

SOUTH AFRICA / JUDGMENT

S v Mmako (515/10) [2011]

ZAECGHC 73 (30 November 2011)

[2011] ZAECGHC 73

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula, E Revelas

CASE / FILE NUMBER

515/10

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE-GRAHAMSTOWN)

Case No: CA&R

Review Case No: 515/10

Date delivered: 30 November 2011

In the matter between:

THE STATE

vs

KHOMOTSO LESIBA MMAKO

REVIEW JUDGMENT

MAKAULA J:

[1] The accused appeared before the magistrate, Aliwal North charged with three counts viz:

“1. Driving under the influence of liquor or drugs in contravention of the provisions of Section 65 (1) (a) read with Sections 1, 33, 65 (3), 65 (4), 65 (8), 65 (9), 69 (1), 73 and 89 of the National Road Traffic Act 93 of 1996;

2. Negligent Driving in contravention of the provisions of Section 63 (1) read with Sections 1, 33, 63(2), 63 (3), 69, 73, 89 (1) and 89 (5) of the National Road Traffic Act 93 of 1996;

3. Using a motor vehicle without consent in contravention of the provisions of Section 66 (2) read with Section 89 of the National Traffic Act 93 of 1996 – Using a motor vehicle without consent”.

[2] Accused pleaded guilty to counts 1 and 3. He was questioned in terms of Section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 (the Act). After questioning the magistrate found him guilty on counts 1 and 3 and not guilty on count 2. The matter came on review and my brother Smith J raised the following query;

“[1] The magistrate is requested to comment on the following:

It appears from the record that the magistrate did not properly question the accused in terms of section 112(1)(b) of the Criminal Procedure Act no 51 of 1977.

The accused indicated that he pleaded not guilty to Count 2 being the charge of negligent driving. Why did the magistrate not enter a plea of not guilty?”

[3] The magistrate responded as follows to the query:

“Ad Para 1:

The Presiding Officer, on the perusal of the record and analysing it with reference to the provisions of the Section 112(1)(b), realizes that the questioning does not fully comply with the requirements. Further reference is made to the following citations:

S v Mshengu 2009 (2) SACR 316 at 3196 (TK)

S v Gaviyaya [2009] JOL 23630 (ZH) (unreported)

S v Nagel 1998 (1) SACR 218, 219

S v Khipa 1978 (2) SA 540.

Ad Para2:

The Presiding Officer, on perusing the typed record at P2, notes that line 17 corresponds to the entries on J15 in that the accused pleaded guilty to counts 1 and 3, not guilty to count 2.

On questioning the accused the Presiding Officer concluded that he was also guilty of count 2. Having read the cases cited in ad paragraph1, the Presiding Officer concedes that the questioning was not properly and adequately done. The Honourable Judge’s directive will be appreciated in this regard and presiding officer undertakes compliance.

The presiding officer is very grateful to the Honourable Judge for bringing these issues to his attention.”

[4] With respect to the magistrate concerned, I do not understand how these proceedings were conducted. In order for this to be clear I would have to refer to excerpts from the record. In the first instance, it does appear from the record that the accused pleaded guilty to count 1 and 3 and not guilty to count 2. The engagement that immediately ensues between the

prosecutor and the magistrate boggles the mind. The questions and comments by the magistrate are startling. I am unable to comprehend what was actually being discussed and what the outcome of such a discussion was. What follows immediately thereafter confuses me further.

“PROSECUTOR: Negligent driving, that is the one which did not read it on record, Your Worship. And the State was not proceeding with reckless

driving, it was proceeding with negligent driving because as I understand . . . (intervention). (sic)

COURT: It can't be avoided, you can't avoid that he knocked that person, that he knocked the cyclist.

PROSECUTOR: Yes, Your Worship, and as I . . . (indistinct) he briefly explained in as far as Count 2 is concerned, that he did not see this cyclist. So those are the basis upon which the State is proceeding, on just negligent driving, not reckless. Yes Your Worship. (sic)

COURT: He was driving without a proper lookout for other road users.

