

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

Review No. : 971/2006

In the review between:-

**THE STATE**

and

**JAMES SIPHIWE NDONDO**

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**CORAM:** RAMPAL J *et* KRUGER J

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**JUDGMENT BY:** RAMPAL J

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**DELIVERED ON:** 19 OCTOBER 2006

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[1] The accused was charged for driving a motor vehicle while he was under the influence of alcohol in contravention of section 65(1) Act No. 93/1996. It was alleged that he committed the offence in Greyling Street at Bothaville on 17 April 2006.

[2] On 25 July 2006 he was found guilty on his plea. On the same day he was sentenced to R2 000,00 or 10 (ten) months imprisonment of which half was conditionally suspended for 3 (three) years.

[3] After the accused plea of guilty the magistrate questioned him in terms of section 112(1)(b) Act No. 51/1977. Among others the magistrate asked him the following important elementary question:

Q : Did the liquor impair your driving?

A : I did not feel like it disturbed me.

At the end of it all the magistrate was satisfied that the accused admitted all the allegations in the charge sheet. He accordingly convicted the accused as charged.

[4] In response to my query on review the learned magistrate stated his reasons for the conviction as follows at paragraph 4 on page 2 of his memorandum dated 1 October 2006:

“The answer that the accused gave was that ‘I did not feel like it disturbed me’. To my understanding of the accused was that he was not sure of his condition. He did not give a definite answer and say: ‘It did not impair my driving’. He admitted having taken liquor before he drove the vehicle, he also said the police told him he smelled of liquor, which is a fact that cannot be disputed or needs to be proved. My overall understanding of the accused was that he admitted having driven the said vehicle while under the influence of liquor. The only concern is whether that liquor impaired his driving capacity.”

[5] In my view the aforesaid answer was very unsatisfactory.

The magistrate correctly says that the accused “was not sure of his condition”. The magistrate also correctly remarks that the accused “did not give a definite answer”. The mere

intake of alcohol and the mere smell of alcohol do not individually or collectively, necessarily and conclusively, indicate, without more, that a motorist was in fact driving a motor vehicle under the influence of alcohol. The point is this: such alcohol intake plus such alcohol smell do not always equal impaired driving under the influence of alcohol.

- [6] The alcohol intake or the alcohol smell may in certain circumstances stem from an inexcessive alcohol concentration which is below the prescribed maximum limit or from an excessive alcohol concentration which is above the prescribed maximum limit or from an alcohol concentration with such strong intoxicating effect that it adversely impairs the driver's ability to manoeuvre a motor vehicle with proper, careful and skilful manner. These are the three different ways in which an alcohol intake can affect a motorist. It is also how the consumption of alcohol is viewed in our law. The law does not criminalise the first category of drivers.

[7] The magistrate reckons that the above answer was unsatisfactory. To use his exact words the answer “..... seems to be not satisfactory “. He and I are therefore *ad idem*. However, we do not share the same view as to the implications of such an unsatisfactory answer. The answer was unsatisfactory in the sense that the accused did not admit that his driving faculties were impaired. It follows therefore that he did not admit an essential element of the charge.

[8] The magistrate says that the accused was not sure about his condition. This simply means that the magistrate did appreciate that the accused was uncertain as to whether his abilities to drive a motor vehicle properly, carefully and skilfully were impaired by the alcohol he had consumed or not. Now, if the accused himself was doubtful about the adverse effects or otherwise of the alcohol, how then could the court itself have been satisfied at the end of the inquiry that the accused was beyond reasonable doubt guilty of the crime?

[9] It is so that before the accused gave the aforesaid dubious answer, he on two occasions admitted that he drove a motor vehicle under the influence of alcohol. But the dubious answer he subsequently gave towards the end of the inquiry clearly showed that he had no idea of what driving under the influence of liquor entailed. The court below did not explore the matter further by asking the accused appropriate questions to make doubly sure he understood what driving under the influence really meant. Apparently the accused reckoned that because he had consumed alcohol, that because he drove a motor vehicle and that because he smelled alcohol, he was therefore guilty as charged. Clearly that is a misconception of the law.

[10] The magistrate writes: "He did not give a definite answer and say: "It (alcohol) did not impair my driving". From this passage the reasoning of the magistrate becomes quite obvious. Had the accused given such a negative answer the magistrate would not have convicted the accused. With respect to the magistrate, such reasoning is defective.

[11] The purpose of section 112(1)(b) is to ensure that an accused person indeed admits all the elements of the

charge. Since the section concerns an accused who has pleaded guilty, the emphasis is on the affirmative and not on the negative dimension of the enquiry. The driver's impairment as a result of alcohol must be clearly admitted before conviction for the contravention of section 65(1) Act No. 93/1996 can follow. It was never unequivocally admitted in the instant case. It is incorrect to reason that because the accused did not pertinently deny it; he thereby admitted it. There is no room allowed for inferential reasoning during the inquiry process in terms of section 112(1)(b).

[12] In **S v LOMBARD** 1967 (4) SA 538 (AD) at 549 A – B Milne AJA, as he then was, said the following about impaired driving faculties.

“It seems to be quite clear from R v Spicer that even a slight degree of impairment or diminution of faculties due to the consumption of liquor will suffice for a conviction under the relative legislation.”

At 549 C he added:

“..... that, no doubt, is why he will be guilty of contravening the section, even though he drives with great care.”

Milne AJA was clearly referring to a case where there was evidence that a driver's proper, careful and skilful driving faculties were slightly impaired. In the instant case there is virtually no such evidence against the accused. It follows therefore that the second passage above on which the magistrate placed reliance for his conviction of the accused, does not support his view. The misdirection cannot be allowed to stand. The admissions cannot sustain the conviction.

[13] For the reasons advanced above, I am inclined to set the conviction and the sentence aside and to remit the case to the court below. I do this in terms of section 312 Act No. 51/1977. I hold the firm view that this is the case where the magistrate ought to have doubted whether the accused was indeed guilty of the offence of driving a motor vehicle in contravention of section 65(1). It seems to me that a deeper or further probe in terms of section 112(1)(b) in respect of the aforesaid element of the offence may well yield an affirmative response. The case of **S v LOMBARD**, *supra* provides good

example of some useful questions relative to driver's impaired faculties. If that fails, then the magistrate would have to proceed in terms of section 113. See **DU TOIT** *et alii*: **Commentary on the Criminal Procedure Act** and the authorities there cited. In principle the sentence imposed on the accused is one which I would not consider to be wrong. Should the conviction follow, the same sentence may, in my view, be re-imposed.

[14] Accordingly I make the following order:

14.1 The conviction and the sentence are set aside.

14.2 The matter is remitted to the district magistrate court to question the accused further in terms of section 112(1)(b).

14.3 The magistrate is directed to proceed in terms of section 113 should the further questioning in terms of section 112(1)(b) fail to elicit the necessary admission.

**M.H. RAMPAL, J**

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I concur.

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**A. KRUGER, J**

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