

SOUTH AFRICA / JUDGMENT

Ntlemeza v S (R129/19) [2019] ZAGPPHC 1090 (15 August 2019)

[2019] ZAGPPHC 1090

COURT

North Gauteng High Court, Pretoria

BEFORE

Tuchten, HJ Fabricius

CASE / FILE NUMBER

R129/19

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER

JUDGES: YES/NO

CASE

NO: R129/19

In

the matter between:

THE
STATE
and
ANELE
NTLEMEZA
Accused

JUDGMENT

Tuchten J:

1 A senior magistrate has sent this case on special review. This court considers such reviews under the provisions of s 304(4) of the Criminal Procedure Act, 51 of 1977. The enquiry before this court is whether the proceedings in the court below were in accordance with justice and, if not, what remedy should be fashioned to achieve justice.

2 The accused was charged in a regional court with driving under the influence of liquor or drugs. In the alternative to this count, the accused was charged with driving with an excessive amount of alcohol in her bloodstream. There was a second count of reckless or negligent driving. All the counts alleged contraventions of the National Road Traffic Act, 93 of 1996.

3 From the record of the proceedings, only the alternative charge of driving with an excessive amount of alcohol in her bloodstream was in fact put to the accused. The accused pleaded guilty to this charge.

4 On the charge sheet, the presiding magistrate (not the senior magistrate who sent the case on review) recorded that she found the accused "guilty as charged". The senior magistrate who sent the matter on review submits that either the accused was convicted of a charge which was never put to her or she was convicted on a s 112(2) statement which did not admit the elements of the (alternative) charge which was put to her.

5 The offence of driving with an excessive amount of alcohol in the bloodstream under s 65(2) of the National Road Traffic Act is in these terms:

No person shall on a public road

- (a) drive a vehicle; or
- (b) occupy the driver's seat of a motor vehicle the engine of which is running,

while the concentration of alcohol in any specimen of blood taken from any part of his or her body is not less than 0,05 gram per 100 millilitres, or in the case of a professional driver referred to in section 32, not less than 0,02 gram per 100 millilitres.

6 The accused, who was not a "professional driver" as contemplated by s 65(2), said in her statement under s 112(2) of the Criminal Procedure Act that she was driving a motor vehicle when a police officer asked her to pull over and then questioned her. Arising from this questioning, the accused was arrested and taken to have a blood sample extracted.

7 In her s 112(2) statement, the accused admitted that blood was taken from her and tested. The statement reads in this regard:

The test results ... revealed the concentration in my blood specimen was not less than 0.05 gram per 100 millilitres to wit 0.18 gram per 100 millilitres.

8 The senior magistrate submits that it was a material element of the offence that the blood was drawn within two hours from the time of her driving. In this regard, s 65(3) reads:

If, in any prosecution for an alleged contravention of a provision of subsection (2), it is proved that the concentration of alcohol in any specimen of blood taken from any part of the body of the person concerned was not less than 0,05 gram per 100 millilitres at any time within two hours after the alleged contravention, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,05 gram per 100 millilitres at the time of the alleged contravention, or in the case of a professional driver referred to in section 32, not less than 0,02 gram per 100 millilitres, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,02 gram per 100 millilitres at the time of the alleged contravention.

9 In my view, s 65(3) does not make it an element of the offence that the blood should be drawn within two hours of the driving. The subsection creates a rebuttable presumption that if it is proved that the blood was drawn within two hours after the alleged contravention, then the blood alcohol content at the time of the commission of the alleged contravention will be deemed to be not less than the applicable permitted statutory minimum.

10 So, with respect, I think the senior magistrate has asked the wrong question. Section 112(2) of the Criminal Procedure Act requires (in the present context) no more than that the court should be "satisfied that the accused is guilty of the offence to which he has pleaded guilty". The question is therefore whether, on the accused's statement, she is guilty of having driven a motor vehicle when her blood alcohol content exceeded 0,05%.

11 I am satisfied that when one reads the s 112(2) statement as a whole, the only reasonable conclusion was that the accused did indeed drive the motor vehicle while her blood alcohol content exceeded the statutory minimum. The statement shows that the accused admitted to the police officer who stopped her that she was driving the vehicle while under the influence of alcohol. The accused repeated her admission in her s 112(2) statement.

12 Although the accused was not charged with the more serious offence of driving under the influence in contravention of s 65(1), her admissions in this regard might properly be taken into account for the purpose of assessing guilt under s 65(2). In my view, the presiding magistrate was entitled, to accept, as she apparently did, that the accused's blood alcohol content exceeded the statutory minimum.

13 The accused was therefore properly convicted on her plea of guilty to contravening s 65(2). The record ought to have made this clear and I shall address this aspect in my order.

14 I do not think that the decision not to put the main count of driving under the influence and the second count of reckless or negligent driving constitutes an irregularity; much less a reviewable irregularity. It is open to a prosecutor, acting in good faith, to elect not to put specific charges to the accused. A decision to do so means, as in this case that there is no issue between the state and the accused in relation to the charges not put.

15 The senior magistrate raised two further matters of concern. The presiding magistrate asked the accused to address her on whether she ought to be declared unfit to possess a firearm, something which the senior magistrate submits ought not even to have been raised.

16 The accused was (properly, it would appear) not declared unfit to possess a firearm. So while raising the issue may have been irregular (I express no opinion on the point), no failure of justice ensued in this regard. In this regard, therefore, no intervention by this court is required.

17 The second matter of concern raised by the senior magistrate was that s 35(1) of the National Road Traffic Act required the presiding magistrate to suspend the accused's driver's licenses for a period of six months (as the accused was a first offender) unless the presiding magistrate was satisfied under s35(3) after the presentation of evidence under oath that the suspension should not take effect or should operate for a lesser period. The presiding magistrate heard the accused, but not under oath, and decided not to suspend the accused's licenses.

18 This was a significant irregularity and, in my view, did result in a failure of justice. Evidence under oath is required so that if it is later found to be false, the person who gave such evidence might be held liable for the criminal offence of giving false evidence under oath. That portion of the magistrate's order cannot stand and the case must be remitted to the presiding magistrate to hear such evidence as the accused may wish to present in accordance with s 35(3).

1.51cm; textindent: 1.51cm; lineheight: 150%"> 19 The presiding magistrate sentenced the accused pay a fine of R3 000. The sentence is in order.

20 I make the following order:

1 The verdict of the regional court for the district of Tshwane held at Pretoria in the case against the accused under case no. C 13/882/2017 is altered to read: "The accused is found guilty of contravening s 65(2) (a) of the National Road Traffic Act, 93 of 1996 ."

2 Subject to i above, the said conviction and the fine of R3 000 imposed on the accused are confirmed.

3 The decision of the regional court not to suspend the accused's driver's license is set aside for failure to receive evidence under oath as required by s 35(3) of the National Road Traffic Act and remitted to the court below for reconsideration of the question whether the drivers' licenses of the accused ought to be suspended under s 35(1) of the National Road Traffic Act. The reconsideration may be conducted by the magistrate who presided at the trial of the accused.

NB Tuchten

Judge of the High Court

15 August 2019

I agree.

HJ Fabricius

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