

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 522/2008

In the review between:-

THE STATE

versus

H J B NAGEL

CORAM: *MOLEMELA, J et MOLOI, AJ*

JUDGMENT BY: MOLEMELA, J

DELIVERED ON: 6 NOVEMBER 2008

[1] The matter came before me as an automatic review brought in terms of the provisions of section 304A of the Criminal Procedure Act, Act 51 of 1977 (Criminal Procedure Act).

[2] The accused person was convicted by the district court at the Parys Magistrate's Court pursuant to a plea of guilty. The matter was then postponed so as to obtain the accused's record of previous convictions (SAP 69) Before the accused's SAP 69 could be obtained the magistrate, by oversight, transferred the matter to the Parys Regional Court,

purportedly in terms of the provisions of Section 75 (2) (b) of the Criminal Procedure Act. I have accordingly been requested to exercise my powers of review by setting aside the transfer of the matter to the regional court so that the accused's sentencing can be proceeded with in the district court by the magistrate who convicted him.

[3] I requested the office of the Director of Public Prosecutions to give input on the matter. Adv Botha from that office commented as follows: "It does not appear from the record of this case that the prosecutor requested the transfer of this case to the Regional Court, nor can a matter be transferred in terms of section 75 (2) (b) of Act 51 of 1977 where an accused has already pleaded guilty and has been convicted."

[4] I agree with Adv Botha that a matter cannot be transferred in terms of section 75 (2) (b) of the Criminal Procedure Act by the magistrate *mero motu*. This view is fortified by the court's remarks in **S v KHALEMA AND FIVE SIMILAR CASES 2008 (1) SACR 165 (CPD)** at 172 f-j and especially at 172 l -173 a where the following was stated: "Section 75 is clear: it provides that a case cannot be transferred to the

regional court or the High Court unless the prosecutor so requests.... The district court cannot therefore transfer a case to the regional court unless requested by the prosecutor or unless the prosecutor has indicated that a case will be transferred for purposes of trial to a court designated by the prosecutor.” Also see Ex Parte **Prokureur – Generaal Transvaal 1978 (4) SA 15 (TPA)**.

- [5] Although section 114 (1) of Act 51 of 1977 does allow a magistrate to, *mero motu*, transfer the case, the jurisdictional facts warranting this action must appear from the record, such as the number and nature of previous convictions. This provisions is not applicable *in casu* for two reasons, viz (1) the magistrate purposed to be acting in terms of section 75 (2) (b) of the Criminal Procedure Act and (2) the jurisdictional factors warranting such a transfer are not apparent from the record.

- [6] I accordingly make the following order:

1. The conviction is confirmed

2. The referral of Case No 214/2008 from the district court in Parys to the Regional Court in Parys is set aside.
3. The matter is referred back to the district court at the Parys Magistrate's Court for finalisation by the magistrate who initiated the trial, viz G C Prinsloo.

M B MOLEMELA, J

I concur.

K J MOLOI, AJ