

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 146/2013

In the review between:

THE STATE

versus

PHILLIMON NHLAPO MASIU

CORAM: LEKALE, J *et* PHALATSI, AJ

JUDGMENT BY: LEKALE, J

DELIVERED ON: 15 SEPTEMBER 2013

- [1] On the 16th April 2013 the accused appeared before the Magistrate's Court at Bothaville on a charge of assault with intent to cause grievous bodily harm and was convicted of contravention of section 1 of the Criminal Law Amendment Act 1 of 1988 (the CLAA) as a competent verdict. He was, eventually, sentenced to twelve months imprisonment, which was conditionally suspended and a further eighteen months of correctional supervision on the 26th April 2013.
- [2] The matter, eventually, came before me on automatic review and I caused a query to be directed to the trial magistrate to which he has, gratefully, since responded, *inter alia*, as follows:

- “2. Was there evidence before the court that the accused consumed a substance which impaired his faculties to appreciate the wrongfulness of his act or his ability to act in accordance with the appreciation of the wrongfulness of his act while knowing that such substance has that effect?”**

.....

Accused admitted during questioning by the court in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977, that he had on that day consumed liquor and on page 3 of the record, when the court asked him if he was drunk on that day he said ‘I was under the influence’.

Based on this admission by the accused himself, it was then that the court concluded that since he admitted being under the influence of liquor and unable to explain as to what transpired on the day in question, the substance he had consumed had impaired his faculties to appreciate the wrongfulness of his act or to act in accordance with that appreciation, while knowing that such substance has that effect.

When asked if he did stab the complainant with a bottle, he says ‘we were both drunk and the last time I checked I was in possession of dumpies and I am not in a position to can express further what happened’. This in my view clearly shows that he is aware that the substance he had consumed on the day in question had an effect on his recollection of what transpired on the day in question.

- 3. Was an enquiry held before a decision was made in terms of Section 103 of Act 60 of 2000?**

.....

Since the offence of which the accused in this instance (sic) is not referred to in Schedule 2 and is not a crime or offence contemplated in Schedule 1, I was of the view that an enquiry to determine whether accused is unfit to possess a firearm is not a must, and that accused was not declared unfit to possess a firearm.”

- [3] The mental element of the offence created by section 1 of the CLAA consists in knowledge of the effect of the substance involved at the time of its consumption or use. (See **S v MPHUNGATJE** 1989 (4) SA 139 (O) and **S v Lange** 1990 (1) SACR 199 (W) at 205a – c.)

- [4] It is clear from the learned magistrate’s response that the conviction is based on the accused’s *ex post facto* knowledge of the effect which alcohol had on his faculties as opposed to knowledge of such effect at the time of imbibition of the alcohol. To this extent *mens rea* was not established beyond a reasonable doubt in order to sustain a conviction.

- [5] A guilty finding for the offence in question calls for stipulation, in the description of the conviction, of what the initial charge was or what crime the accused would have been convicted of if he was not criminally incapacitated by his intake of the relevant substance. In the instant matter reference should be made to assault with intent to cause grievous bodily harm, by way of an insertion, in brackets, after the description of

the crime of which the accused has been convicted in terms of CLAA, in order to assist the court which later consults the accused's previous convictions. (See **S v Oliphant** 1989 (4) SA 169 (O) at 171B – C.)

- [6] The learned magistrate's view that the provisions of section 103 of Firearms Control Act (the FCA) are not applicable in the instant matter is, in my view, not correct. A look at section 103(1)(j) of FCA shows that a conviction of any offence involving the abuse of alcohol or drugs renders the convicted person unfit to possess a firearm unless the court determines otherwise. In my judgment and depending on whether or not the accused is sentenced to a period of imprisonment without the option of a fine, reference to assault when the accused is convicted of contravention of section 1 of CLAA also throws the offence within the purview of either section 103(1)(g) or section 103(2) read with Schedule 2 of CLAA insofar as such an offence involves violence.
- [7] The conviction, therefore, falls to be set aside as not being in accordance with justice.

ORDER

- [8] The conviction and sentence are set aside.

L.J. LEKALE, J

I concur.

N.W. PHALATSI, AJ

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