



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

REVIEW NUMBER: R161/2019

In the matter between:

THE STATE

and

MXOLENI JOHAN SALAKUFA

CORAM: LOUBSER J et RAMLAL, AJ

JUDGMENT BY: RAMLAL, AJ

DELIVERED ON: 14 NOVEMBER 2019

- [1] Pursuant to systematic checks of the completed criminal cases, on 30 November 2018, the acting senior magistrate of Bloemfontein,

drafted an application for a Special Review in terms of section 304(4) of the Criminal Procedure Act, Act 51 of 1977, in respect of this case that was finalised on 29 May 2018.

- [2] On 30 November 2018, she invited the trial magistrate to comment on her written reasons as to why she believed that the matter should be sent for a special review.
- [3] She received the response from the trial magistrate (dated 25 January 2019) as well as the record of the proceedings and the charge sheet from the Acting Sub Cluster Head on 20 September 2019.
- [4] There seems to have been a lack of communication and monitoring between the office of the Acting Senior Magistrate, the trial magistrate and the Acting Sub-Cluster Head. The response of the trial magistrate seems to have been left unattended for nine months, in an unopened envelope (addressed to the acting senior magistrate) in a pigeon hole at the office.
- [5] The Acting Sub-Cluster Head instructed the Acting Senior Magistrate who originally wrote the request for a special review to attend to the finalisation of this matter.

- [6] The relief sought entails the setting aside of the conviction and sentence that was imposed on 29 May 2018.

THE PROCEEDINGS:

- [7] The transcript of the proceeding reflects that the charge was put to the legally represented accused as follows:

“Driving under the influence of liquor or drugs”

- [8] The legal representative then indicates to the court that the charge has not been ‘read to the accused’. The magistrate agrees .

- [9] The accused then pleads guilty. The legal representative informs the court that the plea is not in accordance with his instructions as there were originally two charges against the accused. The proceedings are then adjourned for the legal representative to “sort out the issues” with the accused.

- [10] When the court resumes, the Prosecutor informs the court that the charge has already been put to the accused and that the legal representative will address the court.

- [11] The legal representative requests to be excused for “ethical reasons”. The withdrawal of the legal representative is noted and he is excused. The magistrate then notes a plea of guilty.

[12] The magistrate convicts the accused in terms of section 112 (1)(a) CPA. Immediately thereafter, she elects to question the accused in terms of section 112(1)(b) and states that she is *correcting* herself. She disregards the answers given by the accused in her questioning in terms of section 112(1)(b) when he says that he was not drunk when he drove the motor vehicle. The magistrate pronounces the accused guilty for the second time.

[13] The accused is then sentenced as follows:

“Fined R1500 (One Thousand Five Hundred Rand) or to undergo 3 (Three) months imprisonment which is wholly suspended for period of 3 years on condition that accused is not found guilty of contravening NTRA 93 of 1996, section 35 of NRTA 93 of 1996 not invoked”

THE CHARGE:

[14] Annexure A that is attached to the charge sheet reads as follows:

“That the accused is guilty of the contravention of the offence(sic) of contravening the provisions of Section 65(1)(a)/(b) read with sections 1, 33, 34, 35, 65(3), 65(9), 69(1), 73 and 89 of the National Road Traffic Act 93 of 1996-Driving under the influence of liquor or drugs.

In THAT on or about the 04 day of February 2018 and on Andries Lubbe Street, Ipopeng a public road in the district of Fouresmith, the accused did wrongfully:

(a) Drive a vehicle, to wit FORD CORTINA with registration number CNG214FS

Whist he was under the influence of intoxicating liquor or a drug having narcotic effect”

The charge as appears on the Annexure to the charge sheet was, however, never read out to the Accused.

[15] The essence of a charge is that an accused person has to be informed with sufficient clarity, of the case that the State wants to pursue against him.

Section 84(1) of the CPA dictates the two essentials that must be set out for a charge to be valid. Firstly, the relevant offence and secondly, particulars as to time, place, person and property and both these essentials must be set forth in such a manner “as may be reasonably sufficient to inform the accused of the nature of the charge”

[16] There is no doubt in my mind that the charge that was put to the accused did not constitute one that was in compliance with the above stated requirements.

