

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A111/2024

In the matter between:

CHAD MICHAEL

Appellant

v

THE STATE

Respondent

Coram: Thulare J et Parker AJ

Matter heard on – 02 August 2024

Judgment delivered electronically on – 06 August 2024

JUDGMENT

PARKER, AJ

Introduction

[1] The appellant appeals his conviction following a charge in the District Court for the District of Wynberg, held at Athlone on count one, namely the contravention of the provisions of s 65(1) (a) read with Sections 1, 65(3), 65(4), 65(8), 65(9), 69(1), 73, and 89 of the National Road Traffic Act 93 of 1996 - Driving Under the Influence of Liquor.

Issues for determination

[2] Respondent opposes the appeal on all grounds, however, given the narrowing of the grounds of the Appeal, *men's rea* is not an issue, consequently, the only issue in dispute is whether the appellant was under the influence of alcohol at the time of driving his motor vehicle.

Background

[3] At the commencement of the trial the appellant made formal admissions in terms of s115 and s220 of the Criminal Procedure Act 51 of 1977 ("CPA"). The State called four witnesses, the first, being traffic officer Mr. Bernard Plaatjies ("Mr Plaatjies") who gave evidence regarding the driving of the motor vehicle. A further three witnesses testified with regard to the chain of events from the police station to when the blood sampling took place and back to the police station. After the State closed its case, the appellant initially considered an application in terms of section 174 of the CPA, for a discharge. However, it was abandoned and instead elected to close its case without calling the appellant to testify.

The State's case

The driving

[4] The respondent called only one witness namely Mr Plaatjies' to give evidence regarding the driving of the motor vehicle who saw the appellant driving and was present at the time when the appellant was arrested. Mr. Plaatjies, testified that he was on duty seated as a passenger in a motor vehicle driven by Officer Louw whilst Officer Wentzel was seated in the rear seat of their vehicle. These two witnesses were not called to testify. Mr Plaatjies described how he observed the appellant's vehicle coming from Gugulethu in the oncoming direction. He observed it slowing down and swerving

from left to right, and left again. This prompted Mr Plaatjies' to instruct Officer Louw to stop the appellant's vehicle.

[5] They executed a U-turn and activated the siren, whereupon the appellant brought his vehicle to a standstill. Mr. Plaatjies approached him from the driver's side of the vehicle and enquired from him whether "*everything was ok*", he replied that he was lost and searching for his girlfriend's house. Based on his observations coupled with the smell of alcohol in the vehicle and the bloodshot eyes of appellant, Mr Plaatjies enquired from the appellant whether he had anything to drink, to which he replied that he had consumed four tequilas the night before.

[6] When the appellant could not differentiate between Saturday and Sunday, Mr. Plaatjies concluded that he was under the influence of alcohol and unable to operate his vehicle. On his orders appellant handed over the keys and the vehicle to him. The appellant co-operated and together with Officers Louw and Wentzel, they proceeded to SAPS Manenberg. Thereafter Mr Plaatjies accompanied appellant to the Athlone Shadow Centre for a blood test.

[7] During cross-examination, it was put to Mr. Plaatjies that the appellant denied being intoxicated or incapable of driving his vehicle to which he conceded that "*sometimes a person is intoxicated, he can still drive his vehicle safely on the road*". He could not determine whether the appellant fell into this category, but believed the swerve was dangerous and suspicious,

The Blood sample

[8] The three witnesses who were called testified regarding the sequence of events that transpired after the blood sample was returned to Manenberg SAPS for safekeeping and until it was delivered to the laboratory for analyses, were not present on the scene when the arrest took place. The chain of evidence for the blood sampling

exhibits was discarded by the Learned Magistrate, leading to no further developments regarding this evidence.

Evaluation

[9] On an examination of the evidence led at the hearing the State called only one witness, Mr. Plaatjies who was present at the time when the appellant was arrested whilst the State had two other witnesses who were present at the time of the arrest which it could have called to corroborate Mr Plaatjies version. In this regard the Learned Magistrate did take into account that the cautionary rule applies to Mr Plaatjies and as a single witness, relied on *R v Mokoena*¹, and accordingly found Mr Plaatjies to be a credible witness:

“A court should not base its findings on unreliable evidence or evidence that is not trustworthy. If the evidence is suspect, the court should ensure that it is supported or confirmed in some way to ensure it can safely rely on the evidence. This is what is known as the cautionary rule. The rule is not a mechanical test and should not replace the exercise of common sense”.²

[10] What is glaringly absent in the evidence on behalf of the State is a description of the physical features of the road. No evidence was led regarding the road layout. The Learned Magistrate mentioned familiarity with the location, whilst the legal practitioner for the respondent had not been familiar with the area. This does not help a higher court on Appeal as it is important to understand the nature and details of the transgression in the context of the physical landscape and layout of the road.

