

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

Review No.: 394/2007

In the case between:

THE STATE

and

BEN THATO ZIM

CORAM:

RAMPAI, J *et* MOLEMELA, AJ

JUDGEMENT BY:

RAMPAIM J

DELIVERED ON:

13 SEPTEMBER 2007

- [1] The matter came to court by way of a special review in terms of section 304(4) of the Criminal Procedure Act, No. 51 of 1977. The accused was charged for contravening section 65(1)(a) of Act No. 93 of 1996 – driving a motor vehicle under the influence of liquor or drugs. This was the main charge. The alternative charge was driving a motor vehicle while the alcohol concentration in his blood was not less than the permissible limit of 0,05 grams per 100ml in

contravention of section 65(1(b) of Act No. 93 of 1996.

[2] The matter was assigned to me to review. The record reveals that the accused intended pleading guilty to the alternative charge of driving with an excessive alcohol concentration in his blood. He was not really required to plea. His intention was merely conveyed to the court by the prosecutor.

[3] As is the custom, the defence lawyer then stood up and confirmed that the accused had indeed instructed him to plead guilty on the alternative.

[4] The attorney then proceeded to read a written statement in terms of section 112(2) of Act, No. 51 of 1977. The statement reads:

“I, the undersigned

BEN THATO ZIM

do hereby make the statement as follows:

1.

I am the accused in this matter and make this statement freely, voluntarily and in my sober senses without undue influence.

2.

I plead guilty to the offence of contravention of section 65(1)(b) read with section 65(2)(b), 89(1) + 2 (sic) of Act 93 of 1996 driving a motor vehicle with excessive percentage of alcohol in blood.

2.1

In that on the 19th November 2005 and on Riverside and Boiketlo road a public road in the district of Witsieshoek I wrongfully sat in the driver's seat of a motor vehicle to wit a Nissan Van with registration No. CNG244FS while the engine was running, or driving the said vehicle whilst the concentration of alcohol in a monster of blood drawn from any part of my body was not less than 0,05 gram per 100ml but was 0,20 gram per 100ml.

3.

I admit that on the said day I had embibed (sic) intoxicating liquor to wit four (4) quarts of Castle Beer.

4.

I further admit that the process followed from my arrest to the drawing of blood sample from my body as well as the analysis of the blood was in order.

5.

I admit that the blood sample was extracted from my body within the prescribed time limit of two (2) hours.

6.

I admit that I have seen the forensic certificate and admit the correctness thereof.

SIGNED on this 17th day of October 2006.

Accused signature: (SIGNATURE)

Witness: (SIGNATURE)"

[5] The accused was then asked to confirm the above written plea. He apparently did although his answer was indistinct. The state accepted the plea as tendered by the defence. The accused was, without more, convicted on the strength of his written plea on 17 October 2006.

[6] The magistrate then sentenced the accused on 8 December 2006 to a fine of R3 000,00 or 6 months imprisonment conditionally and wholly suspended for 24 months.

[7] On review I found the accused's written statement in terms of section 112(2) to be somewhat vague. He simply repeated the wording of section 65(1)(b). The section envisages two practical scenarios. The first is where a person with an excessive alcohol concentration in his blood sits on the driver's seat of a stationary motor vehicle whose engine is still running. The second is where a person with an excessive alcohol concentration in his blood manipulates a motor vehicle which is in motion. This distinction was not made by the accused in his written plea of guilty – vide paragraph 2 thereof.

[8] The result is that the statement in terms of section 112(2) failed to state pertinently in what way the accused contravened section 65(1)(b) read with related provisions of the relevant legislation. It appears to me that neither the prosecutor nor the magistrate appreciated the aforesaid distinction in the section and the defect in the written plea.

[9] On 17 October 2006 the magistrate noted on form j15 where he was required to state the judgment:

“Guilty as pleaded as charged.”

Vide page 4 of the paginated court record.

As we have seen there was the main charge and there was the alternative charge in the instant case – section 65(1)(a) and section 65(1)(b) respectively. To describe the verdict in the circumstances by noting, as the magistrate did, is unhelpful and undesirable. Where the accused had faced one charge only, it is not wrong to say guilty as charged. But even in such a situation it is unconventional to say “guilty as pleaded as charged.” Perhaps one may say: “Guilty as charged in accordance with the plea”.

[10] In the instance case the verdict should have been noted as follows:

“Guilty contravention of section 65(1)(b) Act No. 63/96)”

It was unnecessary to say: “Guilty as pleaded...” since it has, as a matter of fact, already been noted in the appropriate block or paragraph that the accused had pleaded guilty.

[11] The sentence imposed on the accused was suspended on

condition that the accused is not convicted of the same offence “**he is charged with.**” The emphasis is mine. The condition is, with respect to the court below, poorly worded. It should have been phrased as follows:

“on condition that the accused is not again found guilty of contravention of section 65(1)(b) committed during the period of the suspension.”

The emphasis at the sentencing stage shifts completely away from the offence an accused was charged with to the offence of which he has finally been **convicted**. Sometimes the two may be poles apart, for instance, where the accused is found guilty of a competent verdict.

[12] In his response to all the queries I raised, the trial magistrate conceded that the queries had substance. He wrote in paragraph 4 of his memo dated 17 July 2007 which the registrar received on 21 August 2007:

“4. The oversight on the part of the magistrate is too much and is quite regrettable, there are of course no reasons to advance as to why the conviction and sentence should stand and not be set aside and the matter remitted for

fresh consideration.”

[13] In the light of the foregoing I am unable to certify that the proceedings in this case were in accordance with justice. The magistrate suggestion appears to me to be the correct course of action. Both the conviction and the sentence cannot be allowed to stand.

[14] Accordingly I make the following order:

14.1 The conviction and sentence are set aside.

14.2 The matter is remitted to the court below for consideration *de novo*.

14.3 The accused must be informed of this order, and the decision of the National Prosecuting Authority, should the matter, for any reason, be abandoned.

M.H. RAMPAL, J

I concur.

M.B. MOLEMELA, AJ

/em