PROSECUTOR: It's inconsiderate driving so to speak. (sic)

COURT: Ja, inconsiderate, you just can't avoid – I can't say so, you mean to say in concerning I just want to clarify your situation and your attitude. You mean to say you never bumped this person, this cyclist on that particular day?" (sic)

“ACCUSED: Your Worship, I'm saying that in front of this truck I was driving I did not see this cyclist. But after I have already passed looking at the mirror, I could see, Your Worship, that there was a person there. (sic)

COURT: You can't escape that.

ACCUSED: Yes, Your Worship, I did see him. Your Worship, I say that I have already passed this person I did not see him in front of the car. After I've already passed I looked through the mirror and then I could see there was a cyclist who had fallen down there.”

“COURT: Please come forward please. Count 1 for drunken driving, that's excessive amount of alcohol in blood or what, or just under the influence of liquor and driving? There's no quantity, no word of the liquor. (sic)

PROSECUTOR: It's drunken driving, Your Worship.

COURT: Okay.

PROSECUTOR: The quantity of alcohol . . . (intervention).

COURT: You admit you were intoxicated, do you admit that on the day in question you drove the motor vehicle while you had consumed liquor and you were drunk?

ACCUSED: Yes, I do admit, Your Worship, because I was having alcohol in my system, Your Worship, because I had consumed the previous day and then I did not sleep. (sic)

COURT: So you say you had drunk – you had consumed some liquor and you know that you're driving a motor vehicle while you under the influence of liquor is unlawful? (sic)

ACCUSED: Correct.

COURT: And do you also admit that but where you say you don't admit the negligent – driving negligent bumping the cyclist who was also a user of the same road as you? (sic)

ACCUSED: It's because, Your Worship, I did not see this person in front of the truck, maybe he is the one who was closer to the truck, Your Worship.

COURT: Didn't see the cyclist. When did you see the cyclist?

ACCUSED: After I passed, Your Worship.

COURT: And you also plead guilty to driving a motor vehicle without owner's consent?

ACCUSED: That is correct, Your Worship.

COURT: Based on your explanation we find you GUILTY of all counts including Count 2, because Count 2 you were negligent. (sic)

PROSECUTOR: As the Court pleases, Your Worship. The State is in possession of the accused SAP 69's and proves no previous convictions against him."

[5] From the above, it is clear with respect, that the questioning of the accused is not structured and the magistrate did not deal with one offence at a time with the purpose of determining whether the accused was actually pleading guilty to one offence before proceeding to the next offence.

[6] Section 112 (1)(b) of the Act reads as follows;

"(1)

...

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 underlining)

- [7] This section was designed to protect an accused – and especially an uneducated and undefended accused – from the adverse consequences of an ill-considered plea of guilty.¹
- [8] The purpose of the questioning is to determine whether the accused admits all the elements of the offence which the state would otherwise have been required to prove. If any of the elements is not admitted, the court cannot be satisfied of the accused's guilt.² From the questioning as it appears above, it cannot be said that the accused admitted all the elements of the offences with which he had been convicted.
- [9] The court found accused guilty of negligent driving even though he pleaded not guilty to that charge. Even if, for argument sake, the accused had pleaded guilty to negligent driving (which he did not) the questioning regarding that offence reveals that accused had a possible defence to it. The magistrate therefore, should have entered a plea of not guilty in respect thereof.
- [10] As conceded by the magistrate, the questioning in terms of Section 112 (1)(b) of the Act is not sufficient to sustain the convictions.

Consequently, I make the following order:

1. The convictions of the accused in respect of all three counts are set aside.

M MAKAULA

JUDGE OF THE HIGH COURT

I agree:

E REVELAS

1 See: du Toit et Al, Commentary on the Criminal Procedure Act, Service 46, 2011 page 17-4B and the authorities cited therein

2 See: S v Mkhize 1978 (1) SA 264 (N) @ 267

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