CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 61/16

In the matter between:

KLAAS LESETJA PHAKANE Applicant

and

THE STATE Respondent

Neutral citation:	*Phakane v S* [2017] ZACC 44
Coram:	Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mbha AJ, Musi AJ, Madlanga J, Mhlantla J and Zondo J
Judgments:	Zondo J (majority): [1] to [46] Cameron J (concurring): [47] to [60] Froneman J (concurring): [61] to [63]
Decided on:	5 December 2017
Summary:	[murder] — [right to a fair trial] — [incomplete trial record] — [competent verdicts] [leave to appeal granted] — [incomplete record infringes fair trial rights] — [accused to be released]

ORDER

On appeal from the Full Court of the High Court of South Africa, Gauteng Division, Pretoria, the following order is made:

1. Leave to appeal is granted.
2. The appeal against the decision of the Full Court of the Gauteng Division of the High Court is upheld.
3. The order of the Full Court of the Gauteng Division of the High Court is set aside and replaced with the following:
   "(a) The trial proceedings relating to the appellant as well as the conviction and sentence of the appellant by the trial court are hereby set aside.
   (b) The appellant must be released from prison immediately."
4. The Registrar of this Court is directed immediately to take steps to ensure that this judgment is delivered to the Head of the Kgosi Mampuru II Central Correctional Centre, Pretoria.

JUDGMENT

ZONDO J (Nkabinde ADCJ, Jafta J, Khampepe J, Mhlantla J, Madlanga J and Musi AJ concurring):

Introduction

[1] The applicant is Klaas Lesetja Phakane. He is a prisoner at Kgosi Mampuru II Central Correctional Centre. He has brought an application for leave to, in effect, appeal against a decision of the Full Court of the North Gauteng Division of the High Court (Full Court). That decision is a judgment by Molefe J (in which Roussouw AJ and Davis AJ concurred). The judgment was given in the applicant's appeal against his conviction of, and, sentence for, murder by Seriti J, sitting in the Circuit Local Division for the Northern Circuit District, Polokwane. It was found that he had

murdered Ms Matilda Chuene Boshomane. The murder was alleged to have been committed sometime in August 2006. He was sentenced to 20 years' imprisonment.

[2] In the appeal, the State delivered an incomplete record of the trial proceedings. It was established that the transcript of the evidence did not contain the evidence of the main state witness, Ms Martha Manamela. It was accepted that that evidence could not be reconstructed. The Full Court held that the absence of the transcript of Ms Manamela's evidence in the appeal record was not such that the Court could not fairly determine the appeal. It went on to dismiss the appeal against conviction but upheld the appeal in respect of sentence. It reduced the sentence from 20 years' imprisonment to 15 years.

[3] If leave to appeal is granted, the applicant seeks to have the decision of the Full Court that his appeal could be determined fairly despite the absence of the transcript of Ms Manamela's evidence set aside and to have his trial proceedings set aside in their entirety. This is on the basis that the failure of the State to furnish a complete trial record for his appeal constitutes an infringement of his right to a fair appeal entrenched in section 35(3) of the Constitution.

[4] The applicant's contention is that, if he is deprived of a fair appeal by reason of the State having failed to furnish a complete record to enable the Full Court to fairly determine his appeal, his conviction and sentence cannot stand and should be set aside. Before I can consider the application for leave to appeal, here is the background to the matter.

Background

[5] The applicant stood trial before Seriti J in the Circuit Local Division for the Northern Circuit District for the assault and murder of Ms Boshomane who was his girlfriend. The applicant pleaded not guilty to both counts. The State led the evidence of seven witnesses. One of those witnesses was Ms Manamela who was also a girlfriend of the applicant at the time of Ms Boshomane's death. Another witness was

the applicant's mother, Mrs Martha Phakane. In the view I take of this matter, it is not necessary to specify all the witnesses who testified at the trial.

[6] The evidence led at the trial revealed that the applicant and Ms Boshomane had a history of frequent quarrels which were known to people around them. It also revealed that during those quarrels the applicant would sometimes beat Ms Boshomane up. At a certain stage the applicant and Ms Boshomane lived together. It is not clear from the evidence whether, at the time of Ms Boshomane's death, the applicant and Ms Boshomane were still living together.

[7] The date of Ms Boshomane's death is not known. Her decomposed body was found in a veld. It would seem that Ms Boshomane was last seen on 19 or 20 August 2006 when she was with the applicant and the two of them were quarrelling. Unfortunately, the police investigation of Ms Boshomane's death does not appear to have been conducted properly. There is no reason why the trial court should not have been told how far from the applicant's home and Ms Boshomane's home the place was where the body was found. The trial court also appears not to have been told who discovered Ms Boshomane's decomposed body in the veld and how that person came to be the one to discover the body. It would appear that the discovery was not the result of a pointing out by the applicant because, if it was, the trial Judge would have said so in his judgment.

