

SOUTH AFRICA / JUDGMENT

Kew v S (CA&R138/19) [2020] ZAECHGC 46 (21 May 2020)

[2020] ZAECHGC 46

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S Jikela, B Hartle

CASE / FILE NUMBER

CA&R138/19

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Heard on

: 18 March 2020

Delivered

on : 21 May 2020

Case

no: CA&R138/19

In

the matter between:

JOHN RICHARD

KEW

Appellant

And

THE

STATE

Respondent

JUDGMENT

Jikela AJ:

[1] The appellant was convicted on 29 June 2018 in the Regional Court, Port Alfred for contravening s 65(2) read with ss 1, 65(2), 65(4), 69, 73, 74 and 89 of Act 93 of 1996 ('the Act'); Driving a motor vehicle whilst the blood alcohol concentration exceeded 0, 05 grams per 100 ml, namely when it was 0.20 grams per 100 ml. He was sentenced to a fine of R6 000.00 or to undergo 6 months imprisonment of which R2 000.00 or two months imprisonment was suspended for a period of 3 years on condition that he is not found guilty of contravening the provisions of s 65(2) of the Act within the period of suspension. The learned Magistrate granted the appellant leave to appeal against the conviction.

[2] The appellant now appeals against the conviction on the grounds that:

2.1 The Learned Magistrate erred in finding that the State proved beyond reasonable doubt the charge of driving a motor vehicle on a public road with excessive amount of alcohol in the appellant's blood;

2.2 The Learned Magistrate erred in finding that the State had proved beyond reasonable doubt that blood samples analysed were free from contamination; and

2.3 The Learned Magistrate erred in finding that the statutory presumption contained in s 65(4) of the Act is applicable in this case.

[3] Three issues arise in this appeal, namely:

3.1 Whether the blood specimen analysed was taken from the appellant;

3.2 Whether the blood specimen analysed was free of any contamination;

3.3 Whether the provisions of s 65(4) of the Act are applicable herein and if applicable, whether such provisions are inconsistent with the appellant's constitutional right to be presumed innocent until he is proven guilty beyond reasonable doubt.

[4] During trial, the state sought to prove its case by relying on the evidence which was to the following effect:

4.1 On 3 June 2017 at about 22h30 the appellant was driving a motor vehicle on a public road commonly known as Masonic road in Port Alfred. He was stopped by Sgt Witbooi, a police officer in the South African Police Service with 13 years' experience. Sgt Witbooi testified that he was on duty when he received a call at 22:30 informing him to attend to a complaint at Kenny's bar. Indeed Sgt Witbooi and Constable Lobeze proceeded to Kenny's bar in separate marked police vehicles. On arrival, Sgt Witbooi was advised that the issue had been resolved, thus they got into their respective vehicles and left. Whilst driving along Campbell road he noticed a black Porsche that was without registration plates. He followed the Porsche from Campbell road, up until Masonic road. The Porsche was driven at a high speed and the tyres spun when it turned around

the corners. He switched on the blue lights of his vehicle as a signal to the driver of the Porsche to stop and it finally came to a halt at Masonic road. Sgt Witbooi approached the driver and introduced himself as a police officer. Sgt Witbooi identified the driver as the appellant whom he asked to produce a driver's licence.

4.2 The appellant's response was that he had forgotten his driver's licence at Kenny's bar. He noticed that the appellant's breath smelt of liquor. Sgt Witbooi asked the appellant to switch off the engine and step out of the vehicle. The appellant refused to comply and an argument between the appellant and Sgt Witbooi ensued. According to Sgt Witbooi, despite the appellant's yelling at him, he eventually stepped out of the vehicle. At that time, he noticed that the appellant's face was red, he was unsteady on his feet and his speech was slurred. Sgt Witbooi suspected that the appellant was under the influence of intoxicating liquor.

4.3 According to Sgt Witbooi, the aforesaid were the reasons why he arrested the appellant. He explained his constitutional rights to him. He drove him to the Port Alfred police station, charged him, registered a case docket and booked out a blood sample kit where after he took him to the Port Alfred hospital where he was attended by one Dr Futshane.

4.4 At the hospital the appellant was very uncooperative. He refused to have his blood drawn by Dr Futshane. He insisted that his doctor should be called to attend to him as a result of which Sgt Witbooi and Constable Lobeze were instructed by Dr Futshane to restrain the appellant in order to take his blood sample. Sgt Witbooi testified further that he handed to Dr Futshane the blood sample kit with serial number AM1016314. This was a sealed blood sample kit. Dr Futshane broke the seal open and drew blood from the appellant and sealed it with serial number AM 101 6315. The appellant was driven back to the police station where he was detained. On arrival at the police station, Sgt Witbooi registered the blood sample on the SAP 13 register as SAP Number 373/2017.

