

IN THE FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: SHW25/2013

Review Case number: 181/15

In the matter between:

THE STATE

and

TSIETSI DAVID THOBALO

CORAM: MOLOI, et MOCUMIE, JJ

DELIVERED ON: 08 OCTOBER 2015

REVIEW JUDGMENT

MOLOI, J

- [1] This matter purports to be placed before me in terms of Section 304A of Act 51 of 1977, the Criminal Procedure Act, as amended.

The acting Regional Magistrate C.F. Nekosie observed as follows when referring the matter as Special Review:

"The matter is referred in terms of section 304A of Act 51 of 1977 to the Honourable Judge in charge of Review Cases for consideration.

The accused is charged with rape, (contravention of section Act 32 of 2007) in the Regional court sitting at Wesselsbron. The trial commenced on 13 March 2014 with Mr. J Human presiding over the matter. The matter could not be concluded and was remanded.

On the following three remand dates the matter could not proceed for various reasons. On 4 July 2014 and 11 July 2014 the matter proceeded despite the fact that the record of the previous proceedings of 13 March 2014 could not be traced. The matter was remanded to 21 July 2014 for further trial.

On the remand date the accused failed to be in attendance, a warrant for his arrest was authorized and his bail was forfeited. Mr. Human retired at the end of October 2014 whilst the accused was still at large.

The accused was arrested and brought to court on 21 November 2014 and trial date arranged for 27 January 2015. Mr. Human was informed of the date but required the record to be transcribed as he had disposed of all his notes after his retirement. The available records was transcribed but did not include the evidence in chief of the complainant as same was lost.

When Mr. Human was called upon to reconstruct the record and continue with the trial he telephonically informed all the parties concerned that he will not be returning to complete the trial. Several attempts were made to secure the attendance of Mr. Human but he refused to return.

The honourable review judge is accordingly humbly requested to order that the proceedings be set aside and that the trial be started de novo.

The partially transcribed record is also attached.

The accused is currently in custody awaiting the outcome of the review."

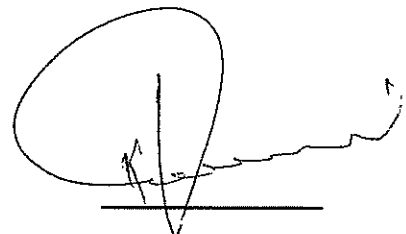
- [2] Section 304A is meant for situations where a presiding officer in the Magistrates or Regional Court who has convicted the accused but before sentence is imposed is of the opinion that the proceedings are not in accordance with justice. In that event the same Magistrate or Regional Magistrate transmits the record for a judge to review the proceedings. The matter on hand is clearly a totally different matter. In this matter, the presiding officer had retired whilst the matter was part-heard by him and no conviction had as yet been pronounced. Section 304 of the Criminal Procedure Act does equally not apply to these set of facts.
- [3] In this matter we are dealing with the impossibility of the presiding officer who heard the matter in part continuing with the trial as a result of retirement. The fact that the retired Regional Magistrate is unwilling to continue with the trial compounds the problem because only if he was willing to continue with the case, he would be cloaked with jurisdiction to do so in that specific matter otherwise he has no more jurisdiction in that court where he presided: R v Mhlanga, 1959 (2) SA 220 T. at 222, where the following was stated:

"Many events may however occur after the taking of the plea which may render the proceedings abortive and therefore a nullity because court, as constituted at the plea stage, has ceased to exist or the presiding judicial officer has ceased to have jurisdiction in the matter. Such events may include the death of the Magistrate, his resignation or dismissal, his recusal or his transfer out of the particular district..."

In S v De Koker, 1978 (1) SA 659 (O) at 660 H the following was stated:

"Volgens die regspraak bring onmoontlikheid daarvan om met die verhoor voort te gaan weens onbeskikbaarheid van die landdros mee dat die verrigtinge sonder meer as abortief beskou word en verval sonder die noodsaak van enige tersydestelling deur 'n Hoër Hof"

- [4] If proceedings are abortive, like *in casu*, they are a nullity. There is no need to set aside proceedings that are a nullity. Only valid proceedings can form a subject of review. The matter can simply start *de novo* before another Regional Magistrate without delay.
- [5] In the circumstances no order setting aside the proceedings is made.



MOLOI .J

I agree,



MOCUMIE . J