

SOUTH AFRICA / JUDGMENT

S v Kondile (11/2020) [2021] ZAECHHC 3 (12 February 2021)

[2021] ZAECHHC 3

COURT

Eastern Cape High Court, Bhisho

BEFORE

Hartle, Zilwa

CASE / FILE NUMBER

11/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

Case No. 11/2020

Case reference 23/20

THE STATE

and

ANELE NONDODA KONDILE

REVIEW

JUDGMENT

HARTLE J

[1] This matter came before me as a “special review”.

[2] The accused was released on bail in the sum of R300.00 pending a charge of housebreaking. He failed to appear in the district court on 13 October 2020 which was the date to which the proceedings had been postponed. As a result, his bail was provisionally

cancelled and declared forfeited to the State and a warrant for his arrest was authorized. He failed to appear within the 14 day threshold contemplated in Section 67 (2) of the Criminal Procedure Act 51 of 1977 (“the CPA”) and ultimately both the provisional cancellation of bail and its estreatment were made final.[1]

[3] On 18 November 2020 the Magistrate held a purported enquiry into his failure to have appeared on 13 October 2020 and thereupon convicted and sentenced him to three months' imprisonment.

[4] Section 67A of the CPA provides as follows in respect of the procedure to deal with absconders released on bail who fail to appear:

"67 Failure of accused on bail to appear

(1) If an accused who is released on bail—

(a) fails to appear at the place and on the date and at the time—

(i) appointed for his trial; or

(ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or

(b) fails to remain in attendance at such trial or at such proceedings, the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.

(2) a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.

(b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and

the provisional forfeiture of the bail money shall lapse.

(c) 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.

(3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded."

[5] The enquiry is the absconder's opportunity, if he appears within the fourteen day period after the issue of the warrant for his arrest or such extended period as the court may on good cause determine, to persuade the court that his failure to appear was not due to fault on his part. There are two significant consequences that may flow from his failure to appear

which the court will determine at such an enquiry. Firstly his bail may be revoked. Secondly, the bail monies paid by him (or by someone on his behalf) may be declared forfeited to the State. This is likely to be the default position if he is not vindicated in the envisaged enquiry, assuming the provisional cancellation of bail and the provisional forfeiture of the bail monies has not yet become final. (If it has become final the absconder's remedy is to make a fresh application for bail. He can also apply under section 70 of the CPA for the bail monies forfeited to be remitted to him.)

- [6] But there are also criminal consequences of his failure to appear. For criminal liability to ensue as a result of his breach, he will however have to be separately charged with the offence contemplated by the provisions of section 67A. This section, in turn, provides as follows:

“67A Criminal liability of a person who is on bail on the ground of failure to appear or to comply with a condition of bail

Any person who has been released on bail and who fails without good cause to appear on the date and at the place determined for his or her appearance, or to remain in attendance until the proceedings in which he or she must appear have been disposed of, or who fails without good cause to comply with a condition of bail imposed by the court in terms of section 60 or 62, including an amendment or supplementation thereof in terms of section 63, shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year.”

- [7] In the present instance the accused was evidently not formally charged although he was “convicted” and sentenced to 3 months direct imprisonment under the mantle of a “summary

enquiry” held after his bail had already been finally cancelled and the bail monies declared forfeited to the State. In this respect the magistrate appears to have conflated the two sections referred to above. An enquiry in terms of section 67 (2) of the CPA was however no longer applicable and would have been for a different purpose in any event as I have indicted above. Contrariwise, if the State was intent on prosecuting the accused for his failure to appear under the provisions of section 67A of the CPA he should have been charged and a proper trial ought to have been held with the objective of convicting and punishing him for his failure to appear.

- [8] Both the enquiry and consequent conviction and sentence were clearly a mistake. The magistrate conceded as much by submitting the matter on special review for the situation to be reversed.

- [9] In the result, I issue the following order:

1. The conviction (and subsequent sentence imposed) by the magistrate for the accused's failure whilst then on bail to appear on 13 October 2020 is set aside.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

P ZILWA

DATE OF JUDGMENT: 12 February 2021

[1] On 13 November 2020 the accused appeared. The warrant was cancelled and his bail was finally declared forfeited to the State, but was remanded in custody for an “enquiry”, which was ultimately held on 18 November 2020.

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