

SOUTH AFRICA / JUDGMENT

S v Mhlongo (HC A1665/10) [2012] ZANWHC 1 (26 January 2012)

[2012] ZANWHC 1

COURT

North West High Court, Mafikeng

BEFORE

A.M. Kgoele, R.D. Hendricks

CASE / FILE NUMBER

HC A1665/10

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST HIGH COURT, MAFIKENG

HC . A1665/10

In the matter between:-

ELVIS MHONGOAppellant

and

THE STATERespondent

REVIEW

JUDGMENT

KGOELE J.

- [1] The accused was charged with Reckless / Negligent driving as the main count and inconsiderate driving as an alternative thereof in contravention of the relevant sections of the National Road Traffic Act 93 of 1996. (The Act).
- [2] He pleaded guilty to the main count and was consequently convicted as such on his plea explanation.
- [3] I directed the following query to the presiding officer in regard to the manner in which the inquiry was held:-

“1. From the questions put to the accused, it appears that there were:

insufficient facts upon which the presiding officer can safely form a basis that the action of the accused was negligent or reckless on that particular day and further that the accused is guilty of the offence to which he has pleaded;

no questions at all were posed to establish the following elements of the offence the accused was charged with:-

- Public Road
- knowledge of wrongful and or unlawfulness of the offence

I am of the view that the manner in which the section 112 (1) (b) inquiry was held in respect of the first count fell short of the standard as required in conducting such an inquiry.

2.1 If the presiding officer holds a different view, full reasons must be provided for such. The following cases can be of assistance:-

Heugh; Dingele; Mlindeshweni; Mtyalelwa 1998 (1) SACR 83 (E)

Mkhize v The State and Another 1981 (3) SA 585 (N)

S v Gwenya 1995 (2) SACR 522 (E)”

[4] The presiding officer responded as follows:-

“1.1 I did question the accused that after he could not remember the speed he was travelling he indicated that he was travelling at a fast speed. He could see to his left the oncoming taxi but not to his right where the truck blocked his view he could not see the vehicle behind the truck. He acknowledged that if he had travelled at a slower speed he could have managed to stop in time and not to stop on the tar road as he did, this in itself refer to the accused being negligent and/or reckless.

1.2 I acknowledge that I did not question to establish that the tar road the accused entered with this front wheels was a public road.

I acknowledge that I failed to establish through questioning the elements of wrongfulness and unlawfulness of the accused actions.

I do acknowledge the mistake I have made during this plea and that the enquiry fell short of establishing wrongfulness and unlawfulness would request the Learned Judge that the matter be set aside and referred back”.

[5] The relevant provisions of sec 112(1)(b) of the Criminal Procedure Act 51 of 1977 reads as follows:

“(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, 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 or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.” [my own emphasis]

[6] It is quite clear from the provisions quoted above that, the inquiry remains “a factual one”.

[7] As seen from numerous decisions of the various High Court divisions, it is generally accepted that the duty of a judicial officer in terms of this section are twofold:

to “question the accused with reference to the alledged facts of the case in order to ascertain whether he admits the allegations in the charge; and

to satisfy himself that the accused “ is guilty of the offence of which he has pleaded guilty. (Mkhize v The State and another 1981 (3) SA 585 (N); Heugh, Dingele, Mlindeshweni, Mtyalelwa 1998 (1) SACR 83 (E); S v Gwenya 1995 (2) SACR 522 (E). It has also been generally accepted that the best way of establishing these facts is to allow the accused to explain fully and in his own words what transpired during the commission of the offence.

[8] Du Toit et al in his book “Commentary on the Criminal Procedure Act” on page 17 – 8 of Service issue 44 of 2010 discuss the court’s approach to the answer tendered under the following heading as follows:-

“Evaluation of an accused’s answers

The answers given by an accused are not ‘evidence’ from which inferences may be drawn (S v Naidoo 1989 (2) SA 114 (A))

In S v Mkhize 1978 (1) SA 264 (N) 268 A-B Didcott J concluded that it is not the function of the court to evaluate the answers as if it were weighing evidence or to judge the truthfulness or plausibility of the answers (See also S v Jacobs 1978 (1) SA 1176 (C); S v Molauzi 1984 (4) SA 738 (T) 740 I and 741A-B and S v Londi 1985 (2) SA 248 (E)). ‘The test, said Didcott J in S vs Mkhize (supra) 268B, ‘is what the accused person has said, not what the court thinks of it’. See also S v Mtyai 1991 (1) SACR 412 (Tk). Conflicting answers should, however, be cleared up (S v Molaudzi (supra) it was held that there can as a rule be no question of a finding that a material element had been admitted by way of an inference.”

[9] In this matter, the accused was charged with a formally defined crime. Section 63(2) of the Act provides that:-

Reckless

“Without restricting the ordinary meaning of the work “recklessly” any person who drives a vehicle in wilful or wanton disregard for the safety of persons or property shall be deemed to drive that vehicle recklessly”.

- [10] Section 63(3) of the Act provides that in considering whether an offence has been committed under subsection (1), the court shall have regard to all the circumstances of the case including, but without prejudice to the generality of the foregoing, the nature, conditions and use of the public road upon which the offence is alleged to have been committed, the amount of traffic which at the time actually was or which could reasonably have been expected to be upon that road and the speed at and manner in which the vehicle was driven.
- [11] It goes without saying that, when considering whether the offence has been committed one has to look at all the elements of the offence. Most importantly, to determine whether the act of driving is reckless or negligent, the court has to consider the abovementioned factors.
- [12] All of the above considerations relates to the crucial factual determination of whether the accused correctly pleaded guilty and is indeed guilty of the offence he was charged with.
- [13] It is quite clear from the manner in which the presiding officer conducted the section 112 (1) (b) inquiry and also from the concession he made in his reply that the questioning in this matter fell short of the standard required in the application of this section.
- [14] I therefore come to the conclusion that the plea of guilt of the accused and its resultant conviction and sentence by the trial court cannot, as correctly admitted by the presiding officer, stand as such.
- [15] Consequently the following order is made:-

15.1 The conviction and the sentence of the accused is hereby set aside;

15.2 The matter is referred back to the magistrate court of Rustenburg to start de novo before another presiding officer different from the one that presided in this matter.

A.M. KGOELE

JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS

DATED : 26 January 2012

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Prepared on 11 October 2026 · Esheria