REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: A349/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

....
DATE
SIGNATURE

In the matter between:

NDLOVU GEORGE **APPELLANT1**

THOKOLO KHETHANI **APPELLANT 2**

and

THE STATE **RESPONDENT**

J U D G M E N T

I INTRODUCTION

[1] According to the charge sheet Appellant 1 was accused 4, and Appellant 2 accused 3 in a trial in the regional court, Randburg where they were two of 5 accused. They were charged with 10 counts which were all allegedly

committed. As far as counts 1 - 8 are concerned, with common purpose and as far as counts 9 and 10 are concerned, based on joint possession. This was for robbery on 4 August 2006 at or near the First National Bank, Ferndale, with aggravating circumstances as far as counts 1 - 4 are concerned, in that they used firearms. They faced the following counts:

1. Robbery with aggravating circumstances, in that they assaulted Erick Westhuizen and other staff members of the bank and with force took R157 000.00 from them;

2. Robbery with aggravating circumstances in that they assaulted Bradley Forman and with force took his watch;

3. Robbery with aggravating circumstances in that they assaulted Moganamhal Naidoo and with force took his cell phone;

4. Robbery with aggravating circumstances in that they assaulted Joleen Pillay and with force took her cell phone;

5. Attempted murder of Inspector Jan Swarts or his crew members, by shooting at them;

6. Attempted murder of Mkhanyisela Jajini by shooting at him and wounding him;

7. Theft of a motor vehicle KHF 344 GP, the property of Doug Slater;

8. Malicious injury to the cashier's safety glass in front of the cashier booths, the property of First National Bank;

9. A contravention of section 4(1)(b) of the Firearms Control Act 60/2000, in that they possessed prohibited firearms; and

10. A contravention of section 3 of the same Act, in that they possessed 2 semi-automatic firearms without a license.

[2] They were both represented by Mr Tshivhase during the trial and pleaded not guilty to all 10 the charges on 19 June 2008 without disclosing the bases of their defences. During the trial Appellant 2 made certain formal admissions which rendered him guilty to 9 counts, excluding count 8, as this was found to be a duplication of charges. After a lengthy trial Appellant 1 was convicted on 22 May 2014 as charged, which obviously excluded counts 3 and 8 as the trial court found that Appellant 1 did not commit count 3, and count 8 was a duplication. Appellant 2 was convicted on account of his admissions on 9 counts, except count 8.

[3] On 23 May 2014 the Appellants were sentenced as follows:

i Count 1, 2, 3, and 4: Robbery with aggravating circumstances: Both Appellants 10 years imprisonment on each count, to be served concurrently;

ii Count 5: attempted murder: Both Appellants 3 years imprisonment;

iii Count 6: Appellant 2: attempted murder: 3 years imprisonment;

iv Count 7: theft of the Maxima motor vehicle: Both Appellants 3 years imprisonment;

v Count 9: unlawful possession of automatic firearms: Both Appellants 10 years imprisonment;

vi Count 10: unlawful possession of semi-automatic firearms: Each Appellant 10 years imprisonment.

The trial Court ordered counts 9 and 10 to run concurrently.

Appellant 1 was sentence to effectively 26 years imprisonment and Appellant 2 to 29 years imprisonment. They were both declared unfit to possess firearms.

[4] Immediately after their sentences Appellant 1 applied for leave to appeal against his convictions and sentences, and Appellant 2 against his sentences. There are no written grounds of appeal that is part of the record, and we assume that the grounds are those set out in the petition for appeal that was lodged on 10 July 2014 by Appellant 1 in person. The first and most important ground can be summarised as follows as far as the conviction is concerned, namely that the court a *quo* erred in finding the Appellant guilty of the crimes as the evidence of the State Witnesses did not meet the requirements to prove his guilt. Appellant 2's grounds of appeal were mainly that his sentences should have run concurrently with two previous sentences that were imposed in previous matters, that he pleaded guilty, that he was in custody for another matter and completed various rehabilitative programmes, that he spent 3 years and 4 months in custody pre the trial, and that he is the breadwinner for his family.

[5] The applications were dismissed. Not content with the finding, both petitioned the Judge President for leave to appeal on the same grounds as in the trial court, which leave to appeal was granted.

[6] It is unclear what happened in the interim, and is not improbable that the papers containing the route that was taken thereafter, is also lost. According to the file however, the petition served before Maumela J and Setusha AJ on 23 March 2016. They could not consider the petition as the record was incomplete, and the matter was struck off the roll.

