

A49/2007

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

A49/2007

DATE:

20 MAY 2011

5 In the matter between:

NICKROY NOVEMBER

Appellant

and

THE STATE

Respondent

10

J U D G M E N T**ERASMUS, J:**

15 This matter is brought on appeal on both the conviction and
sentenced imposed. The appellant was sentenced on 23
February 2004, which is more than seven years ago. He
shortly thereafter applied for leave to appeal which was
granted on both the conviction and sentence. He was released
on bail and nothing further happened. It was only at a later
20 stage when it was discovered that the appeal was not properly
prosecuted in this court, that the appellant was brought back
before the trial court, his bail was cancelled and he was
committed to prison.

25 When the record was prepared, it transpired that the recording

/bw

/...

mechanism in court did not operate properly. There was correspondence between the representatives of the appellant, it being the Legal Aid Board, and the Clerk of the Court in George, as well as the office of the Director of Public Prosecutions with the clerk of the court and the magistrate. The magistrate indicated that it would be easy to reconstruct the record as it was a guilty plea and that the "gaps" in the record had to be filled in. Unfortunately this never happened. So we are sitting with an incomplete record.

10

There are at least two reported cases in this division that sets out clearly the duties of a trial court to reconstruct the record and I refer specifically to the cases of Zenzile and Gora. I don't find it necessary to quote the full references here. The record is incomplete, as I have stated, and furthermore, if one has regard to the questions and answers preferred by the appellant at the section 112(1)(b) stage when the magistrate questions him about the offences, it is clear from the transcribed portions, that the appellant offered a defence to both the charges. That is only on the portion that we can read. We do not know how the portions that is noted as "onhoorbaar" would have influenced that.

In the circumstances, this court must interfere. The conviction and sentence cannot stand. I, however, believe that the

A49/2007

appropriate way to deal with this matter is to set the conviction and sentence aside, order the magistrate to enter a plea of not guilty in terms of section 113 and the proceedings can proceed before another magistrate. I know that in many cases of this nature, the order was merely made to set the conviction and sentence aside. I do not believe it would be just and fair towards the complainants in this matter, if a man that offered a plea of guilty on a rape charge, would just be set free because of officials in justice, and that includes the trial magistrate, did simply not do their job.

It would be just and fair, in my view, that a person who is charged with these type of offences, be put through a due process of law. The community expects that of us as a system of justice and no less would be appropriate. Accordingly I would order that the convictions and sentences be set aside. The magistrate be ordered to enter a plea of not guilty on both these charges and that the process from there be followed in accordance with the law.

FORTUIN, J: I agree.

ERASMUS, J: It is so ordered.

5

A handwritten signature in black ink, consisting of a large, sweeping loop followed by several smaller, more intricate strokes. The signature is written on a horizontal line.

ERASMUS, J