[8] Because of the state of decomposition in which Ms Boshomane's body was discovered, the cause of her death could not be established. None of the witnesses who testified at the trial said that he or she witnessed Ms Boshomane's killing or saw the applicant attack her on 19 or 20 August 2006. Furthermore, no evidence of anybody from her family was led as to when Ms Boshomane had last been seen at her home.

[9] Ms Manamela had made a statement to the police on 2 September 2006. That appears to have been a week or so after the discovery of the body in the veld. A

warning statement had also been taken by the police from the applicant. The Full Court was to later suggest in its judgment that the applicant's warning statement was or may have been a confession by the applicant to a peace officer. However, a reading of the trial court's judgment reveals that the trial court did not make any reference whatsoever to any warning statement or confession by the applicant.

[10] It is appropriate to refer to Ms Manamela's statement of 2 September 2006. Her statement was quoted in full in the judgment of the trial Judge. It read:

> "On Sunday 20 August 2006 at about 10:00 Klaas Phakane of Washbank came to my home. He is the father of my two kids. On his arrival he told me that he had a fight with Tilly Boshomane of Kordon. I asked him why they fought and told me that after he told her that our child is sick, Tilly wished that the child should die. He further told me that he assaulted her with a waist belt. Further he told me that after he assaulted her he took her to Kordon and left her in the grazing field next to her home. I asked him why he left her in the grazing field and he said to me that he wanted her to go home. He did not want to take her to her home. The same Sunday he returned home at Washbank. On Monday 21 August 2006 at about 17:00 Klaas came to my home. On his arrival he told me he was at Tilly's home and she was not at home. He even found her younger brother whom he asked where Tilly is and the child told him that she never returned home. He further told me that he even went to the grazing field where he left her but could not find her. During the week he came to my home and told me that he went to Tilly's home where he found her and told her about their fight and the fact that she is nowhere to be found."[1]

[11] It is also necessary to refer to Ms Manamela's evidence in court. It was summarised by the trial Judge in his judgment as follows:

> "At the end of July or August 2006 when she was at her parental home, accused visited her at her parental home where she had gone to stay as she had just given birth to a child. It was a Sunday morning when accused came to see her. She was carrying a young child and the accused instructed her to take the child to the back room as he,

[1] *S v Phakane*, unreported judgment of the Circuit Local Division for the Northern Circuit District, Polokwane, Case No CC26/07 (14 October 2009) (Trial Court judgment) at 3-4.

> the accused, does not want to come in close proximity of the child. She took the child to the back room and accused told her that they must go out of the yard as he does not want her family members to hear what he is going to tell her.
>
> They went outside the yard and outside the yard the accused told her that he has killed the deceased in this matter. She asked him why he killed her and he did not reply. He further told her that he wants to throw the corpse into a pit toilet and she suggested that he must take the corpse to a place where the deceased's relatives can find it. At about 19:00 the accused left for his home and said to her that he is going to take the corpse and throw it in the veld where people can see it. At about midnight the accused came back to her carrying a school bag which has a white curtain inside. The curtain had blood stains. There was another piece of cloth which he said he used it to clean and carry the corpse of the deceased to the veld. He stayed for a while and later left for his home. Shortly before the incident the accused was staying with the deceased at his home."[2]

[12] After mentioning certain features of Ms Manamela's evidence, which I mention later in this judgment, the trial Judge correctly pointed out that Ms Manamela's evidence in court differed from the statement she had made to the police on 2 September 2006. The trial Judge pointed out that in that statement Ms Manamela had said that the applicant had come to her on Sunday 20 August 2006. He then said that 20 August 2006 was the date which he accepted as the date on which the applicant came to see Ms Manamela.

[13] The trial Judge referred to Ms Manamela's evidence that she had advised the applicant to leave the corpse at a place where Ms Boshomane's relatives could find it. Immediately after that, the trial Judge pointed out that this evidence was "consistent with the place where the corpse was found as contained in the admitted annexure B being the sketch plan, key and photographs".[3]

[2] Id at 2 (lines 24-5) and 3 (lines 1-20).

[3] Id at 12.

