



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST HIGH COURT, MAFIKENG**

HC . 8/2013

In the matter between:-

GODFREY JOEL KEKANA

Appellant

and

THE STATE

Respondent

REVIEW JUDGMENT

KGOELE J.

[1] This matter came before me by way of special review under cover of a minute which read thus:-

“(i) *The abovementioned case is submitted to the Honourable Review Judge with a request to the reconsider the proceedings held on 27/12/2012 by the District Magistrate Odi.*

(ii) *The facts of the case can be summarised as follows:-*

- (a) *The accused was granted bail of R500-00 on 12/03/2012 which he duly paid*
- (b) *He failed to attend court on the 14/08/2012*
- (c) *A warrant for his immediate arrest was authorised and his bail was provisionally forfeited in terms of section 67(1) of the Act*
- (d) *On 28/08/2012 the provisional forfeited became final*
- (e) *On 21/12/12 the accused appeared on a warrant of arrest, the case was postponed to 27/12/2012 for purposes of holding an enquiry to his failure to attend court*
- (f) *The inquiry was held on the 27/12/2012 no mention is made in terms of what section the magistrate acted*
- (g) *Accused was found guilty and was sentenced to R300-00 or 3 months imprisonment*
- (h) *Accused did not pay the fine and is currently serving the imprisonment sentence*
- (i) *Accused was not charged under the provisions of section 67A of the Act by the State.*

(iii) *It is my humble submission that there is no provision in law to hold an enquiry in the instance where the accused bail was forfeited. It is further my humble submission that the enquiry held together with the conviction and sentence imposed were not in accordance with justice and the Honourable Review Judge is humbly requested to set the proceeding aside."*

[2] I fully agree with the remarks made by the Regional Magistrate who sent the matter on special review that prior to the insertion of Section 67A of the Criminal Procedure Act 51 of 1977 (The Act),

non appearance, or non-compliance with a bail condition was not punishable. Forfeiture of bail money and loss of liberty were the “sanctions”. See **S v Williams 2012 (2) SACR 158 WCC** where the following was said:-

“Section 67(2) of the Criminal Procedure Act 51 of 1977 does not provide that at the stage when the accused appears before the court an inquiry into his failure (to appear) can be instituted or launched from which a conviction and sentence can flow. Section 67A does not create an offence but the authorities are unanimous that a conviction and sentence can only follow a formal trial and not a summary inquiry. (Paragraph [3] at 159g.)

- [3] The following was emphasized by the writers **Du Toit et al** in their “**Commentary on the Criminal Procedure Act** in regard to cases of this nature:

“The criminalisation of a failure to appear or to comply with a bail condition, should be seen against the background of decisions like *S v Sibiya 1979 (3) SA 192 (T)*, *S v Ndwana 1983 (1) PH H93 (E)*, *S v Nkosi 1987 (1) SA 581 (T)* and *S v Bobani 1990 (2) SACR 187 (T)*. These cases made it clear that the Act – as it stood at the time of each decision, ie, prior to the insertion of section 67A – did not make non-appearance, or non-compliance with a bail condition, punishable. Forfeiture of bail money and loss of liberty were the “sanctions”. In *S v Ndwana (supra)* it was held, for example, that an accused who was on bail and failed to appear could not be convicted of contravening section 170 which deals with the failure of an accused to appear after an adjournment or to remain in attendance. And in *S v Sibiya (supra)* it was held that Section 67 could not be read with Section 72(4), ie, a sentence could not be imposed.”

[4] Consequently the following order is made:-

4.1 The resultant conviction and the sentence in this matter is hereby set aside.

A.M. KGOELE
JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS
JUDGE OF THE HIGH COURT

DATED : 21 FEBRUARY 2013