

SOUTH AFRICA / JUDGMENT

S v Bam (R52/2019) [2019] ZAFSHC 123; 2019 (2) SACR 662 (FB) (22 July 2019)

[2019] ZAFSHC 123**COURT**

Free State High Court, Bloemfontein

BEFORE

MHLAMBI, MOLITSOANE

CASE / FILE NUMBER

R52/2019

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Review****case number: R 52/2019****In**

the matter between:

THE
STATE
and
CORNELIUS BAM

CORAM:

MHLAMBI, J et MOLITSOANE, J

JUDGMENT**BY: MOLITSOANE , J****DELIVERED ON: 22 JULY 2019****REVIEW JUDGMENT**

- [1] This matter came before us on automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977(the CPA).The state alleged that he drove a motor vehicle on a public road at a speed of 196km per hour in excess of the general speed limit of 100 km per hour which was applicable on that road.The accused pleaded guilty and was convicted of contravention of section 59(4)(a) of the National Road Traffic Act 93 of 1996-exceeding the

general speed limit. He was sentenced to a fine of R20 000 or 6 months imprisonment half of which was suspended for five years on certain conditions. The trial court ordered that the suspension of his licence should not take effect.

- [2] I enquired from the learned Magistrate on what basis the court was satisfied that the traffic officer who operated the speed measuring device was competent to operate the speed measuring device.
- [3] In his response the learned Magistrate refers to the excerpt of the record and further says the following: "In essence when I was asking the accused whether he was admitting that the traffic officers operated the machine lawfully and without irregularities, I meant that or was implying that they are qualified and competent to do so."
- [4] It is apposite at this stage to refer to the parts of the record referred above pertaining to the questioning of the accused in terms of s112(1)(b) of the CPA:

"COURT: Do you have any lawful defence or grounds of justification for committing this particular offence?"

ACCUSED: No your Honour.

COURT: Is there anything that you want maybe in your own words what transpired after the traffic officer stopped you?

ACCUSED: They stopped me they showed me the reading on the machine, they showed me the calibration certificates, and took me to the police station where I filled in some documentation.

COURT: So in essence all the procedures that was followed by the traffic officers from the moment they stopped you from the time they took you to the police station you are satisfied with everything that happened that your rights were properly explained to you?

ACCUSED: Yes your Honour."

- [5] A full bench decision of this division in *The State v Enoch Phuzi*[1] dealt extensively with the elements of this offence. The court summed up the elements to be proven in this type of offence as follows in order to secure a conviction:

"[39] (a) Fault in the form of intention or negligence is an element of the offence of exceeding the speed limit;

- (b) when an accused is questioned in terms of section 112(1)(b) the magistrate must ascertain whether the accused admits:
- (i) the recorded speed;
- (ii) the proper functioning of the speed measuring device; and
- (iii) the competence of the traffic operator to set up and operate the speed measuring device."

- [6] Upon perusal of the record it is evident that no questioning was directed at the competence of the relevant traffic officer to set up and operate the speed measuring device. Section 112(1)(b) of the CPA provides that the court may:

“....question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he has pleaded guilty convict the accused on his or her plea of guilty of that offence and impose any competent sentence.”

It is clear that the questioning in terms of this section is aimed at questioning the accused on the facts of the case in order to determine if he admits the allegations in the charge. The questioning in terms of section 112(1)(b) is not aimed at conclusions of the law without reference to the facts. To ask whether an accused as contended by the magistrate ‘was admitting that the traffic officers operated the machine lawfully and without irregularities’ appear to me to go to the heart of conclusions of law. The following remarks in *State v Mshengu*, [2] although the court dealt with the provisions of s112(2), are aptly relevant and applicable during questioning in terms of

s112(1)(b):

“[7] Section 112(2) requires that the statement must set out the facts which he admits and in which he has pleaded guilty. Legal conclusions will not surface. The presiding officer can only convict if he or she is satisfied that the accused is indeed guilty of the offence to which a guilty plea has been entered. If not, the provisions of s113 must be invoked”.

- [7] Only once the facts have been established can the court make an informed decision whether the act complained of is unlawful or irregular. To ask a general question of whether the accused was satisfied with ‘all procedures that was followed...’ cannot suffice to satisfy the court that the accused admits all the elements of the offence including the competency of the traffic officer. Such a requirement must be admitted or proven. This was not done in this case. In *Phuzi* (supra) the court held that judicial notice cannot be taken of the fact that the person who operated the speed measuring device was trained to do so, and the court found that the “competence of the traffic officer to set up and operate the speed measuring device must be admitted in order to prove that the speed was measured in accordance with the manufacturer’s specifications”. [3] In this case, as indicated above this did not happen.
- [8] In line with *Phuzi* I have to find that the proceedings were not in accordance with justice and leave it up to the Director of Public Prosecutions to decide whether to recharge the accused. It follows that the fine paid by the accused is to be repaid.
- [9] The following order will issue:
1. The conviction and sentence are set aside.
 2. The order made in terms of section 35(3) of the National Road Traffic Act 93 of 1996 is set aside.

P.E.MOLITSOANE, J

I concur.

JJ MHLAMBI, J

[1] (R254/2018)[2018] ZAFSHC 213(28 December 2018)

[2] 2009(2) SACR (SCA) 316 at 319

[3] Phuzi(supra) at par [31]

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