



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

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

Case number: R50/2016(B)

In the matter between:

THE STATE

and

THABO PETER MOKHETHI

JUDGMENT BY: CHESIWE, AJ *et* NAIDOO, J

DELIVERED ON: 24 NOVEMBER 2016

**SPECIAL REVIEW IN TERMS OF SECTION 304(4)
OF THE CPA 51/1977**

- [1] This matter came before us in chambers as a special review in terms of section 304(2) of the Criminal Procedure Act 51 of 1977 (the act).

- [2] The accused was found guilty, in his absence, by the magistrate in Kroonstad of possession of a firearm as envisaged in section 3 read with section 1, 103 120 (1)(a), section 121 read with the schedule 4 and section 151 of the firearms control Act 60 of 2000.

The accused was sentenced to three years imprisonment. The accused applied for leave to appeal against his sentence in January 2016. It is not evident from the records whether leave to appeal was granted as the provisions of section 302(1)(a) of the Act are suspended by the ruling of an appeal.

- [3] The first reviewing judge in chambers requested the trial magistrate to submit a statement in terms of section 304(2) of the Criminal Procedure Act 51 of 1977 requiring him to comment on whether the proceedings were in accordance with justice.
- [4] A query was directed to the presiding officer by Pienaar AJ who was of the view that the proceedings were not in accordance with justice, as the proceedings took place in the absence of the accused and after his legal representative withdrew upon the recording of a plea of not guilty by the court. The magistrate was also asked to comment on whether the provisions of section 159 of the Act are applicable in this matter, and if any attempts were made to allow the accused to come to his senses for the trial to proceed in his presence, with reference to **S v Moko**a 1985 (1) SA 350 (OPA).

- [5] The presiding officer supplied his comment and conceded that even though the accused left the courtroom out of his own free will, he erred by continuing with the trial in his absence.

The record shows that the accused wanted the matter to proceed in the Regional Court.

Accused: “I will be happy if this matter is trailed (sic) at the Regional Court.” (Line 13 page 3 of the record)

Court: The prosecutor decided it must be in this court and so it will be.” (Page 4, line 1 of the record)

- [6] The magistrate indicated that it was not his intention to act unfairly towards the accused and therefore suggested that the case be referred back for the trial to start de novo in the District Court at Kroonstad.

- [7] The accused was found in possession of a fire-arm and possession of ammunition, as envisaged in section 1, 103 117 120(1)(a), section 121 read with Schedule 4 and Section 151 of the Firearms Control Act 60 of 2000 and further read with 250 of the Criminal Procedure Act, 51 of 1977 and it was on this basis that the accused was tried in the District Court. He was charged only with possession of a firearm and possession of ammunition. The charge sheet does not indicate if the firearm is an automatic or semi-automatic weapon, and is described as a Rossi 38 Special. This appears to be the reason why the matter was enrolled in the District Court. I see no reason to direct otherwise.

[7] The matter is therefore referred back to the District Court.

ORDER

[8] In the circumstances the following order is made.

1. The entire proceedings are set aside.
2. The matter is referred back to the District Court in Kroonstad for the trial to start de novo before another magistrate.
3. The accused is to be informed of this order.

S. CHESIWE, AJ

I concur

S. NAIDOO, J