4.5 On cross-examination, Sgt Witbooi was questioned at length about how the appellant drove his vehicle, the speed at which the vehicle was allegedly driven and precisely where he first noticed the appellant's vehicle. It was suggested to him that the only reason he stopped the appellant's vehicle was because it was driven fast. Sgt Witbooi denied this suggestion. He was questioned further why he did not record on the pocket book the specific details regarding the manner in which the appellant drove the vehicle. Most importantly, Sgt Witbooi was extensively interrogated about the different serial numbers of the blood sample kit and the alteration made in his statement. It appears that he initially recorded AM1016314 as the seal reference number utilised by Dr Futshane in drawing the appellant's blood, but thereafter changed it to reflect the number as AM101 6315.

4.6 In response thereto Sgt Witbooi testified that he made a mistake by recording AM1016314 but he immediately corrected it by altering the 4 (last digit) to read 5. He explained to the court that the blood sample kit came with a serial seal numbers AM1016314. When asked to explain the process chain that the blood sample took after it was registered in the SAP 13 register, Sgt Witbooi testified that the SAP 13 clerk would have transmitted the blood sample to the laboratory for

analysis. He had no knowledge of what became of the blood sample kit after he entered and recorded it in the register.

4.7 Constable Lobeze testified. He is in the South African Police Service and had 9 years' experience as a police officer in the rank of constable. On 3 June 2017 he was on duty with Sgt Witbooi. He drove to Kenny's bar where he found Sgt Witbooi already at the scene. He spoke with Sgt Witbooi and he established that the problem was already resolved and they both got into their respective vehicles and drove away. Constable Lobeze was driving behind Sgt Witbooi in a marked police vehicle. When they reached Campbell road Constable Lobeze realised that Sgt Witbooi was giving chase to the appellant's vehicle and he followed suit. He noticed Sgt Witbooi's flashing blue lights and he also flashed the blue lights of his vehicle. The

appellant's vehicle stopped in Masonic road. He saw Sgt Witbooi approaching the appellant's vehicle and he also went closer to the appellant's vehicle to provide cover to Sgt Witbooi.

4.8 Constable Lobeze testified further that the appellant was aggressive and angry. He smelt of liquor, his eyes were red. The appellant was asked to step out from his vehicle and Sgt Witbooi arrested the appellant for driving a vehicle whilst under the influence of intoxicating liquor. At the police station Sgt Witbooi obtained a sealed blood sample kit. He did not take note of the serial numbers on the sample kit. The said blood sample kit was handed to Dr Futshane at the hospital. Dr Futshane informed the appellant of what he was about to do and the appellant refused to be attended to by Dr Futshane. The appellant was uncooperative and had to be restrained. He had no knowledge of what became of the blood sample container after Sgt Witbooi registered it in the SAP13 register nor did he know who transmitted it to the laboratory for analysis.

4.9 Dr Futshane testified that he is a qualified medical practitioner who had been practising medicine since 2001 with 17 years of experience. On 3 June 2017 he was on duty at the Port Alfred Hospital. He came into contact with the appellant at twelve minutes before midnight. He introduced himself as the doctor on call and explained to the appellant what he was about to do in respect of the drawing of a blood sample from him. He testified further that the appellant was uncooperative. He did not want to be touched by Dr Futshane. In spite of Dr Futshane's assurance to the appellant that he was the doctor on call, the appellant demanded that another doctor must be called to draw his blood. He threatened Dr Futshane with legal

action if he touched his body or took a sample of his blood. Dr Futshane requested Sgt Witbooi and Constable Lobeze to restrain the appellant and he was so restrained.

4.10 He received a blood test kit from Sgt Witbooi with a seal number that ends with 14. He broke the seal open in full view of the appellant. He did not clean the area of the skin before taking the blood sample as it was not necessary to do so. He drew blood from the appellant and labelled the glass tube before sealing the container. On cross examination, Dr Futshane clarified that he had received a sealed blood sample kit from the police officers. Inside the sample kit container there was an instruction leaflet, a blood sample tube and attached to it was a blood drawing needle. These items were in a sealed container. He testified further that usually there is an alcohol-free

swab, but on the said kit, the swab was not included. Nonetheless, that was not of any concern to him as in the recent times, the blood sample kits come without swabs.