[14] I pause here to make two points about this statement by the trial Judge. The first is that, in accepting that it was on 20 August 2006 when, according to Ms Manamela's evidence in court, the applicant visited her, the trial Judge was accepting that version of Ms Manamela that was in her statement of 2 September 2006. In effect he was rejecting Ms Manamela's version given in court in regard to when the applicant came to see her. In her statement she said that he came to her on 20 and 21 August 2006 whereas in her evidence in court she said that he came to her at the end of July or August 2006. The trial Judge gave no reason for preferring the version in the statement on this aspect and rejecting by implication the version given in court on this aspect.

[15] The second point is that, in pointing out that Ms Manamela had testified that she had advised the applicant to throw the corpse where the deceased's relatives could find it, the trial Judge was referring to evidence that Ms Manamela gave in court that was not contained in her statement of 2 September 2006. In other words, in regard to one aspect the trial Judge preferred the version contained in Ms Manamela's statement and in regard to another aspect, he preferred Ms Manamela's version given in court.

[16] The trial court found the applicant guilty of murder but acquitted him of assault. It said that there was not enough evidence to justify a conviction on the charge of assault. It found that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence for murder, namely, 15 years. Instead, it found that there were circumstances which justified imposing a longer sentence of imprisonment than the prescribed minimum. The Court then imposed 20 years' imprisonment. In convicting the applicant of murder, the trial court relied on circumstantial evidence. It could not say how the applicant had carried out the murder.

[17] Ms Manamela's evidence played a decisive role in the trial court convicting the applicant of Ms Boshomane's murder. There was also evidence of some witnesses who testified about the frequent quarrels that the applicant and Ms Boshomane used to

have, one or two of which may have involved the applicant assaulting Ms Boshomane in the past. In my view, this evidence played an insignificant role in the court convicting the applicant of the murder. The evidence that was treated as crucial was that of Ms Manamela.

[18] The trial Judge's finding that the applicant was guilty of murder was based largely on the certain parts of Ms Manamela's evidence. Those parts were that the applicant had in effect told Ms Manamela that he had killed Ms Boshomane and that she had advised him not to "throw" the corpse into a pit toilet which he had said he intended doing. Another part was that she had advised him to throw the corpse where Ms Boshomane's relatives would find it and that the corpse had been found in the veld. The trial Judge regarded the fact that the corpse was discovered in the veld as corroborating Ms Manamela's version that the applicant had visited her on 20 August 2006; that he had told her that he had killed Ms Boshomane and that she had suggested to him that he should throw the corpse where the relatives would find it. The trial court held that the only inference that could be drawn from the facts was that the applicant had murdered Ms Boshomane.

Full Court

[19] The applicant appealed to the Full Court against his conviction. As already indicated, the State delivered an incomplete record of the trial proceedings. The transcript of the trial proceedings did not include Ms Manamela's evidence. The tapes containing the evidence led at the trial were missing. There was no transcript of that evidence. Also missing were the warning statement that the applicant was said to have made to the police as well as the statement that Ms Manamela had made to the police on 2 September 2006. However, the absence of the latter statement did not present any difficulty because the trial Judge had quoted it in full in his judgment. It was common cause that all reasonable attempts had been made to reconstruct the missing evidence but these had come to naught.

[20] An issue that arose in the appeal was whether, in the absence of the missing evidence, the Full Court could determine the appeal fairly. If it could not do so, this would mean that the applicant's right to a fair appeal entrenched in section 35(3) of the Constitution had been infringed. Section 35(3) reads:

> "Every accused person has a right to a fair trial, which includes the right—
>
> . . .
>
> (o) of appeal to, or review by, a higher court."

If the Full Court could determine the appeal fairly, the applicant's right to a fair appeal would not have been infringed.

[21] After hearing argument, the Full Court held that the applicant's appeal could be determined fairly despite the incomplete record. It then proceeded to consider the appeal and concluded that the applicant had been properly convicted of murder. It, accordingly, dismissed the applicant's appeal against conviction. In respect of the appeal against sentence, the Full Court upheld the appeal and reduced the sentence to 15 years' imprisonment which it antedated to 15 October 2009, the date of sentence.

[22] With regard to the incomplete record, the Full Court said that—

> "[a]lthough the evidence and statement of Manamela [are] missing, the court *a quo* did not rely solely on her evidence in order to convict the appellant. The trial court considered the evidence in totality in order for it to make a finding that the appellant was guilty. The learned Judge also quoted the missing statement in full in his judgment. I am satisfied that the nature of the defects in the record are not so serious that a proper consideration of the appeal is not possible. I am, therefore, of the opinion that the appellant will not be prejudiced by the [ir]regularity occasioned by the failure to reconstruct the record and that the record before us is adequate for a fair and meaningful adjudication of this appeal."[4]

[4] *Phakane v S*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No A186/2013 (3 November 2014) (Full Court judgment) at para 15.

