008, from prison, the applicants instructed their counsel to obtain the record of the trial proceedings in order to apply for leave to appeal. Some time later, in 2009, counsel informed them that the record appeared to be missing. The applicants, assisted by the first applicant's sister, then sent several letters to the Registrar of the High Court requesting a copy of the record. On 8 March 2010, the applicants received a letter from the transcription company. This informed them that the record would be available – but at a cost of R5 230. The applicants paid this fee. They were told that a copy of the record would be available within 10 days. This promise proved futile. Despite follow up correspondence, they never received a copy of the record.

[9] On 26 April 2010, the applicants sent a letter to the trial Judge requesting his assistance in obtaining the record. The applicants also asked for the matter to be placed before the Court so that, if the record was unavailable, the Court could issue a certificate confirming that reconstruction was impossible. On 10 May 2010, they received a letter from the Registrar to the effect that the recordings of the trial were lost and untraceable. The Registrar attached a copy of a reconstructed record Hendricks J provided on the basis of his trial notes.[7]

[10] The applicants now explain that they initially sought to challenge this reconstruction and to participate in the reconstruction process. However, in the interests of finalising their appeal and on the advice of their counsel, they decided to proceed with their appeal on the basis of the trial Judge's notes.

[7] According to the first applicant, this letter stated that "this reconstructed record by the presiding judge . . . is the only record available". Although the first applicant stated that this letter was attached as an annexure, it was not attached to the filings before this Court.

[11] As already related, the High Court in August 2011 refused leave to appeal.[8] It did so in a very full judgment. The Court concluded that there was no reasonable prospect of another court arriving at a different decision. While the Court addressed the applicants' arguments concerning the sufficiency of the evidence against them, it plainly did not consider it necessary to address the absence of the original record or the adequacy of the reconstructed record.

[12] The applicants' petition to the SCA likewise makes no complaint about the sufficiency of the trial Judge's notes as a basis for appealing.

[13] After the SCA granted leave to appeal, the Registrar of the High Court on 14 August 2012 wrote to the applicants' attorneys. The letter confirmed that the original record could not be traced and that the matter had been proceeding on the basis of a reconstructed record. The letter purported to grant the applicants permission to proceed with their appeal to the Full Court with this as the only available record.

[14] In February 2013, the Full Court dismissed the applicants' appeals. The applicants challenged their sentences as well as the evidence supporting the second applicant's murder and assault convictions. But they signally omitted to attack the sufficiency of the reconstructed record.

[15] The Full Court noted that the original record was unavailable and that the reconstruction was based on the trial Judge's notes. However, considering the Judge's notes plus his judgment refusing leave to appeal, the Full Court disposed of all the issues on appeal.

Submissions before this Court

[16] In their application for leave to appeal, the applicants now change tack. Rather than challenging the sufficiency of the evidence against the second applicant, or the

[8] *Schoombee v S*, unreported judgment of the North West High Court, Mahikeng, Case No 83/06 (4 August 2011) (leave to appeal judgment).

severity of their sentences, they now directly attack the reconstructed record. They submit it was inadequate. Its use on appeal amounted to a denial of their right to a fair trial. They stress that they proceeded with their appeal using the reconstructed record only because they were desperate after years of delay. And, they say, counsel advised them that on the record as it stood they had reasonable prospects of success.

[17] Regardless of their decision, the applicants submit, the Full Court should, in the interests of justice, of its own accord have taken up the issue of the record. That Court, the applicants point out, was well aware that the reconstruction was based only on the trial Judge's notes. The applicants complain, accurately, that they did not participate in the reconstruction. They also note, again accurately, that the reconstruction process was insufficiently transparent. Rather than unilaterally reconstruct the record, they say, the trial Judge should have had the High Court Registrar arrange a date for the parties to reassemble in court and jointly undertake the reconstruction.

[18] As a result of this inadequate process, the applicants now argue, several issues were not correctly reflected in the reconstructed record. It did not include the substance of the first applicant's guilty plea. There, he expressly stated that the second applicant did not participate in the murder. The reconstruction also did not record the trial court's reasons for the convictions and sentences imposed. Nor did it record specific findings on the demeanour and credibility of the State witnesses or cautionary precepts about them.

Discussion

Reconstruction of a trial record

[19] It is long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal.[9] An adequate record of trial court

[9] Section 35(3)(o) of the Constitution.

proceedings is a key component of this right.[10] 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".[11]

[20] 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".[12] 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.[13] Others have required the

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[10] See *Davids v S* [2013] ZAWCHC 72 at para 13:

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

Sebothe v S 2006 (2) SACR 1 (T) at para 8:

> "The Constitution of the Republic of South Africa, 1996, provides, inter alia, through section 35, that an accused person has a right to a fair trial, which includes a right to appeal or review. If the appeal court or the review court is not furnished with a proper record of the proceedings, then the right to a fair hearing of the appeal or review is encroached upon and the matter cannot properly be adjudicated."

