

SOUTH AFRICA / JUDGMENT

S v Mthembu (374/17) [2017] ZAGPPHC 1303 (18 December 2017) [2017] ZAGPPHC 1303

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Mosopa, N P Mngqibisa-Thusi

CASE / FILE NUMBER

374/17

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA

High

Court Ref no: 374/17

Benoni

Case no: A2186/17

Review

number: 08/2017

In

the matter between:

THE
STATE
and
COLLEN
MTHEMBU
REVIEW

JUDGMENT

MOSOPA, AJ

[1] The accused who was not legally represented appeared before the magistrate, Benoni, on a charge of contravening the provisions of section 65(2)(a) of the National Road Traffic Act 93 of 1996 being excessive amount of alcohol in blood.

[2] Following his plea of guilty to the charge levelled against him, the Accused was questioned in terms of section 112 (1) (b) of the Criminal Procedure Act 51 of 1997 by the presiding magistrate. After court's questioning the magistrate found the accused guilty of the contravention of the provisions of section 65 (2)(a) of the National Road Traffic Act 93 of 1996.

[3] The matter comes on automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1997.

[4] Before dealing with the merits of the matter, it is important to refer to the provisions of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 which provides as follows:

" 112 (1) (b) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea;

(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 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."

[5] Section 112(l)(b) was designed to protect an accused and especially an uneducated and undefended accused from the adverse consequences of an ill

- considered plea of guilty. See *S v Samuels* 2016 (2) SACR 298 (WCC) at [21]. 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 accused guilt. See *S v Mkhize* 1978 (1) SA 264 (N).

[6] In casu, the magistrate after the accused pleaded guilty questioned him as follows:

"(a) That he was driving a motor vehicle a VW Polo Playa registration number MKY 305 GP;

(b) On which road;

- (c) Do you confirm that you were drinking beer;
 - (d) After being stopped by the Police you were taken to Kempton Park where your blood was drawn, did they explain to you why were they drawing your blood;
 - (e) How long after your arrest was your blood drawn."
- [7] From the court's questioning it was abundantly clear that they fell short of the provisions of section 112(1)(b) in that not all the elements of the offence were admitted.[8] The magistrate failed to ask the accused as to whether his mental facilities were impaired as a result of driving under the influence of alcohol and whether did he know that it was an offence for him to drive a motor vehicle on the road while under the influence of alcohol.
- [9] The accused conceded having consumed beers, no amount or quantity was placed on record but at no stage did he say that his abilities were impaired as a result of the intake of the alcohol.
- [10] In *S v Mbiza* 2012 (2) SACR 233 (N) the following was stated: "This element of crime requires an impairment, not only of an accused's mental state of mind i.e. that the alcohol induced him of a state that he was prepared to take risks, but that his driving ability was impaired. It is therefore necessary that an accused person charged with an offence of drunken driving should admit that he/she lacked the necessary skill and judgment normally required in the manipulation of a motor vehicle and that such skill or judgment has been diminished or impaired as a result of the consumption of alcohol or drugs." See also: *S v Englebrecht* 2001 (2) SACR 38 (c) and Milton & Crowing South Arica Criminal Law and Procedure vol III statutory offences at 45
- [11] The certificate in terms of section 212 from the forensic science laboratory accompanying the report of alcohol content in the accused's blood was handed in after conviction of the accused. The accused was not afforded an opportunity to verify and confirm the content of the report as he was not asked questions by the court relating to the report. The certificate was handed in by the prosecution without the consent of the accused.
- [12] In *S v Engelbrecht* 2001 (2) SACR 38(C) the court when dealing with the essential elements of the crime proffered as follows: "That the accused (i) drove
- (ii) a vehicle (iii) on a public road (iv) mens rea."
- [13] The magistrate failed to establish when questioning the accused, whether the offence was committed within the jurisdiction of the Benoni Magistrate Court. What is on record is evidence by the accused that the he was driving in Springs Road in Crystal Park.
- [14] Before the matter came before the review Judge, the Acting Senior Magistrate Ms L Knight of the Head Office Benoni, doing judicial quality control duties whilst inspecting finalized matters, came across this matter. Ms Knight indicated to the presiding Magistrate that her questioning in terms of section 1 12(1) (b) was short of determining that the accused admitted all the elements of the offence and she conceded to such error. Based on the

concession of the presiding magistrate it is my considered view that queries should not be directed to the Director of Public Prosecution or the presiding magistrate but the matter be disposed off in this review application.

[15] In *S v Mshengu* 2009 (2) SACR 316 (SCA) states: "The cause prescribed by the section must however, be followed unless the court on review or appeal is of the view that it would lead to an injustice or would be a futile exercise. The court retains the discretion not to order remittal if the circumstances of the case are such that the remittal will be inappropriate."

[16] I am of a considered view that the magistrate questions in terms of section 112(1)(b) did not determine the elements of the offence that accused was convicted with. The conviction and sentence of the accused placed the accused in major jeopardy. The matter needs to be remitted back to the magistrate to comply with the provisions of section 112(1) (b) of Act 51 of 1997 and the conviction and sentence must be set aside.

[17] I, accordingly, make the following order:

1. The conviction and sentence are set aside;
2. The case is remitted back to the magistrate Benoni to start de nova.

M J Mosopa

Acting Judge of the High Court

I agree

N. P Mngqibisa-Thusi

Judge of the High Court

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/1303.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-mthembu-unknown-topic-agpphc-2017>

Prepared on 9 October 2026 · Esheria