

SOUTH AFRICA / JUDGMENT

S v Luzil (18294) [2018] ZAWCHC 75; 2018 (2) SACR 278 (WCC) (19 June 2018) [2018] ZAWCHC 75

COURT

Western Cape High Court, Cape Town

BEFORE

Wille, Thulare

CASE / FILE NUMBER

18294

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

REVIEW 18294

In the matter between

THE STATE

VS

KRIGA LUZIL

CORAM WILLE J; THULARE AJ

JUDGMENT DELIVERED ON 19 JUNE 2018

THULARE AJ

[1] The matter comes before this court on review. The accused was arrested together with another and made his first appearance before

the magistrate Bellville on 8 May 2017 for unlawful possession of undesirable dependence producing substance. The accused elected to apply for legal aid and the matter was postponed to 23 August 2017 for further investigation and legal representation and the accused was granted to bail of R400-00.

- [2] The accused failed to appear on 23 August 2017. It is difficult, if not impossible, to follow what really happened in court in relation to which of the two accused, from the minutes of the record of proceedings kept by the presiding acting magistrate, Mr Ahmed from 23 August 2017. This court will allow itself to be led by the two Memoranda compiled by Magistrate Jacks and Adv Stephen SC respectively.
- [3] From the two Memoranda, it is said that on 23 August 2017 a warrant of arrest was authorised against the accused and her bail was declared provisionally forfeited to the State with a return date of 6 September 2017. On 6 September 2017 the accused was still absent and the forfeiture order was extended to 20 September 2017 on which date it was made final and her bail forfeited to the State as she was still absent.
- [4] The accused was arrested and brought before court on 9 February 2018. She was represented and the matter was postponed to 14 February, 1 March and ultimately 7 March 2018 for an enquiry. The accused, a mother of an infant less than six months old, was kept in custody throughout, until bail at R300-00 was fixed on 7 March 2018.
- [5] On 7 March 2018 the defense attorney made submissions that the accused admits guilt for contravention of section 170 (1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the Act). The explanation given was that the accused was in hospital on days preceding the court appearance date and gave birth to a baby. She was no longer in hospital on the day of appearance but the excitement of the newborn baby caused her to forget about the court date.
- [6] Despite a specific request by the Public Prosecutor to address the court, no such opportunity was afforded and there is no explanation
- as to why the State was not afforded an opportunity to address the court on the merits on 7 March 2018. The magistrate simply proceeded
- to pronounce judgment and found the accused guilty for failing to attend court. It remains unknown whether the denial of the audience
- of the Public Prosecutor would have saved the court from the irregularity that occasioned.
- [7] It is only when the court had to attend to the sentencing, that the magistrate realized that it was incorrect to conduct the matter in terms of section 170 of the Act, and that the court should have acted as envisaged in section 67 of the Act. The magistrate immediately stopped the proceedings and submitted the matter for special review.
- [8] Section 170(1) of the Act reads as follows:

“170 Failure of accused to appear after adjournment or to remain in attendance

- (1) 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).”

In Commentary on the Criminal Procedure Act, Du Toit et al, service 58, 2017 22-105 the learned authors said:

“The wording of the section makes it plain that s 170 is applicable only to an accused who is not in custody and who has not been released on bail.”

It was irregular, which irregularity vitiates the proceedings, for a magistrate to apply the provisions of section 170(1) of the Act to an accused who had been granted to bail and had failed to appear in court after her bail was finally cancelled and forfeited to the State.

- [9] An enquiry may be held if the accused appears before court within fourteen days of the issue of the warrant of arrest – [Section 67(2)(a) of the Act]. The enquiry is limited in its scope. It does not attract punishment ordinarily at the discretion of the court. It is only qualified to satisfy the court that the failure to appear was not due to fault on the part of the accused. If the accused satisfies the court that the failure to appear was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money becomes invalid, which amongst others includes that bail is reinstated. The position before the provisional cancellation and provisional forfeiture maintains – [S v Mabuza 1996 (2) SACR 239 (T) at 243d]. If the accused fails to satisfy the court that his failure was not due to fault on his part, the provisional orders may be made final. It follows that I do not agree with Adv. Stephen SC, when he wrote in the Memorandum on behalf of the Director of Public Prosecutions, Western Cape, that no enquiry is held in terms of section 67 of the Act.
- [10] The provisional cancellation of bail and the provisional forfeiture of bail money had become final by the time the accused was arrested and appeared before the court – [Section 67(2)(c) of the Act]. In my view, this is not the end of the matter. The court has the power to remit the whole or any part of any bail money forfeited under section 67 – [section 70 of the Act].

