

FREE STATE HIGH COURT, BLOEMFONTEIN
(REPUBLIC OF SOUTH AFRICA)

Review No. : 101/2010

In the review between:-

THE STATE

versus

THABO DAVID KOTOLOANE

CORAM:

MOLEMELA, J *et LEKALE, AJ*

JUDGMENT BY:

LEKALE, AJ

DELIVERED ON:

11 MARCH 2010

[1] The accused was convicted of and sentenced to 24 months imprisonment for theft in the Magistrate's Court at Marquard on the 22nd January 2010.

[2] The matter, eventually, landed before me by way of review in terms of section 302 read with section 304 of the Criminal Procedure Act no .51 of 1977 as amended.

- [3] A reading of the record of the proceedings revealed that at the commencement of the sentence stage of the trial the accused indicated that he wished to call a witness to testify in mitigation of sentence. The presiding Magistrate duly directed the intended witness to leave the court room before the accused could take the stand.
- [4] It is, further, clear from the record that, after the accused had testified, the Magistrate invited the prosecutor to address the court on sentence without affording the accused the opportunity to call his witness. The Magistrate, eventually, concluded the trial by imposing sentence without the benefit of the evidence of such a witness.
- [5] In a letter enclosing the record of the proceedings the Magistrate highlighted the foregoing defect in the proceedings and, after apologising profusely for the same, proposed, inter alia, that, in the event of the conviction being confirmed on review, the sentence be set aside and the matter be remitted for the hearing of such evidence and the imposition of appropriate sentence.

[6] I am in respectful agreement with the Magistrate on the proposed course of action insofar as the accused's constitutional right to adduce evidence in terms of section 35 (1) (i) of the Constitution of the Republic of South Africa of 1996 includes the right to call witnesses. (see **S v Younas** 1996 (2) SACR 272 (c)).

[7] I am satisfied that the conviction stage of the proceedings was in accordance with justice. The same, however, cannot be said about the sentence stage which is, evidently, vitiated by the said gross irregularity. (see **S v Gwala** 1989 (4) SA 937 (n)).

ORDER:

[8] For the above reasons the conviction is confirmed and the sentence is, hereby, set aside.

[9] The matter is remitted to the Magistrate primarily for the hearing of further evidence in mitigation from the accused's side, if available, and the imposition of appropriate sentence thereafter.

L J LEKALE, AJ

I concur.

M B MOLEMELA, J

/AM