

SOUTH AFRICA / JUDGMENT

S v Botha (29/2015, 7/2015) [2016] ZANCHC 61 (29 January 2016) [2016] ZANCHC 61

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Erasmus

CASE / FILE NUMBER

29/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape Division, Kimberley)

Saakno

/ Case number: Review

Case No: 29/2015

Kathu Case No: 7/2015
Datum

gelewer/Date delivered: 29/01/2016
In

the review of: THE
STATE
and
RONNIE
BOTH
Accused

Coram: Mamosebo, J et
Erasmus,
AJ

JUDGMENT

ON REVIEW

ERASMUS, AJ

- [1] This matter was sent for review in terms of section 304 of the Criminal Procedure Act, No. 51 of 1977 (the “CPA”).

The accused pleaded guilty to and was convicted of contravening section 65(2)(a) of the National Road Traffic Act, No. 93 of 1996 by the Acting Magistrate Mr. Mamadi. He was sentenced to a fine of R1,000.00 or 12 (TWELVE) months imprisonment which was wholly suspended for 3 (THREE) years on condition that the accused is not convicted of the offence of driving a vehicle while the alcohol content in his blood exceeded the prescribed limit. He was not declared unfit to possess a firearm and his driver’s licence was not suspended.

- [2] Mamosebo, J directed the Registrar to remit the case record to the Magistrate Kathu requesting his response on as to whether

2.1 the accused’s rights to a fair trial in terms of section 35(3) of the Constitution of the Republic of South Africa (the ‘Constitution’) were properly explained;

2.2 the Court questioned the accused in terms of section 112(1)(b) of the CPA;

2.3 the Court was satisfied that the accused had admitted all the elements of the offence on the main and/or alternative counts;

2.4 there was any evidence that the engine of the accused’s motor vehicle was running;

2.5 there is any evidence that the accused’s blood was drawn within the prescribed two hours;

2.6 the Court was impartial and open-minded in the adjudication of this matter in the light of the manner in which the proceedings were conducted.

- [3] From the response of the Acting Senior Magistrate Kathu it appears that the Magistrate who conducted the proceedings in the Court a quo is no longer in the employ of the Department of Justice and is not available to respond to the queries of Mamosebo, J. The Acting Senior Magistrate responded to the queries though and from her response it appears that she does not support the conviction of the accused.

- [4] Mamosebo, J requested the Director of Public Prosecutions to provide a legal opinion in respect of the issues raised. A detailed opinion was provided by Adv. Van Heerden. She submitted that the conviction and sentence should be set aside and the matter referred back to the Magistrates Court to commence de novo before a different Magistrate. Adv. Birch, the Deputy Director of Public Prosecutions agreed with the opinion and conclusions of Van Heerden. Adv. van Heerden is thanked for her efforts.

THE ACCUSED'S RIGHT TO LEGAL REPRESENTATION AS ENTRENCHED IN SECTION 35(3)(f) OF THE CONSTITUTION

[5] An accused's right to legal representation is entrenched in the relevant section of the Constitution and entails that every person has the right to a fair trial which includes the right to be represented by a legal practitioner of his choice. It includes the right to be informed of such rights promptly and to provide a reasonable opportunity to secure the presence of a legal

representative.

[6] From the record it appears that the accused wanted legal representation from the onset of proceedings. He applied for Legal

Aid, but apparently he did not qualify for such services. It appears that the Magistrate did not afford the accused further

reasonable opportunity to obtain legal representation and that he in fact discouraged the exercise of such right. It does appear though as if the accused was eager to finalise the matter because when the Magistrate indicated that the matter should be postponed for trial, the accused indicated that he wanted to plead guilty. The Magistrate responded that he could plead guilty and that they could then finalise the matter. The accused responded to this by saying that this was what he wanted to do as he wanted to finalise the matter.

PROCEEDINGS IN TERMS OF SECTION 112(1)(b) OF THE CPA

[7] The accused pleaded not guilty to the main charge of contravening section 65(1)(a) of the National Road Traffic Act, but pleaded guilty to the alternative charge of contravening section 65(2)(a) of the same Act and the prosecutor indicated that he accepted such plea. The accused provided the background to the events which had led to his arrest. From his explanation it appeared that he was sleeping in the car and that someone who had passed by had phoned the police and informed them that there was somebody in the car. The police were then sent to the scene. The only questioning by the Court pertaining to the elements of the offence and the answers thereto were the following:

"COURT: Maar ons wil weet is dit wat is dit wat u jy gedrink het, dat jy as

jou alkohol was so hoog in jou bloed.

