

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION: BLOEMFONTEIN

Review No: 191/2014

In the matter between:

THE STATE

And

PHELLO MXHAKA

CORAM: MOCUMIE J *et* MOENG, AJ

JUDGMENT: MOENG, AJ

DELIVERED ON: 9 FEBRUARY 2015

- [1] This is an automatic review in terms of section 302 of the Criminal Procedure Act, 51 of 1977 (the CPA). The accused was convicted in the Magistrates' Court, Botshabelo, on contravening section 65(1)(a) of the National Road Traffic Act 93 of 1996 (the National Road Traffic Act): driving a motor vehicle whilst under the influence of intoxicating liquor. The conviction follows on his plea of guilty and his admissions in terms of section 112(1)(b) of the CPA. He was sentenced to a fine of R8000, 00 or 12 months imprisonment half of which was suspended conditionally.

[2] The record was placed before me to determine whether the proceedings were in accordance with justice. I thereafter directed the following query to the magistrate:

- “1. Were the questions in terms of section 112(1) (b), more importantly the question relating to the impairment of the accused's driving skill, not leading in nature and therefore irregular ? – See S v Gwenya 1995 (2) SACR 522 (E).
2. Did the accused give any factual basis for the court to have concluded that his skill and judgment or ability to drive the vehicle had been impaired or affected? Should the accused not have been invited to explain what happened, so as to determine the way that he was driving?
3. Was a proper investigation conducted to determine whether the accused will be able to pay the fine in instalments, more so that he indicated under cross examination that he will be employed until December and that his contract may be extended? Is a permanent job a pre requisite for the granting of a deferred fine? - See S v Lekgwabe 1992(2) SACR 219 (T).”

[3] The magistrate responded as follows:

- “1. Die wyse van ondervraging volg ek al vir die afgelope 36 jaar wat ek op die regbank is en het dit die goedkeuring van die Oos-Kaapse Afdeling, Noord-Kaapse afdeling en die afgelope 22 jaar, die Vrystaatse Afdeling van die Hooggeregshof weggedra. Indien 'n hof nie 'n beskuldigde mag vra of hy erken dat die drank sy bestuursvermoë aangetas het nie, hoe sal jy dit weet. Ek het al gevalle gehad wat hy op die vraag “nee” geantwoord het. Selfs al bestuur die bestuurder normaal kan sy vaardigheid wel

aangetas wees, deurdat hy nie instaat is om 'n noodsituasie soos 'n nugter persoon te hanteer nie. Die wyse van bestuur is dus nie deurslaggewend nie – Collinton 1970 (4) sa 325”(sic)

2. Insoverre die betaling van die boete betref, die beskuldigde het dieselfde dag 'n hofboete betaal soos aangedui op die handgeskrewe notule en is die feit dat hy vrygelaat is, op die J4 aangedui.”

[4] In terms of section 112(1) (b) of the CPA the magistrate posed the following questions which are of relevance to the query I posed:

“HOF: Is u deur die polisie gestop of was jy in 'n ongeluk?

BESKULDIGDE: Deur die polisiebeamptes gestop Edelagbare.

HOF: Het die polisie vir u gesê waarom stop hulle u?

BESKULDIGDE: Nee

HOF: Het hulle nie vir u gesê hulle vermoed u is onder die invloed van drank nie?

BESKULDIGDE: Ja hulle het my later gesê.”

[5] In the course of the questioning, the accused admitted to having consumed 4 x 750 ml bottles of beer. The following questions were thereafter posed:

“HOF: Erken u dat u ten tye van die bestuur onder die invloed van drank was?

BESKULDIGDE: Ja ek erken.

HOF: Tot hoe ‘n mate sou u sê was u onder die invloed van drank?

BESKULDIGDE: Matig

HOF: Erken u ook dat die drank u bestuursvermoë tot ‘n mate aangetas het?

BESKULDIGDE: Dit is so Edelaagbare.”

