

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 10/2013

In the review between:-

THE STATE

and

BOITUMELO GRANT MOKOKOLO

CORAM: LEKALE, *Jet* PHALATSI, AJ

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 30 MAY 2013

[1] This is an automatic review in terms of section 302 of the Criminal Procedure Act, 51 of 1977 (“the CPA”). The accused was charged with

“contravention of section 59(4) read with section 89 of Act 93 of 1996, in that upon or about 5 March 2012 and at or near N1, a public road in the district of Brandfort, the accused unlawfully exceeded the speed limit of 120 km/h by driving the vehicle with registration number CNH918FS at 171 km/h”.

[2] During the hearing of the matter on 12 July 2012, the accused, who was unrepresented, pleaded guilty to the charge.

- [3] The court proceeded to ask questions to determine whether the accused admitted all the elements of the crime.
- [4] The court entered a plea of not guilty after questioning the accused, in that the accused did not admit that he had intention to commit the crime.
- [5] Immediately thereafter, the State closed its case without calling any witnesses.
- [6] The court then advised the accused as follows, after informing him that the State had closed its case:

“At this stage you have the following rights that this Court has to inform you of. You can testify under oath, you can call witnesses. Now from the facts, which this Court has already advised you shall stand as proof of the facts thereof. This would mean that the state is relieved from proving such allegations against you, and that in terms of the Criminal Procedure Act those aspects that are not in dispute shall be accepted as proved. You also have the right to remain silent and elect not to say anything.”

- [7] The accused elected to testify and was thereafter convicted as charged.
- [8] The case is subject to automatic review and the Reviewing Judge before whom the matter first served, requested the magistrate to give reasons for the conviction, with specific reference to the following:

- “- Did the accused have a case to meet after the State closed its case?
- Was there a duty on the magistrate to acquit him after the State closed its case?
- Was there a duty on the magistrate to explain to him that he may apply for his discharge in terms of section 174 of Act 51 of 1977?”

[9] 9.1 The learned magistrate responded thereto by, firstly, quoting from the record what transpired during examination in terms of section 112(1)(b). The only relevant part for the purpose of this judgment, is the following:

“Court: Was it your intention to drive at 171km/h?
Accused: No.”

9.2 The plea of not guilty was then recorded in terms of section 113, pursuant to this response.

9.3 The court quoted the case of **S v Mphateng en ‘n Ander** 1981 (3) SA 511 (T), where it was stated that although it does not often happen in practice, it is possible that the accused can be convicted solely on what he/she has said during plea explanation.

9.4 She further quoted, with approval, it would seem, the case of **S v Goitsemanq** 1997 (1) SACR 99 (O), where the court per Wright J, said the following at page 103A:

“Dit is duidelik uit die omstandighede van die onderhawige geval dat die Staatsaanklaer nie in 'n posisie was om enige sinvolle getuienis aan te bied wat lig sou werp op die beskuldigde se gemoedstoestand of besef van die onregmatigheid van sy optrede ten tyde van die neem van die skaap nie.”

9.5 Based on the abovementioned cases, the learned magistrate comes to the following conclusions and I quote:

“The aspect that was in dispute pertained to the accused’s own state of mind and understanding. The accused was the only one who could shed insight on this aspect since it would have been impossible for the state to lead such evidence in rebuttal.

By placing his intention in dispute, the accused had a duty to lead evidence as to what happened and what he believed. If the accused does not give a credible explanation of his psychological disposition, knowledge of wrongfulness and intention may be inferred.” My emphasis.

9.6 It is trite that the State must prove the guilt of the accused beyond reasonable doubt. This means that the State must prove each and every element of the crime that the accused is charged with, beyond reasonable doubt, failing which, the conviction cannot stand.

[10] The finding by the magistrate that where the accused places his intention in dispute, he/she has a duty to lead evidence as to what happened and what he/she believed, is not only

against, but is also a danger to our whole criminal justice system and *juris prudence*.

- [11] In **S v Lubaxa** 2001 (2) SACR 703 (SCA) the court, dealing with applications in terms of section 174 of the Criminal Procedure Act, held that if there is no possibility of a conviction other than if the accused enters the witness box and incriminates himself, a failure to discharge an accused in these circumstances would be a breach of his/her rights guaranteed by the Constitution.
- [12] In **S v Nyanga** 2004 (1) SACR 198 (C) at 201, the court held that if the court is satisfied that the admissions adequately cover all the elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty.
- [13] On the question as to whether the accused had a case to meet after the State had closed its case, it is clear from the record that the State had failed to prove the element that had been put in dispute by the accused, being intention.
- [14] This simply means that the State had failed to prove all the elements of the offence against the accused beyond reasonable doubt. I have already found that there was no duty on the accused to lead evidence to prove or negate intention and the accused, therefore, had no case to meet after the State closed its case.

[15] The two other aspects of the query directed to the trial court are, in my opinion, two sides of the same coin, and can therefore be dealt with together.

[16] The response of the learned magistrate is as follows, and I align myself with the sentiments expressed:

“The accused should, in appropriate cases, be advised of his/her right to apply for his/her discharge at the conclusion of the State case; **S v Kester** 1996 (1) SACR 461 (B). The option of applying for a discharge at the close of the prosecution case must be explained to an accused when he/she is unrepresented and has no case to answer. To refrain from doing so and to advise the accused that he/she may testify or remain silent is to imply that he/she has a case to answer, thus misleading him/her. In such circumstances the judicial officer should discharge the accused *meromotu*. (**S v Nzimande** 1993 (2) SACR 218 (N).)

[18] I, therefore, find that the learned magistrate erred in convicting the accused as charged. Her reliance on the evidence of the accused to prove intention was an irregularity of such a gross nature that it vitiates the proceedings insofar as the accused's constitutional right against self-incrimination was violated thereby.

[19] In the light of the above, the order of the magistrate is set aside and replaced with the following;

“The accused is found not guilty and discharged.”

The money paid in respect of the fine shall be refunded to the accused within a reasonable time.

N.W. PHALATSI, AJ

I concur.

L.J. LEKALE, J

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