LEGAL REPRESENTATION:

[17] Section 35 of the Constitution recognises the right to legal representation as an attribute of a fair trial. Section 35(3)(f) and (g) of the Constitution provides:

(3)

Every accused person has a right to a fair trial, which includes the right-

...

- (f) *to choose and be represented by, a legal practitioner, and be informed of this right promptly;*
- (g) *to have legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly”*

[18] In **S v Sokoi [2017]ZAFSHC 201 (10August 2017)** at para 11, it was said:

“Failure to advice(sic) an accused person of the right to request a postponement and, thus, allowing her an opportunity to acquire the services of another legal representative after the attorney withdrew constitutes a gross irregularity insofar as she is, as such, given no

choice and opportunity as to the exercise of her constitutional right to legal representation. It in fact, amounts to a failure of justice in the context of section 322(1) of the CPA"

- [19] In the case under review, when the legal representative withdrew for ethical reasons, the magistrate, without affording the accused an opportunity to employ the services of a different legal representative, or to forego this right so to do, proceeded to subject the accused herein to an instantaneous trial. Although the accused did not request a postponement to obtain legal representation, the possibility that he would have requested such a postponement, if his rights were explained to him, cannot be excluded.

SECTIONS 112(1)(a), 112(1)(b), 113 and 176 OF CPA

- [20] The magistrate convicted the accused in terms of section 112(1)(a) of the CPA and then proceeded to 'correct' herself by questioning the accused in terms of section 112(1)(b) of CPA. During the questioning in terms of section 112(1)(b) the following is recorded on page 5 lines 20-25:

COURT: Are you aware that there is a possibility of you hurting yourself or hurting other people as a result of driving under the influence of liquor?

ACCUSED: No I was not drunk Your Worship, I was not that drunk Your Worship because I was from sleep when I took.

COURT: so let us agree that you were drunk but not so drunk according to you now."

- [21] In **S v Naidoo 1989(2)SA114 (A)** it was said that it is well settled that section 112 (1)(b) *"was designed to protect the accused from the consequences of an unjustified plea of guilty, and that in conformity with the object of the Legislature our courts have correctly applied the section with care and circumspection, and on the basis that where an accused persons responses to the questioning suggest a possible defence or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered and the matter clarified by evidence".*

See also S v Aucamp and Six Similar Cases 2002(1) SACR 524 (E)

- [22] In the present case, the magistrate, after pronouncing the guilt of the accused 'corrected' herself by questioning the accused in

terms of section 112(1)(b) of CPA. The right of the accused to remain silent, not to answer any questions or not to incriminate himself and the consequences of answering questions put to him by the court, as well as the provisions of section 113 were not explained to him.

[23] It is also not sufficiently clear from the record whether or not the magistrate was 'correcting the plea of guilty' or correcting the judgment that was delivered. Either way, the manner in which the 'correction' was effected was improper and constituted an irregularity.

[24] Ironically, the magistrate disregarded the rights of the accused whilst using a procedure that is designed to protect the rights of the accused.

[25] Section 176 CPA stipulates that when by mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, amend the judgement.

[26] The offence of driving a motor vehicle on a public road while the blood alcohol concentration of the driver exceeds the prescribed maximum is noticeably not an inconsequential matter, nor is it a trivial transgression. For these reasons, the magistrate should not

have resorted to proceed in terms of section 112(1)(a) CPA, as she initially did.

[26] In **Director of Public Prosecutions v Klue** [2003]1 All SA 306

(E) Kroon J said:

“The provisions of section 65 of the Act are aimed at combating the carnage on our roads. They send a clear message that any person who has consumed more than a relatively minimal amount of liquor, must not venture onto our roads as a driver of a vehicle. The public interest has been served by the putting into place of strict legislative measures designed to make our public roads safer for everyone”.

