

SOUTH AFRICA / JUDGMENT

S v Ngete (25/2023) [2023] ZAWCHC 116 (19 May 2023) [2023] ZAWCHC 116

COURT

Western Cape High Court, Cape Town

BEFORE

Henney, Sher

CASE / FILE NUMBER

25/2023

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

High Court Ref No: 25/2023

Magistrates Court Case No: 24/261/2022

Magistrate's Serial No: 02/23

(Coram: Henney J et Sher J)

In the matter between:

THE STATE

v

ALUTA NGETE

JUDGMENT: 19 MAY 2023

HENNEY J:

- [1] The accused was arraigned before the Magistrate's Court, Cape Town on a charge of theft of two bottles of perfume valued at R1889,00 committed on 24 February 2022 at Clicks Stores, Century City in the district of Cape Town. He appeared in court for the first time on 28 February 2022 and the matter was postponed to 7 March 2022 to consider whether the accused ought to be released on bail.
- [2] On this day, he was granted bail by the magistrate of R500,00. The matter was postponed to 3 May 2022 and thereafter, for the reasons as stated on the court record, to 13 June 2022. A warrant of arrest was issued by the court upon his non-appearance on that day but no order

was made simultaneously therewith in terms of section 67(1)[1] of the CPA declaring that his bail was provisionally cancelled and forfeited to the State. In terms of section 67(2), the matter was also not set down within fourteen days for an order to consider the final forfeiture of bail to the state as required by this section.

- [3] Nowhere on the warrant was it endorsed as required under subsection
- (c) of the warrant, that the accused was released on bail and that he failed to comply with his bail conditions. The accused was subsequently arrested on 16 January 2023 on the warrant and the magistrate rather surprisingly, instead of holding an inquiry in terms of 67A[2] of the CPA, proceeded to hold an inquiry in terms of section 170(1)[3] of the CPA.
- [4] After he held an inquiry in terms of section 170, the accused was incorrectly found guilty on a charge of failure to appear in court, and was sentenced to a fine of R500 or 50 days imprisonment. The accused should instead have been found guilty of contravening section 67A of the CPA, because section 170 finds application in a situation where an accused is one “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 the proceedings may be adjourned...”

Section 67A would find application in a case like this where “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 appearance... shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year.”

- [5] This section is completely different section to 170, because section 170 requires the court to act in summary manner, whereas 67A requires the accused to be formally charged.

Du Toit[4] states “...For purposes of s 67A a charge sheet must be drawn and a formal trial held (S v Mabuza 1996 (2) SACR 239 (T)). See also S v Luzil 2018 (2) SACR 278 (WCC) at [13]. The prosecution must prove the guilt of the accused beyond reasonable doubt. See S v Mamekoa (unreported, TPD case no A822/2003, 15 April 2003). See also S v Williams 2012

- (2) SACR 158 (WCC). In S v Mabuza (supra) it was also held that the accused could not properly have been convicted of contravening s 67A of the Act as he had not yet been physically released on bail.

Section 67A does not empower the court to enquire in a summary manner whether s 67A has in fact been contravened. See S v Edipute (unreported,

ECG case no CA&R45/2018, 22 February 2018) at [3]. See also S v Theko 2010 (2) SACR 339 (GNP) at

- [14] where Prinsloo J relied on S v Mabuza (supra). Cf the provisions of s 170(2). An alleged contravention of s 67A will have to be prosecuted in the ordinary way and not before a presiding officer who was involved in s 67 proceedings which had resulted in any adverse findings of credibility as regards the accused.

The trial for purposes of s 67A is completely separate from an enquiry in terms of s 66—S v Williams (supra) at [4].”

This conviction therefore falls to be set aside.

[6] On 24 January 2023, after his right to legal representation was explained by the magistrate, he elected to conduct his own defence and pleaded guilty to the charge of theft against him. The magistrate then proceeded to question him in terms of the provisions of section 112(1) (b) of the Criminal Procedure Act 51 of 1977 (“the CPA”).

