IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. CC22/2018

In the matter between:

THE STATE

Vs

SIVIWE RULWA **Accused No.1**

VUSUMZI MALILA **Accused No.2**

JUDGMENT

JOLWANA J:

Introduction

[1] This is an interlocutory application by the legal representative of the accused for the reconstruction of the record of the trial on the basis that the condition of the record as it stands will result in the accused not getting a fair trial.

Background to the application

[2] Throughout the proceedings the accused were represented by a senior attorney Mr Noxaka. The trial commenced in the normal way and at the opportune time after the accused had pleaded to the charges preferred against them the state led its evidence by calling a number of witnesses. The state closed its case once it had exhausted the evidence it intended to present before court. When the state closed its case the scheduled time for the court sitting had run out. It therefore became impossible for the accused to open the defence case thus necessitating a postponement.

[3] However between the date on which the trial was postponed and the date on which the proceedings were scheduled to recommence, Mr Noxaka unfortunately passed away. This unfortunate turn of events forced another postponement to enable the accused to find another legal representative to represent them.

[4] Eventually and after a few postponements Mr Daubermann came into the record representing both accused. He opened the defence case by making an application on behalf of both accused on affidavit. The order sought in that application is for the record of the trial proceedings to be reconstructed in so far as it is incomplete. The factual averments alleged in the accused's affidavit are as follows:

> "[12] I am further advised by Mr Daubermann that in *casu* that the Transcribers have inserted the word "inaudible" in no less than 1152 places and the word "indistinct" in no less than 1247 places in the Transcript thereby indicating that the digital recording of the proceedings in indistinct or inaudible in those locations and can, accordingly, not be transcribed. This means that, on the face of the Transcript, 2399 parts of the proceedings at my trial were not digitally recorded and cannot be transcribed.
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> [13] I am further advised by Mr Daubermann that in *casu* that the Transcribes have inserted the word "not interpreted" in 87 places in the Transcript thereby indicating that the digital recording of the proceedings in those locations also could not be transcribed.

[14] Evidence was led in this matter on 4, 5, 6, 7, 8, 11, 14, 15 & 18 March 2019. The following table reflects a breakdown by date and number of times the words "indistinct", "inaudible" and "not transcribed" appear in the Transcription according to Mr Daubermann:

Date	**"Inaudible"**	**"Indistinct"**	**"not interpreted"**
4 March 2019	116	3	3
5 March 2019	122	11	6
6 March 2019	308	17	5
7 March 2019	235	5	2
8 March 2019	68	561	35
11 March 2019	16	605	24
14 March 2019	249	7	0
15 March 2019	2	2	0
18 March 2019	35	36	12
Sub-totals	**1152**	**1247**	**87**
Total	**2486**		

[15] I am advised by Mr Daubermann that the "inaudibles", "indistinct" and "not transcribeds" appear in the Transcript which is before the court and that it is therefore unnecessary for me to refer herein to the exact location of each "inaudible" and/or each "indistinct" and/or "not transcribed". The Transcript "speaks for itself" and a simple reading thereof will reveal the location of each and every "inaudible", "indistinct" and "not transcribed" therein.

[16] The record of the proceedings at my trial before the above Honourable Court is patently incomplete in numerous material respects.

[17] Although it seems that it was mainly the prosecutor's voice that was not recorded, the replies of the witnesses concerned cannot be understood in context without knowing what her questions were.

[18] I am advised by Mr Daubermann that large parts of the Transcription are, in the result, intelligible in their present form.

[19] I respectfully submit that the above Honourable Court was obliged to keep a proper record of not only the witnesses' answers but also of the questions that were put to them. The questions put to the various witnesses are no less important than their answers to those questions.

[20] In order for me to properly instruct Mr Daubermann on the evidence that has been led thus far by the State and for him to conduct my defence properly, I obviously require a complete and accurate record of the proceedings thus far. The record of the proceedings is, however, so deficient / defective / inadequate that it is simply impossible for me to properly instruct Mr Daubermann and for him to conduct my defence properly and/or advise me on trial at this stage.

[21] I am advised that the trial simply cannot proceed without a complete and accurate record of the proceedings before the above Honourable Court and that an attempt will have to be made to reconstruct the record. I stand to be severely prejudiced in conducting my defence should the trial proceed with the record of the proceedings in its present, incomplete and inaccurate, form.

[22] I have a constitutional right to a fair trial which includes the right to adduce and challenge evidence. I cannot challenge the evidence which has been adduced against me without a complete and accurate record of that evidence.

[23] I respectfully submit that to proceed with the trial with the record in its current, incomplete and inaccurate, form will constitute a gross violation of my constitutional right to a fair trial.

