



LVS

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

DATE: 2 SEPTEMBER 2009

NOT REPORTABLE

MAGISTRATE MALAMULELE

Case No: B221/08

Magistrate's serial no: 66/08

High Court Ref No: 2208

THE STATE VS LOYD NKUNA

REVIEW JUDGMENT

EKSTEEN AJ:

The accused, a [.....], was convicted of charges of culpable homicide and secondly contravening the provisions of Section 65(5)(a) of the National Road Traffic Act 93 of 1996 (excessive

amount of alcohol in breath).

The accused was sentenced on 30 July 2008 to pay a fine of ten thousand rand (R10 000.00) or two (2) years imprisonment on count 1. On count 2 the accused was sentenced to pay a fine of twenty thousand rand (R20 000.00) or three (3) years imprisonment. The accused conducted his own defence.

The case was sent on review and the High Court after requested the magistrate for reasons. The case was forwarded to the Director of Public Prosecutions for comment. It was submitted by the state advocate that there was no evidence tendered by the prosecution in respect of the concentration of alcohol in any specimen of breath by the accused

The evidence tendered was in respect of driving with an excessive concentration of alcohol in the blood, being 0.14 gram per 100 millilitres.

The state submitted further "... That the proceedings are clearly in accordance with broad justice" In terms of section 88 of Act 51 of 1977 the defect in the charge will in any event be cured by evidence at the trial providing the matter which should have been averred. The accused disputed the chain evidence in respect of the sample, clearly conducted his defence with knowledge that

the state was alleging that he drove the vehicle while the concentration of alcohol in his blood exceeded the legal minimum that for record purposes the conviction on count 2 can safely be substituted with one of contravention of section 65(2) of Act 93 of 1996.

In *S v Hugo* 1976(4) SA 536 A the conviction was set aside on the basis of prejudice because evidence had been admitted regarding an allegation which did not appear in the charge. An amendment was refused on the grounds of prejudice. In ***S v Magelepo* 1999(1) SACR 382(0)** it was held that, where the evidence adduced, on the one hand, and the allegation contained in the charge sheet, on the other, were of such a nature that the evidence proved an offence other than the alleged in the charge sheet, the difference could not be remedied by section 86

The facts in *casu* have to be distinguished from the facts in ***S v Mhlango* 2005(1) SACR 209(T)**.

To comply with the state's submission will be severely prejudiced to an undefended accused

In the result the following order is made:

- 1. The conviction and sentence on count 1 is confirmed.**
- 2. The conviction and sentence on count 2 is set aside.**

C.J EKSTEEN
ACTING JUDGE OF THE HIGH COURT

I agree

C BOTHA
JUDGE OF THE HIGH COURT