4.11 After drawing the blood, Dr Futshane testified that he placed a marked test tube inside the polystyrene box and then noted down the details of the appellant on the form which was inside the box and sealed it with a seal that ended with a number 5. He explained how he connected the needle to the drawing apparatus and took a blood sample from the appellant. According to Dr Futshane, the drawn blood goes directly into the glass tube. The blood sample kit had not expired. He had no reason to believe that the test kit had been contaminated because the kit was sealed. He confirmed that the sample kit was not contaminated in the process of drawing the appellant's blood.

4.12 It is common cause that the contents of the affidavit by Dr Futshane prepared in terms of s 212 of the Criminal Procedure Act 51 of 1977 ('CPA'); the certificate issued in terms of s 212 (4) and 212(8) (a) of the CPA by the forensic analyst and her supplementary report with regard to the calibration of the gas chromatograph and ion selective meter, were admitted as evidence in the court a quo. The State then closed its case after which the appellant applied for a discharge in terms of s 174 of the CPA. That application was refused on the basis that the evidence led by the State at that stage suggested that the appellant had a case to answer. The appellant thus testified in his own defence.

[5] The appellant's evidence is summarised as follows:

5.1 On the day in question he had been playing golf at the royal golf club and later that day he had a meeting with his friend at Kenny's Bar. He had two glasses of Captain Morgan rum, an alcoholic beverage, but before he could finish the second glass, he had an argument with Kenny, the owner of the bar and that resulted in the police being summoned to restore order at the bar. However, before the police arrived he was escorted out of the bar. The appellant saw three police vehicles parked on the road outside the premises of the bar. He is adamant that Sgt Witbooi and Constable Lobeze saw him when he

was escorted out of the premises of the bar.

5.2 According to the appellant he spilt his drink on his chest when he was pushed by Kenny during an altercation and that was the reason he smelt of alcohol. He was angry and agitated from the altercation with Kenny at the bar. He got into his vehicle and drove away. He turned left from West road into Masonic road and that is when he noticed for the first time a blue light from the police vehicle that was following him. He drove further down until he found a suitable spot to park. Sgt Witbooi's vehicle parked in front of his vehicle, and blocked his way. Constable Lobeze's vehicle parked parallel

to him and the third vehicle driven by a white male officer parked behind his vehicle.

5.3 He got the fright of his life on seeing three police vehicles blocking his way. Sgt Witbooi approached him and demanded his driver's licence. He was angry at the manner in which the police approached him. Constable Lobeze and the other white male police officer also

approached him. One of them shouted 'get him, get him good' or words to that effect. The appellant testified that Sgt Witbooi was the most aggressive amongst them. Sgt Witbooi shouted at the appellant and said 'you are drunk, get out of the vehicle'. He denied that he was driving fast and that the wheels of his vehicle made noise when he turned.

5.4 He admitted that he was uncooperative with the police because all they were trying to do was to handcuff him and put him in the back of a police vehicle. He was driven to the police station and Sgt Witbooi registered the police docket. From the police station he was loaded into the back of the police vehicle and driven to the hospital. At the hospital he asked the reception staff to call Dr Tommy Webster whom he trusts. He was asked to wait at a cubicle and sit on the bed. The general condition of the room appeared to him as if there was 'quite some work going on in that area'. He saw blood stained cotton buds on the stainless steel table next to the bed.

5.5 The appellant testified further that Dr Futshane arrived and asked him to sit down so that he can take his blood. He insisted that another doctor be called instead. He found Dr Futshane to be either too busy or not bothered at all. Dr Futshane ordered Sgt Witbooi and constable Lobeze to handcuff him to the bed and that is how he forcefully managed to draw blood from him. Dr Futshane took something from the stainless steel table which to him looked like a needle. He became petrified for his life. Then he realised that Dr Futshane was drawing his blood. He does not know where the needle that was used to draw his blood came from and where it went afterwards.

5.6 The appellant testified further that the serial and seal numbers of the blood sample kit were not read to him and that Dr Futshane did not show him how the needle was removed from the box. On cross examination the appellant testified that he was hand cuffed and there was a needle that came from a room which appeared like there had been a number of stabbings, which is why he become uncooperative. The appellant suggested that he was arrested because the police were part of Kenny's ploy to land him into trouble. The appellant denied that the blood sample that was analysed was his blood. According to the appellant, he was transported back to the police station where he was detained until the following morning when he was released on bail.

