

SOUTH AFRICA / JUDGMENT

S v Nkuna (A255/2011) [2011] ZAGPPHC 60 (19 April 2011) [2011] ZAGPPHC 60

COURT

North Gauteng High Court, Pretoria

BEFORE

Ranchod, Kollapen

CASE / FILE NUMBER

A255/2011

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT)

DATE:

19 April 2011

CASE

NO:A255/2011

Magistrate:

BABERTON

- LOW'S CREEK

SUPREME

COURT REF NO: 1113MAGISTRATE'S SERIAL NO: 19/2010CASE NR:

L80/2010 L

THE

STATE vs DAVID SIPHO NKUNA

REVIEW

JUDGMENT

RANCHOD, J

- [1] The accused Mr David Sipho Nkuna was arraigned in the Low's Creek Magistrate's court on a charge of the contravention of section

80(1)(a) read with sections 1,12,15,35A or 54,47,65-67,80(2),87 and 95 of the Customs and Excise Act, Act 91 of 1964. - having illicit goods in his possession knowing that they were illicit. It was alleged that on 15 May 2010 the accused wrongfully and intentionally

had 100 cartons of Dullahs cigarettes, each carton containing 10 packets and each packet containing 20 cigarettes, in his possession

knowing that these good were illicit as they were imported without being declared and/or without being taxed and/or of which the

packaging does not contain the prescribed stamp impression. On 5 August 2010, the accused was convicted after questioning in terms of section 112(1)(b) of Act 51 of 1977 and sentenced to a fine of R2 000, 00 or four months imprisonment. This was despite the fact that the accused, during his guilty plea, did not admit knowledge of the goods being illicit. No plea of not guilty was formally entered into the record nor was the accused informed thereof. No evidence was led by the state or the accused.

[2] The matter lay before me on automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977(the Act). I caused the following queries to be addressed to the magistrate:

2.1 Was there proper compliance with section 113 of the Criminal Procedure Act 51 of 1977 in respect of accused 1?

2.2 Was the conviction of accused 1 correct given that during questioning in terms of section 112(1)(b) he denied knowing the goods were illicit goods; the State had closed its case without leading any evidence and the accused had also closed his case without leading any evidence?

[3] The learned magistrate C. Kruger responded as follows:

"2.1 Only when reading the transcription did I realize that I failed to explain to Accused No 1, after questioning in terms of section 112(1)(b) of the CPA, that his plea of guilty was changed to one of not guilty in terms of section 113 and that the admissions he made during questioning would remain as proof of the facts therein.

2.2 Accused No 1 did deny that he know (sic) that the cigarettes were illicit goods. He however kept on using "we" and "us"

- referring to him and his wife, Accused No 2. He created the impression of him and his wife being in this deal together

When Accused no 2 answered the questions during section 112(1)(b) proceedings it was quite clear that they were working together and she knew very well that they bought illicit goods.

Accused No 1 did not testify after the state closed his (sic) case and therefore he could not be cross-examined with regard to the fact that he denied knowing that the cigarettes were illicit goods. The denial could therefore not be taken into consideration as evidence in his favour.

Although the correct procedure was not adhered to, it is my humble submission that justice prevailed."

[4] The matter was thereafter referred to the Director of Public Prosecutions for comment. A helpful memorandum was received from

State Advocate L. Williams and Deputy Director of Public Prosecutions, G.D. Baloyi.

[5] At no stage after questioning in terms of Section 112(1)(b) was the accused informed that the court is not satisfied that all the elements of the crime are admitted and that a plea of not guilty is entered into the record. For all practical purposes the accused was and probably still is under the impression that the court found him guilty based on his plea of guilty which he entered when questioned by the magistrate. An unusual feature of the matter is that the magistrate advised the accused to close his case without leading any evidence or repeating the fact that he had no knowledge of the fact that the goods were illicit goods. The proceedings are as confused as the learned magistrate appears to be. The record reads as follows:

"COURT: You know I am sorry luckily I have Mr Gumede who is up and about and I have Mr Krause who is up and about. Okay that is the State's Case. Accused number 1 you now have the opportunity of putting your version before court you can testify under oath you can call witnesses you can also remain silent. You heard what Advocate Krause said he is not going to call any witnesses so now if you had a lawyer he would tell you now not to testify because it is only going to take some time. I am not giving you the wrong information or anything but I would suggest that at this time you close your case. ACCUSED 1: I close my case your worship. DEFENCE CASE - ACCUSED 1

COURT: Okay I close my case okay that is Defence Case with regard to accused number 2 Mr Krause?