[7] It is evident from the record that was placed before us, that no attempt was made to reconstruct the record, and there is no indication that either the

Appellants or any other witnesses were approach to assist with such a reconstruction.

[8] In an affidavit received by the Registrar on 20 July 2016, the clerk of criminal court in Randburg stated that he was unable to locate the recording of the proceedings, and that the presiding officer had retired and was not available for a reconstruction of the record.

[9] The current regional magistrate of Randburg confirmed that the trial magistrate Mr Andrews had no intention to attend to outstanding matters. A search for his notes to assist in a reconstruction of the record, led to nothing. The prosecutor stated that she gave her notes to the appeals clerk, and she could not remember the facts to assist in a reconstruction of the record. Mr Tshivhase from Legal Aid SA who represented the Appellants in the trial, declared that the file of the matter could not be located, and that he had no notes or record on the trial.

[10] On 20 February 2017 the petition again served before Wright and Twala JJ wherein they found that they were unable to weigh the petition because p, 555 up to p. 663 of the record was missing, and ordered the Appellants to complete the record before the petition could be dealt with.

[11] On 12 December 2017 Modiba J confirmed that the matter served before her and Msimeki J on petition, but that the petition could not be considered due to the incomplete trial record. She issued a directive that the matter be enrolled in the appeal court for legal argument whether the Appellants' constitutional right to a fair trial had been encroached.

[12] On 25 March 2019 the Judge President issued a practice directive that Applicant 1's petition application be enrolled for finalization despite the lacunae in the trial record as further reconstruction was not possible.

[13] On 27 July 2022 the petition served before Dosio J and Bhoola AJ. In granting both the Appellants leave to appeal their convictions and sentences, they made the following orders:

> ***"1. That the petition in terms of section 309C of Act 51 of 1977, for leave to appeal the convictions of George Ndlovu and Khetani Thkolo is granted for the following reasons:***
>
> *The recordings for the following dates are missing, namely 5 July 2011, 6 July 2022, 19 October 2022" (*The reference to 2022 in both instances is an error. It should be 2012.) "*and 16 July 2013. There are other dates where the transcript is also not complete but it is difficult to determine with certainty which further dates were not transcribed.*
>
> *As regards the first state witness, namely Andries Ignatius van der Linden, most of his evidence in chief and the complete cross-examination was not recorded.*
>
> *As regards the second state witness, namely Warrant Officer Swarts, his complete evidence in chief his missing. Only the cross-examination is transcribed.*

As regards the third state witness namely Warrant Officer Shai, there is no recording of the inception of his evidence in chief and it is difficult to ascertain how much of the evidence in chief was not recorded.

As regards the fourth state witness namely James Arthur Benjamin Swann, it is unclear whether his complete evidence was recorded as there were numerous adjournments and the evidence is extremely brief.

The judgement is not fully recorded as the part that is transcribed commenced halfway through the evaluation of accused 1, as a result, the evidence of the state witnesses is missing, as well as the evaluation of their evidence. It is also unclear if the evidence of all the state witnesses has been transcribed, as no comparison can be made with the evidence available due to the judgement not being recorded fully.

The record cannot be rectified as the regional magistrate retired and the supervisor at the Randburg appeals section states that the regional magistrate no longer has a recollection of this matter. The appeals clerk was unable to trace the recording.

The judge president has also requested that this petition be enrolled for finalisation despite the lacunae in the trial record.

2. That the petition in terms of section 309C of act 51 of 1977 for leave to appeal against the sentence is granted for the following reasons:

Due to the lacunae in the trial record, it is difficult to determine the factors that led to the imposition of the sentence in respect of George Ndlovu and Khetani Thokolo."

[14] The matter now serves before us on appeal following their order. It must be pointed out that Appellant 2 made all the necessary admissions which led to his convictions on the charges of which he had been charged. Advocate Milubi on his behalf confirmed the correctness of the convictions and confirmed that Appellant 2 is not appealing the convictions, but only the imposed sentences.

II LEGAL PRINCIPLES

[15] The powers of a court of appeal in terms of section 322 (1) of the Criminal Procedure Act 51/1977, are set out as follows:

> *(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may -*
>
> *(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or*
>
> *(b) give such judgment as ought to have been given at the trial or*

impose such punishment as ought to have been imposed at the trial; or

(c) *make such other order as justice may require……"*

[16] If the trial court commits a misdirection on a point of law, the court of appeal must nevertheless establish whether the evidence proves beyond reasonable doubt that the accused is guilty. It is therefore a possibility that a point of law may be decided in favour of an accused, and the conviction still upheld (*S v Bernardus* 1965 (3) SA 287 (A) at 299F).