[6] In summary, this was the evidence that was considered by the learned Magistrate where upon she found the evidence of Sgt Witbooi to contradict the evidence in his statement. The material contradictions noted were the irreconcilable

serial numbers of the blood sample recorded by Sgt Witbooi in his statement, the subsequent correction thereof and what he recorded on the pocket book. Correctly so, the Learned Magistrate found such discrepancies to have been cured by the evidence of Dr Futshane and the report of the forensic analyst. Furthermore, the challenge against the contamination of the blood sample of the appellant and the presumption that arose in terms of the provisions of s 65(4) of the Act was found to have been eliminated by Dr Futshane's

evidence recorded in his s 212 affidavit that the blood sample kit was valid until 2019. Noteworthy is the fact that the appellant was found not to have presented evidence to contradict the state evidence that the syringe used to draw blood and the receptacle in which the specimen was placed and dispatched to the forensic analyst was free of contamination.

- [7] Before us on appeal, Mr Koekemoer, counsel for the appellant contended that the discrepancy in the testimony of Sgt Witbooi regarding the seal reference number of the blood sample kit and what he recorded in his statement tainted the reliability of the State's case. It was submitted that in the absence of sufficient proof of chain evidence of the blood sample from the moment it was drawn by Dr Futshane to it being analysed by the forensic analyst, the State could not be said to have proved its case beyond reasonable doubt. The appellant insisted that the blood sample analysed was not his.
- [8] The State was criticised for not presenting expert evidence to prove that the blood sample and the kit were free of contamination either prior to or during the drawing of blood from the appellant. To this end, it was submitted further that s 65(4) of the Act does not impose a burden of proof on the appellant, but gives rise to an evidential burden. Put differently, it is only required that there must be evidence sufficient to give a reasonable doubt as to the factual issue, the factual issue being one of contamination. Mr Koekemoer submitted further that on the evidence before us (evidence which according to him, is reasonably possibly true), the presumption of non-contamination is in-operative.
- [9] On the other hand Mr Henning, counsel for the respondent placed much reliance on the legal principle enunciated in *S v Boyce*[1] as followed in *S v De Leeuw* [2] and endorsed in *S v Janties en 'n Ander* [3] He submitted that the appellant admitted the accuracy of the certificate in terms of s 212 of the CPA furnished by the forensic

analyst that the sample analysed was received with an unbroken seal bearing numbers AM1016315. Therefore, any speculation regarding the interim handling and the subsequent delivery of sample is of no consequence and the court a quo was thus justified in holding that it was proven that the sample analysed was that of the appellant. It was argued further that the presumption contained in s 65(4) constitutes an evidentiary burden which operates to the assistance of the prosecution. It does not place the onus of proof on the accused, however, it requires the accused to dislodge the presumption by adducing evidence to the contrary, which may cause the trier of fact to find on a balance of probability that the instruments used to draw blood may have been contaminated. In the absence of evidence to indicate that the blood drawing apparatus and the receptacle in which the blood specimen was placed, was contaminated, the Learned Magistrate could not have found that there was contamination.

- [10] I now deal with the contradictions in the State's case and the criticism that the Court a quo did not discount the evidence of Sgt Witbooi. It is common cause that where it is evident that there are contradictions between the versions of the same witness, the Court should approach such evidence with caution. In *S v Mafaladiso*[4] the Court set out the approach regarding contradictions in the versions of the same witness. It was held 'Secondly, not every

error by, or discrepancy in the statement affects the witness's credibility. Thirdly, the different versions must be evaluated holistically. This evaluation includes the circumstances in which the versions were given, reasons for the discrepancies, the effect of the discrepancies on the witness's credibility and whether the witness had sufficient opportunity to explain the discrepancies. Lastly, the witness's statement to the police must be weighed up against the witness's viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide the truth has been told despite any shortcomings'.

[11] There is in my view no sound reason in principle not to follow and apply the approach referred to in Mafaladiso. Be that as it may, contradictions per se do not lead to the rejection of a witness' evidence. The Learned Magistrate found, in my view correctly so, that the contradictions in Sgt Witbooi's evidence were cured by the evidence of Dr Futshane and the pathologist report. Even more so, the appellant had from the inception of the trial admitted the accuracy of the certificate furnished by the forensic analyst of the forensic chemistry laboratory.

[12] This takes me to the appellant's contention that because the State did not present evidence regarding the handling and transmission of the blood sample from the SAP13 register to the forensic laboratory in Durban, therefore, it has not been proven that the blood sample analysed was that of the appellant. Also relevant to this consideration is what the forensic analyst noted in her report. The following is stated:

'2. on ' 20 June 2017, the laboratory received from the South African Police Service, Port Alfred, a polystyrene container, sealed with seal number AM 1016315 and bearing inter alia the following identification mark: Port Alfred Cas 14/06/2017, SAP13 No 373/2017.

