

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 1388/06

In the review between:-

THE STATE

versus

MBALAKELWA ANCHES TAOLE

JUDGMENT BY: CILLIé J

DELIVERED ON: 19 APRIL 2007

[1] The accused pleaded guilty on a charge of contravening section 63(1) of Act 93 of 1996 in that he drove a motor vehicle negligently. In order to establish whether he was in fact guilty the magistrate directed the following questions to the accused as required by section 112(1) of Act 51 of 1977:

“Q. Do you plead guilty voluntarily?

A. Yes

Q. On the 16-10-2006 were you at the district of Ficksburg?

A. Yes

Q. It is alleged that on the 16-11-2006 you were arrested?

A. Yes for driving recklessly and negligently a motor vehicle.

Q. What kind of motor vehicle were you driving?

A. A Ford truck with registration no ZLW 639 FS.

Q. What kind of road were you driving this car?

A. Public road

Q. How did you drive this car?

A. I was driving in a proper manner, with care

Q. Any damages occurred as a result of your driving?

A. Yes – two children were injured and they are 10 years old

Q. How were they injured?

A. I met with these children in the district of Ficksburg hitching a hike. They told me that they will alight next to the Sandstone. When they arrived to the Sandstone they just alighted.

Q. At which part were they conveyed?

A. At the back (trailer) of the truck.

Q. Why did you not stop at the place they mentioned?

A. I thought they refer to another Sandstone I know, not the one they mentioned.

Q. Did you see them alighting from the truck?

A. No – I did not have a proper look at all times

Q. How did you know about the incident?

A. I was informed by the police about this incident when I was approaching Fouriesburg and at that time they were not inside the truck – at the back. I was also informed by the police that they both alighted while the truck was moving next to the Sandstone that is in Ficksburg.

Q. What speed were you travelling with?

A. ± 75 km/h”

[2] The prosecutor accepted the plea on that basis. Thereupon the magistrate recorded that

“The court is satisfied that accused admits all the elements of negligent driving and is convinced that he is guilty of negligent driving.”

[3] Having considered the submitted mitigation the accused was then sentenced to a fine of R3 000,00 or 6 (six) months imprisonment wholly suspended for 4 (four) years on condition that he is not convicted of negligent driving committed during the period of suspension.

[4] When the matter was submitted for review the reviewing Judge requested reasons for the conviction and an indication by the magistrate in what respects he found the accused to have driven the vehicle negligently.

[5] The Clerk of the Court now reports that the magistrate was only temporarily at that office and that her present whereabouts are unknown. This matter therefore regrettably has to be considered without the advantage of the magistrate's reasons for convicting the accused. Fortunately the circumstances are such that it is hardly possible to think of anything that the magistrate could report that could have a bearing on the outcome of this review.

[6] Section 63(1) of Act 93 of 1996 reads as follows:

“No person shall drive a vehicle on a public road recklessly or negligently.”

What is clear from section 63 is that the negligence must relate to the actual operating of the motor vehicle by the accused. In the present case there was nothing shortcoming in the manner in which the accused operated his vehicle. As a matter of fact the accused confirmed during his questioning by the magistrate as is evident from what is quoted, *supra*, that he drove in a proper manner and with care. The fact that the accused did not see the children alighting from his vehicle is understandable. Apparently the vehicle was a truck with a trailer and in all probability the children would alight right at the extreme back of the trailer. In these circumstances the accused would in any event at best only observe the children after they alighted. In the absence of any evidence of the nature and precise shape of the vehicle, it is unjustified to infer that the accused was negligent in not observing the children alighting from this vehicle.

- [7] The fact that the accused misunderstood the exact location where the children wanted to alight from the vehicle, does not relate to his driving of the vehicle. If that was not so, it would have disastrous consequences. For instance, the courier who delivers his parcels at the wrong address would be prosecutable on a charge of contravening the aforementioned section. Also so, the bus driver who forget the exact location of the busstops where he is supposed to stop.
- [8] The question now is whether the matter should be remitted to the magistrate to enter a plea of not guilty as envisaged in section 312 of Act 51 of 1977. The position, however, is that the State accepted the facts as alluded to by the accused. This means that there is no dispute between the accused and the State about what actually occurred. As set out above these facts does not constitute the offence set out in the charge sheet. It would therefore be an exercise in futility to remit the matter to the magistrate to act in accordance

with section 113 of Act 51 of 1977 as it is clear that the State cannot produce evidence that would prove the accused's guilt.

[9] For these reasons the conviction and sentence are set aside.

C.B. CILLIé, J

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