In this Court

Jurisdiction

[23] If we grant the applicant leave to appeal, the issue for determination in the appeal will be whether the applicant's right to a fair appeal entrenched in section 35(3) of the Constitution has been infringed in that the applicant is deprived of an appeal because the State has been unable to deliver a complete record of the trial proceedings. That is a constitutional matter. Accordingly, this Court has jurisdiction.

Leave to appeal

[24] The question raised in this matter is an important one. That is whether the State's failure to deliver a complete trial record to the Full Court in circumstances where the missing evidence cannot be reconstructed has infringed the applicant's right to a fair appeal entrenched in section 35(3) of the Constitution. Furthermore, if this Court does not entertain this matter, the result may be that a possibly innocent person may continue to be incarcerated for a number of years whereas, if we entertain the matter, we may find that the applicant's right to an appeal has been infringed and he should be released from prison. There are reasonable prospects of success for the applicant. Therefore, it is in the interests of justice that leave to appeal be granted.

The appeal

[25] The matter is decided without oral argument. The parties were directed to deliver written submissions. The Pretoria Bar Council provided the applicant with counsel at the request of the Court. We are indebted to counsel for their assistance.

[26] The question for determination is whether the absence in the appeal record of a transcript of Ms Manamela's evidence had the effect that the Full Court could not fairly determine the applicant's appeal and, if it could not, what the effect thereof is. Counsel for the applicant submitted that the absence of the transcript or tapes of that evidence meant that the applicant's appeal could not be determined fairly and that the effect thereof was that the applicant's conviction and sentence should be set aside.

Counsel for the respondent adopted the same attitude that was adopted by the Full Court. He submitted that the absence of the transcript and tapes of that evidence did not mean that the applicant's appeal could not be determined fairly. He submitted that the trial Judge had relied on the totality of the evidence before the Court and not just that of Ms Manamela alone.

[27] In order to properly consider the issue before us, it is necessary to examine how the trial court came to the conclusion that the applicant was guilty of murder and what an appeal court would require in order to determine the appeal fairly. Earlier on I quoted the statement that Ms Manamela made to the police on 2 September 2006 as found in the trial court's judgment as well as the trial court's summary of Ms Manamela's evidence. It is not necessary to quote those again.

[28] After summarising Ms Manamela's evidence, the trial Judge pointed out that under cross-examination Ms Manamela was referred to the statement she had made to the police on 2 September 2006. He then quoted the statement and recorded the evidence of the next witness, Ms Paulina Motheba, without saying what questions were put to Ms Manamela under cross-examination about her evidence as a whole and in particular about the contents of her statement to the police.

[29] The next time the trial Judge said anything about Ms Manamela or her evidence in his judgment was when he mentioned certain features of the evidence she gave in court. Those features included that Ms Manamela said that—

(a) the applicant came to her home on a Sunday morning and told her that he had killed Ms Boshomane;
(b) the applicant had said that he wanted to throw the corpse into a "pit toilet";
(c) she suggested to the applicant that he should rather put the corpse where Ms Boshomane's relatives could find it;

(d) on the same day the applicant came back at night carrying a "school bag" and that "school bag" had a blood-stained "curtain" inside; and

(e) on his return to Ms Manamela's home in the night, the applicant told Ms Manamela that he had "thrown" the corpse in the veld.[5]

[30] The trial Judge also referred to the evidence of other witnesses that did not show that the deceased had died as a result of anything done by the applicant. Thereafter, the trial Judge reverted to Ms Manamela's evidence and said:

> "As a result of the known and accepted facts in this case, my view is that the court can accept the evidence of Ms Manamela that the accused came to her on Sunday 20 August 2006 and informed her that he had killed the deceased and that he later threw the corpse in the veld as suggested by her."[6]

This passage contains the fundamental finding on which the trial court based its conviction of the applicant.

[31] As already indicated one of the witnesses who had been called by the State against the applicant was his mother. She had testified that on 22 August 2006 the applicant had telephoned her and asked her to come back home as he had fought with, and injured, his girlfriend. According to the trial court's judgment, her evidence was that she asked him how he had injured Ms Boshomane and the applicant told her that he had left Ms Boshomane at home but, when he came back, she was not at home. Apparently, the deceased's corpse was found about a week after the applicant's call to his mother.

[32] The trial Judge said that the applicant denied having telephoned his mother on 22 August 2006 and informed her that he had fought with, and injured, the deceased.

