

SOUTH AFRICA / JUDGMENT

S v Thezela (K36/11) [2011] ZANCHC 17 (2 August 2011) [2011] ZANCHC 17

COURT

Northern Cape High Court, Kimberley

BEFORE

Hughes-Madondo, B Pakati

CASE / FILE NUMBER

K36/11

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

CASE NO: K36/11

DATE DELIVERED: 05/08/2011

In the matter between:

THE STATE

and

GORDAN THEZELAACCUSED

REVIEW JUDGEMENT

HUGHES-MADONDO AJ

The accused in this matter is a seventeen year old youth, GORDAN THEZELA. He is facing a charged of theft, that took place on 24 June 2011. His first appearance in the district court Galeshewe was on 27 June 2011.

On 27 June 2011 a formal bail application was heard. From the record of the proceedings it is evident that the accused was unrepresented and his legal guardian was not present. None the less the Magistrate continued with the formal bail application. The outcome of this application was that bail was refused.

The record indicates that when the Magistrate enquired as to whether the accused required legal representation through the auspices of the Legal Aid Board, the accused responded in the affirmative. In the face of the accused's request the Magistrate continued with the formal bail application without the accused being represented.

In terms of Section 35(3) (f) and (g) of the Constitution every accused person has a right to legal representation. Whether he opts to choose his own in terms of (f) or whether he is assigned one by the state in terms of

(g) *supra*.

It therefore stands to reason that an accused must be granted an opportunity to secure such representation. This right to legal representation applies equally to children and adults.

From the record it is also evident that the proceedings conducted by the Magistrate were not held in camera as is required by Section 56 of the Children's Act 38 of 2005. The act provides that proceedings involving children should be closed and are to be conducted in the presence of those persons whose attendance is necessary, such as the accused parents or legal guardian and the legal representative, in order to protect privacy and confidentiality.

According to the record no preliminary inquiry was conducted as is required on the accused first appearance at court.

In terms of Section 43

- (3) (a) and (b) of the Child's Justice Act 75 of 2008 (the Act) "a preliminary inquiry must be held in respect of every child who is alleged to have committed an offence". This inquiry must be held within 48 hours of the arrest, if the child is arrested and remains in detention.

The objectives of this preliminary inquiry are set out in Section 43 (2) (a) - (h) of the Act. In a nut shell the inquiry ensures that all the available information relevant to the child and his circumstance are before the court, in order that the court make an informed decision on how to deal with the child going forward.

It is evident that there was a denial of the fundamental rights of the accused. These fundamental rights being; access to legal representation, having the proceedings closed and the holding of a preliminary inquiry by the Magistrate before proceeding with the formal bail application. The denial of the accused aforesaid fundamental rights, results in the accused not been afforded the right to a fair trial. This must ultimately result in the vitiation of the proceedings.

In my view Section 304(2) of the Criminal Procedure Act 51 of 1977 is applicable in this case, as it is evident that the proceedings of the court below were not in accordance with justice.

In the circumstances, the proceedings in the court below may be declared unfair and as such were not in accordance with justice. The only result that can be reached is that the proceedings in the court below must be set aside in terms of Section 304 (2) (c) (iii) of the Criminal Procedure Act.

The proceedings against GORDON THEZELA in case number GAL955/11 in the District Court, held at Galeshewe, is set aside.

HUGHES-MADONDO

ACTING JUDGE

Northern Cape High Court, Kimberley

I agree

B PAKATI

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