

SOUTH AFRICA / JUDGMENT

Femel v S (CA 37/2017; R/C 66/2015) [2023] ZANWHC 144 (17 August 2023)

[2023] ZANWHC 144**COURT**

North West High Court, Mafikeng

BEFORE

A H Petersen, R D Hendricks

CASE / FILE NUMBER

CA 37/2017; R/C 66/2015

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Source record**IN****THE HIGH COURT HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION, MAHIKENG****APPEAL****NO: CA 37/2017****CASE****NUMBER: RIC 66/2015****In**

the matter between:

JOSEPH
DODO FEMEL
APPELLANT
and
THE
STATE
RESPONDENT**Coram:**

Hendricks JP, Petersen ADJP

Heard:04
August 2023
Handed
down: 17 August 2023
ORDER
The
appeal is removed from the roll.

JUDGMENT

PETERSEN ADJP

Introduction

- [1] The appellant was charged in the Regional Court, Atamelang with three counts. Count 1: Contravening section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51 and Part I of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'). Count 2: Robbery with aggravating circumstances read with section 51(2) of the CLAA. Count 3: Assault with intent to do grievous bodily harm. The appellant was convicted on 29 June 2017 as charged on all three counts and sentenced on even date to twenty (20) years imprisonment on count 1; ten (10) years imprisonment on count 2; and one (1) year imprisonment on count 3. The Regional Magistrate ordered that the sentences run concurrently. The appellant was therefore sentenced to an effective twenty (20) years imprisonment.
- [2] On 12 July 2017, the appellant only sought leave to appeal against his conviction on the three charges, which leave was granted by the Regional Magistrate.
- [3] The parties agreed to dispense with hearing of oral arguments and that the appeal be decided on the papers.

The failure to lodge an application for reinstatement of the appeal

- [4] The appeal herein was set down for hearing for the first time on 6 May 2022. The appeal was postponed from 6 May 2022 to 26 August 2022, for reasons unknown. On 26 August 2022, the appeal was removed from the roll on the basis that the heads of argument of the respondent were not in the file. The record, however, reflects that the heads of argument of the respondent were in fact filed on 19 August 2022. The heads of argument of the appellant however, were only filed on 31 August 2022, after the appeal was removed from the roll on 26 August 2022. The order of 26 August 2022 is clearly recorded incorrectly as it was in fact the heads of argument of the appellant and not those of the respondent that were not filed. If any blame is to be apportioned for the appeal not being heard on 26 August 2022, it must be attributed to the appellant.
- [5] The appeal was subsequently set down for hearing before this Court on 11 August 2023. In the papers before this Court, the appellant applies for condonation for the late prosecution of the appeal. The appellant has, however failed to apply for the reinstatement of the appeal, after the removal thereof from the roll on 26 August 2022, as a result of his failure to file heads of argument. The removal of the appeal from the roll on 26 August 2022, occasioned by the failure of the appellant to file his heads of argument is not without consequences.

[6] Rule 67(5A)(a) of the Magistrates' Court Rules dealing with criminal appeals was substituted in the Government Gazette by GN R2134 of 3 June 2022 with effect from 8 July 2022 and by GN R2434 of 2 September 2022 also with effect from 8 July 2022. The substituted Rule 67(5A)(a)(ii) brought about a change to the status of appeals from the Magistrates' Court, that were either struck-off or removed from the roll for any reason by providing that:

“(5A) (a)(i)

(ii) In the event of the appeal being struck-off or removed from the roll for any reason, the appeal shall then be re-enrolled within 10 days of the date of such striking-off or removal, failing compliance therewith the appeal shall lapse. '

[7] When the appeal was removed from the roll on 26 August 2022, Rule 67(5A)(a)(ii) was in operation. It was therefore incumbent on the appellant to re-enrol the appeal within 10 days of the date of such removal. An application termed "Application for Trial Date — Appeal" was however, only filed on 3 April 2023, woefully out of time. The appeal has in accordance with the prescripts of Rule 67(5A)(a)(ii), lapsed.

[8] In the absence of an application for reinstatement of the appeal, the appeal cannot be entertained.

Conclusion

[9] There is no appeal before this Court. The matter accordingly stands to be removed from the roll.

Order

[10] In the result, the following order is made:

The appeal is removed from the roll.

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT

Appearances:

For the Appellant: Mr O Madiba Instructed by: Legal Aid South Africa Mahikeng Justice Centre

For respondent: Adv J Maseko Instructed by: The Director of Public Prosecutions, Mahikeng

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Prepared on 9 October 2026 · Esheria