See also *S v Molaudzi* [2014] ZACC 15; 2014 (7) BCLR 785 (CC) at para 5:

> "It is not necessary to decide whether a delay in appeal proceedings might also be considered a breach of fair trial rights, because here the record was eventually properly completed and available for a fair assessment of the matter on appeal. It could easily have been otherwise if the compilation of a proper record became impossible because of a lapse of time."

[11] *S v Chabedi* [2005] ZASCA 5; 2005 (1) SACR 415 (SCA) at para 5.

[12] *Gora v S* [2009] ZAWCHC 145; 2010 (1) SACR 159 (WCC) at para 16.

[13] See *S v Zenzile* [2009] ZAWCHC 59; 2009 (2) SACR 407 (WCC) (*Zenzile*) at para 21:

> "What the magistrate should have done, in circumstances such as in the matter before me, once he had been informed by the clerk of the court that a portion of the record could not be found despite diligent search, is the following: to direct the clerk of the court to inform all the interested parties, being the accused or his legal representative and the prosecutor of the fact of the missing record; arrange a date for the parties to re-assemble, in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate to place it on record that the parties have re-assembled for purposes of the proposed reconstruction; the parties to express their views, on record, that each aspect of reconstruction accords with their recollection of the evidence tendered at trial; and ultimately to have such reconstruction transcribed in the normal way."

Mohapi v Minister of Justice and Correctional Services [2016] ZANWHC 5 at para 8:

> "The Presiding Regional Court Magistrate . . . shall fix a date for a hearing, which shall not be later than 30 ordinary days from the date of this order, and cause the applicant, and invite his previous and current defence legal representative (if any), prosecutor, and interpreter to attend in open court in order to jointly undertake a reconstruction of the missing parts of the record,

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.[14]

[21] 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".[15] While the trial court is required to furnish a copy of the record,[16] the appellant or his/her legal representative "carries the final responsibility to ensure that the appeal record is in order".[17] 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.[18]

> where this is feasible. The proceedings shall be recorded. The Magistrate shall invite those present to express their views whether each aspect of the reconstruction accords with their recollection of the evidence tendered at trial."

S v Chokoe [2014] ZAGPPHC 515; 2014 (2) SACR 612 (GP) at para 9:

> "Case law abounds that the reconstruction process must give effect to the accused's right to a public trial before an ordinary court, his right to be present when being tried, as well as his right to challenge and adduce evidence."

[14] *S v Sibelelwana* [2012] ZAWCHC 150 at 9:

> "[T]he clerk of the court must obtain an affidavit to prove the loss of the record if that is the situation. Thereafter the clerk must obtain affidavits from witnesses and others who were present at the trial in order to prove the evidence that has been adduced. Eventually he will then submit a reconstructed record to the accused to establish whether he agrees with it or not. The accused's response is confirmed by means of an affidavit. A report concerning the correctness of the record must also be obtained from the presiding magistrate."

[15] Id. See also *Gora* above n 12 at paras 14 and 50.

[16] See *Ngidi v S* [2010] ZAKZPHC 10 at para 5, explaining that "it is the duty of each and every presiding officer to ensure that a complete record be sent to the court dealing with the appeal".

[17] *Sibelelwana* above n 14 at 10.

[18] See *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 16, noting that in the constitutional era, criminal trials must be conducted in accordance with "notions of basic fairness and justice" and that it "is now for all courts hearing criminal trials or criminal appeals to give content to those notions". See also *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo* [2015] ZACC 39; 2016 (4) BCLR 443 (CC) at para 36, concluding in the context of a review of a CCMA award that "it was improper of the Labour Court to dismiss the review without a proper record of the arbitration proceedings in the face of evidence that no record existed".

Assessing adequacy

[22] The DPP contended that the applicants waived their right to a fair trial regarding participation in the reconstruction process. In their application to this Court, the applicants note that they considered participating in reconstructing the record. They even filed an application to be released on bail pending this process. However, on the advice of their counsel, they decided to proceed using the "reconstructed" record the trial Judge provided. By their own acknowledgement, they thus chose not to pursue a reconstruction process.

[23] After the High Court denied leave to appeal but the SCA granted it, the applicants proceeded to use this record in their appeal to the Full Court. They did not raise concerns about the record then or, when their appeal failed, in their subsequent application to the SCA for leave to appeal.