[17] The duty of a presiding officer was described as follows in *S v Thomo* 1969 1 SA 385 (A) 394 C-D: "*It is of importance first to determine what conduct was established ... Having thus determined the proper factual basis, the court can then proceed to consider what crime (if any) has [been] committed. The former enquiry is one of fact, the latter essentially one of law. When the presiding officer considers what one might call, a fact finding phase, it must be shown that the evidence was considered and evaluated. This phase forms an important element of each judgment and must appear as part of the judgment."*

[18] As for the evidence of an appellant, "*in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities.*

But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true." (*S v Shackell* 2001 (4) SA 1 (SCA) para 30).

IV MISSING RECORD

[19] The problem that we are confronted with as far as the convictions of Appellant 1 is concerned, is that large parts of the record are missing, and cannot be reconstructed. All that we have are bits and pieces of what was testified during the trial. We are permitted to evaluate those bits and pieces to establish whether there was a correct finding by the presiding officer. In this matter however, the evidence is gravely fragmented and lack crucial evidence and cross-examination.

[20] The State has submitted in argument that the main issue in the appeal is the identity of the perpetrators. We are of the opinion however, that the grounds of appeal of Appellant 1 is formulated in more wider terms, and cannot be restricted to identity only. He specifically stated that the evidence of the State Witnesses did not meet the requirements to prove his guilt, which does not limit his defence to identity.

V MISSING OR INCOMPLETE RECORD

[21] *Ex facie* the record before us, no attempt was made to reconstruct the record as it was found to be impossible without the co-operation of the trial magistrate. Other participants in the trial, like the prosecutor and Legal Aid SA who appeared on behalf of the Appellants in the trial, were of no assistance.

All that we have before us, is the incomplete record with large portions of the evidence missing.

[22] The State has referred us to *S v Chabedi* 2005 (1) SACR 415 (SCA) par [6] where the following was said:

> *"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."*

[23] We have already referred to the issue that has to be decided on in the Appeal as far as Appellant 1 is concerned. We will refer hereunder to the defects in the record, and determine whether it is complete enough for us to determine the issue.

[24] When a trial record is incomplete, a high court may in certain circumstances, set aside the conviction. It must be established whether the record is substantially correct, which will be considered in the context of each case (*S v Booysen* 1996 (2) SACR 393 (EC)). In that case it was impossible to reconstruct the record, which missing parts contained essential evidence. As it was not possible to reconstruct the record, it led to the proceedings being set aside. In *S v S* 1995 (2) SACR 420 (T) the mechanical recording was defective and large sections of the essential evidence were indicated as being inaudible. On appeal the court set aside the conviction and sentence.

[25] The record must be *adequate* to properly consider the appeal but it need not be a perfect recording of everything that was said at the trial (*S v Chabedi* 2005 (1) SACR 415 (SCA) par [5]).

[26] In addition to the incomplete record before us, a copy of what appears to be a copy of the docket was inserted at p007. 3-13 to 007.3-34, obviously for it to serve as secondary evidence.

[27] In *S v Zondi* 2003 (2) SACR 227 (W) the court concluded that both the appellant and the state had a duty to try and reconstruct the record from secondary sources (p. 245 b–d). The clerk of the court must state what attempts were made to reconstruct to record (p. 245 b–c), and submit the best secondary evidence (p. 244g–h). In *Zondi* the police statements of the witnesses were submitted accompanied by affidavits from the legal representatives. The court accepted the reconstruction and confirmed the conviction on appeal, even though the official record contained no transcription of the trial proceedings.

[28] In this matter the prescribed procedures were not or could not be followed. The copy of the docket was not accompanied by any affidavit or explanation from the prosecutor or legal representative. The docket on its own does not contribute anything to a proper reconstruction of the record. There is no indication which of the deponents testified. As already mentioned, the prosecutor and legal representative did not contribute anything to assist in the reconstruction of the record. There is no indication that the Appellant was approached for his assistance.

[29] In *Davids v S* [2013] ZAWCHC 72 at para 13 the court decided as follows:

"*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*."

