

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Review No: 161/2014

In the matter between:-

THE STATE

and

ANDRIES TSHOLO

CORAM:

JORDAAN, J *et* POHL, AJ

JUDGMENT BY:

POHL, AJ

DELIVERED ON:

4 SEPTEMBER 2014

- [1] The control magistrate, Bloemfontein, sent this matter as a special review to this court in terms of the provisions Section 304(4) of the Criminal Procedure Act, Act 51 of 1977.
- [2] The accused was charged with one count of assault with intent to do grievous bodily harm and released on bail of R500.00. The matter was then remanded to the 3rd of October 2013, but on that date the accused defaulted and a warrant for his arrest was authorized and issued. The accused's bail was provisionally cancelled and provisionally forfeited to the State on that same day. The provisional cancellation and the forfeiture of the bail money were made final by the Court on 17 October 2014, due to the accused's continued absence.

- [3] The accused was rearrested on a warrant of arrest and appeared before the Court on 5 August 2014. The magistrate then proceeded to hold a “default enquiry”. The magistrate did not refer to any Section of the Criminal Procedure Act in terms of which the said enquiry was held. At the end of the enquiry the accused was then convicted for “failure to appear in court” as reflected on the charge sheet and he was sentenced as follows:
“R200.00 or twenty days imprisonment”
- [4] Section 67 of the Criminal Procedure Act, Act 51 of 1977 does not make provision for this procedure the magistrate adopted. It does not make provision for the conviction and sentence after bail money has been finally cancelled and forfeited. In the premises the magistrate committed an irregularity by the convicting and sentencing of the accused.
- [5] In the decision of **S v Williams** 2012(2) SACR 150 (WCC) the following dicta appears at page 159, paragraph 3:
- “Dit is duidelik dat Art 67(2) soos bo uiteengesit nie daarvoor voorsiening maak dat daar op die stadium dat die beskuldigde hom voor die hof bevind het, op hierdie wyse ‘n ondersoek na sy versuim ingestel en/of geloods kan word waaruit ‘n skuldigbevinding en vonnis kan voortspruit nie. Art 67A skep wel ‘n misdryf, maar die gesag is dit eens dat ‘n skuldigbevinding en vonnis slegs kan volg op ‘n formele verhoor en nie op ‘n summiere ondersoek nie.”
- [6] In the work Hiemstra’s Criminal Procedure at page 929, the authors has the following to say about this issue:

“Failure to appear or to comply with a condition of bail is now an offence but, in contradiction to Sections 55 and 72 there is no summary enquiry. A charge sheet has to be drawn up and a formal trial must be held.”

[7] I agree with the above mentioned authority. Compare also **S v Mabuzza** 1996(2) SACR 239 (T).

[8] I would therefore set aside the conviction and sentence for the failure to appear in Court and furthermore direct the Clerk of the Court to pay any fine that the accused may have paid back to the accused forthwith.

L. le R. POHL, AJ

I agree and it is so ordered.

A.F. JORDAAN, J