

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 79/2013

In the review between:

THE STATE

versus

THEBE JOHN MAHOOA

CORAM: KRUGER, J *et* LEKALE, J

JUDGMENT BY: LEKALE, J

DELIVERED ON: 16 MAY 2013

- [1] On 28 February 2013 the accused appeared before the Magistrates' Court at Bothaville on a charge of assault with intent to cause grievous bodily harm. At the commencement of the proceedings the public prosecutor informed the court that the accused was conducting his own defence and the trial proceeded accordingly.
- [2] The accused tendered a plea of guilty which was later changed to not guilty in terms of section 113 of the Criminal Procedure Act (the CPA). The State, thereupon, called its first witness and, during her testimony in chief, a legal representative attached to Legal Aid South Africa interrupted

the proceedings pointing out that she was assigned to represent the accused.

- [3] The proceedings were, thereupon, adjourned and the learned magistrate sent the matter on review pointing out that:

“In view of the fact that the court in this instance has a doubt as to the correctness of the proceeding where the matter was proceeded with in the absence of the accused legal representative, I would like to forward the record to the Reviewing Judge in terms of section 304A of the Criminal Procedure Act 51 of 1977 that the Honourable Judge make an order:

- 1. That the legal representative be given an opportunity to go through the record and be allowed to start her cross-examination and proceedings be continued if that would not prejudice Mr. Mahooa, or**
- 2. Make an order that the proceedings be stopped and the matter to start *de novo* before another magistrate.”**

- [4] Section 304A of CPA can only be invoked after a conviction and before a sentence is imposed. In the instant matter there is no conviction and, as such, the review machinery of section 304A of CPA is not available. (See **S v Engelbrecht and Others** 2005 (2) SACR 383 (C) at 384i – j.)

- [5] The foregoing is, however, not the end of the enquiry because, in circumstances where grave injustice may result unless the Review Court exercises its inherent powers ,

such a court does not hesitate to intervene in the middle of the proceedings (*in medias res*). The question is, therefore, whether or not the circumstances of the present matter are such that a gross injustice may ensue if this court does not intervene. (See Ishmail and Others v Additional Magistrate, Wynburg and Another 1963 (1) SA 1 (A) and S v Burns 1988 (3) SA 366 (C).)

- [6] The practice, where the accused engages the services of a legal representative *in medias res* after voluntarily flying solo with full knowledge of his right to legal representation, is for the newly employed legal representative to be allowed to qualify herself for trial by perusing the record in order to represent the accused effectively and properly. A close perusal of the record reveals that on 21 November 2012 the accused elected to be provided with a legal practitioner at State expense. It is, further, not apparent *ex facie* the record that the trial court invited the accused to confirm the prosecutor's *ipse dixit* to the effect that he was conducting his defence and that he, in fact, did confirm the same.

- [7] An accused person has a constitutional right to a fair trial which includes the right to legal representation. In proceeding with the trial without the accused's legal representative despite his clear election the trial court, effectively, and inadvertently violated his fundamental right to a fair trial and, thus, committed an irregularity so gross as to vitiate the proceedings (See section 35(3)(f) of **The Constitution of Republic of South Africa 1996** (the

Constitution) and generally **S v Pitso** 2002 (2) SACR 586 (O).)

- [8] The admissions made by the accused in his plea remained after the guilty plea was changed in terms of section 113 of the CPA. Such admissions would clearly prevent the legal representative from operating on a clean slate when she undertakes the accused's defence and are, thus, likely to impede, unfairly, the accused's proper and effective representation. Grave injustice may, therefore, result. (See proviso to section 113 subsection (1) of CPA.)

ORDER

- [9] In consequence the proceedings are set aside.
- [10] The matter is remitted to the Bothaville Magistrates' Court for trial *de novo* before another magistrate.

L.J. LEKALE, J

I concur.

A. KRUGER, J