[27] Further authority regarding the seriousness of the offence can be found at paragraph 33 in the case of *S v Nangu*, *S v January* and *S v Nayika* [2012] JOL 28376 (ECP)

“Ordinarily section 112(1)(a) is used for minor transgressions and it is highly undesirable that it be used for charges in respect of the driving of the motor vehicle whilst under the influence of liquor or where the concentration of alcohol in the blood exceeds the legal limit”.

SECTION 175 CPA

[28] Neither the prosecutor nor the accused were given the opportunity to address the court before judgment. A failure of this nature denies the accused of his constitutional right to a fair trial. This omission by the magistrate, demonstrates yet another irregularity in these proceedings.

SENTENCE AND ORDER IN TERMS OF SECTION 35 OF THE NATIONAL ROAD TRAFFIC ACT

[29] The sentence imposed by the magistrate is suspended on the condition that the accused is not found guilty of contravening the National Road Traffic Act (NRTA). This condition is wide in that it does not confine itself to the contravention of any specific provision of the NRTA. The wording of the suspension of the sentence does not refer to a contravention "committed during the period of suspension" thus making the sentence reliant upon the conviction only, irrespective of the period in which the contravention takes place.

[30] The magistrate conducted the enquiry in terms of section 35 of the NRTA regarding the suspension of the accused's driver's licence by asking the accused:

“COURT: Sir, are you a licenced driver? No, Your Worship.

Do you know that the court has the right to make an order which says that you shall never ever have a driver’s licence? Yes, Your Worship”

That is the sum total of the enquiry upon which the magistrate ordered that “section 35 NRTA is not invoked”.

[31] The legal position is that upon a conviction, the driving licence of an offender is automatically suspended through the operation of law. After the offender who possesses a valid driving licence, is sentenced, an inquiry should be held to determine whether or not the automatic suspension of the driving licence should be lifted or not. The offender must then be called upon to give cogent reasons why such mandatory suspension should not immediately take effect. The Prosecutor must also be afforded the opportunity of tendering submissions during this inquiry.

[32] The accused in this case informed the court that he did not possess a driving licence. The magistrate should have considered an order in terms of section 35(2) of the NRTA.

[33] The magistrate, with respect, seems to have misconstrued the nature of the inquiry to be conducted. The order made by the magistrate is, in my view, not competent.

SECTION 103 OF THE FIREARMS CONTROL ACT , ACT 60 OF 2000

[34] No inquiry was conducted in terms of section 103 of the Firearms Control Act (FCA) to determine the fitness of the accused to possess a firearm. However, as the magistrate has made no order in this regard, the accused remains *ex lege* unfit to possess a firearm as stipulated in section 103(1)(j) FCA.

RIGHTS TO LEAVE TO APPEAL

[35] The accused was not informed of his rights to apply for leave to appeal either the conviction and sentence or the section 35 NRTA order made by the magistrate.

FINAL REMARKS AND CONCLUSION

[36] The manner in which the proceedings were conducted is lamentable. I take into consideration, however, that the magistrate who conducted the proceedings was appointed on 1 February 2018 and this matter was adjudicated by her on 29 May 2018. Of greater concern, however, is the lax monitoring and mentoring that

should be provided by her seniors. This is reflected in at least two separate instances:

(a) in the time that it took for the acting senior magistrate to realise that the proceedings were to be reviewed, in that this case was finalised on 29 May 2018 and acting senior magistrate only checked the completed proceedings during November 2018; and

(b) The response of the Magistrate, dated 25 January 2019, was only attended to during September 2019 when the magistrate queried the progress of the review application.

[37] A more stringent mentoring and monitoring regime should be implemented by the Judicial Management to oversee the work done by judicial officers and to ensure that the administration of justice is not compromised.

[38] For the reasons set out above, the proceedings were not in accordance with justice, and as such the conviction must be set aside. Simple logic dictates that the sentence as well as the section 35 NRTA order must be set aside as the foundation on which it built no longer stands.

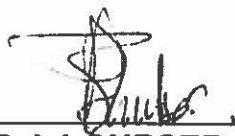
[39] Accordingly, I make the following order:

The conviction and sentence are set aside, and the matter is remitted to the lower court with an instruction that a plea of not guilty be entered.



A.K. RAMLAL, AJ

I concur



P.J. LOUBSER, J