

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, BHISHO**

**CASE NO: 4/2015
NOT REPORTABLE**

In the matter between

THE STATE

versus

MCEBISI SOMELEZE FUNANI

REVIEW JUDGMENT

HARTLE J

1. The accused, who was not assisted by an attorney in the proceedings under review, was convicted in the magistrate's court in Zwelitsha on a charge of contravening section 65(1)(a) of the National Road Traffic Act, No. 93 of 1996, it being alleged that he drove a motor vehicle on a public road while he was under the influence of intoxicating liquor. As a result, so the charge sheet alleged, he bumped a motor vehicle with registration letters and numbers FAH [...] from behind.

2. His conviction followed pursuant to his plea of guilty. He was sentenced to a fine of R3 000.00 or in default to undergo twelve months' imprisonment. No order was made in terms of section 35 of the National Road Traffic Act.

3. The matter came before me on automatic review to determine if the proceedings were in accordance with justice.

4. Section 112(1)(b) of the Criminal Procedure Act, No. 51 of 1977, which was applicable in this instance, provides as follows with regard to the magistrate's duty to question the accused following his plea of guilty to the offence charged:

“112. Plea of guilty.—(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea—

(a) ...

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, or if requested thereto by the prosecutor, 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.”

5. In *S v Naidoo*¹ Botha JA remarked as follows with reference to the objective of this provision and the peculiar duty of the magistrate to punctiliously question the accused upon his plea of guilty:

“[I]t is well settled that the section was designed to protect an 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’s 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.”

6. The questioning therefore entails two aspects about which the presiding officer must be convinced, namely, firstly, that the accused admits all the allegations in the charge and, secondly, that he is guilty of the offence.²

7. A plea of guilty to a charge of driving a motor vehicle while under the influence of liquor must incorporate an admission that the accused’s driving ability was impaired as a result of the consumption of intoxicating liquor. This is necessary on account of the relevant substantive law requirement that “the skill and judgment normally required of a driver in the manipulation of a vehicle (must be) diminished or impaired as a result of the consumption of intoxicating liquor”.³

8. In *S v Mzimba*⁴ the court noted as follows with regard to this essential requirement:

¹ 1989(2) SA 114(A) at 121 F.

² *S v Nagel* 1998 (1) SACR 218 (O) at 219 e – g.

³ Hoctor Cooper’s *Motor Law – Criminal Liability, Administrative Adjudication and Medico-Legal Aspects* 2 ed (2008) at B11 – 45.

⁴ 2012 (2) SACR 233 (KZP) at par [6].

“This element of the crime requires an impairment, not only of an accused's state of mind, ie that the alcohol induced him to a state that he was prepared to take risks, but that his driving ability was impaired. It is therefore necessary that an accused charged with an offence of drunken driving should admit that he/she lacked the necessary skill and judgment normally required in the manipulation of a motor vehicle and that such skill or judgment has been diminished or impaired as a result of the consumption of alcohol or drugs.”

9. It appears from the transcript that there was no admission made by the accused before he was convicted that his driving ability was impaired as a result of his admitted consumption of vast amounts of alcohol imbibed at a traditional ceremony throughout the night before.

10. He admitted only during questioning by the magistrate that he had collided with the abovementioned motor vehicle on Independence Avenue in the district of Zwelitsha around 13h00 or 14h00 on 14 October 2012, following the night of his binging. He was travelling “in a high speed,” but seemingly he meant at the permissible speed for the faster lane of the two. The offending motor vehicle suddenly changed to the lane in front of him. He had to brake, but was unable to stop his motor vehicle in time to avoid colliding with it.

11. After the magistrate convicted him and during sentence proceedings the accused explained in mitigation that he thought that the sleep he had had in between drinking and driving, from 05h00 to 11h00 that morning, would have sobered him up. He had also since consumed water and had had something to eat. He assumed therefore that he would “not be drunk”. However he volunteered, quite co-incidentally, that:

“... if I had not taken liquor, Your Worship, I think I would be able – I was going to be able to apply brakes immediately, Your Worship, or to control the vehicle, Your Worship, not to bump another vehicle”.

12. The conviction of the accused, deficient of the necessary admission made purposefully *before conviction* that he was incapable of exercising proper control of the motor vehicle, or that his ability to drive had been impaired due to the consumption of liquor, would appear to me to constitute a fundamental irregularity in the proceedings. Leaving aside the question whether the accused's statement in this regard would have been sufficient in all the circumstances to conclude that he was affected by the alcohol to the extent that he could not control his motor vehicle (for the reasons I refer to below), the situation is not alleviated at all by the fact that the accused after his conviction coincidentally happened to make the admission which the magistrate ought in the first place to have elicited during his questioning of the accused in terms of section 112(1)(b) of the Criminal Procedure Act.

13. The correct course of conduct in such an instance is to correct the plea of guilty to one of not guilty for it is trite that when an accused does not admit all the elements of an offence charged with, the court cannot be satisfied with his guilt.

14. There is a further reason why the court *a quo* should not have been so eager to accept the accused's guilt without thoroughly interrogating the matter. What the accused did say, regardless of whether this was before or after his conviction, suggests a possible defence or leaves open to doubt whether his driving skills were in fact impaired at the time of the collision as a result of the liquor consumed. It appears from the information furnished by him during questioning that the driver of the other motor vehicle may have been responsible for the collision in exercising a sudden and dangerous manoeuvre in front of him and that he was unable to avoid colliding with this vehicle not necessarily because he was taking a risk by driving faster in the second lane, but because

the vehicle had slowed down considerably to mount a speed bump at the time. The mere fact of a collision cannot in itself be regarded as proof that the accused was under the influence of liquor. It seems too that the police drew blood from both drivers which may have been another reason to tread carefully around the issue of the collision constituting proof in itself of the supposed state of drunkenness of the accused and being unable to control his motor vehicle so as to prevent it from colliding with the other vehicle.

15. Some time had passed by the time of the collision since the accused's last drink before 05h00. He had slept, eaten and consumed water to counteract the affect of the alcohol imbibed. He picked up two hitch hikers who were with him in the motor vehicle. After the collision he had also himself suggested that he and the other driver go to the police station and in fact drove himself there. This functionality suggests the opposite of being so drunk that his skills or judgment were significantly impaired by alcohol consumed during the night before.

16. In either respect the magistrate should not have been satisfied as to the guilt of the accused and the conviction accordingly falls to be set aside.

17. I issue the following order:

1. The conviction and sentence are set aside.
2. The matter is remitted to the magistrate's court on the premise that a plea of not guilty be entered in terms of section 113 of the Criminal Procedure Act, No. 51 of 1977, so that the doubtful matters be clarified by evidence.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

D A VAN ZYL
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 17 APRIL 2015