

SOUTH AFRICA / JUDGMENT

S v Lenkoe (R17/2020) [2020] ZAFSHC 21 (13 February 2020)

[2020] ZAFSHC 21

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo, Molitsoane

CASE / FILE NUMBER

R17/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Review

No: R17/2020

Magistrates Court Case

No: A727/19

In

the review between:

THE
STATE
versus
BOITUMELO
LENKOE
Accused

CORAM:

NAIDOO J et
MOLITSOANE J

JUDGMENT:

NAIDOO, J
DELIVERED
ON: 13
FEBRUARY 2020
REVIEW

JUDGMENT

- [1] This matter was referred to us by the Magistrates Court, Welkom in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA), with the request for the court to make an appropriate order. The accused was charged in the Magistrates Court, Welkom with one count of contravening section 59(4)(b) of the National Road Traffic Act 93 of 1996. The allegation is that on 26 January 2019 at or near the R73 road in Welkom, the accused drove his BMW motor vehicle bearing registration number HBH [...] FS at a speed of 151 kilometres per hour which was in excess of the speed limit of 100 km/h on that road. The accused who conducted his own defence, pleaded guilty to the charge and was accordingly found guilty, after the matter was dealt with in terms of section 112(1)(b) of the CPA. The accused was sentenced as follows:

“R6000.00 (Six Thousand Rand) or 3 (three) months imprisonment wholly suspended on condition the accused is not convicted of negligent (sic) (driving) committed during the period of suspension. In terms of section 35 of Act 93 of 1996 driver’s licence not endorsed”

- [2] The Senior Magistrate, Welkom, referred the matter to the High Court under cover of a letter pointing out that, in his opinion, there were a number of irregularities that required this court’s intervention. Firstly the condition of suspension of the sentence, namely that the accused not be convicted of negligent driving, is not related to the offence he was convicted of. He advised that the presiding magistrate agreed with this view. Secondly, the Senior Magistrate pointed out that the accused was not advised of his right to remain silent and not answer questions put to him, in spite of his plea of guilty. Thirdly, the presiding magistrate did not establish whether the accused pleaded guilty freely and voluntarily. A perusal of the record reflects that the concerns of the Senior Magistrate are well founded.
- [3] It has long been established that conditions of suspension should bear some relation or relevance to the offence for which the accused is convicted, and the condition must be clearly stated so that the accused understands the implications thereof. This was clearly stated about 45 years ago in *S v Du Preez* 1975(3) SA 187 (E), where the court cited with approval the following extract from *R. v Cloete*, 1950
- (4) SA 191 (E), where Reynolds, J., remarked, inter alia, at p. 192 that:

"While the words of sec. 360 (b) of Act 31 of 1917 are wide and the discretion of the judicial officer should not be lightly interfered with, it does seem that two principles at least should be observed in the imposition of the conditions. The first is that the condition imposed should bear at least some relationship to the circumstances of the crime which is being punished by the imposition of the suspended sentence. It need not be closely related but it should be related to it in some degree at least, even though slightly related, and not divorced from it, or remote from it. The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition."

- [4] In the present matter the accused was convicted of contravening the speed legislation. Negligent driving is not a feature of the offence for which he was convicted, and although it is a driving-related offence, it is not related to the offence with which the accused was charged. In my view, it is an inappropriate condition of suspension as it visits undue harshness upon the accused.
- [5] I deal now with the other two issues raised by the Senior Magistrate. It is equally well established in our law that the questioning in terms of section 112(1)(b) of the CPA is designed to protect an accused, especially if he is uneducated and undefended, against the adverse consequences of an ill-advised plea of guilty. The court should establish that the accused is firstly in his sound and sober senses, that he is pleading guilty freely and voluntarily and not doing so as a result of any undue influence upon him. This is in addition to questioning the accused to establish if his plea covers at least all the elements of the offence with which he has been charged. [See Du Toit et al, Commentary on the Criminal Procedure Act 17-9 to 17-11 and the cases cited therein].
- [6] Similarly, an accused person's right to remain silent is a constitutionally protected right, and even if he pleads guilty, the court is obliged to advise him of this right so that he can make the election to remain silent or not. In my view, but for the irregularities committed by the magistrate, this court could have intervened to correct the sentence. However, the failure by the magistrate to advise the accused of his right to remain silent and not answer any questions put by the magistrate, and to elicit from him that his guilty plea was tendered while he was in his sound and sober senses and that he did so freely and voluntarily, without undue influence, vitiates these proceedings.

[7] In the circumstances, the following order is made:

The conviction and sentence in this matter are set aside.

S. NAIDOO, J

I agree.

P MOLITSOANE J

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