[24] My former legal representative, Mr Noxaka, being deceased, can obviously not assist in the process of reconstructing the record and I can also not assist because I did not keep notes of the proceedings and cannot remember everything that was said during the trial. This exacerbates the prejudicial effect of incomplete and inaccurate record.

[25] I am advised that the only course open to the above Honourable Court, in the circumstances, is to direct that the record be reconstructed.

[26] I have very serious reservations concerning the ability of the Honourable Presiding Judge and the counsel for the State being able to reconstruct the record in this case with any degree of accuracy given the vast number of occasions on which the recordings of the proceedings are noted to be "indistinct" and/or "inaudible" and/or "not interpreted". Given Mr Noxaka's untimely death, I also stand to be prejudiced by the fact that my present legal representative, Mr Daubermann, will not be able to play any meaningful role in the reconstruction process. I cannot remember everything that was said during the trial and will not be able to confirm the correctness or otherwise of the reconstructed record. I am certainly unable to properly instruct Mr Daubermann with regard to the reconstruction of the record."

[5] The State opposes this application and oral submissions were made by both the accused legal representative and Mrs Ngxingwa, counsel for the State on what the court should take into account in determining the application.

[6] The duty of the court to keep a proper record of the proceedings is provided for in section 76(3) of the Criminal Procedure Act 51 of 1977 (the Act) on which this application is based. Section 76(3) provides:

"76(3)(*a*) The court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept and the charge-sheet, summons or indictment shall form part thereof.

(*b*) Such record may be proved in a court by the mere production thereof or of a copy thereof in terms of section 235.

(*c)* where the correctness of any such record is challenged, the court in which the record is challenged may, in order to satisfy itself whether any matter was correctly recorded or not, either orally or on affidavit hear such evidence as it may deem necessary."

[7] Section 235(1) provides:

> "It shall at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be prima facie proof that any matter purporting to be recorded was correctly recorded."

[8] The trial proceedings in this matter were mechanically recorded and later transcribed into a written record. As I understand it the accused's contentions are not based on the record of the proceedings being inaccurate or incorrectly recorded. Their case is simply that the record is incomplete because the transcriber inserted the words "inaudible", "indistinct" and "not interpreted" in a number of places. Therefore, so goes the submission, the accused are unable to instruct their legal representative fully as they do not know and cannot remember what the missing words were. They are therefore unable to effectively defend themselves without knowing what the questions were to which the recorded answer was given or what the actual words of the speaker were where the words "inaudible", "indistinct" or "not interpreted" have been inserted by the transcribers.

[9] That the record contains areas with missing words where the transcribers wrote the words "inaudible", "indistinct" or "not interpreted" is common cause. I did not understand the State to be contending that the record has no "inaudibles", "indistinct" or "not interpreted". The State's submission is that despite the existence of those "inaudible", "indistinct" and "not interpreted", the evidence as recorded and as contained

in the transcribers' record is clear. Therefore, the accused should be able to instruct their legal representative and effectively defend themselves.

[10] The fundamental issue as I see it, is whether the fairness of the trial is compromised by the "inaudibles", "indistinct" and "not interpreted". I shall henceforth refer to these three categorisations of the transcribers collectively as "indecipherables". I do this because in using the three descriptions, the transcribers simply meant that they were not able to discern what was said by the speaker in the voice recording that they were transcribing.

[11] The right of the accused to a fair trial is provided for in the Constitution[1]. For the purposes of this application I am of the view that the following provisions of the Constitution are not only some of the most fundamental constitutional rights of an accused in a criminal trial but are also implicated in this application:

> "35(3) Every accused person has a right to a fair trial, which includes –
>
> (a) to be informed of the charge with sufficient detail to answer it;
> (b) to have adequate time and facilities to prepare a defence;
> (c)
> (d)
> (e)
> (f)
> (g)
> (h)
> (i) to adduce and challenge evidence;"

[12] The evidence of the state was led over a period of 9 days after which the state closed its case. I do not consider it necessary for the purposes of determining the

[1] Constitution of the Republic of South Africa, 1996.

issues before me, to indicate how many indecipherables are there on which sentence, page or even witness or speaker. However, having read the whole record, it is indeed so that there are a number of indecipherables scattered all over the record. These occurred mostly where the prosecutor was speaking probably due to a faulty microphone or some other reason.

[13] In the main there are two issues for determination. The first issue is whether the prayer sought by the accused namely, to have the record reconstructed is feasible or even desirable in this matter.

[14] Section 76(3) of the Act on which the accused rely for the orders they seek envisages a situation in which for some reason the correctness of the record is challenged. The word correct or correctness is not defined in the Act. I do not understand the accused's case to be that the record is incorrect in the sense that what is recorded is not what was said. The accused's case is simply that because of the indecipherables the record is incomplete in that some information is missing. The view that I take is that whatever was envisaged by the Legislature in crafting section 76(3) in the manner that they did, what was sought to be achieved is that the whole record must be a true reflection of the proceedings so that the accused knows exactly what the case of the State against him is and so as to be able to challenge it.

