IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

1.	**Reportable: YES/NO**
2.	**Of Interest to other Judges: YES/NO**
3.	**Circulate to Magistrates: YES/NO**

Case no:R109/2019

In the matter between:

THE STATE

and

TSIETSI DANIEL KHAMADI AND NINE OTHERS

CORAM: LOUBSER, J et OPPERMAN, J

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 13 JUNE 2019

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[1] This matter came before me in the form of a Special Review in terms of Section 304(4) of the Criminal Procedure Act 51 of 1977.

The ten accused appeared in the Regional Court of Kroonstad on charges of the theft of copper cable to the value of some one million Rand from Transnet. In addition, seven of them were also charged with the offence of entering or remaining in South Africa without valid passports or visas.

[2] In his letter requesting a review of the proceedings, the presiding Magistrate informed as follows:

> "*The accused have pleaded not guilty on various counts. The trial is at the stage where the first witness of the State is under cross-examination. This request comes after an objection by the defence that the accused persons cannot appear in court while being shackled on their ankles*".

He therefore requested the High Court to set the proceedings aside and to order that the matter be heard *de novo* before another judicial officer, or to make any other order it deems expedient. The record of the proceedings submitted by the Magistrate, only pertains to the proceedings that followed the objection. It appears from that record that the Magistrate had recused himself *mero motu* from the trial after hearing the evidence of the commander of the court orderlies at the Kroonstad court cells. The commander

testified that the accused before the court were shackled in compliance with a Provincial Order of 2010 issued by the Police.

[3] The first issue that needs mentioning in this review, is that the recusal of the Magistrate has rendered all the proceedings in the trial a nullity. It has the further effect that the trial must now commerce *de novo* before another presiding officer.[1]Strictly speaking, it is therefore not necessary for this Court to make any orders to such effect, as the Magistrate has suggested, unless the recusal itself is set aside for some reason. A trial *de novo* would follow as a matter of logic without the review Court having to set aside the proceedings and to order a hearing *de novo.* From what is set out hereunder, I am not inclined to find that the Magistrate has erred by recusing himself from the proceedings. In my view, there was good reason for him to recuse.

[4] The shackles or leg irons on the accused in court provided the good reason. In his judgment pertaining to this question, the Magistrate found that shackles or other restraints on accused persons should be the exception and not a rule. When an accused comes to court to defend himself, he must not be restrained in any

[1] S v Van Heerden and Another 1995 (2) SACR 339 (T), R v Mhlanga 1959 (2) SA 220 (T)

way whatsoever, unless the court so directs, he stated. If there are reasonable grounds for believing that an accused will be violent or will attempt to escape, the court may allow shackles or leg irons. These remarks of the Magistrate cannot be faulted, since they are in line with the sentiments expressed by a number of courts over the years. [2]

[5] In **S v PHIRI,** [3] **VAN DER WESTHUISEN, J** (as he then was) said the following:

"Courts have on several occasions expressed the clear view that the practice of accused persons appearing in court in manacles, leg irons, chains or prison clothing is unsatisfactory, undesirable and objectionable and is to be deprecated and strongly disapproved of. On the simplest and perhaps most technical it may indicate to a judicial officer that the accused has been brought from prison, where he or she is serving a sentence for a previous conviction and thus in effect place inadmissible evidence before the court. Under certain circumstances it may also influence a judicial officer to draw an inference about an accused's character, for example that he or she is a dangerous person and a potential threat to the public, court officials, or the judicial officer. Thus it may even induce a sense of fear or apprehension. It may also lead to an inference that he or she had escaped from custody before, or has given reason to believe that he or she would escape if the opportunity arises. All of this to some extent, relates to the presumption of

[2] See eg. S v Stevens 1961 (3) SA 518 (C),
S v Khubeka 2013(1) SACR 256 (GNP)
S v Maputle and Another 2003(2) SACR 15 (SCA)
S v Pakkies 1985(4) SA 592 (Tk)

[3] 2005(2) SACR 476 (T)

innocence, which is an aspect of a fair trial, as guaranteed in Section 35(3) of the Constitution. However, the undesirability of such situation goes further. The appearance of an accused in court in leg irons or chains or in prison clothing violates the human dignity of the accused as a person. The recognition of human dignity lies at the heart of the constitutionally guaranteed right to a fair trial, and indeed of the Constitution itself." [4]

[7] It therefore speaks for itself that the discomfort of the presiding Magistrate with the accused appearing in leg irons should be respected. Although his recusal had already nullified the trial proceedings up to that point,

I make the following orders for the sake of clarity:

1. The recusal of the presiding Magistrate is confirmed.
2. The trial proceedings against the accused are set aside.
3. The accused must be tried *de novo* before another presiding officer.

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P. J. LOUBSER, J

I agree:

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M. OPPERMAN, J

[4] At 482 par 15