[30] In S v *Sebothe and Others* 2006 (2) SACR 1 (T) at paragraph [8], the court made the following remarks regarding incomplete records on appeal*:*

"The Constitution of the Republic of South Africa, 1996, provides, inter alia, through s 35, that an accused person has a right to a fair trial, which includes the right to appeal or review. If the appeal Court or the review Court is not furnished with a proper record of proceedings, then the right to a fair hearing of the appeal or review is encroached upon and the matter cannot properly be adjudicated. In that regard, the only avenue open to protect the right of the accused or the appellant is to set aside those proceedings if it is impossible to reconstruct the record."

[31] A lost or incomplete record of the proceedings does not automatically lead to the setting aside of the conviction and sentence. Such relief will only be granted where a valid and enforceable right of appeal is frustrated by the fact that the record is lost or incomplete and cannot be reconstructed (see *S v Ntantiso and Others* 1997 (2) SACR 302 (E) and *S v Leslie* 2000 (1) SACR 347 (W) at 353D-E).

[32] The Appellant at no time abandoned his right to appeal, and took timeous steps as required. He even applied for condonation where he timeously applied for leave to appeal in his petition application.

[33] In *S v Marais* 1966 (2) SA 514 (T) the court was confronted with a lost record with no prospect of its reconstruction. It found as follows at 516 G-H:

> "*The appellant has been seriously frustrated and prejudiced owing to a fault on the part of the State's servants. She is entitled to an appeal as of right. She is entitled to receive a copy certified as correct. This cannot be achieved. She has been frustrated in a basic right. She has been deprived of this through no fault of her own. In all these circumstances the only thing to do is to exercise the powers granted in s 98 of Act 32 of 1944, as amended, and to set aside the whole of the proceedings"*

And at 517A-B*:*

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

VI THE AVAILABLE RECORD

[34] The question that remains, is whether the contents of the current record contain sufficient evidence to consider the appeals of the Appellants.

[35] We confirm the shortcomings that was referred to by Dosio J and Bhoola AJ in their order mentioned in par [13] *(supra*), except with respect, for the sentence as far as Appellant 2 is concerned.

[36] In addition we found the following shortcomings:

1. There is no evidence on record of the commission of the robberies mentioned in counts 1, 2, 3 or 4. The evidence of Erick Westhuizen and other staff members of First National Bank, who are mentioned as complainants on count 1, are not on record and the way in which Appellant 1 is linked to the offence, if at all, cannot be determined. Similarly, the evidence of Bradley Forman mentioned in count 2, Moganamhal Naidoo mentioned in count 3 and Joleen Pillay mentioned in count 4 are not on record. None of these people are mentioned in the court's judgement. It is not clear on what grounds it was found that "the state has proved the factual allegations in counts 1, 2, 3 and 4".
2. The evidence of Andries van der Linde, a Forensic Specialist from First National Bank, was not completed.
3. The evidence-in-chief of Warrant Officer Swarts, the complainant in count 5, is missing.
4. The court found that there were minor discrepancies in the version of the State, but there is no record of the version that is referred to, and whether they are indeed "minor".
5. The only evidence as far as Appellant 1 is concerned, is that he jumped over a wall and was found on the other side in the

> presence of other accused. It does not warrant a finding beyond reasonable doubt that he is guilty of the charges that he had been convicted of. Warrant Officer Holmes who arrested him, was confused with the faces of Accused 1 and Appellant 1.

[37] We cannot find that the record is substantially correct. Essential parts of the evidence are missing, and it is impossible to reconstruct it. We are not able to properly consider the appeal as far as Appellant 1 is concerned.

[38] The inability of Appellant 1 to exercise his right of appeal because of the incomplete record, which was pointed out by 8 Judges who considered his petition on 4 separate occasions, is not attributable to him. It is a breach of his constitutional right to a fair trial. In our opinion the proceedings have not been in accordance with justice.

VII APPELLANT 2

[39] Appellant 2 made certain admissions during the trial, which led to him being found guilty on the charges in respect of which he made the admissions. He is not appealing the convictions, but only the sentences that were imposed.

[40] The address in mitigation of sentence appears on p. 004-272 of the record before us, and the reasons for sentence on p. 004-277. There is no indication that there are aspects of the sentence that are missing from the record. Appellant 2 only has one issue, and that is that he wants this court to interfere with the sentence.

[41] In an appeal against sentence it must be determine whether the trial court exercised its discretion properly, and not whether another sentence should have been imposed (*S v Farmer* [2002] 1 All SA 427 (SCA) par 12).

