



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No.: R210/2018

In the matter between:-

BAFANA ERIC DLUDLA

and

THE STATE

CORAM: MBHELE, J *et* MOLITSOANE, J

JUDGMENT BY: MOLITSOANE, J

DELIVERED: 13 SEPTEMBER 2018

- [1] This matter came before us on special review in terms of s304 (4) of the Criminal Procedure Act 51 of 1977(the CPA).

- [2] The accused was found guilty of failure to appear in court after a summary enquiry as contemplated in s170 (2) of the CPA. He was sentenced to R300 or 30 days imprisonment.
- [3] During a routine systemic check the Acting Senior Magistrate discovered that the trial Magistrate convicted the accused without enquiring from the accused as to whether there was a reasonable possibility of the absence of fault on the part of the accused.
- [4] The accused appeared before court on the 19th September 2016 on a charge of contravention of s37(1) read with s37(2) of the General Laws Amendment Act 62 of 1955(Receiving suspected stolen property). He was released on warning and he was again warned to appear before court on the 10th October 2016.
- [5] On the 10th October 2016 he failed to appear before court. A warrant of arrest was authorised for his immediate arrest and detention .On the 24th January 2018 he appeared before court on a warrant of arrest. The following transpired upon his appearance in what purports to be an enquiry for failure to appear:
- “Accused appears on a warrant. Accused confirms his identity as it appears on a J165. Warrant of arrest cancelled and attached .Rights to legal representation explained. Accused elects to apply for legal aid. Ms.Mdlulwa on record. The instructions from the accused is that he was a witness in the case and that the investigating officer will tell him which [when?] to come to court.*

Case remanded until 13/02/2018 for further investigation. Accused in custody bail fixed at R800.00. If bail paid warned for 8:30 and to remain in attendance. Court 36.”

- [6] The magistrate noted that the accused was convicted of contravention of s 72(4) and 170(1) of Act 51 of 1977(Failure to appear).It is contended in essence that the accused stood to be acquitted if there was a reasonable explanation that his failure to appear was not due to fault on his part.

- [7] When requested for reasons for the conviction, the trial Magistrate made concessions and indicated that he had nothing further to add.

- [8] S170 of the CPA, is applicable in circumstances where an accused fails to appear in court after a matter had been adjourned and in circumstances where the accused was not released on bail. The enquiry is summary in nature and the court is enjoined to determine whether there is a reasonable possibility that the failure to appear was not due to fault on his part. See *S v Singo* 2002(20 SACR 160 (CC) par [44], although this case dealt with s72(4) of the CPA. The accused bears the onus to show that there was no wilful default on his part. The presiding officer has a duty to explain to an undefended accused the existence of such an onus,-See *S v Blenkele* 1983(1) SA 515(O)].Section170 (2) of the CPA contemplates that mere failure to appear will justify a conviction in the absence of an explanation. - See *S v Chaplin* 1995(2) SACR 490(C) at 494 f-g.

[10] The provisions of s170 correspond substantially to the provisions of section 55(3) and 72(4) where the accused is summoned or warned to appear in court and he subsequently fail to do so. In *S v Singo* 2002(4) SA 858 (CC) the court considered s72(4) of the CPA which is similar to s170(2) of the CPA and held as follows:

“[13] The court must be conducted in a fair and impartial manner. As part of the enquiry, the presiding officer must establish from the accused whether he or she disputes the fact that he or she was duly warned, giving the details of the warning recorded, and that he or she failed to comply with the warning. If the accused does not dispute the two basic facts, the presiding officer must establish from the accused the reason for his or her failure to appear in court.”

Although these remarks were made in respect of an undefended accused, it is my considered view that they are also equally appropriate where the accused is legally represented. Surely a legal representative acts on behalf and in the stead of the accused person. Such a legal representative is obliged to confirm that the accused was indeed duly warned and must also give reasons for failure to comply with the warning. As may be seen from above the court must establish the reason for the accused's failure to appear in court.

[11] The accused in this case through his attorney gave an explanation to the court. He indicated that he was told that he was a witness in the case. He also said that he was told that the investigating officer will tell him when to come to court.

Without any further ado the accused was convicted and sentenced. The magistrate failed to interrogate further the explanation of the accused that a reasonable possibility existed that he might have been under a misconception that he was a witness in the case and further that the investigating officer would inform him later as to when to come to court. The court is obliged as of fairness to the accused to attempt to determine the truth in the enquiry. See *S v Baloyi* 2000(1) SACR 81 (CC) par[29]. Failure to interrogate the explanation further and thus to attempt to get the truth, led to a failure to establish fault on the part of the accused. In this regard there was a misdirection and the conviction can thus not be sustained. In the circumstances the following order is made:

ORDER:

[19] The conviction and the sentence are hereby set aside.

P.E. MOLITSOANE, J

I agree

N.M. MBHELE, J