- [6] Section 112(1)(b) of the CPA requires of a judicial officer to question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence. The duties of a judicial officer under the section are therefore dual: (a) He has to question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge and (b) to satisfy himself that the accused is guilty of the offence to which he has pleaded guilty to. In **S v Mshengu** 2009 (2) SACR 316 (SCA) at 318 E, Jafta JA (as he then was), stated that the primary purpose of the written statement in terms of s 112(2) of the CPA (in *casu* section 112(1)(b) of the CPA) is to set out the admissions of the accused and the factual basis supporting his or her guilty plea.

- [7] It has been repeatedly stated by our courts that the questioning of an accused is intended as a cautionary measure to reduce the risk of an erroneous conviction on a plea of guilty. (Compare **S v Kholoane** 2012 (1) SACR 8 (FB) at para [5]). In **S v Mshengu** *supra*, Jafta JA, referred with approval to **S v M** 1982 (1) SA 240 (N) at 242D-E, where it was put thus by Didcott J:

'Accused persons sometimes plead guilty to charges, experience shows, without understanding fully what these encompass. The danger of doing so is obvious in a society like ours, which sees many who are illiterate and unsophisticated coming before the courts with no legal assistance...'

- [8] From the record, it is clear that the proceedings in casu were dominated by the magistrate's questioning. The accused was not given an opportunity to tell his story. When probed whether the police told him why they stopped him, the accused responded in the negative. This response prompted a direct leading question from the magistrate: "Het hulle nie vir u gese hulle vermoed u is onder die invloed van drank nie?" To this, the accused answered in the affirmative. This question suggested an answer and was not aimed at discovering what ensued. The question created the impression that because the accused pleaded guilty, he simply had to confirm that the police suspected that he was under the influence of alcohol. The construction of this question suggests that the magistrate was eager to have the accused admit that he was under the influence of liquor

- [9] It is in this context important to reiterate that leading questions are not *per se* irregular. Such questions may be posed as a form of introduction guiding the accused to the occurrence that led to his arrest. Such questions may also be posed to confirm aspects that were already placed on record by the accused or left out by him when telling his story but should be supplemented by questions inducing factual responses to prove or disprove the element raised by the question. It is however improper on material issues, to put leading questions to the accused without further ado.
- [10] The easiest method of applying section 112(1) (b) of the CPA is for the accused to be invited to explain what happened, for the presiding officer to ascertain whether a factual basis for the admissions in his plea of guilty exists. The accused should therefore be questioned with reference to the alleged facts of the case. In my view the requirement that the presiding officer had to be satisfied that the accused is guilty envisages that he be satisfied that there is sufficient factual support for the admissions in the plea in regard to all the allegations. These facts have to be placed on record by the accused and should later be confirmed by the prosecutor if they are in accordance with the facts in the police docket. An accused should in a nutshell simply be encouraged to tell his story.
- [11] As I understand the import of s 112(1)(b), the magistrate was not only expected to ignore the fact that the accused pleaded guilty, but he was also required to employ a fact finding mission to ascertain whether the facts supported the admissions and the plea of guilty.

The posing of leading questions, the answers to which are either yes or no, did not elicit the truth since the answer was suggested in the question. The simplest question under these circumstances would have been to ask the accused why the police stopped him and what led to his arrest.

- [12] It is common cause that the accused admitted to having consumed four 750ml bottles of beer. He was resultantly questioned whether he admitted having been under the influence of liquor while driving the vehicle and whether the liquor affected his driving abilities. He responded in the affirmative. The magistrate was required to pose further questions to explore the factual basis upon which these admissions were made. Apart from the fact that these questions were leading, the magistrate similarly failed to discover whether these admissions expressed the version of the accused truthfully.
- [13] Whether the accused was driving while under the influence of alcohol within the meaning of section 65(1)(a) is a conclusion of law to be derived from the facts placed before the magistrate. Questions put to an accused under s 112(1)(b) are questions about the factual elements of a criminal offence, not questions about conclusions of law. This was accurately put by Wallis J in **S v Zerky** 2010 (1) SACR 460 (KZP) at 469d–e that questions put to an accused under s 112(1)(b) are questions about the factual elements of a criminal offence, not questions about conclusions of law to be drawn from facts.