[7] During the questioning before the magistrate, he stated that he went to the Clicks Stores, took the two bottles of perfume from the shelf and hid it under his shirt. While he was walking out of the store the alarm went off and they found the two bottles of perfume on him. He admitted that it was his intention to steal the perfume and that the value thereof was R1 899,00. He further admitted that he had no right or permission to act in this manner and that he knew that that he had committed an offence that was punishable by law. After questioning the accused, the magistrate was satisfied that he

admitted all the elements of the offence and found him guilty of the offence of theft, on the same day.

[8] The prosecutor proved previous convictions which the accused admitted. After the accused had an opportunity to address the court in mitigation of sentence and the prosecutor also had an opportunity to address the court, he was sentenced by the magistrate to a period of 24 months imprisonment, also on 24 January 2023. The magistrate also ordered that the 24 months imprisonment be served concurrently with the sentence of R500 or 50 days imprisonment imposed by him on 16 January 2023 on the charge of failure to appear in court, on which he was wrongly convicted and sentenced as shown above, which the accused was serving at that time.

[9] When the matter was transmitted for review and upon receipt thereof, this court on 20 February 2023, raised the following query with the Magistrate:

“The Magistrate is hereby requested to furnish the review court with reasons for the order that the sentence of 24 months imprisonment is to be served concurrently with the earlier sentence of a fine of R500 or 50 days imprisonment for his conviction on contravening Section 170(2) of the Criminal Procedure Act 51 of 1977 (“the CPA”). Was this a competent order to make in terms of Section 280(2) of the CPA?”

The Magistrate is also referred to the full bench decision of the Free State High Court in S v Jeffries 2011(2) 350 (FB), in this regard.

The Magistrate should provide the reviewing Judge with the reasons without delay by 16 March 2023.”

[10] After some delay, which is explained by the Magistrate, in his reply he states, that due to inexperience he realized that the sentence that he imposed was an oversight on his part. Section 280 of the CPA provides that.:

“ 1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently. (own emphasis)

(3) ...”

[11] Apart from the fact that the conviction and sentence in respect of the failure to appear in court charge is a gross misdirection and should never have been imposed, the order of the magistrate that the sentence which was imposed on this offence should run concurrently with the sentence which was imposed on the theft offence, is a further misdirection. Section 280(2) clearly states that the court can only order that a sentence of imprisonment be served concurrently.

[12] The sentence imposed for the charge of failure to appear in court was not a sentence of imprisonment but a fine. The period of imprisonment was an alternative to the sentence of a fine and was not a substantive or self-standing sentence of imprisonment.

In *S v Jeffries* 2011

(2) SACR 350 (FB) 355g–h a full bench of the Free State High Court, concluded as follows:

'The 1993 amendment made it clear that concurrent running can only be ordered where imprisonment is the only sentence (“such sentences of imprisonment”) The amended section makes it clear that, where imprisonment is imposed as an alternative to a fine, an order that sentences are to run concurrently cannot be made, because concurrent running under s 280(2) can only be ordered where there are sentences of imprisonment Alternative imprisonment is not a sentence of imprisonment. Alternative imprisonment can never stand alone, separate from the fine. Alternative imprisonment is not a substantive sentence.'

[13] It therefore follows that an alternative period of imprisonment to a fine is not a sentence of imprisonment that can run concurrently with a sentence of imprisonment that had been imposed for another offence, either prior or simultaneously. So, even if the conviction and sentence imposed by the magistrate were in accordance with justice, the sentence imposed of a fine with the alternative of imprisonment could not be served concurrently, with the sentence of 24 months imprisonment imposed on the theft charge.

[14] In the result, I make the following order:

“1. The conviction and sentence of R500 or 50 days for the accused’s failure to appear in court in contravention of section 170(2) of the CPA are not in accordance with justice and are set aside.

2. The order of the magistrate that the sentence which was imposed on this offence should in terms of Section 280(2) of the CPA, run concurrently with that imposed on a charge of theft is also not in accordance with justice and is set aside.
3. The conviction and sentence imposed on the theft charge is in accordance with justice”.

HENNEY, J

I agree.

SHER, J

[1] 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.

[1] 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,
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- (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.
- [2] 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.
- [3] 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). (2) 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

[3] 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).

(2) 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

[4] With De Jager, Paizes, Skeen & Van Der Merwe in Commentary on the Criminal Procedure Act RS69-2022 Ch 89 page 116

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