

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case Number : 585/09

In the special review between:-

THE STATE

and

ISHMAEL KHUMALO

CORAM: EBRAHIM, J *et* MOLOI, J

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 12 NOVEMBER 2009

[1] This matter was placed before us by virtue of the provisions of section 304A of Act 51 of 1977 for an order setting aside the proceedings conducted thus far.

[2] The reasons for requesting such an order were set out by the Add. Magistrate, Odendaalsrus in a letter dated 4 September 2009 and which reads as follows:

“Enclosed herein is the charge sheet and part of the transcribed court proceedings. The accused Ishmael Khumalo, was found guilty of theft on 18/2/2009.

Due to his previous convictions, the proceedings were stopped and the matter was to be referred to the Regional Court for sentence in terms of Section 116(1)(b) Act 51/1977.

From 18/2/2009 till 30/06/2009, the transcripts were not received. The clerk of the court on numerous occasions tried to ascertain the reason for the delay, but without success.

On the 31/7/2009 Craig le Roux from Advocate Solutions was subpoenaed by the Court to give reasons for the delay.

He testified that they were experiencing problems with the new digital recording machine as the central server in Bloemfontein was not functioning probably and has since been replaced.

However, a few days later, the CD's were received and the record was transcribed.

Upon receipt of the record, it was apparent that the record was incomplete.

The evidence of key witnesses, Abraham Chopo, Cynthia Nought and Nomsa Radebe was not recorded.

Due to the laps of time, and the fact that the court's notes were misplaced, it will be impossible to reconstruct the record.

I humbly request that the proceedings be placed before the Honourable Review Judge in chambers, in order for the

proceedings to be set aside, and the matter start *de novo* before another magistrate.

The accused has been informed of the current situation and he has been warned to appear on the 30th October 2009.”

[3] As the proceedings are incomplete, justice cannot properly be served and the following order is made:

3.1 The proceedings in the matter S v Ishmael Khumalo, Case No. 585/09, is hereby set aside.

3.2 The conviction of theft is set aside.

3.3 The proceedings are to commence *de novo* before a different Add. Magistrate.

S. EBRAHIM, J

I concur.

K.J. MOLOI, J

/sp