[14] It is trite that the state need not prove that the actual driving of the accused showed him to be incapable of controlling the vehicle. (**S v Collington** 1970 (4) SA 325 (R)). But what is important is what the court set out succinctly at 331 in para B-F, where it is stated:

“I do not want it to be understood, however, that the manner in which the accused actually drives is an irrelevant consideration in determining his guilt under the section. Far from it, the manner in which the accused actually drives is most important evidence proving his state of intoxication; but the State can secure a conviction even though the accused drives perfectly provided the court is satisfied from other evidence that he was so drunk that the only conclusion that can be drawn is that he was not capable of being in proper control of a car at the time. For example, even though he was driving perfectly at the time it may be inferred from his state of intoxication that if he was faced with a sudden emergency he would be incapable of exercising that degree of skill which would be required of a normal driver, and to that extent would be incapable of having proper control of the vehicle. There may be other cases, however, where the accused is not so obviously under the influence of intoxicating liquor, where the manner in which he actually drives may well be decisive in determining whether or not he is capable of exercising proper control. In such cases if he drives perfectly this may well justify the court in acquitting him, and the instant case may be such a case. In other cases, however, if the accused drives in a most irregular fashion this in itself would prove that the amount of alcohol which he had consumed, though perhaps not great, was sufficient to render him incapable of having proper control of his vehicle.” (My emphasis).

- [15] The manner in which the accused drove the vehicle is of importance in deciding whether he was under the influence, particularly where there are no visible displays of intoxication on his part. There were no facts on record for the magistrate to have concluded that the manner of driving was not decisive. Had there been such facts, except for the leading question that prompted the accused to admit that his driving ability was impaired, this contention by the magistrate may have been sound.
- [16] It therefore follows that, for a conviction to follow, the magistrate should have been satisfied not only that the accused was under the influence of liquor, but also that at the time his normal skill and judgment in controlling his vehicle was diminished as a result of his consuming alcohol. Mere prove of consumption of intoxicating liquor is not *per se* sufficient, his driver's skill, which involves an element of physical ability, and his judgment, which involves an element of mental ability, should likewise have been affected. (See **S v Grobler** 1972 (4) SA 559 (O), at 561)
- [17] It was not enough to simply ask the accused whether the liquor affected his driving abilities, but there should in addition have been prove of some or other manifestation of intoxication noted from the facts placed on record by the accused. This question may have been posed provided a factual basis was laid by the accused from which it may have been established that he was driving while under the influence of liquor. The accused should have indicated how his driving skill had been impaired by the consumption of alcohol. The

extent of the impairment of the accused's faculties should therefore have been elicited by the magistrate through his questioning and reliance should not have been placed on the say so of the accused which was provoked by a leading question.

- [18] I am satisfied that the magistrate failed to follow a course that would have assisted him to determine the true facts of the case and he resultantly failed to protect the accused from the consequences of an unjustified plea of guilty.
- [19] Generally, in order for the magistrate to have been able to determine whether the accused should be given the opportunity to pay a deferred fine, the following factors were sufficient: (i) the accused was employed earning around R2000, 00 per month; (ii) he had been so employed for two months and his contract of employment was due to expire within 3 months. This contract was however renewable depending on the quality of his workmanship. This is a reasonable approach regardless of whether the accused had indicated that he was not in a position to pay a fine immediately, more so that such fine was far in excess of his resources.
- [20] At this stage too, a presiding officer is still expected to play an active role, more so if the prosecution is also in favour of a deferred fine. The fact that the fine could not be deferred because the accused was not permanently employed is not correct. To do so unduly disadvantages those who are casually employed yet able to pay fines

in instalments. It is unimaginable that permanent employment may be a pre-requisite for the granting of a deferred fine.

[21] The magistrate's failure to conduct a proper enquiry placed the accused in jeopardy of imprisonment. By imposing a fine, the magistrate asserted his intent of not sending the accused to prison. There was therefore no reason why a proper enquiry could not be conducted to ensure that the accused is afforded the opportunity to pay the fine in instalments.

[22] I, accordingly, make the following order:

1. The conviction and sentence are set aside;
2. The case is remitted to the magistrate and he is directed to comply with the provisions of section 112 (1) (b) of Act 51 of 1977 as set out in this judgment.

L.B.J. MOENG, AJ

I concur.

B.C MOCUMIE, J