

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No: 1/2012

In the review between:

THE STATE

and

SKANSE PETRUS TSINYANE

CORAM:

MOLOI, J *et* MOLEFE, AJ

JUDGEMENT:

MOLEFE, AJ

DELIVERED ON:

20 SEPTEMBER 2012

[1] On the 16 July 2012, the accused person, Mr Skanse Petrus Tsinyane, residing at 1327 Mahlatswetsa, Excelsior was found guilty of housebreaking with intent to steal and theft, by the Magistrate Court, Excelsior. He was sentenced to three years imprisonment. The accused was not assisted by a legal adviser. He had three different legal representatives who withdrew as his attorneys prior to the commencement of the trial.

[2] The accused was, when the trial commenced, very

uncooperative and did not want to participate in the proceedings. He refused to hear the charges preferred against him and refused to plead. The presiding officer recorded a plea of not guilty. The accused elected to remain silent, and left the dock and refused to go back into the dock. He was invited by the presiding officer to take a seat on the bench that was provided next to the dock but the accused refused to take the seat. He stood near a door facing the grilled area (the cell) and refused to abide by the court's ruling that he must be seated as a matter of courtesy.

[3] The accused kept on repeating that he did not want to listen to the court. When the State called their first witness the accused interrupted the witness and the presiding officer instructed that the accused be escorted to the cells and the trial proceeded in the accused's absence.

[4] There was therefore no cross-examination of the state witnesses by the accused. The accused was only brought back to court so that the last State witness could identify him and after the accused was positively identified by the

witness, he was escorted back to the cells, after he again refused to participate in the proceedings. The state closed its case after the last witness in the absence of the accused.

[5] Judgment was handed down in the accused's absence and the accused was found guilty of housebreaking with intent to steal and theft.

[6] The accused was brought back to court after he was convicted. The presiding officer informed him of his conviction and asked him to address him in mitigation. The accused still refused to participate and informed the presiding officer that the matter be transferred to another court. The accused was again taken back to the cells.

[7] The presiding officer sentenced the accused to three (3) years imprisonment. The case was remitted to this court in terms of section 302 of the Criminal Procedure Act 51 of 1977 ("the CPA"). The automatic review served before Acting Judge F W A Danzfuss. In his letter dated 24 August 2012, Danzfuss, AJ raised the following query:

“At no stage has the accused been specifically warned that the trial may be finalised and he be convicted in his absence, neither were the risks involved, explained to him. He has also not during the proceedings been brought back, but only after the final witness has testified.

At that stage his rights in terms of section 160 of the CPA were not explained to him. See also **S v MOKOA** 1985 (1) SA 350 (OPD) at 354F – 355F.

- [8] The presiding officer responded as follows in his letter dated 13 September 2012:

“I thank you for having offered me the opportunity to furnish reasons/ or comment further.

In principle I have nothing further to add as my reasons are more so contained in my judgment. I have studied the case of ***S v Mokoia 1985 (1) SA 350 (OPD)***. I am fully acquainted with Sections 159 and 160 of the CPA 51/1977, more so with Section 35(3) of the **Constitution** and have so been prior to the proceedings.

With respect, My Lord, the accused cannot escape the fact that he was not going to be a willing participant in the trial despite him invited to do so. The record reflects that he had

about three (3) different legal representatives and it is unlikely that he (the accused) will believe that his matter will not proceed on the trial date and that he be acquitted or convicted. He conveniently elected not to hear the charges (see page 1 line 16). It is the risk he alone took not to participate. He could have elected to listen to the evidence but chose not to do so.

Our courts are not “game rooms”, but are Shrines of Justice where our calling to deliver justice without fear, favour or prejudice must at all times prevail.

If I study points one to four that My Lord raised is it not sufficient for one to come to the conclusion that we have here an accused who has no respect for our **Constitution** and the Rule of Law. The cited case **supra** was dealt with prior to our **Constitution** and our court now take into account the rights of the complainant (inter alia section 9, 14 and 25 of the **Constitution**).

The common denominator is that the accused did not want to partake in the proceedings at all and it would have made no sense to escort him in and out of the ‘record’.

I humbly pray that the conviction and sentence stand.”

[9] Section 159(1) of the CPA states as follows:

“If an accused at a criminal proceedings conducts himself in a manner which makes the continuation of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence.”

[10] In the **Commentary on Hiemstra’s Criminal Procedure**, it was said that the court can have the accused removed if the accused’s conduct made it impracticable to continue the proceedings in his or her presence. Upon his or her return, the accused received certain rights which are set out in section 160 of the CPA. The power to lock out the accused should be exercised with caution. An accused who deliberately hampers proceedings can be excluded without further ado. It is however, always desirable first to warn the accused and to have the warnings noted on the record.

[11] In **R v PAULINE** 1928 TPD 643 at 646, Tindall, decided that it is also desirable to cause the accused to be brought back

at a suitable time for the court to see whether they should realise that they should change their attitude.

[12] In **S v MOKOA** 1985 (1) SA 350 (O) at 354G – 355A, Smuts, J decided that it may even be desirable, if at all possible, to allow the case to stand down or, to postpone it in order to allow the accused time to come to his or her senses. The accused should also be informed pertinently that the case can proceed in his or her absence. Given that real prejudice can follow such removal, it is submitted that the presiding officer should also inform the accused of such possible prejudice. The events in **MOKOA** case underlines the fact that patience is an indispensable component of judicial conduct.

[13] To remove an accused during a trial and to proceed in his absence must be exercised by the presiding officer with circumspection. The provisions of section 159(1) of the CPA are made not merely in the interest of the complainant or the accused, but in the interests of the public and for the administration of justice.

[14] In this case, it is clear that the accused was very unco-operative and refused to participate in the proceedings. He interrupted the witness and refused to take a seat. He conducted himself as to render the continuance of the proceedings in his presence impracticable. It is my view that the presiding officer had very good reasons to remove the accused. It is also clear from the record that the presiding officer failed to warn the accused that his behaviour might result in his removal and in the trial proceedings in his absence. In this regard, it is my view that the proceedings were not in accordance with justice and that the accused's right to fair trial was denied.

[15] In the circumstances the following order is made:

The conviction and sentence of the trial court as on the 23 July 2012 are set aside.

D. S. MOLEFE, AJ

I concur.

K .J. MOLOI, J

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