

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

CASE NO: A167/11

HENDRIK MALGAS

1st Appellant

JOHN GALANT

2nd Appellant

ADAM STUURMAN

3rd Appellant

JUDGMENT DELIVERED ON THIS 9TH DAY OF SEPTEMBER 2011

FORTUIN, J:

[1] The appellants, Hendrik Malgas, John Galant and Adam Stuurman were charged with one count of housebreaking with the intention to steal and theft, committed on 26 December 2009, in the magistrate's court, Oudshoorn. The appellants were legally represented, pleaded not guilty and were convicted on 8 September 2010. Appellants Malgas and Galant were sentenced to two years direct imprisonment, while appellant Stuurman was sentenced to three years direct imprisonment. The appellants successfully applied for leave to appeal against their conviction and sentence. The appellants were also granted bail of R200-00 pending the outcome of this appeal.

[2] It is common cause that the trial record is incomplete and that the trial proceedings were not properly recorded and could therefore not be transcribed.

[3] Section 76 (3) (a) of the Criminal Procedure Act provides as follows:

“ ... the trial court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept.”

[4] Every accused person is entitled to an appeal to a higher court. The right to a fair trial is also entrenched in our Constitution in sec 35(3) which reads as follows:

“Every accused person has a right to a fair trial, which includes the right -

...

(o) of appeal to, or review by, a higher court.”

[5] In a matter similar to this appeal, S v Gora and another 2010 (1) SACR 159 (WCD) the following was said at para 51:

“It is incumbent upon this court to ensure that the values set out in the Constitution be upheld. The most important function this court is required to perform is to dispense justice. Justice is dispensed through the mechanism of a fair trial. Inasmuch as an appeal is part of a fair trial and cannot be properly adjudicated without an original record, or at least a properly constructed

record, it stands to reason that, as far as the appeal against sentence is concerned, the appellants cannot be given a fair trial."

[6] In *casu* it is evident that all the efforts to reconstruct this record have failed with the result that no reconstruction could take place. I am of the view that the right to a fair trial is compromised as material parts of the record could not be transcribed. It is further unknown which circumstances were placed before the trial court to determine the sentence.

[7] In the circumstances, I would set aside the conviction and sentence.



FORTUIN, J

I agree.



SMIT, AJ