

SOUTH AFRICA / JUDGMENT

S v Ntepe and Another (R 85/2020) [2021] ZAFSHC 78 (11 March 2021)

[2021] ZAFSHC 78

COURT

Free State High Court, Bloemfontein

BEFORE

Reinders, Chesiwe

CASE / FILE NUMBER

R 85/2020

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Review case number: R 85/2020

In the matter between:

THE STATE

and

THAMANYANE PETER NTEPE (ACCUSED 1)

GEORGE PETERSEN (ACCUSED 2)

CORAM:

REINDERS, J et CHESIWE, J

JUDGMENT BY: REINDERS, J

DELIVERED ON: 11 MARCH 2021

SPECIAL REVIEW IN TERMS OF SECTION 304 (4) OF ACT 51 JUDGMENT

[1] The Control Magistrate, Welkom submitted this matter for special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (“the CPA”).

[2] In a letter attached to the special review, the Control Magistrate set out the relevant circumstances and facts in respect of the referral as follows:

“During the quality assurance conducted at this office the following was discovered:

The two accused persons were charged with the offences of Theft and Contravening Regulation 16(1) of the Regulations issued in terms of Section 27(2) of the Disaster Management Act, Act 75 of 2002 (Failure to confine to residence). The accused persons conducted their own defense.

The first appearance was on 11 May 2020. Bail was set in the amount of R 500 in respect of both accused. This amount was paid by accused 1 on 26 May 2020 and he was released. On their next appearance accused 2 was released on his own recognisance and both were warned to appear in court on 22 July 2020. On 22 July 2020 both accused persons were absent and warrants were authorized for their arrest whilst the issuing was kept over. The bail of accused 1 was provisionally forfeited to the state. On 05 August 2020 both accused were still absent and the bail in the amount of R 500 in respect of accused 1 was finally forfeited to the State.

Enquiry into Failure to appear at court

Both accused persons were rearrested and appeared in court on 27 October 2020. The Magistrate then proceeded and held an inquiry into their failure to appear in respect of both accused persons in terms of Section 170(2) of the Criminal Procedure Act. They still conducted their own defense. The enquiry was concluded on 29 October 2020. Both the accused persons were convicted on Contravention of Section 170(1) of Act 51 of 1977 and each sentenced to a fine of R 300 or 30 days imprisonment.

It was confirmed that the fines were not paid and the accused persons served the sentence until their release on 27 November 2020.

Both the main counts were withdrawn by the prosecutor against both accused on 19 November 2020.

I am respectful of the opinion that the learned Magistrate could not have proceeded with an enquiry in respect of accused 1 since Section 170(2) of the Criminal Procedure Act is not applicable but rather Section 67(2)(c) of the Criminal Procedure Act. The accused was also not charged in terms of Section 67A of the Criminal Procedure Act.

The accused person's rights in respect of the enquiry held were explained and can be found on page 1 line 5 – 19 of the proceedings conducted on 27 October 2020.

From the record it does not appear that both accused were informed of their right to remain silent as well as the consequences for exercising such right. As per page 3 line 23 accused 1 was told to testify in the enquiry. Procedural fairness is also required from the magistrate.

There appears to be no further proceedings conducted on 28 October 2020, the date to which the enquiry was remanded. The enquiry proceeded on 29 October 2020. From the transcription it does not appear that accused 2 were sworn in as the magistrate requested the 2nd accused to advance reasons why he did not attend court. It appears that both accused's rights were not fully explained to them. The following decision has reference:

S v SINGO [2002] ZACC 10; 2002 (2) SACR 160 (CC) – par 11-13.

[11] In order to comply with the obligation imposed by s 35(3) of the Constitution, the presiding officer implementing the 72(4) procedure must ensure that it is fair. Therefore unless the accused is legally represented the court ought, the moment it decided to pursue the matter of the ostensible non-compliance with the warning, to explain the nature, requirements

and effect of the proceedings about to be commenced. The explanation should include telling the accused that it appears from the record that he or she was duly warned (the contents of 2002 (2) SACR p169 the warning may have to be explained) and that there was a non-appearance or other failure to comply with the warning. It

should include telling the accused that such non-compliance is an offence for which that law allows a fine or imprisonment of up to three months; that unless the pre-conditions are congenitally challenged, they may be regarded as having been established, whereupon the court will be empowered there and then to investigate the issue of culpable non-compliance and intends doing so.

[12] In addition to the above, the presiding officer is obliged to inform an undefended accused of his or her basic procedural right including the right to legal representation, to be presumed innocent and to remain silent and not to testify during the proceedings, to adduce evidence and to challenge the prima facie case against him or her, and not to give evidence that is self-incriminating. In addition, the accused should be informed of the consequences of remaining silent. At the end of this explanation, the accused should be asked whether he or she is ready to proceed.

[13] The enquiry must be conducted in a fair and impartial manner. As part of the enquiry, the presiding

officer must establish from the accused whether he or she disputes the fact that he or she was duly warned, giving the details of the warning as recorded, and that he or she failed to comply with the warning. If the accused does not dispute the two basic facts, the presiding officer must then establish from the accused the reason for his or her failure to appear in court. Fairness requires the presiding officer to assist and undefended the accused to explain his or her failure to appear in court by putting questions to the accused. By its very nature, the enquiry envisaged in s 72(4) appears to contemplate that the presiding officer will play an active role in such an enquiry by putting questions to the accused. The objective of such an enquiry is to elicit the explanation, if any, for failure to appear in court. Provided that the questioning is conducted in a fair and impartial manner, this will help an undefended accused to put forward the reason for his or her failure to appear in court.

The magistrate's comment was requested in respect of the enquiry conducted in respect of accused 1 and conceded it to be

incorrect."

[3] I have perused the record and the aforementioned comment by the Control Magistrate and is satisfied that the convictions of both accused of contravening Sec 170(1) of Act 51 of 1977 cannot stand and should be set aside. Even though the accused already served their custodial sentences and the order might be of an academical nature in that regard, it is important that the convictions be set aside so as not to reflect as previous convictions on their records.

[4] I therefore make the following orders:

The convictions of respectively THAMANYANE PETER NTHEPE and GEORGE PETERSON in case number A1114/2020 in the Magistrate's Court for the district of Welkom and dated 29 October 2020 for contravening the provisions of Sec 170(1) of the Criminal Procedure Act 51 of 1977 and the respective sentences are set aside.

REINDERS, J

I concur.

CHESIWE, J

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Prepared on 10 October 2026 · Esheria