[11] Initially Mr. Plaatjies did not suspect that the appellant was under the influence of alcohol, but he believed the swerve was hazardous or suspicious. He was under the

¹ *R v Mokoena* 1932 (OPD) 79 Record p 137

² *S v Snyman* 1968 (2) SA 582 at 585

impression that something was wrong with the driver and wanted to check if everything was okay. When he signalled, the appellant promptly stopped his vehicle, rolled down his window, and spoke to Mr. Plaatjies. He understood what was expected of him then, suggesting that his mental faculties were not impaired.

[12] The elements of driving under the influence were dealt with in *S v Engelbrecht*³, are that the accused: (i) drove; (ii) a vehicle; (iii) on a public road (iv); while under the influence of alcohol or drugs; and (v) *mens rea*.

[13] It was argued that what the State must prove is that the skill and judgment normally required of a driver in the manipulation of a vehicle were diminished or impaired as a consequence of the consumption of intoxicating liquor to justify a conviction. The driving skill rests on physical abilities such as muscular control which can be impaired by alcohol by diminishing driving skills whilst judgment, rests on mental faculties. In *R v Magula*⁴ in connection with the driving skill impairment:

“A man will for the present purposes be under the influence of liquor if, by reason of the drink he has consumed, his muscular control has been impaired, and this notwithstanding that his mental activities are in order and alert or even intensified by the exhilaration resulting from drink. For if his muscular action is impaired, powers of manipulating a motor car are then it is a reasonable inference that his diminished.”

[14] In *S v Binta*⁵, the court indicated that should the driver's muscle control and power of judgment be affected, then he is “*under the influence*”. In *S v Lombard*⁶, the court distinguished instances where a driver consumed alcohol and whose faculties are impaired, “*the impairment of his skill and judgment is such that he will not be able to do*

³ *S v Engelbrecht* 2001 (2) SACR 38 at 46i-j

⁴ *R v Magula* 1939 EDL 207

⁵ *S v Binta* 1993 (2) SACR 553 (C) 558

⁶ *S v Lombard* 1967 (4) SA 538 (A) 549

what is required of him as a driver as efficiently as if he were sober. 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”

[15] Against this, the court in *Lombard* also considered the scenario of a driver who had consumed alcohol and driving cautiously by being alert. Whilst the converse is, even if he drives with care *“There is always a danger, of course, that a person who has consumed liquor will not take these precautions”* even if he drives with great care. *“But if he does drive with great care, having specially warned himself of the need for such care, i.e. he drives his vehicle so that, no negligence, as such, can be attributed to him, his punishment, as I see it, cannot justly be of the same degree of severity as would be requisite of his driving were negligent as a result of liquor he has consumed and his negligence results in damage to persons or property.”*

[16] The determination then is whether the appellant was *“affected”* and to what degree, when driving the vehicle. It is trite that the State bears the *onus* to prove its case beyond reasonable doubt. The only version before the court was that of the Mr Plaatjies. The court *a quo* drew an inference that the appellant’s consumption of alcohol the night before proved that he was under the influence of alcohol while driving⁷. How the Learned Magistrate arrived at this conclusion is not supported by the evidence at the court *a quo*, as it was deficient. Simply put, there was no evidence to indicate when, in relation to the driving, appellant had consumed the four tequilas or if he had eaten after consuming the alcohol. Mr Plaatjies initially got the smell of alcohol coming from appellant’s vehicle. At no stage was there evidence to suggest that the appellant smelled of alcohol when he was taken to the Athlone Shadow Centre or whilst the charges were further processed at the police station.

⁷ Record p 140, l 14-19

[17] The appellant's argument was that just because the appellant's vehicle swerved does not imply he had no control over it. He informed Mr. Plaatjies that he was lost and did not live in the area and searched for the correct street to reach his girlfriend's house. Of importance is the argument that he, the appellant engaged with Mr. Plaatjies honestly and in a co-operative manner. He provided Mr. Plaatjies with plausible reasons for swerving his vehicle, which Mr. Plaatjies did not question. There was no sign of impaired speech which would have indicated that his muscle control was impaired. Furthermore, the failure to differentiate whether it was Saturday and Sunday was not too concerning as this occurred in the early hours of the morning on the Sunday.