[5] Trial Court judgment above n 1 at 11 (lines 24-5) and 12 (lines 1–2).

[6] Id at 13 (lines 3-7).

The trial Judge pointed out that under cross-examination the applicant said that he had told his mother that he had quarrelled with the deceased. The trial Judge then said:

> "I have no doubt in my mind that the version of the accused is false and same should be rejected. The accused is not a reliable witness and the Court cannot rely on his evidence."[7]

He pointed out that the evidence of the applicant's witness did not take the applicant's case any further. Thereafter, the trial Judge said:

> "Besides the fact that Ms Manamela testified that the accused told her that he had killed the deceased, the proven facts in this case invite an inference that the deceased was killed by the accused. The said inference in my view is the only inference that can be drawn from the facts of the case."[8]

The trial court then went on to convict the applicant of Ms Boshomane's murder.

[33] It is remarkable that the trial court said nothing in its judgment about the discrepancy between Ms Manamela's evidence in court and the contents of her statement of 2 September 2006 to the police. In its judgment, the trial court also did not say which parts of Ms Manamela's evidence in court the applicant admitted and which ones he disputed nor did it say which parts of Ms Manamela's statement of 2 September 2006 the applicant admitted and which ones he denied. The judgment of the trial court does not even say whether the defence or the Court itself asked Ms Manamela why this critical part of her evidence was not in her statement and how she explained this conflict if she did provide an explanation. The trial court also did not take into account the fact that, when Ms Manamela made her statement as at 2 September 2006, she was still in a romantic relationship with the applicant but, when she testified in court, the two had broken up.

[7] Id (lines 13-4).

[8] Id (lines 18-20).

[34] In one of the two instances Ms Manamela may have been dishonest. If she was dishonest when she made the statement on 2 September 2006, she may have acted dishonestly in order to protect her boyfriend. If she was dishonest when she gave evidence in court, she may have been vindictive against the applicant because they had broken up. In either case it is necessary to know whether Ms Manamela was confronted with this conflict between her evidence in court and the contents of her statement and to see what explanation, if any, she gave for it and whether her explanation was an acceptable one.

[35] In the absence of a transcript of the trial proceedings or any reconstruction of the record of the trial proceedings, an appeal court could not know whether Ms Manamela ever explained the conflict and how she explained it. Without knowing whether Ms Manamela ever explained this conflict between her evidence in court and her statement to the police, an appeal court would never be in a position to determine the appeal fairly. This is so because, without the missing evidence, the appeal court would not know whether Ms Manamela's evidence that the applicant told her that he killed Ms Boshomane, that he said to her he intended to throw the corpse into a pit toilet and that she suggested that he throw it where Ms Boshomane's relatives could find the corpse should be believed.

[36] For its conclusion that the accused was guilty of murder, the trial court did not rely upon the statement by Ms Manamela in court that at about midnight on the day on which the applicant had visited her, the applicant returned to her and this time he was carrying a school bag which had a "white curtain inside" and the "curtain" had blood stains. This evidence is also not in Ms Manamela's statement of 2 September 2006 and, in context, it implicated the applicant in Ms Boshomane's murder. Again, in its judgment the trial court did not say whether Ms Manamela was confronted with the conflict in this respect between her evidence in court and her statement of 2 September 2006. That was a glaring omission on the part of the trial court.

[37] If the transcript of the trial proceedings was available, an appeal court would have been able to establish whether Ms Manamela was confronted with the conflict and whether she proffered an explanation for it and whether the explanation was acceptable. I do not think that an appeal court would be able to do justice to the applicant's appeal without knowing whether Ms Manamela was confronted with this conflict and what explanation, if any, she gave for it. 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. It is difficult to understand how the trial court made the finding to prefer Ms Manamela's evidence to that of the applicant without dealing with this obvious and material conflict between her evidence and her statement. It is equally difficult to understand how the Full Court could conclude, as it did, that the applicant's appeal against his conviction could be properly and fairly determined in the absence of an adequate transcript of the trial proceedings or a reconstructed record covering Ms Manamela's evidence. The Full Court said that the trial court had not relied solely on Ms Manamela's evidence to justify its conviction of the applicant of the murder but on the totality of the evidence before the Court. However, what the Full Court failed to appreciate is that Ms Manamela's evidence was the decisive evidence which led to the trial court convicting the applicant. There is no doubt that, without Ms Manamela's evidence in court, the trial court could not have convicted the applicant.

[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*[9] the then Appellate Division of the Supreme Court said:

[9] *S v Joubert* [1990] ZASCA 113; 1991 (1) SA 119 (A).

