

SOUTH AFRICA / JUDGMENT

## S v Fredericks (293/2018) [2019] ZAFSHC 153 (5 September 2019) [2019] ZAFSHC 153

COURT

Free State High Court, Bloemfontein

BEFORE

L.B.J. Moeng, P.E. Molitsokane

CASE / FILE NUMBER

293/2018

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Review No: 293/2018

In the matter between:

THE STATE

And

BOETA FREDERICKS

CORAM: MOLITSOANE, J et MOENG, AJ

### JUDGMENT:

MOENG, AJ

DELIVERED ON: 5 SEPTEMBER 2019

- [1] This matter was submitted to this court for automatic review in terms of section 302 of the Criminal Procedure Act, 51 of 1977 (the CPA). The accused was convicted and sentenced, based on his plea of guilty, in the Magistrates' Court Clocolan, on one count of contravention of section 59 of the National Road Traffic Act 93 of 1996 – Exceeding the general speed limit.
- [2] He was sentenced to R4000.00 or six months imprisonment, half of which was suspended for three years on condition that he is not convicted of contravention of section 59(4) of Act 93 of 1996, committed during the period of suspension.

[3] The record was placed before Rampai J to determine whether the proceedings were in accordance with justice. The following query was directed to the magistrate:

1. Whether or not the accused admitted that the traffic officer concerned was trained and qualified to operate the speed measuring device;
2. Whether or not the accused admitted the device was in a good and proper functioning condition and;
3. Whether or not the accused admitted that such device was serviced by the manufacturer within a period of six months immediately preceding the date of the offence, being 20 September 2018.

[4] The query was received by the clerk of the court on 24 December 2018. In her response, dated 16 August 2019, the magistrate commented as follows:

‘I concede that the requirements as set out in State versus Phuzi were not ascertained by the Court, and therefore I erred in finding that the accused admits all the allegations contained in the charge. Conviction and sentence may be set aside. I further apologise for the delay in responding to these reviews they were only brought to my attention at a very late stage.’

[5] The transcribed record of the proceedings reflect that the following questions were posed by the magistrate during the questioning in terms of section 112(1)(b) of the CPA:

COURT: On 19 September 2018 were you on R26 a public road in the district of Clocolan?

ACCUSED: Yes.

COURT: Were you driving a motor vehicle to wit a VW Polo Vivo with registration number HCC ... FS?

ACCUSED: Yes.

COURT: And with what speed were you travelling?

ACCUSED: 150 Your Worship.

COURT: And what is the speed limit in that zone?

ACCUSED: 100 Your Worship.

COURT: Okay and do you admit that your actions were unlawful and intentional?

ACCUSED: Correct so your worship.

COURT: Does the State accept the plea?

The magistrate proceeded to convict the accused as charged.

- [6] The duties of a judicial officer under section 112(1)(b) of the CPA are dual: (a) He or she has to question the accused with reference to the alleged facts of the case in order to ascertain whether the accused admits the allegations in the charge and (b) to satisfy him or herself that the accused is guilty of the offence to which he has pleaded guilty to. In *S v Mshengu* 2009 (2) SACR 316 (SCA) at 318 E, Jafta JA, stated that the primary purpose of the written statement in terms of s 112(2) of the CPA (in casu section 112(1)(b) of the CPA) is to set out the admissions of the accused and the factual basis supporting his or her guilty plea.
- [7] It has been repeatedly stated by our courts that the questioning of an accused is intended as a cautionary measure to reduce the risk of an erroneous conviction on a plea of guilty. (Compare *S v Kholoane* 2012 (1) SACR 8 (FB) at para [5]). In *S v Mshengu* supra, Jafta JA, referred with approval to *S v M* 1982
- (1) SA 240 (N) at 242D-E, where it was put thus by Didcott J:
- 'Accused persons sometimes plead guilty to charges, experience shows, without understanding fully what these encompass. The danger of doing so is obvious in a society like ours, which sees many who are illiterate and unsophisticated coming before the courts with no legal assistance...'
- [8] It is clear from the record that the accused was not given an opportunity to tell his story. The facts upon which the conviction followed were therefore never placed before the magistrate. Except for the question relating to the speed that the accused travelled and the general speed limit of the road concerned, all questions were leading. The questions were not aimed at eliciting the facts upon which the magistrate could ascertain whether the accused admitted the allegations in the charge.
- [9] It is in this context important to reiterate that leading questions are not per se irregular. Such questions may be posed as a form of introduction guiding the accused to the occurrence that led to his arrest. Such questions may also be posed to confirm aspects that were already placed on record by the accused or left out by him when telling his story, but should be supplemented by questions inducing factual responses to prove or disprove the element raised by the question. It is, however, improper on material issues, to put leading questions to the accused without further ado.
- [10] The easiest method of applying section 112(1) (b) is for the accused to be invited to explain what happened and be questioned with reference to the facts that he or she placed on record. In my view the requirement that the presiding officer had to be satisfied that the accused is guilty envisages that he or she be satisfied that there is sufficient factual support for the admissions in the plea. The posing of leading questions, the answers to which are either yes or no, did not elicit the truth since the answer was suggested in the question.

