

SOUTH AFRICA / JUDGMENT

S v Theko (Spec 8/09) [2010] ZAGPPHC 146; 2010 (2) SACR 339 (GNP) (13 January 2010) [2010] ZAGPPHC 146

COURT

North Gauteng High Court, Pretoria

BEFORE

WRC Prinsloo, AA Louw

CASE / FILE NUMBER

Spec 8/09

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IN

THE HIGH COURT OF SOUTH AFRICA
NORTH
GAUTENG HIGH COURT. PRETORIA)

DATE:

13/01/2010
Magistrate
BENONI
Case
no: Spec 8/09
High
court ref no: 1671
THE
STATE.....
v
JUSTICE
THEKO.....
REVIEW

JUDGMENT**PRINSLOO. J**

- [1] The accused, a 33 year old male, is appearing in the Benoni magistrate's court on a charge of theft. The accused was released on bail of R500.00 on 29 September 2009 in terms of the provisions of section 59A of the Criminal Procedure Act 51 of 1977. The accused thereafter appeared in court on 30 September 2009 and his bail was extended.
- [2] The accused failed to appear in court on 13 November 2009. when he should have done so, and a warrant for his arrest was issued. His bail money was declared provisionally forfeited to the state. The date of final forfeiture, as intended by the provisions of section 67(2)(a) of Act 51 of 1977, would have been 27 November 2009.
- [3] The accused, however, appeared on his own accord, within the fourteen day period aforementioned, on 18 November 2009.

On this occasion, the accused was remanded in custody to 19 November 2009 for an enquiry into his failure to appear in court on 13 November 2009.

- [4] On 19 November the court proceeded with an enquiry in terms of section 170 of Act 51 of 1977. During the course of the enquiry the accused indicated to the court that his legal representative gave him a wrong date. The court decided that the failure of the accused to appear was due to his fault and he was consequently convicted of contravening section 170(2) of Act 51 of 1977. The accused was sentenced to pay a fine of R500,00 or to serve thirty days imprisonment. The accused paid the fine and the court extended the bail. The matter was further postponed to 30 November 2009.
- [5] On 24 November 2009 the magistrate, Benoni, referred the matter to this court on special review in terms of section 304(4) of Act 51 of

1977. The main thrust of the magistrate's request for review was the following:

"An enquiry in terms of section 170 of Act 51 of 1977 was erroneously held. The court should have proceeded with an enquiry in terms of section 67(2)(a) of Act 51 of 1977."

- [6] The query was referred to the learned Director of Public Prosecutions. A very useful and comprehensive memorandum was received

from State Advocate K Germishuis, endorsed by a learned Deputy Director of Public Prosecutions.

- [7] Section 170 of Act 51 of 1977 is only applicable when an accused who is not in custody and who was not released on bail fails to appear in court or to remain in attendance. It does not apply to the present case. In *Sv Ndwayana* 1983(1) PH H93(E) it was held that an accused who was on bail and who failed to appear could not be convicted in terms of section 170 of Act 51 of 1977.
- [8] Section 67 of Act 51 of 1977 deals with the failure of an accused on bail to appear before court. If the accused appears before court within fourteen days of the issue of the warrant of arrest, the court shall in terms of section 67(2)(a) confirm the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure to appear or to remain in attendance was not due to fault on his part.
- [9] Had the court, in the present instance, acted in terms of section 67(2)(a), the bail of the accused could have been cancelled and the bail money paid by the accused could have been declared forfeited to the state. The forfeiture of bail money and the loss of liberty would thus have been the consequences of the failure of the accused to appear in court. Failure to appear in court or to comply with a bail condition, were not otherwise punishable. The forfeiture of the bail and the loss of liberty were regarded as the appropriate "sanctions". See *Du Toit et al Commentary on the Criminal Procedure Act 9-80* and cases there quoted.
- [10] When an enquiry in terms of section 67(2)(a) is held the onus is on the accused to convince the court on a balance of probabilities that his failure to appear was not due to his fault. See *5 v Cronje* 1983 3 SA 739 (W).
- [11] The insertion of section 67 A of Act 51 of 1977 (by section 9 of Act 75 of 1995) criminalised the failure of an accused on bail to appear or to comply with the bail condition.
- [12] In terms of this section, an accused who has been released on bail and who fails without good cause to appear, shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year.
- [13] Section 67A does not empower the court to enquire in a summary manner whether that section had been contravened.
- [14] In *S v Mabuza* 1996(2) SACR 239 (T) it was held that when an accused is charged with the statutory offence created by section 67A the charge-sheet must be drawn and a formal trial must be held. The state must prove the guilt of the accused beyond a reasonable doubt. It was held, at 243e-g, that section 67A differed from other provisions of the Act such as, for example, section 170, in that section 67A did not provide that a court could summarily enquire into an alleged breach of a condition of bail.
- [15] In all the circumstances the "conviction" which flowed from the abortive section 170 enquiry, cannot be sustained and falls to be set aside. Moreover, the section 170 "conviction" cannot be substituted with a conviction for contravening section 67A because a proper trial was not held as described above.

[16] In my view the extension of the bail after the abortive section 170 enquiry does not require any further intervention by this court.

[17] I make the following order:

1. The conviction and sentence imposed following the enquiry held in terms of section 170 of Act 51 of 1977 are set aside.
2. The clerk of the court, Benoni, is ordered to refund the fine of R500,00 paid by the accused.

WRC PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

AA LOUW

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