> "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."[10]

[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*[11] 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."[12]

This passage was quoted with approval by this Court in *Schoombee*.[13]

[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.

[10] Id at 126 (quoting *S v Marais* 1966 (2) SA 514 (T) at 517).

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

[12] Id at paras 5-6.

[13] *Schoombee v S* [2016] ZACC 50; 2017 (2) SACR 1 (CC); 2017 (5) BCLR 572 (CC) at para 28.

Conclusion

[41] In the light of all the above I conclude that the Full Court was wrong to hold that the applicant's right to a fair appeal entrenched in section 35(3) of the Constitution had not been infringed by the State's failure to ensure that an adequate record of his trial proceedings was available for his appeal. In my view, his right to a fair appeal has been so compromised that his appeal could not be fairly determined. That being the case, the proper remedy is to set aside the trial proceedings in their entirety.

Should we convict the applicant of assault?

[42] I have read the judgment by my Colleague, Cameron J (second judgment), in which he concludes that the applicant should be convicted of assault as a competent verdict for murder. For reasons I set out below, I am unable to agree that the applicant may be convicted or should be convicted of assault as a competent verdict in the present case.

[43] Assault is a competent verdict for murder only if there is a link between the assault and the charge of murder. The second judgment accepts that the charge of murder and that of assault were based on separate incidents. The assault relied upon is alleged to have taken place on 20 August 2006. There is no basis in the record for this latter statement. That there must be a link between the factual basis of the main count and the competent verdict means that the assault must at least have been part of the *actus reus* on which the charge of murder was based. In this case the cause of Ms Boshomane's death is unknown. If we do not know the cause of the deceased's death, we cannot know what verdict would be competent to the charge of murder.

[44] If the two are separate incidents and assault is not part of the conduct on which the charge of murder was based, then one cannot speak of convicting the accused of assault as a competent verdict for the charge of murder. In that case, if there is enough evidence to prove assault, the accused may be convicted of assault as a

stand-alone count and not as a competent verdict for the charge of murder. An example may help to explain this. Last year X physically assaulted Y but Y did not die and this year X put some substance in Y's food and, after some time, Y died. If X is charged with the murder of Y on the basis that the substance he put in Y's food was poison and that poison killed Y but later it is found that that substance was not poison and could not have killed Y, X cannot be convicted of assault as a competent verdict for murder. He may be convicted of that assault as a separate count. These are two separate incidents. There is no link between the assault of last year and the charge of murder.

[45] Lastly, it seems to me that the State will be entitled to recharge the applicant with the murder of Ms Boshomane after we have handed down this judgment setting aside the trial proceedings. However, if we convict the applicant of assault as a competent verdict for murder, the State would be precluded from recharging the applicant with murder. I think we should not close that door. Once this judgment has been handed down, it will be incumbent upon the National Prosecuting Authority to consider and decide whether the applicant should be recharged with murder.

Order

[46] The following order is made:

1. Leave to appeal is granted.
2. The appeal against the decision of the Full Court of the Gauteng Division of the High Court is upheld.
3. The order of the Full Court of the Gauteng Division of the High Court is set aside and replaced with the following:

   "(a) The trial proceedings relating to the appellant as well as the conviction and sentence of the appellant by the trial court are hereby set aside.

   (b) The appellant must be released from prison immediately."

4. The Registrar of this Court is directed immediately to take steps to ensure that this judgment is delivered to the Head of the Kgosi Mampuru II Central Correctional Centre, Pretoria.

CAMERON J (Mbha AJ concurring):

[47] Our sad duty in this case is to vacate Mr Phakane's conviction of murdering Ms Boshomane, his girlfriend, on the ground that the trial court record before the Full Court, which heard his appeal and dismissed it, was materially incomplete and that his constitutional right to an appeal was thus violated. The first judgment, by Zondo J, explains why we are obliged to do that. I concur in the outcome acquitting Mr Phakane of murder. But I do not agree that this means Mr Phakane can walk away free of any conviction. In my view, Mr Phakane must be convicted on a charge of assault as a competent conviction on the main charge of murder.

[48] Mr Phakane must be acquitted of murder because the evidence available to the Full Court in the record before it did not prove *beyond a reasonable doubt* that he committed the crime alleged.[14] But the fact that the evidence was not sufficient to prove that Mr Phakane murdered Ms Boshomane does not mean that he should walk away scot-free. He should be convicted of the charge of assaulting Ms Boshomane that was a competent verdict on the murder charge of which we now acquit him.[15]

[14] Though the issue in this Court and in the Full Court was the sufficiency of evidence available on appeal, questions arose about the sufficiency of the evidence at trial. The first judgment observes that the trial court relied heavily on Ms Manamela's evidence without saying anything about the discrepancy between her statement to the police and her testimony. In the Trial Court judgment above n 1 at 12, Seriti J noted: "Her evidence in court differs from the statement she made to the police, so her evidence must be approached with caution." Molefe J quoted this in the Full Court judgment above n 4 at para 18.

