

SOUTH AFRICA / JUDGMENT

S v Ntanzi and Others (DR15/2024; DR14/2024; DR13/2024; DR16/2024; DR12/2024) [2024] ZAKZPHC 56; 2024 (2) SACR 403 (KZP) (1 July 2024) [2024] ZAKZPHC 56

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Olsen, Bedderson

CASE / FILE NUMBER

DR15/2024; DR14/2024; DR13/2024; DR16/2024;
DR12/2024

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION : PIETERMARITZBURG

In the matter between:

THE STATE

versus

MBHEKISENI SIBONISO NTANZI

ACCUSED

REVIEW CASE NO.: DR15/2024

MAGISTRATE'S CASE NO.: DCB 30/2024

MAGISTRATE'S SERIAL REVIEW NO.: B01/24

JOYCE SBONGILE OLIPHANT

ACCUSED

REVIEW CASE NO.: DR14/2024

MAGISTRATE'S CASE NO.: DCB 40/2024

MAGISTRATE'S SERIAL REVIEW NO.: B06/24

MBHEKISENI MBUYISANI BUTHELEZI

ACCUSED

REVIEW CASE NO.: DR13/2024

MAGISTRATE'S CASE NO.: DCB 35/2024

MAGISTRATE'S SERIAL REVIEW NO.: B04/24

LIZWI MESULI MTHETHWA

ACCUSED

REVIEW CASE NO.: DR16/2024

MAGISTRATE'S CASE NO.: DCB 36/2024

MAGISTRATE'S SERIAL REVIEW NO.: B05/24

JABULANI SIMPHIWE SIBIYA

ACCUSED

REVIEW CASE NO.: DR12/2024

MAGISTRATE'S CASE NO.: DCB 31/2024

MAGISTRATE'S SERIAL REVIEW NO.: B02/24

SPECIAL REVIEW JUDGMENT

Delivered on :

OLSEN J (BEDDERSON J concurring)

- [1] The Acting Senior Magistrate, Lower Umfolozi Sub-Cluster at the magistrates' court, Empangeni, Mr MN Nhleko has submitted the records of the five cases which appear in the heading to this judgment for special review in terms of s 304 of the Criminal Procedure Act. The five cases come to us together as they are of the same type in the sense that they involved a charge of the same offence in each case, were heard by the same magistrate and suffer from similar defects.
- [2] When referring specifically to each case I will refer to the "matter of Ntanzi" or the matter of "Oliphant", and so on.
- [3] The accused in each of these cases was charged with an offence set out in a standard form charge sheet, the material portion of which reads as follows.

'The accused is guilty of the contravening section 50(1) of the National Land Transport Act 5 of 2009 (the Act) read with Sections 1, 90(1)(a), 90(2)(a), 90(3) of the aforementioned Act.

Operate a road based public transport.

In that on or about the [a date is inserted] and at or near [the place is inserted] which is a public road in the district of King

Cetshwayo, the accused did wrongfully and unlawfully operate a road based public transport service to wit [the type and registration

number of the vehicle is inserted] without holding the necessary permit and or operating licence, while carrying passengers for

reward.’

The standard form charge sheet contains an alternative count which was not put to any of the accused.

[4] The National Land Transport Act provides in s 50(1) that no person “may operate a road-based public transport service, unless he or she is the holder of an operating licence or a permit, subject to Sections 47, 48 and 49 issued for the vehicle concerned in terms of this Act.” The word “permit” is defined in s 1 of the Act as one issued in terms of the Road Transportation Act of 1977, and recognised as valid under the National Land Transport Transition Act, 22 of 2000. Permits do not appear to be material in any way to the five cases which are the subject of this review.

[5] Section 1 of the Act defines an “operator” as a person carrying on the business of operating a public transport service. It is apparent from the record of the proceedings that the offence relied upon by the State is that set out in s 90(1) of the Act, which renders a person guilty of an offence

‘if that person operates a public transport service in contravention of s 50’.

[6] I will give a brief description of the record of the hearing in each of the five cases, concentrating mainly on the issues to which Mr Nhleko has referred this court.

THE MATTER OF NTANZI

[7] The case opened with a request to the magistrate to explain the accused’s rights with regard to legal representation. The magistrate then read the main count to Mr Ntanzzi, starting rather unfortunately with the words “you are guilty of contravening Section 50(1) ...”. (Perhaps a typographical error occurred.) The magistrate moved on immediately to inform Mr Ntanzzi of his rights to a lawyer and that he had the right to apply to the Legal Aid Board attorney who is before the court. Mr Ntanzzi said he would apply for legal aid and a Mr Nzuza then stepped forward.