ADDRESS BY THE PROSECUTOR: As it please the court your worship. The State will request that he be convicted both accused were on the same date the same place doing the same things. What accused number 2 knows accused number 1 does not know it does not make sense your worship.

COURT: Ja but then I made a mistake I thought you are going to ask the you know what in all fairness ja what you have got me now. No it is not necessary that he testifies not really.

PROSECUTOR: Your worship if he testifies he is going to be cross-examined.

COURT: Ja

PROSECUTOR: On specific aspects which may be to his detriment.

COURT: Perhaps I, wat moet ek doen nou moet ek horn nou maar vra om te getuig?

PROSECUTOR: Your worship I think accused number 2 is the main suspect so.

COURT: Okay that is fine.

PROSECUTOR: As the court pleases.

COURT: Let us get to accused number 2 at this stage.

Accused number 2 did admit that he was in possession; ag
accused number 1 I am with accused number 1 now.

INTERPRETER: Okay.

COURT: I am sorry I am really not here.

INTERPRETER: As the court pleases"

[6] Thereafter a short judgment follows:

JUDGEMENT-ACCUSED 1

COURT: Accused number 1 when he pleaded guilty he admitted that he was in possession of these goods he only said that he did not know that it was illicit goods. On the other hand accused number 2 when she pleaded guilty she said of cause (sic) she was aware of the fact that these were illicit goods she called her husband and told him about the deal that they can make go and sell it in Nelspruit. Now to helping a person even if he did not buy the goods he was there he was part of this whole deal. He was part of this whole deal the stuff was transported in his vehicle I suppose they were both in it. So accused number 1 is also found guilty of possession of illicit goods knowing that it was illicit. Okay?"

[7] A conviction is still possible on a lesser but competent charge on the basis of section 112(1) (b) admissions even if there was no compliance with section 113 of the Act where the prosecution leads no evidence after the Court has invoked section 113. See *S v NYANGA* 2004(1) SACR 198 (CPD) at 202 e-g sub-para 9.4.

[8] In *S v MATHE* 1981(3) SA 664 (NKA) (a review judgment) Zietsman J held in a concurring judgment:

"Theoretically there may be cases where a conviction can be entered in spite of the entering of a plea of not guilty in terms of s 113 of the Criminal Procedure Act 51 of 1977 and the failure by the prosecutor to tender further evidence. In that case and if the accused himself does not testify, the court must decide whether a case has been proved beyond any reasonable doubt against the accused. What the court must do is to consider and judge the accused's admissions and his failure to testify and to ask itself whether all the elements of the offence which the accused has not admitted have been proved beyond any reasonable doubt against him. If different inferences can be drawn from the accused's admissions and denials, and if one or more of them would mean that he is not guilty, he must get the benefit of the doubt."

[9] The annexure to the charge sheet refers to section 80(2) of the Customs and Excise Act, Act 91 of 1964 which reads as follows:

"(2) When any person is charged with a contravention of paragraph (a) of subsection (1) he shall, until the contrary is proved, be presumed to have known that the goods in question were illicit goods".

[10] When the charge was read to the accused, the prosecutor did not refer to this section (See transcript, page 2 1.5).

[11] The accused were unrepresented and the existence of and the content of this presumption was never during the proceedings brought to their attention, nor explained to them. Indeed, the explanation to the accused by the magistrate after the State's case was closed probably created an expectation by accused 1 to be acquitted after the closure of his case.

[12] I am therefore of the view that the learned magistrate did not properly comply with section 113 and that the court never explained

this fact to the accused. The conviction can therefore not be confirmed. The court advised the accused not to testify and he in all probability believed that the advice was bona fide good advice. This was to the accused's detriment.

[13] In all the circumstances, I would set aside the conviction and sentence.

RANCHOD N

I agree,

KOLLAPEN N AJ

In the normal course of events.

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