[15] Section 258 of the Criminal Procedure Act 51 of 1977 reads:

> "If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, attempted murder, but—
>
> (a) the offence of culpable homicide;
>
> (b) the offence of assault with intent to do grievous bodily harm;
>
> (c) the offence of robbery;

[49] At his trial before Seriti J, Mr Phakane faced two separate charges – one of assault and a main charge of murder. The two charges related to two separate sets of events. The assault charge related to incidents occurring between 16 and 20 August 2006. Mr Phakane stood accused on this charge of a sustained series of assaults on Ms Boshomane. The murder charge was based on allegations involving a particular incident of assault, which culminated on or about 20 August 2006, when Ms Boshomane was brutally killed.

[50] The trial court acquitted Mr Phakane of the separate, preceding, charge of assault – but it convicted him on the main charge of murder. On this, he was granted leave to appeal to the Full Court. Before that Court, the only issues were his conviction of murder and the sentence imposed for that conviction.

[51] Though a portion of the trial record was lost, the Full Court was provided with the evidence of Ms Paulina Motheba,[16] Mr Elias Bango,[17] and Mr Johannes Kgone.[18]

(d) in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act [46 of 1935], with intent to conceal the fact of its birth;

(e) the offence of common assault;

(f) the offence of public violence; or

(g) the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law,

the accused may be found guilty of the offence so proved."

[16] Ms Motheba testified, Trial Court judgment above n 1 at 4-5, that—

> "on Saturday 16 August 2006 she was at the church where she met the deceased. Deceased ha[d] informed her that accused ha[d] assaulted her after falsely accusing her of infecting him with venereal disease. Deceased had a scar but cannot say that is where she was assaulted. Whilst talking to the deceased the accused emerged, chased the deceased threw a stone at her and she ran away but fortunately that stone did not [strike] the deceased. A week later she learnt that the deceased ha[d] passed away. On various occasions deceased told her that accused was assaulting her."

[17] Mr Bango testified, id at 5, that "on 19 August 2006 he visited accused at his parental home. He found the accused and the deceased quarrelling". Upon application by the State, the Court declared him a hostile witness on the ground that in his statement to the police he stated that he saw the accused assaulting the deceased. "He tried to stop the accused from assaulting the deceased. He failed and accused continued to assault[] the deceased and he left them".

[18] Mr Kgone testified, id at 7, that on a particular day – the date of which he could not recall – he saw the accused and his girlfriend arguing. The Court noted:

Of particular importance, the Full Court had before it the evidence of Mrs Martha Phakane, Mr Phakane's mother. She testified that he had said to her that "she must come back home as he has fought with his girlfriend and he has injured her. She asked him how he injured her and she further told him that if he has injured her he must take her to the hospital or to the clinic".[19] The trial court rightly accepted Mrs Phakane's evidence. It was of impeccable pedigree and reliability. The trial court drew the compelling inference that this assault – the assault that culminated in Ms Boshomane's death – was of a different nature from previous assaults.[20]

[52] Evidence available to the Full Court also indicates that Mr Phakane was seen assaulting Ms Boshomane, that he accused her of cheating on him and referred to her demeaningly as a prostitute, that he threw a stone at her, and that he threatened to kill her. The evidence also establishes that Ms Boshomane was last seen sometime on 20 August 2006 and that her body was found in a veld on 31 August 2006.

[53] Before the Full Court, Mr Phakane disputed his conviction on the murder charge. But he himself conceded that, were his appeal against that charge to succeed, a conviction of assault would be competent on the charge of murder. Molefe J for the Full Court records Mr Phakane's concession thus:

> "It is argued by appellant's counsel that the remaining evidence of the state witnesses only serves to prove that the appellant had assaulted the deceased with a belt. This

---

> "He approached them, asked the accused what was the problem and accused told him that his girlfriend was cheating on him and he Phakane, the accused, wanted to assault the girlfriend. . . . He further testified that the accused told him that he was going to kill [his] girlfriend and he again reprimanded the accused."

[19] Id.