[42] The discretion to impose a sentence is that of the trial court. A court of appeal does not have an unfettered discretion to interfere with the sentence imposed by the trial court (*S v Anderson* 1964 (3) SA 494 (A) 495; *S v Whitehead* 1970 (4) SA 424 (A) 435; *S v Giannoulis* 1975 (4) SA 867 (A) 868; *S v M* 1976 (3) SA 644 (A) 648 *et seq*; *S v Pillay* 1977 (4) SA 531 (A); *S v Rabie* 1975 (4) SA 855 (A)).

[43] A court of appeal will only interfere where it is apparent that the discretion of the trial court was not exercised judicially or reasonably.

[44] The test on appeal in relation to sentence is "*whether the court* a quo *misdirected itself by the sentence imposed or if there is a disparity between the sentence of the trial court and the sentence which the Appellate Court would have imposed had it been the trial court……*" (*S v Van de Venter* 2011 (1) SACR 238 (SCA) at para [14]).

[45] In *S v Pillay* 1977 (4) SA 531 (A) at 535 E-F the Court held that the word "misdirection" simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence. The essential enquiry on appeal against sentence is not whether the sentence was right or wrong, but whether the court that imposed it exercised its discretion properly and judicially. A mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the

court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's discretion on sentence.__

VIII COURT *A QUO'S* REASONS FOR SENTENCE:

[46] In 1998 Appellant 2 was convicted of robbery and possession of a firearm. He was released from prison in 2005. The court mentioned that it was considered in his favour that he changed his plea of not guilty to guilty on all the counts.

- The crimes are serious and prevalent, and there are aggravating circumstances.
- The interest of society expects the courts to impose appropriate sentences which would reflect the seriousness of the crimes.
- The cumulative effect of the sentences was considered. The court considered that appellant had spent approximately 6 years in custody in the case that took 8 years to finalize,
- It was consequently found that this amounted to substantial and compelling circumstances and that it could deviate from the prescribed minimum sentences.
- The court consequently imposed the sentences as mentioned in par [3] (supra).

IX GROUNDS OF APPEAL ON SENTENCE:

[47] 1. Appellant 2 was 39 years old during sentencing and 31 years old when the offences were committed;

2. His child was 16 years old at the time of sentence and he was staying with his mother;

3. His highest standard of education was standard 9 at the time of sentencing. He was also studying for a national certificate;

4. He was self-employed, and delivered vegetables to spaza shops;

5. He was serving a sentence of 23 years imprisonment for robbery committed in 2005 at the time when he was sentenced in this matter. (It does not appear as if this conviction was brought to the attention of the magistrate);

6. He changed his plea of not guilty to guilty during the trial;

7. The sentences that were imposed by the learned magistrate were shockingly inappropriate;

8. Although the trial court found that the appellant had been in custody for many years pending the finalization of the matter, this factor was not afforded its due weight when imposing the sentences.

[48] We have considered Appellant 2's plea regarding sentence. The learned regional magistrate mentioned during sentence that it was considered in his favour that he had changed his plea to guilty on all the charges. If one scrutinizes the imposed sentences however, it does not appear that he received any credit for it, or that it was considered in his favour that he changed his plea to guilty. He received the same sentences that were imposed on Appellant 1, for the same offences that they were found guilty of. We regard that as a misdirection which warrants an interference by us.

X ORDER

[49] We consequently make the following orders:

1. The appeal of Appellant 1 succeeds. His convictions and sentences are set aside;

2. Appellant 2's appeal against sentence succeeds. It is replaced with the following:

i Count 1, 2, 3, and 4: Robbery with aggravating circumstances: 10 years imprisonment on each count. It is ordered that these sentences be served concurrently;

ii Count 5: attempted murder: 3 years imprisonment;

iii Count 6: attempted murder: 3 years imprisonment;

iv Count 7: theft of a motor vehicle: 3 years imprisonment;

v Count 9: unlawful possession of automatic firearms: 10 years imprisonment;

vi Count 10: unlawful possession of semi-automatic firearms: 10 years imprisonment.

It is ordered that the sentences on counts 6, 7, 9 and 10 be served concurrently. The effective sentence is 23 years imprisonment.

The sentences are antedated to 23 May 2014.

The court makes no finding in terms of section 103 (1) of Act 60/2000.

P. J. JOHNSON A.J.

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

I agree and it is so ordered

W.J. DU PLESSIS A.J.

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

Heard on:	30 October 2023
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Date of Judgment:	2 November 2023

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