

SOUTH AFRICA / JUDGMENT

S v Hogg (R440/2012) [2012] ZAKZPHC 39 (26 June 2012)

[2012] ZAKZPHC 39

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

D. Pillay, Nkosi

CASE / FILE NUMBER

R440/2012

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IN

THE HIGH COURT OF SOUTH AFRICA, PIETERMARITZBURG

REPUBLIC

OF SOUTH AFRICA

R440/2012

Magistrate's

Case No. 54/2011

In

the matter between:

THE
STATE
v
ROLAND
HOGG
REVIEW

JUDGEMENT

Date of Judgment:

D. PILLAY J

- [1] In this review, the accused was charged in terms of s 65(1)(a) and
- (b) read with various other sections of the National Road Traffic Act, 93 of 1996 (NRTA). His charge sheet alleged that he was driving under the influence of liquor or drugs. He pleaded guilty to that charge. He explained that he was drinking at a party until about 7pm. After the party he slept. Later he agreed to drive a member of his staff home. He thought that because

he had slept after consuming a little alcohol he would be able to drive. Unluckily for him the police stopped him. He admitted that blood taken from him was properly tested. He realised that it was unlawful to drive a motor vehicle on a public road whilst his mental faculties were impaired by alcohol. The trial court imposed a fine of R3 000.00 or one year and six months' imprisonment.

- [2] Notwithstanding the prosecutor querying whether the accused accepted firstly, that he drove his vehicle when his mental faculties were impaired and secondly, that he was not in a position to take proper decisions as a sober person, the learned magistrate ascertained only the first and not both admissions from the accused.
- [3] The magistrate also failed to ascertain the extent of the accused's intoxication and the amount by which he exceeded the permissible limit. This omission is particularly astounding because ascertaining the extent of consumption in a driving under the influence case is routine if not reflexive. Notwithstanding his admission that he had consumed two beers and two tots of whisky between 6 and 7pm the court had to ascertain what the readings were on the machine that tested his blood when he was arrested. This is relevant not only for the conviction but also for the sentence.
- [4] As regards the suspension of the accused's licence in terms of s 35 of the NRTA the accused testified that he did not have a driver's licence and was due to be retested following an injury to one arm. He was unable to use both arms to drive. Not only did the accused drive after consuming alcohol which might have impaired his faculties, he drove without a licence and without the inability to use both arms. The trial court elected to give the accused 'a second chance' because he was 'an old person, who had pleaded guilty and was not a professional driver'. In addition, the trial court noted that he was not charged for driving a motor vehicle without a driver's licence.

- [5] Subsection 35 (4) provides:

'A court convicting any person of an offence referred to in subsection 1 or 2 as the case may be and of subsection 3 to the notice of such person.'

Subsection 1 provides:

'Subject to subsection 3, every driving licence or every licence and permit of any person convicted of an offence referred to in: . . .

...

- (c) section 65(1), (2) or (5).

where such person is the holder of a driving licence or a licence and permit, shall be suspended...'

- [6] The provisions of s 35 (4) are peremptory. Giving the accused a chance because he is an old man is not merely a formal irregularity.

It trivialises the accused's transgressions. Not only are the three transgressions serious on their own, cumulatively, the accused is a risk to the public if he was ever allowed to drive with one hand.

- [7] The omissions of the trial court are so fundamental to the proper administration of justice that the proceedings cannot be held to be in accordance with justice. Accordingly, the judgement of the trial court falls to be reviewed and set aside in terms of s 304(2) of the Criminal Procedure Act 51 of 1977 (CPA). However, as the irregularity can be cured by further evidence I may remit the matter to the magistrates' court to be heard by a magistrate other than the one whose judgment is under review. I give this direction because the competence of the magistrate under review should be reassessed by the Magistrates Commission as soon as possible for the reasons that follow.
- [8] Another judgment of the magistrate under review has been before me earlier this session. In the matter of *S v Zakhele Mathew Mtolo R327/2012* I reviewed and set aside her judgment giving the following

reasons:

'In this review the accused was convicted on a charged with driving under the influence of liquor. He admitted drinking traditional beer. He acknowledged that his breath was tested within two hours by a person who was qualified to operate the testing instrument. However, there is no evidence in the record as to how much alcohol the accused had consumed. Nor is there any evidence as to whether the accused's faculties were impaired as a result of his consumption of alcohol.

In the circumstances, the conviction and sentence are not in accordance with justice and are accordingly set aside.'

- [9] In *S v Siyabonga Vincent Mzimba*, 1 Steyn J with Jappie AJP concurring, records that on 16 March 2012 Booyens AJ asked the learned magistrate to explain why she convicted the accused of drunken driving on his s 112 statement when the accused had not admitted all the elements of the offences of driving under the influence of liquor. More specifically, although he admitted that he had drunk some liquor, he did not admit that his driving was affected. He did not admit the reading of the breathalyzer or blood sample. Admitting that she made a mistake the learned magistrate requested that the sentence be confirmed.
- [10] In considering this response Steyn J helpfully points out that the learned magistrate had a duty to enquire, not only about the influence of alcohol on the accused's mental ability but also on his driving ability.²

Steyn J also pointed out that the learned magistrate had failed to conduct an enquiry in terms of s 35 of the NRTA.

[11] Accordingly Mzimba was set aside and remitted for the magistrates' court to proceed on a plea of not guilty in terms of section 113 of the CPA.

[12] In this case, Murugasen J who was initially seized with the review enquired on 14 May 2012 as follows:

"1. Why were the results of the breathalyzer and blood tests not produced in court?"

2. On what basis was the accused convicted when the results of the tests were not put to him?
3. Please explain comprehensively whether the State discharged its onus in the absence of evidentiary proof of the charge against the accused."

[13] In a fashion similar to her responses in Mtolo and Mzimba the learned magistrate admitted her omissions but requested that the sentence be confirmed. The appropriate response would have been to concede that her omissions amounted to reviewable irregularities and to persuade the reviewing judges that she was competent to rehear the matter if it was remitted to her.

[14] I am reliably informed that other judges of this division have similar reviews emanating from this magistrate. I have serious

reservations about this magistrate's ability to perform her functions.

[15] In the circumstances I join Steyn J and Jappie AJP in requesting the Magistrates' Commission to scrutinise the work of the magistrate under review.

[16] The order I propose is the following:

The judgment is reviewed and set aside.

The matter is remitted to the magistrates' court for rehearing by a magistrate other than the magistrate under review in terms of s 304 (2) (c) (v) of the CPA.

NKOSI J I agree.

It is so ordered

1High Court Ref No: R278/12; Magistrates Serial No: A53/12 Case No:16/2012

2S v Nzimba R278/12 Case no. 16/2012 dated 07 June 2012 unreported

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