In S v Mudau 1999

- (1) SACR 636 (WLD) at 636h-j the court said:

“At this stage I want to say this. Whatever legislative provisions were operative there was clearly an injustice done to the accused; or more pertinently the person who deposited the money. It offends anyone’s sense of justice that persons (in this case clearly poor) should lose R1000-00 because an accused is prevented from attending court. The facts have only to be mentioned for the injustice to be apparent. There was therefore a miscarriage of justice even if the law was correctly applied.”

In applying the law, wherever there was a discretion to be exercised it should have been so exercised that if at all possible a miscarriage of justice was averted.”

There are instances where fairness to such accused would require that the bail money deposited by him or on his behalf be remitted.

- [11] In my view, upon the appearance of an accused granted bail, whose bail had been finally cancelled and the money forfeited, the court should satisfy itself whether it is fair and just for the final cancellation and forfeiture order to stand.

In S v Nkogatse 2002

- (2) SACR 369 (TPD) the court said at 373g-i:

“The provisions of s 70 are not and cannot be construed as being intended to or capable of being interpreted as requiring a court to review its own decision to declare as finally forfeited bail money in consequence of the violation of bail conditions. In my view, and without in any way prescribing or in any way limiting the relevant criteria, the process must determine whether, taking all the facts into account, including the reason, nature and the extent and duration of the recalcitrance of the accused, the actions taken by the depositor to bring to an end such recalcitrant conduct by the accused, the source of the bail funds, it would be fair and just to remit part or the whole of the bail money estreated.”

Earlier on, the court, expressing itself on the onerous responsibility of administering justice, had said at 372i-j:

“That responsibility must be discharged judiciously and in the spirit of justice, fairness and reasonableness.”

The magistrate is obliged in the interests of justice to determine whether the final order of cancellation and forfeiture should stand or whether the bail money forfeited should be remitted. The enquiry is qualified and limited to remittance.

- [12] In S v Rall 1982

- (1) SA 828 (AD) at 831A-B it was said:

“According to the well-known dictum of Curlewis JA in R v Hepworth 1928 AD 265 at 277, which the learned Judge a quo obviously had in mind in his remarks quoted above:

“A criminal trial is not a game ... and a Judge’s position ... is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done”

At 831H the court continued:

- (1) According to the above quoted dictum of Curlewis JA the Judge must ensure that “justice is done”. It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused ...”

The final loss of the money paid for bail, in my view, had to occasion in a manner that is not only substantively fair, but also in a manner that is procedurally fair to the accused and the depositor of the money as well as the State.

[13] I however agree with Adv. Stephen SC, when he said:

“Previously the final forfeiture of the bail was considered sufficient punishment but S v Mabaso 1990 (1) SACR 675 (T) led to section 67A being inserted into the Act by section 9 of Act 75 of 1995. It criminalises the failure of an accused to attend court after having been released on bail. It is not an enquiry but a separate prosecution on its own charge sheet and it must also be held separately from any inquiry that might be held under section 66 of the Act.” [See S v Mabuza, supra, at 243g].

If the State wishes to hold the accused criminally liable, as a person who was on bail, on the ground of failure, without good cause, to appear or to comply with a condition of bail, then such prosecution should follow the ordinary course, and cannot be a summary enquiry.

- [14] In my view, once the bail is finally forfeited to the State, and an accused appears before the court after arrest, there is a second enquiry that should follow, and this relates to the status of the accused. In my view, the provisions of section 50 of the Act relating to procedure after arrest are applicable in general, and in particular section 50(6) read with section 60 of the Act. It follows that at his or her first appearance after such arrest such accused is entitled to be informed of the reasons for his or her further detention if the court so orders, and that he/she is entitled to be released on bail – [S v Mandili

[2006] JOL 17588 (T)] or even be warned – [S v Rabele (76/2014)

[2016] ZAFSHC 178 (29 September 2016) at para 35]. The failure of the magistrate to give attention to the status of the accused was a material misdirection.

- [15] Adv. Stephen SC urges this court to remit the matter to the magistrate to continue with the trial.

For these reasons, I propose the following orders:

1. The conviction of accused under section 170(1) of the Criminal Procedure Act, 1977, for failing to attend court, is set aside.
2. The matter is remitted back to the Magistrate for the accused to be dealt with in accordance with the law.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered;

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WILLE,J

JUDGE OF THE HIGH COURT

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