[24] The State, in its answering affidavit, contends that the applicants were "consciously aware" of their right to participate in a reconstruction and that they waived it. They did so, it urges, by choosing to launch their appeal using the trial Judge's "reconstructed" record. As they acknowledge, the applicants knew they had a right to engage in a reconstruction process. They even sought to do so, the State points out, before changing their minds and deciding to proceed without exercising this right.

[25] Was this a waiver? Perhaps. This Court has emphasised that waiver of a constitutional right is difficult. The bar is high. To waive a right, a party must intentionally and knowingly abandon it.[19] The onus to prove waiver is strictly on the

[19] See *Mohamed v President of the Republic of South Africa* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 62, finding that for a consent to constitute an enforceable waiver, "it would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent"; and *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA) at paras 15-7, concluding that "[w]aiver is first and foremost a matter of intention . . . . The knowledge and appreciation of the party alleged to have waived is furthermore an axiomatic aspect of waiver".

party asserting it – here, the State.[20] Even so, this Court has questioned whether waiver is applicable in relation to constitutional rights. And it has noted the distinction between waiver in the contractual sense and a mere choice not to exercise a constitutional right.[21]

[26] It is not necessary for us now to resolve this question. We note that the facts here suggest a possible waiver – but we find it unnecessary conclusively to determine that the applicants did waive. Nor, indeed, is it necessary for us to determine whether it was possible for them to have done so.

[27] This is because the applicants had a fair trial, including a fair appeal. The record of their trial was improperly and imperfectly reconstructed. But it was more than adequate to ensure the applicants exercised their constitutional right of appeal. The notes the trial Judge took were unusually full and detailed. They were not scrappy, telegram-style annotations. They appear to be a complete narrative account of the evidence led in the trial. They recorded the witnesses' evidence in chief, as well as their cross-examination. A full picture emerges from them, not only of the terrible events of the night of 3 to 4 October 2004, but of what transpired in the trial proceedings that resulted in the applicants' convictions and sentences.

[28] 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

[20] *Mohamed* id at para 64. See also *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (*Mphaphuli*) at para 81 in which Kroon AJ stated: "The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it."

[21] See *Mohamed* id at para 61 at fn 55 and *Mphaphuli* id at para 216. Kroon AJ in a minority judgment in *Mphaphuli* at para 80 noted that the assumption that the right to a fair hearing under section 34 of the Constitution may validly be waived "is in accordance with common law principles regarding waiver of rights". The majority judgment of O'Regan ADCJ at para 216 specifically reserved the question whether this right could be waived as "a topic for another day".

> 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."[22]

[29] 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.[23] This principle is practical and sensible and just.

[30] It applies here. The reconstructed record is detailed and specific. The applicants reviewed this record. They took the advice of counsel. They, in accordance with that advice, chose to proceed with their appeal on that record. Even if they did not waive their right to participate in reconstruction, they certainly signified their assent to the substantive recital contained in the reconstructed record.[24]

[31] On appeal, the Full Court had before it an in-depth and detailed record that vividly recorded the events in issue as brought to life in the trial court. Both the trial Judge and the applicants had reviewed and endorsed this recital. The record was also

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[22] *Chabedi* above n 11 at paras 5-6. In *Machaba v S* [2015] ZASCA 60; 2016 (1) SACR 1 (SCA) at paras 4-5, the Supreme Court of Appeal reaffirmed this finding and concluded that:

> "[T]he adjudication of this appeal on the record as it stands will not prejudice either of the appellants. The appellants' convictions and sentences can, therefore, not be set aside merely on the basis of the record being incomplete."

[23] *Machaba* id at paras 4-5.

[24] Contrast the applicants' attitude here to *Zenzile* above n 13 at paras 5-7, 15 and 22. In *Zenzile*, the Magistrate made a reconstruction on the basis of his trial notes, and presented this to the accused along with a draft affidavit for the accused to sign signifying that the reconstruction accorded with his recollection of the evidence. The accused bluntly refused. On review, the Western Cape High Court noted that:

> "[T]he Magistrate reconstructed the missing portion of the record using his notes made during the course of trial as a source for such reconstruction; that the record was reconstructed entirely in the Magistrate's chambers; there is no indication, on basis of the record forward to this court, if the accused was informed of the missing portion of the record and of the need to have the missing portion of the record reconstructed; there is no indication, on basis of the record before me, whether the accused was informed of his rights arising from the need to have the missing portion of the record reconstructed; and that when the accused was presented with a draft affidavit, which was intended to verify the correctness and the accuracy of the reconstructed portion of the record, *the accused refused to sign the affidavit on the basis that 'hy weet niks en het geweier om te teken'*."

supplemented by the extensive judgment the trial court produced when it denied leave to appeal.