[18] One cannot escape the evidence of Mr. Plaatjies who initially did not suspect that the appellant was under the influence of alcohol, but he believed the swerve was hazardous or suspicious and when signalled, the appellant promptly stopped his vehicle, rolled down his window, and spoke to Mr. Plaatjies. There was nothing extraordinary in the behaviour of the appellant as nothing further was mentioned by Mr Plaatjies who understood what was expected of him, from the time of the arrest to the taking of the blood sampling, suggesting that his mental faculties were not impaired.

[19] A court of appeal is usually hesitant to interfere with the findings of a court *a quo*⁸, unless the findings are manifestly wrong.⁹ A trial court's finding of fact is presumed to be correct unless there is a demonstrable and material misdirection by the trial court¹⁰. However, the findings in the court *a quo* is such that the facts do not support the findings the Learned Magistrate was misdirected at reaching the conclusions.

[20] I am not convinced that the appellant may have been so drunk to have “lost” control over his vehicle. There was no evidence to the contrary. He co-operated in all respects and no mention was made by Mr Plaatjies of his behaviour being questionable

⁸ *S v Robinson* 1968 (1) SA 666 (A) 675G–H

⁹ *Siphoro v S* (A399/2012) [2014] ZAGPJHC 168 14 August 2014

¹⁰ *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) para 645e-f

after he alighted from the vehicle. Mr Plaaityies reported that he smelled alcohol in the car, then he saw the bloodshot eyes of the driver. Subsequently he determined that he was incapable of driving the vehicle further. Swerving left to right and left again is not unusual. It is consistent with someone who is not sure where he was driving and therefore the version of appellant which was put to the witness under cross examination that he was lost, is reasonably possibly true. The court *a quo* erred in not accepting the appellant's version as put to Mr Plaaityies. The failure to call (in the absence of any explanation why) the two available witnesses who were with Mr Plaatjies whilst he was driving, offers no external corroboration of Mr Plaatjies version¹¹.

[21] The criminal standard of proof is absolute, in that the State must prove its case beyond reasonable doubt, and whether this has been done is based on the strength of the State's case. If it is reasonably possible that the accused's version is reasonably possibly true, he is entitled to be acquitted¹². For these reasons, the State failed to prove its case beyond a reasonable doubt, specifically it failed to show that the appellant's mental, physical or emotional capabilities were so diminished or impaired by alcohol that he was incapable of driving his vehicle. The focus is on the reasonable possibility that the appellant's evidence may be true. In considering the evidence holistically the appellant must be acquitted.

Conclusion

[22] Although the chain regarding the blood sampling was not proven, I need merely refer to it to the extent necessary. Let me explain. The failure to call the person (said to be a nurse) who drew the blood from Mr Plaatjies to prove the chain of the blood samples taken amongst other uncertainties, and contrary to the Learned Magistrate's own findings, the Learned Magistrate nevertheless relied on the specimen of blood taken, by referring to it as an "*excessive amount of alcohol in the blood (0.21 grams per*

¹¹ *Stevens v S* [2005] 1 ALL SA 1 (SCA)

¹² *S v Van Der Meyden* 1999(1) SACR 447 (W) para [8]

100 ml)”. Not only was the custody of the blood taken questionable, so was the safe keeping thereof. The chain was found by the Learned Magistrate to be problematic which did not assist the State in proving the alternative charge, hence the Learned Magistrate correctly dismissed the alternative charge, yet he relied on the blood level to draw an inference that it influenced the driving. The Learned Magistrate could not in the circumstances have relied on the results of the first charge.

[23] What we have before us are two mutually destructive versions of a single witness on each side, the one (Mr Plaatjies) ascribing the swerving to drunkenness, the other (the appellant’s version as put to Mr Plaatjies), of being lost and searching for his girlfriend’s house. Drawing on the *onus*, the State has not discharged its *onus* beyond reasonable doubt, in circumstances where the facts do not support the findings. The Learned Magistrate was misdirected in drawing the inference that appellant was driving his motor vehicle whilst under the influence of alcohol. The evidence viewed cumulatively¹³ did not support the findings, and taken as a whole did not establish the guilt of the appellant beyond reasonable doubt. The appeal succeeds. The appellant’s conviction and sentence are set aside.

[24] In the result:

- a) The appeal is upheld.
- b) The conviction and sentence is set aside.

ACTING JUSTICE PARKER
OF THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

¹³ *Boonzaaier v S* (A137/13) [2014] ZAWCH 72 (13 May 2014) para [19]

I agree, it is so ordered.

JUSTICE THULARE
OF THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for delivery is deemed to be 06 August 2024 at 14h00.

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