[20] Seriti J, id at 11, found: "The evidence of Mrs Phakane, in my view, indicates that the accused had seriously injured the deceased and that is the reason why he requested his mother to come back home." Molefe J, Full Court judgment above n 4 at para 19, aptly noted:

> "It is common cause that the appellant assaulted the deceased on many occasions. I do not see any reason why the appellant would have called his mother to report that he injured the deceased if he only assaulted her with a belt and did not injure her, according to his testimony. The appellant was the last person who was seen arguing with the deceased and the two had a history of violence between them."

> evidence of assault was admitted by the appellant but only justified a conviction on the competent verdict of assault."[21]

[54] Here, there is more than enough evidence to prove beyond a reasonable doubt that Mr Phakane assaulted Ms Boshomane on or around 20 August 2006. We should convict Mr Phakane, now, of assault as a competent verdict on the murder charge for which we must acquit him. That would not be to convict him of the charge of assault for alleged actions between 16 and 20 August 2006 of which the trial court acquitted him. It would be to convict him, separately, of assault on the murder charge. Indeed, that the trial court acquitted Mr Phakane on the separate charge of assault is irrelevant to determining his guilt of assault on the separate charge of murder, of which assault is a competent verdict.

[55] The purpose of the competent verdict is to provide the state with the ability to prosecute an individual for a lower level crime – which the evidence establishes – in the event that the more serious crime cannot be proven beyond reasonable doubt.[22]

[56] In this instance, the evidence before the Full Court proves beyond reasonable doubt that Mr Phakane assaulted Ms Boshomane on or about 20 August 2006. There is strong circumstantial evidence – namely, the fact that this was the last time that she was seen – to indicate that the assault was related to her murder. Zondo J's argument requiring a direct link is misplaced.[23] Any stronger link between the assault and the murder would have allowed the Full Court to properly uphold the murder charge.

---

[21] Full Court judgment above n 4 at para 17.

[22] Joubert (ed) *Criminal Procedure Handbook* 10 ed (Juta & Co Ltd, Cape Town 2011) at 302:

> "It is possible that the evidence might fall short of proving the crime charged, but nevertheless succeeds in proving beyond reasonable doubt the commission of some other offence not specifically formulated as an alternative charge . . . to the charge in the indictment or charge-sheet, as the case may be. This type of situation is governed by the statutory rules pertaining to so-called competent verdicts, that is, the unexpressed or latent or implied charges which only surface once the crime charged is not proved but some other crime, which is normally lesser than or akin to the crime charged, is proved."

[23] See [43] to [44].

[57] Given the facts the trial court accepted, and the portions of the record available to the Full Court and to us on appeal, a competent verdict of assault on the charge of murder should be entered.

[58] It may be true that, if we were to do this, the State would not be able to re-institute the murder charge against Mr Phakane. But the prospect of that happening, so many years after the murder, is small, especially since Mr Phakane has already spent more than eight years in prison, and the location and wellbeing of the potential witnesses against him, should he ever be re-charged, must be very uncertain.

[59] This hardly reduces the sadness of this case. Even if we were to convict Mr Phakane of assault, any sentence we imposed for it would be far less than he has already served on the murder conviction, which we must now set aside. His time already served in prison means that he must be released anyway. A competent conviction of assault would make no practical difference to Mr Phakane. And it would bring no justice to his victim, Ms Boshomane, nor to her mother and her loved ones.

[60] The only difference is that the conviction of assault would be entered in and reflected on Mr Phakane's criminal record. It would be known and recorded that he grievously wronged Ms Boshomane. And that the justice system held him to account at least on that. Some small justice, in this way, may have emerged from what duty requires us to do today.

FRONEMAN J (concurring):

[61] I have read the judgments of Zondo J and Cameron J. It seems to me that the crucial issue here is whether the missing evidence taints the record entirely – with the result that the appeal must succeed but that a retrial might be possible – or only partly, in which case a competent verdict of assault is still possible on the remaining part of the record. This is an evaluative assessment, open to reasonable disagreement.

[62] I tend towards the view that the missing evidence is crucial to the determination of the applicant's guilt or innocence on all the charges. Zondo J accepts that this does not mean that a retrial is not possible, but elects not to order that the matter be remitted to the trial court. I fail to see why this should not be done. Justice to the deceased and her family demands it. If circumstances have changed to the extent that further prosecution has become practically unrealistic or impossible, then that can be dealt with appropriately in the High Court. But that should not be assumed by us.

[63] I thus concur in granting leave and upholding the appeal, but would also order that the matter be remitted to the High Court for an investigation into whether a retrial should proceed.

For the Applicant:	M Malowa and C Mavundla instructed by Pretoria Law Society of Advocates
For the Respondent:	AJ Rossouw and DWM Broughton instructed by the Office of the Director of Public Prosecutions