



**IN THE HIGH COURT OF SOUTH AFRICA**

**FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: B403/2022

REVIEW NO: R36/2023

In the matter between:

**STATE**

and

**TUMELO ORIEL SOMPANE**

**ACCUSED**

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**CORAM:** MOLITSOANE, J *et* THAMAE, AJ

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**DELIVERED ON:** 15 AUGUST 2023

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**JUDGMENT BY:** THAMAE, AJ

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[1] This is a review in terms of section 304 (4) of the Criminal Procedure Act, Act 51 of 1977 (the Act)<sup>1</sup>.

<sup>1</sup> Section 304 (4) provides: *If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such*

- [2] The Senior Magistrate Welkom, SF Ferreira provided us with a memorandum setting out the factual background of the district court's dealings with the accused person until the current referral. From what appears on the memorandum, the accused was arrested, detained and charged with kidnapping and robbery. He appeared and was subsequently granted bail on 25 November 2022. He paid bail on 30 November 2022. His matter was due back in court on 16 January 2023 but the accused failed to appear whilst on bail. His bail was cancelled, his bail money provisionally forfeited to state and a warrant of arrest authorised against him. 30 January 2023 was set as a day for final forfeiture of his bail money. On 30 January 2023 his bail money was finally forfeited to the state and a warrant for his arrest remained in circulation.
- [3] He was subsequently arrested and brought for appearance before the District Court, Welkom on 14 March 2023. Upon his appearance, the District Magistrate conducted an inquiry into his failure to appear in terms of section 170(2) of the Act.<sup>2</sup> The accused was accordingly convicted for contravening the provisions of section 170(1)<sup>3</sup> of the Act. He was sentenced to payment of a fine of R300.00 or 30 days imprisonment. He did not pay the fine and was thus subsequently remanded in custody. His matter was eventually transferred to the Regional Court. I should remark that by the time the Registrar of this court received the referral, being the 02 August 2023. The accused would have since completed the serving of the sentence imposed in terms of section 170(2).

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*proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.*

<sup>2</sup> Section 170(2) provides: *The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and, unless the accused satisfies the court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months*

<sup>3</sup> Section 170(1) provides: *An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).*

[4] During the performance of quality assurance duties, the Senior Magistrate came across the charge sheet of the accused and discovered the anomalies that necessitated this referral. I briefly, hereunder encapsulate the essence of his concerns as they appear on the memorandum. The learned Senior Magistrate is of an opinion that:

(a) The learned Magistrate should not have proceeded with an inquiry into failure to appear in terms of section 170(2) of the Act<sup>4</sup>.

[5] I am in agreement with the Honourable Senior Magistrate's opinion on this score. Upon reading section 170(1) of the Act, one can see from there that the section is meant to govern the procedure in dealing with a defaulting accused who is not in custody and who was not released on bail.<sup>5</sup> Thus, the learned Magistrate did not act in accordance with the law, in proceeding with an inquiry in terms of section 170(2) of the Act.

The learned Senior Magistrate is of an opinion further that:

(b) Section 67(2)(c)<sup>6</sup> of the Act is applicable<sup>7</sup>.

[6] From an understanding that I gathered, upon reading the summary of background facts supplied to this court by the learned Senior Magistrate, I understand that an order for the final forfeiture of the accused bail money was made on 30 January 2023. If this be the case; section 67(2)(c) found application and was applied at the time an order for final forfeiture of accused bail money was made. The effect of the order for final forfeiture of accused bail is that, the accused, against whom the order for final forfeiture is made, no longer has bail as at the time of the order. Section 67(2)(c) was thus no longer applicable on 14 March 2023 when the accused was eventually arrested on a warrant of arrest previously authorised.

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<sup>4</sup> Line 17 – 19 on page 2 of the Memorandum by SF Ferreira: Reference1/4/13/1

<sup>5</sup> See: *Cooper v District Magistrate, Cape Town* 2018 (1) SACR 369 (WCC)

<sup>6</sup> Section 67(2)(c) provides: *If the accused does not appear before court within fourteen days of the issue under subsection (1) of the warrant of arrest or within such extended period as the court may on good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.*

<sup>7</sup> Line 19 on page 2 of the Memorandum by SF Ferreira: Reference1/4/13/1

[7] On 14 March 2023 when the accused appeared before the district court, his status was that of an accused in custody without bail. An enquiry into the position of the accused ought to, have then been conducted. Since the accused was in custody and without bail. The provisions of section 50 of the Act relating to procedure after arrest would then have been applicable, in general, and in particular, section 50(6) read with section 60 of the Act. The accused, should then, have been informed of the reasons for his further detention if the court so ordered, and that he was entitled to bring an application for his release on bail or warning.<sup>8</sup>

[8] The learned Senior Magistrate further opined, lamenting the manner in which the section 170 inquiry was conducted by the learned District Magistrate. The learned Senior Magistrate went on to correctly refer to and cite the authority in *S v Singo*<sup>9</sup>. In order to avoid unnecessarily convoluting issues, I remark that continuous training and refresher courses even for magistrates with extensive years of experience<sup>10</sup> is indispensable in ensuring that quality justice is dispensed. The need for refresher courses is evident because the learned Magistrate who committed the irregularity complained of, is an additional magistrate with substantial years of experience, gauging from the appointment dated noted as 08/08/91. This case serves as an example that the relevant requirements of the law and the appropriate application of the law may at times elude even those with great years of experience.

[9] In the light of the procedural irregularities noted above, I am of the view that the proceedings were not in accordance with justice.

In the circumstances, I propose to make the following order:

## **ORDER**

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<sup>8</sup> See: *S v Luzil* 2018 (2) SACR 278 (WCC)

<sup>9</sup> 2002(2) SACR 160 (CC) para 11-13.

<sup>10</sup> See the reasoning by Daniso AJ (as she then was) in *S v Setho and Another* (R153/2017) ZAFSHC 183 (26 October 2017) at par 11-13: Whilst the Judge was addressing special review cases that were referred to this court, which were dealt with by a contract magistrate. I believe, Daniso AJ's (as she then was) reasoning, regarding continuous monitoring and training are significant even in the current case.

1. The conviction and the sentence are set aside.
2. A copy of this judgment must be forwarded to the Chief Magistrates Welkom and Bloemfontein.

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MS THAMAE, AJ

I concur and it is so ordered.

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P MOLITSOANE, J