[32] The issues on appeal before the Full Court centred on the trial court's evaluation of the evidence in convicting the second applicant. He argued that the only evidence linking him to the murder was circumstantial[25] and that the trial court failed to apply a cautionary approach to the single witness, the complainant, whose evidence formed the basis of his assault conviction.[26] And it erred, he said, by refusing to draw adverse inferences from the State's failure to call two additional witnesses.[27] Both applicants also contended that the trial court failed to consider mitigating circumstances in imposing life sentences.[28]

[33] That was then. The applicants now urge that the record was radically defective because it failed to reflect facts and conclusions necessary for the fair consideration of these issues on appeal. They submit that neither the record nor the leave to appeal judgment describe the content of the first applicant's guilty plea or the second applicant's response to this plea. The reconstruction also failed to record the trial court's reasons for the convictions and sentences imposed and whether the trial court took cautionary rules into account for certain witnesses. Finally, nothing in the record identifies the second applicant, they say, as the perpetrator of the assault on Mr Mokwakwa.

[34] None of this is persuasive. It is evident from the Full Court judgment that these complaints did not prevent a full, proper and just consideration of the appeal. The Full Court in fact sets out the content of the first applicant's guilty plea. Those facts were clearly before it.[29] The second applicant was avowedly convicted on the basis of

[25] Full Court judgment above n 1 at paras 25.2.4 and 35-44.

[26] Id at paras 25.1.1-2.

[27] Id at paras 25.1.3 and 25.2.2.

[28] Id at paras 45-55.

[29] Id at paras 21-23.

circumstantial evidence. The evidence damning him is detailed in the reconstructed record as well as in the trial Judge's judgment on leave to appeal. That judgment records that the Judge, in convicting the second applicant of assault, approached the evidence of Mr Mokwakwa, the complainant, with the requisite caution.

[35] The Full Court, taking into account all the evidence, concluded that there was a "clear and unambiguous intention on the part of the two, to kill the deceased".[30] It says it was unable to ascertain from the reconstructed record "whether a cautionary approach was adopted in respect of certain witnesses" but concludes that "[n]o inference is justified however that the trial court did not approach the evidence" of Mr Mokwakwa and the other witness "with the necessary caution".[31]

[36] That conclusion was sound. It is not assailable now. The Full Court acknowledged that the original case record was unavailable and that the reconstructed record did not clearly indicate whether a cautionary approach was adopted in respect of certain witnesses. But it concluded that the trial Judge's judgment on leave to appeal indicated that he had made a positive credibility finding in the case of those witnesses.[32] This is plainly right. The leave to appeal judgment also addressed the State's failure to call certain witnesses.[33] The Full Court was able to assess independently the legal consequences of that failure.

[37] All of this points powerfully to one conclusion: the record was amply adequate for just consideration of the issues the applicants raised on appeal.

Breach of process in reconstructing the trial record

[38] None of this detracts from the magnitude of the lapses that took place in reconstructing the record. The High Court failed to ensure that the reconstruction

[30] Id at para 42.

[31] Id at para 26.

[32] Id at paras 26-7.

[33] Id at paras 32-4.

process involved both parties. It was its duty to do so. The loss of trial court records is a widespread problem. It raises serious concerns about endemic violations of the right to appeal. Reconstruction should not be the norm in providing appellants with their trial records. But when reconstruction is necessary, the obligation lies not only on the appellant, but indeed primarily on the court to ensure that this process complies with the right to a fair trial. It is an obligation that must be undertaken scrupulously and meticulously in the interests of criminal accused as well as their victims.

Leave to appeal

[39] The applicants style their application as one for direct access. They ask this Court to adjudicate the fairness of their trial in light of the missing record and the improperly reconstructed record. But what they actually seek is not direct access. After the Full Court dismissed their appeal, they sought and were denied leave to appeal to the SCA. Although they now raise a new argument about the reconstruction process, this is in substance not a new application.

[40] Indeed, as the applicants themselves note, they have exhausted other legal remedies – and the relief they now seek from this Court "cannot anymore be considered by another court". But, for the reasons set out, the application lacks prospects of success, and it would not be in the interests of justice to grant leave to appeal.

[41] Presumably because they clothed their application as one for direct access, the applicants have not sought condonation for the lateness of their application. The SCA refused further leave to appeal on 17 May 2013. The applicants filed this application more than three years later, on 6 July 2016. They state that, at some point after the SCA dismissal, they appointed legal representatives to advise them with regard to further remedies. They do not provide any further reason for the delay. On these grounds too, this application stands to be dismissed.

[42] But behind the form of the application and condonation for its lateness, in substance the application must fail because the applicants had a fair trial, including a fair appeal.

Order

[43] The application for leave to appeal is dismissed.