IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: R39/2022

In the matter between:

THE STATE

and

LUNGILE STABULI DLAMINI **ACCUSED**

REVIEW JUDGMENT

Delivered on: 12 September 2022

Khallil AJ (Mossop J concurring)

Introduction

[1] This matter is not subject to review in the ordinary course (automatic review) as contemplated in section 302 (1) (a) of the Criminal Procedure Act 51 of 1997 (CPA).

[2] The learned magistrate after convicting and sentencing the accused for the offence of 'failure to attend court' endorsed the face of the charge sheet with the direction 'please send for review' .Nothing more.[1]

[3] The matter serves on review ostensibly in terms of Section 304 (4) of the CPA which provides that 'where it is brought to the attention of any Judge of the Provincial or Local Division having jurisdiction that the proceedings in which the sentence was imposed in any criminal case in the magistrate's court (regional or district) was not in accordance with justice', such Judge shall have the same powers as when considering a Review in terms of section 303 of CPA.[2]

[4] Unfortunately no grounds of review were submitted by the learned magistrate nor was there any indication by the magistrate that the proceedings were not in accordance with justice as contemplated in Section 304 (4) of the CPA. Having read the record of proceedings, it was decided to deal with the matter by virtue of the court's inherent jurisdiction in order to promote the interests of justice within the context of the values in the constitution.

Proceedings in the Court a quo

[5] The accused, Mr L S Dlamini, was indicted in the district court sitting at uMzimkhulu on a single count of a contravention of section 17(a) of the Domestic Violence Act 116 of 1998. He was legally represented.

[6] The accused was released on bail but failed to appear in court on a subsequent date when he was required to, namely, 16 September 2021. A warrant for his arrest was authorised and his bail money estreated in favour of the State.[3]

[7] The accused was re-arrested pursuant to the warrant of arrest and brought before court on the 26 January 2022. The matter was postponed until 3 February 2022 for

[1] Indexed bundle, page 1-Enquiry conducted in terms of section 67 A of the Criminal Procedure Act
[2] Section 304 (4) of the Criminal Procedure Act 51 of 1977
[3] Indexed bundle pages 4 and 6 -7.

an enquiry envisaged in section 67A of the CPA pertaining to his failure to appear[4]. He was held in custody pending the outcome of the enquiry.

[8] The matter was postponed on a few occasions thereafter[5] and on 21 February 2022, the enquiry was conducted. The accused elected to be self-represented at the enquiry. He was convicted of a failure to attend court and was sentenced to undergo *'30 days' imprisonment, alternatively, pay R500-00 fine (sic), wholly suspended for period of 3 years on condition that the accused is not again (sic) convicted of a failure to attend court which is alleged (sic) to have been committed during the period of suspension.'*

[9] The insertion of section 67A to the CPA, criminalises the failure, without good cause, of an accused on bail to appear in court when required to do so. Upon conviction of such offence ,the accused is liable to a fine or to imprisonment not exceeding one (1) year.[6] The transcribed record of the enquiry is annexed to the bundle of documents.[7]

[10] When the matter first served before me, the following queries were raised with the learned magistrate dated 29 April 2022:

> *'1. Why was the accused unilaterally stopped by the magistrate when tendering his explanation for non-appearance in court? Can it be said that the accused was allowed an opportunity to be heard? (record page 19, lines 11-12)*
>
> *2. It appears from the record that the accused was under the impression that because he was in default of appearance, therefore he is guilty (record, page 19, lines 9-10). Should the magistrate have not corrected this misconception on his part moreso because he was self-represented?*

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[4] Indexed bundle, page 8: Section 67(3) of the Criminal Procedure Act 51 of 1977 which provides" the court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded"

[5] Indexed bundle, pages 10-14

[6] Section 67A (inserted by section 9 of act 75 of 1995)

[7] Indexed bundle, pages 16-27

3.*Is there any evidence that the accused was in wilful default? If not, can the conviction stand? "*

[11] In an undated letter received by the Registrar on 3 August 2022, the learned magistrate responded as follows:

'1. Indeed, the accused was not given an opportunity to explain his failure to attend court. The accused should have been questioned by me with reference to the alleged facts of the case in order to ascertain whether he fully admits the allegations of his failure to attend court.

2.Upon realizing that I did not give the accused an opportunity to explain why he was pleading guilty. I felt that the conviction was unfair and I sent the matter for review.

3. I completely concede with the remarks by the Honourable Judge. The accused must be afforded the opportunity to be heard at all times. Especially if he is not represented.'

Conclusion

[12] From a reading of the record, it is clear that the accused was not given a fair hearing in that he was, *inter alia,* effectively denied the fundamental right to be heard before rendering of a verdict. As such, the proceedings leading to his conviction and sentence were tainted with gross irregularity. The concession by the learned magistrate of a failure of justice is noted. The conviction and sentence accordingly fall to be set aside.

[13] The manner in which this matter was submitted to the High Court on Review warrants comment. A magistrate who approaches a High Court with a view to having proceedings reviewed in terms of section 304 (4) of the CPA should, at the least, indicate that the proceedings were not in accordance with justice, as well as the

reasons for holding such belief.[8] This was not done in the present case and such practice must be discouraged.[9]

Order

[15] In the result, I propose the following order:

15.1 The conviction and sentence is set-aside.

KHALILL AJ

I agree.

MOSSOP J

[8] S vs De Wee and others 2006 (1) SACR 210 (NC)
9. S v Singh 2013 (2) SACR 372 (KZD), para 15