[15] The solutions provided for in the Act for an incorrect or incomplete record is not appropriate for this matter. This is so because Section 76(3)(c) provides that the court may hear such evidence orally or on affidavit so that the court itself is satisfied as to whether any matter was correctly recorded or not. The problem here is not whether or

not any matter was correctly recorded. The problem is that there are missing words in some places all over the record mostly where the prosecutor was speaking as I said before. This immediately makes the oral hearing or the submission of an affidavit inappropriate for the obvious reason that the prosecutor was not a witness. Some of the indecipherables in this matter occurred when I was speaking while others occurred when Mr Noxaka was speaking. These are few, but this is not the point as it will become clear later.

[16] The solution provided for in the Act to an incorrect recording would be appropriate if the purpose was to get confirmation from the witness of what she or he said in his evidence. The reconstruction of the record by the defence, the state and the court comparing notes as alluded to by Mr Daubermann, while practical, does not appear to be provided for in the Act.

[17] Mr Dauberman further submitted that even the solution of comparing notes in an attempt to reconstruct the record would not work in this matter. That is because he was not on brief when the trial commenced up until the state closed its case. He only got involved following the untimely passing away of Mr Noxaka, the accused's erstwhile legal representative. Therefore, in the reconstruction of the record in the sense of notes being compared he would not be able to participate because he simply does not have the notes. He submitted that it would not be appropriate for the accused through his legal representative, not to participate in the process. I might add that it is undesirable and in fact an anathema to the principles of a fair trial for the accused not to participate in the course of the meanderings of his trial. That then means the reconstruction of the record is neither feasible nor desirable in this matter.

[18] Therefore the real question is not only whether the record is complete or not or correct or not but whether whatever defect is found to exist is such that it compromises the constitutional right of the accused to a fair trial. Fundamentally, and especially for the purposes of this case, section 35(3)(i) of the Constitution provides that every accused person has a right to a fair trial which includes the right to adduce and challenge evidence. Mr Daubermann submitted and the accused make the point in their affidavits that the record in the manner that it is, precludes them from instructing him. In other words it makes it impossible for them to challenge the evidence of the state.

[19] It appears from the record itself that on some days the indecipherables occurred more often than on other days especially and as indicated before, this mostly occurred when counsel for the State was speaking. For this reason there are indecipherables on the record largely when counsel for the State would be leading the State witnesses. There were also missing words when counsel for the State cross-examinated accused no.2 during a trial within a trial. In almost all situations the answer by the witnesses tended to be recorded fully. This means that while the questions by counsel for the State might not be fully recorded at times, the answer was mostly recoded in full.

[20] This surely means that it is possible for the accused to instruct their legal representative based on the witnesses' answers and based on his own version if they choose to lead evidence. Besides, in some instances, as it happens with trial proceedings generally, questions tend to be repeated. Even in this cases there are questions that have been repeated in follow up questions or questions that sought confirmation of the answer that was given. I am not saying that this happened to all the

questions that counsel for the State asked when State witnesses gave their evidence or when accused no.2 was cross-examined.

[21] Because of the requirement that leading questions are generally impermissible when a witness is giving his or her evidence in chief, where the questions are incomplete, I do not think that the incomplete questions in those circumstances compromises the ability of the accused to challenge the evidence of the State or to adduce their own evidence in rebuttal, if so advised.

[22] Fundamentally, the real issue is whether the right of the accused to a fair trial is compromised or negated by the condition of the record. This is a constitutional principle with regard to which the Constitutional Court has had occasion to express itself. In *Phakane*[2] Zondo J, as he then was, said:

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

[2] *Phakane v S* 2018 (1) SACR 300 (CC) paras 35 and 39

> "[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.
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> 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] As far as the evidence of the State is concerned the record is largely complete. This is not to say that there would have been no benefit to the accused if the questions were all fully reflected. However, the nature of the State witnesses when they give evidence is that while they are directed on the evidence required from them the carefully monitored standard procedure is that the prosecutor may not ask leading questions. In fact the State witnesses are required to tell their stories in their own way. The evidence that they gave in this matter is largely reflected completely with very little or no extra ordinary inderipherables. This should surely enable the accused to know how to deal with the evidence of the State. Most importantly, when the State witnesses were cross-examined by the accused's legal representative, the recording is again complete with little or no occurrences of indecipherables.

[24] While the prayer sought by the accused is very clear and cannot possibly be misunderstood, namely an order for the reconstruction of the record, during submissions by the legal representative for the accused, it became very clear that the accused were actually not persisting with the prayer for the reconstruction of the record. It was submitted that this was because the defence counsel has no notes as the current legal representative of the accused was not present when the proceedings were conducted. Therefore, they have no way of assisting in the process. They also pointed

to the undesirability of a part of the proceedings taking place in circumstances where they are unable, not unwilling but unable to make any contribution. Indeed it cannot be correct that at any stage of the proceedings the accused are unable to participate meaningfully.