- [11] The question whether the accused admitted that his actions were unlawful and intentional related to a conclusion of law that had to be derived from the facts placed before the magistrate. It is self-evident that an unsophisticated accused would not understand the import of such terms. Questions put to an accused in terms of section 112(1)(b) are questions about the factual elements of a criminal offence, not questions about conclusions of law. See *S v Zerky* 2010 (1) SACR 460 (KZP) at 469d–e.
- [12] Turning to the query that was directed to the magistrate, the elements of exceeding the speed limit were succinctly set out by a full bench of this division in *S v Phuzi* (R254/2018) [2018] ZAFSHC 213 (28 December 2018). Musi AJP held as follows at para 29:

‘In order to prove that the speed limit was exceeded the State would have to prove that the speed measuring device was reliable for the purpose; that it determined and registered the speed accurately and that it was properly set up in accordance with the manufacturer’s

specifications. It is axiomatic that a properly trained person would be able to set up the device in accordance with the manufacturer’s

specifications’.

- [13] He proceeded at para 30 as follows:

‘The court cannot take judicial notice of the fact that the person who operated the device is trained to do so. The court can also not take judicial notice of the fact that all traffic officers are trained to set up speed measuring devices. Likewise, it cannot take judicial notice of the fact the speed measuring device functioned properly’.

- [14] The concession by the magistrate was therefore correctly made. I am satisfied that the questioning of the accused was inadequate and did not achieve the purpose envisaged by section 112(1)(b). In my view, the magistrate failed to protect the accused from the consequences of an unjustified plea of guilty.
- [15] I find it apposite to comment on the inordinate delay in responding to the queries directed by Rampai J on 6 December 2018. From the court date stamp, the query was received by the clerk of court on 24 December 2018. The magistrate only responded to the query on 16 August 2019, approximately eight months after it was received by the clerk of court. The magistrate’s response reached the Registrar of this court on 27 August 2019.
- [16] The magistrate apologised for the delay and indicated that the review was brought to her attention at a very late stage. Her response unfortunately lacks in detail. It is not clear who was responsible for bringing the reviews to her at such a late stage and when this happened. It was important to provide a detailed explanation of the delay. Whoever was remiss in the execution of their duties must account for their ineptitude.

[17] Without fear of stating the obvious, queries directed to magistrates by reviewing judges should be dealt with urgently. This is so as the procedure of automatic review provides urgent protection to a large number of unrepresented accused. Delays in submitting review records and responding to queries affects a number of the accused constitutional rights. Measures should therefore be put in place to prevent a recurrence.

[18] In *S v Jacobs and Six Similar Matters* 2017 (2) SACR 546 (WCC), Sher AJ (Henney J concurring), stated at para 39 as follows:

'The very fact, that from 1963 to date the law reports are littered with cases in which judges have regularly lambasted magistrates for failing to comply with the provisions in question (either by sending through records well outside the time limits provided or by failing to ensure that the records are complete), illustrates that the system is not working and that it is high time that effective measures be put in place to rectify this.'

[19] In this division, various judges have likewise expressed their displeasure with the delays in submitting reviews and responding to queries. In *S v P* (unreported, FB case no 322/2013, 5 June 2014) at [12]–[14], Mbhele AJ urged the Department of Justice and Constitutional

Development to provide the magistrates' courts with dependable and dedicated support staff to ensure the effective functioning of the courts' administration and do justice to an accused's constitutional right to a fair trial. In *S v Tshabalala* (unreported, FB review no 102/2015, 5 May 2016) at [10]–[14]) the court emphasised that where a matter has been sent on review to the High Court and such court requests a magistrate to furnish

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for the conviction or sentence, the magistrate should regard such request as one of an extremely urgent nature. Steps should be taken to ensure that a recurrence of the above does not happen.

[17] In the result I propose to make the following order:

1. The conviction and sentence are set aside;
2. A copy of this

## judgment

must be forwarded to the Chief Magistrate Bloemfontein and the Area Court Manager with specific reference to paragraphs [15] to [19] of this judgment;

3. The Chief Magistrate and Area Court Manager are directed to conduct an enquiry in order to determine whether;
  - i. the clerk of the criminal court and or any other officials were negligent in failing to take steps to ensure that the query was handed to the magistrate timeously and to take appropriate steps if such officials were remiss or;

ii. whether the magistrate was remiss in timeously attending to the query and to consider whether the magistrate's conduct in relation to the delay warrant the institution of disciplinary proceedings by the

Magistrates Commission;

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L.B.J. MOENG, AJ

I concur and it is so ordered.

P.E. MOLITSOANE, J

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