3. The polystyrene container was kept in an access-controlled area until

analysis.

4. On 26 June 2017, in the performance of my official duties, I broke the intact seal and found a blood specimen with a label attached to it bearing inter alia the following identification mark: Port Alfred Cas 14/06/2017, SAP 13 No 373/2017, AM1016315'

[13] Noteworthy is the fact that the forensic analyst did not find any irregularities in the blood sample nor in the container itself. The seal numbers and the identification marks of the polystyrene container are in keeping with the viva voce evidence of Sgt Witbooi and Dr Futshane. Moreover, the blood specimen respectively taken by Dr Futshane and analysed in the laboratory, were not only identified by the seal number, but also the Port Alfred CAS number 14/06/2017, which is also reflected on the results of the specimen analysed. In light of the appellant's admission of the accuracy of the certificate furnished by the forensic analyst, it is difficult to comprehend appellant's denial that the blood sample analysed was taken from him.

- [14] Nevertheless, the appellant's contention that the blood specimen analysed was not taken from him, was not pursued with great vigour during trial. In fact, it only emerged under cross examination of the appellant that the blood sample analysed was not his blood. The appellant did not elaborate on this issue.
- [15] Coming to the issue of possible contamination of the blood specimen analysed. The appellant attempted to impeach the regularity of obtaining the specimen, but fell short of achieving the desired outcome. Dr Futshane was an impressive witness, who demonstrated credible knowledge and experience in drawing blood samples. It appears that the appellant's apprehension of contamination arose from the evidence that Dr Futshane took out a needle from a stainless steel table where blood stained cotton-wool balls were seen by the appellant. The appellant does not say whether Dr Futshane used that needle to draw his blood. It suffices to state that Dr Futshane was never cross examined about this allegation nor was the evidence that he used the blood drawing apparatus from a sealed blood sample kit ever challenged by the appellant during the trial proceedings. The unrefuted evidence of Dr Futshane was that in the process of drawing blood from the appellant, the specimen was not contaminated. This evidence was not contradicted by the appellant at all.
- [16] Section 65(4) of the Act provides that where in any prosecution in terms of the Act proof is tendered of the analysis of a specimen of the blood of any person, it shall be presumed, in the absence of evidence to the contrary, that any syringe used for obtaining such specimen and the receptacle in which such specimen was placed for dispatch to an analyst, were free from any substance or contamination which could have affected the result of such analysis.
- [17] Accordingly, the presumption in this case is applicable and justifiable as being rational. The presumption does not shift the onus to the accused, however, it simply requires an accused to give evidence of a matter which it would be unreasonable to expect the state to be able to prove. Indeed

this is an example of a matter where the state is generally not in a position to produce evidence unless the accused speaks. The appellant was the only person best placed to explain the contention that his blood sample was contaminated[5].

- [18] The appellant failed to discharge the obligation arising from the operation of the presumption. The appellant's mere remark that Dr Futshane drew the blood sample with a contaminated needle is not of sufficient probative value as to constitute proof on a balance of probabilities, enough to rebut the operation of the presumption.
- [19] I disagree with the appellant's submissions that the State should have presented expert evidence to prove that the blood sample and/or the kit were free of contamination. The effect of requiring the State to bear such burden may mean that the offence would only be effectively prosecuted in extremely rare circumstances, if at all. Having said that, there is no doubt that the onus rests on the State to prove the guilt of the appellant beyond a reasonable doubt.

[20] In view of my conclusions that the presumption is applicable and justifiable, I find that appellant's constitutional right to be presumed innocent until he is proved guilty beyond reasonable doubt has not been infringed.

[21] Having regard to all the evidence presented, I am satisfied that the court a quo was correct in concluding that the State has proven beyond reasonable doubt that the specimen analysed was the blood specimen

obtained from the appellant and that the said specimen was free of any contamination. I find no basis upon which the learned Magistrate's interpretation of the law and facts is flawed.

[22] I accordingly propose the following order:

The appeal against the conviction is dismissed.

S JIKELA

ACTING JUDGE OF THE HIGH COURT

I AGREE

B HARTLE

JUDGE OF THE HIGH COURT

Appearances:

For the Appellant

: Adv. JR Koekemoer

Instructed by

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: 119 High Street

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For the Respondent

: ` Adv. N Henning

Director of Public Prosecutions

[1] 1990

(1) SACR 13 (T)

- [2] 1990
- (2) SACR 165 (NC)
- [3] 1993
- (2) SACR 475 (A)
- [4] 2003 (10 SACR 583 (SCA) 593E-594A-H
- [5] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC) “Some [presumptions] may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove”.
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