[25] Mr Daubermann further submitted understandably so, that even to ask the court to do it alone would not help as the benefit from the notes of the State would be lost. The submissions were clearly not for the order sought to be granted. This begs the question, why make the application if you do not want the very order you are asking for. A conundrum indeed, which is obviously not of Mr Daubermann's or the accused's own making as it is not his fault that he does not have the notes. He then submitted that in the circumstances continuing with the trial when the record is incomplete would render the trial unfair. He submitted that should I find that the reconstruction of the record is impossible, that would mean that the accused are not able to instruct him and he in turn is unable to properly represent them given the state of of the record. Once that point is reached, he submitted that the only course would be for me to refer these proceedings to the full court of this Division for the reconsideration of the fairness of these proceedings.

[26] He submitted that referring the matter to the full court for the reconsideration of the fairness of these proceedings would be based on section 173 of the Constitution which provides:

> "The Constitutional Court, Supreme Court of Appeal and the High Courts have inherent power to protect and regulate their own process and to develop the common in the interest of justice."

Based on this provision, so went the submission, the full court of this Division would be in a position to set aside these proceedings if it so decides as this court has no review powers.

[27] In any event I am of the view that as it happens in court proceedings there are almost always some indecipherables of one sort or the other. However, Mr Daubermann did submit that the problem is not just that there are too many inaudibles, but the problem is the fact that they are there whether they be a hundred or two or five hundred of them, is not the issue, as he submitted. The issue is that there should be a complete record of the proceedings.

[28] I agree that there should be a complete record of the proceedings. In my view the completeness of the record is not determined by the absence of the indecipherables of any number. There may be no indecipherables but the missing of the evidence of a witness as it happened in *Phakane*. I understood the Constitutional Court in *Phakane* to be saying that even if the record was incomplete in the sense of a witness' evidence not being part of the record, it would be relevant as to whether the court based its decision to convict the accused on that missing witness' evidence and if so to what extent.

[29] This is how the Constitutional Court expressed itself in *Phakane* in this regard:

> "[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.

[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."

[30] Clearly what determines whether or not the record needs to be reconstructed is not the presence of indecipherables but whether they render the trial unfair in that it is impossible to determine with any degree of accuracy what that witness said or did not say. After all, the fairness of the trial cannot be determined without reference to whether what the witness said is clearly captured in the record so that the accused is put in a position of putting his own countervailing evidence. The critical issue is that the fairness of the trial is to be the determining factor. Therefore, each case must obviously be determined on its own facts. Those facts include the effect of the indecipherables to the overall comprehension of the evidence and consequently the ability or otherwise of the accused to challenge it.

[31] Something needs to be said about the indecipherables which occurred when the prosecutor cross-examined accused no.2 during a trial within a trial. By way of an example, if the answer of the accused was yes or no or such answers that are

incapable of full appreciation without understanding the question, I do not think that the State would, in any event be entitled to argue its case based on those answers. If the State were to do that, the defence would be entitled to object to that and the court would rule on the matter relevant to a specific question or answer. Besides, a ruling on the admissibility of a confession and/or pointing out is not, without more, determinative of the outcome of the trial itself. In this case, as Mr Daubermann himself correctly pointed out, the indecipherables occurred in the main from the State counsel's microphone. This was when she led her own witnesses. The evidence of those witnesses was not so affected adversely and where affected, it did not, in my view, inhibit the ability of anybody especially the accused to understand what the witness said. Therefore armed with full knowledge of what the witness said the accused should surely be able to challenge that evidence and instruct their legal presentative accordingly.

[32] The view that I take of this matter is that it is not necessary for the record to be reconstructed. Furthermore the fairness of the trial to the accused will not, in my view, be affected by the occurrence of the indecipherables in the record. There is therefore no need to refer the matter to a full court for the reconsideration of the fairness of these proceedings, even if there was a legal basis to do so.

[33] Accordingly, the application for the reconstruction of the record must fail. Therefore the following order will issue.

1. The application for the reconstruction of the record is refused.

2. The application for the referral of the record in this matter to the full court for reconsideration of the fairness of these proceedings is also refused.

3. The matter is postponed in *absentia* to the 13 July 2020 provisionally to be heard in Butterworth.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the State: N NGXINGWA

Instructed By: NPA

MTHATHA

Counsel for the Accused: P DAUBERMANN

Instructed by: PETER DAUBERMANN ATTORNEYS

PORT ELIZABETH

DATE HEARD: 18 MARCH 2020

DELIVERED ON: 19 JUNE 2020