ACCUSED: Dit was sterk drank wat ek gedrink het.

COURT: Maar nou aanvaar jy dat dit was onwettig om die kar te ry wanneer jou alkohol was so hoog?

ACCUSED: Ja nee, ek aanvaar dit."

- [8] As correctly pointed out by Adv. van Heerden, section 112(1)(b) of the CPA is designed to protect an uneducated and undefended accused from the adverse consequences of an ill-considered plea of guilty. The Magistrate therefore had the responsibility to ensure that the accused wanted to plead guilty, that he believed that he was guilty and that he had no possible defence to the charge.
- [9] It is trite that the object of questioning in terms of section 112(1)(b) of the CPA is to ascertain whether the accused admits all the elements of the offence with which he is charged and further to satisfy the Court that the accused is indeed guilty of the offence charged.
- [10] In NDLELA; JANTJIE; JONAS; MacGREGOR; SOOBRAMONEY; MAZEKA; NAIDOO[1] Law J stated the legal position in this regard as follows:

“The second requirement of s 112(1)(b) namely that the court must be satisfied regarding the guilt of the accused carries with it the implication that the court must be satisfied that admissions made the accused are admissions that he is able to make correctly.”

- [11] In this matter the accused did not admit that the amount of alcohol in his blood was higher than the prescribed minimum limit. He also did not indicate whether he had perused or had had sight of the blood analysis certificate, whether a blood sample had been properly obtained from him and whether he understood the blood analysis certificate to reflect the concentration of alcohol content in his blood. There is no indication in the version of the accused at what time he had consumed the alcohol, at what time he had driven the vehicle nor at what time the blood sample had been obtained.
- [12] It further appears from the record that the prosecutor was not even satisfied that all the elements of the offence had been admitted by the accused. The Prosecutor indicated that the State had a problem with the timeframe within which the blood of the accused had been drawn. Despite this, the Magistrate proceeded with the matter by putting to the accused the following:

“COURT: Ja, kan jy dit so sê jy, betwis nie die polisie het die blood (sic) van jou getrek binne 2 ure wanneer hulle jou gekry het en jy betwis nie dat die proses wat hulle gevolg het om die bloed van jou te vat was verkeerd.”

- [13] It is thus clear that the accused did not admit all the elements of the offence charged with and that certain admissions were elicited by the Magistrate. The conduct of the presiding Magistrate in these proceedings clearly constituted an irregularity. Nolan AJ said in STATE v WILLIAMS[2]:

“I agree with the regional magistrate that the conduct of the district magistrate constituted a striking irregularity. The magistrate

abandoned her judicial function, took over the role of the prosecution, and proposed certain allegations from the bench that were not ‘allegations in the charge’. She then elicited admissions from an unrepresented accused that he was not able to

make, and which he might not have made had he been properly represented.”

[14] Section 312 of the CPA provides that where a conviction and sentence under section 112 is set aside under review or appeal on the ground that any provision of section 112(1)(b) or 112(2) was not complied with or on the ground that the provisions of section 113 should have been applied, the Court shall remit the case to the court by which the sentence was imposed and direct that the Court comply with the provisions in question or to act in terms of section 113 of the CPA. Since the Magistrate who conducted the proceedings is not available anymore, the matter will necessarily have to commence before a different Magistrate.

[15] In the light of the above, the following order is made:

1. THE CONVICTION AND SENTENCE ARE SET ASIDE.
2. THE CASE IS REMITTED TO THE MAGISTRATE KATHU TO COMMENCE DE NOVO BEFORE A DIFFERENT MAGISTRATE.

SL ERASMUS

ACTING JUDGE

I agree.

MAMOSEBO, J

JUDGE

[1] 1984 (4) SA 131 (N) at 137 ; [1] See also S v NAIDOO 1985 (2) SA 32 (N) at 36

[2] 2008 (1) SACR 65 (C) at 68. Par. 12

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