[8] Mr Nzuza features in all of the five cases. His status is not clear. He is variously presented as an attorney appearing pro bono, or as the legal aid attorney. In one of the five cases Mr Nzuza advises the court that legal aid is not available for road traffic matters.

- [9] Be that as it may Mr Nzuza advised the court that it would not be appropriate for his client to plead guilty because he had a defence along the lines that he had an operating permit, albeit not one for the vehicle now used which has replaced his original vehicle which was destroyed in an accident. The court then proposed the next available date for the hearing of a defended trial, whereupon Mr Nzuza advised the court that Mr Ntanzi cannot wait that long and that there will be a plea of guilty “in terms of Section 112(1)(a)”. (The reference is obviously to s 112 of the Criminal Procedure Act, 1977.) The prosecutor said the state would accept the plea “in terms of s 112(1)(a)”, whereupon the charge was put to the accused by the prosecutor. The accused pleaded guilty. Mr Nzuza confirmed the plea and the prosecutor formally accepted the plea. The prosecutor then asked the court to “assist with the verdict”. The magistrate responded by expressing her satisfaction that all the elements of the case before the court were admitted. There was no formal statement that the accused was found guilty. The court proceeded straight to sentence without inviting any submissions on the subject. The sentence imposed was R2000 or three months’ imprisonment.
- [10] There can be no doubt about the proposition that in a criminal case the court is bound to express its decision to convict the accused, or find him guilty, in so many words so that it is clear to the accused that the issue of criminal responsibility has been disposed of. That is the gateway to the next phase of the proceedings where it is legitimate for the court to be furnished with information relevant to sentence which would not be appropriate or permissible before conviction, encompassing, perhaps, remorse and obviously whether the accused has any previous convictions.
- [11] In Mr Ntanzi’s case he was not convicted and he was not afforded any opportunity to make submissions on sentence. The proceedings were not in accordance with justice.

THE MATTER OF OLIPHANT

- [12] The case of Ms Joyce Oliphant commenced in much the same way as the case of Mr Ntanzi, although when the magistrate told her of the charge against her she was not told that she was guilty of it. She said that she required legal aid and Mr Nzuza stepped forward to say that a plea would be tendered. The prosecutor said that the State would accept the plea, again in terms of s 112(1)(a).
- [13] The prosecutor read the main count, Ms Oliphant was asked whether she understood the charge, and answered in the affirmative; and said that she confirmed the plea which the State then accepted. The next entry in the record is the court saying “Nzuza, mitigating factor”. Mr Nzuza then addressed on sentence, the principle factor being that Ms Oliphant was 72 years of age. The prosecutor then made his address without referring to the seriousness of the offence.

- [14] After the addresses on sentence the magistrate recorded that she noted that Ms Oliphant had “admitted all the elements for this offence”. The record shows no formal statement of conviction. (There might have been one because the record reveals that the recording was muted at that crucial time for 22 seconds.) The magistrate then imposed the sentence which in this case was a fine of R2000 or two months’ imprisonment.
- [15] In my view the referring magistrate is correct in his complaint that there appears not to be any verdict, and his complaint that you cannot render your judgment on the merits at the same time as passing sentence, or hear submissions on sentence before the accused is actually convicted. This trial was also not conducted in accordance with justice.

THE MATTER OF BUTHELEZI

- [16] This case followed the same route at the case of Ms Oliphant until the close of submissions on sentence. The magistrate then delivered a judgment on sentence, setting out the various submissions which had been made by Mr Nzuza, adding at the end that, in the light of the “evidence” submitted by Mr Nzuza, she was satisfied that Mr Buthelezi was admitting all the elements of the offence. The only submissions made by Mr Nzuza were on the subject of sentence. Having done that the verdict was in this case pronounced, that is “guilty as charged”. Mr Buthelezi was sentenced to a fine of R3000 or three months imprisonment. For the same reasons as discussed above, this trial was also not conducted in accordance with justice.

THE MATTER OF MTHETHWA

- [17] Mr Mthethwa said that he would represent himself and then, pressed on the reason why he was doing so, said that it was because he intended to plead guilty. What followed was unacceptable. The court asked Mr Mthethwa whether he wanted to testify “standing there or do you want to come to the witness box?”. Mr Mthethwa clearly did not understand. The court admonished him, saying that he should not waste the court’s time. And finally Mr Mthethwa was addressed as follows.

‘What is so difficult about conducting your own defence? You said you understand the court proceedings, so why now are you not proceeding?’.

At that Mr Mthethwa said he “changed his version” and would apply for legal aid whereupon Mr Nzuza advised that legal aid would not be granted but that he would assist pro bono.

- [18] Mr Nzuza then confirmed that the plea was in accordance with his instructions. The State said it would accept the plea “in terms of Section 112(1)(a) of the Criminal Procedure Act”; The court then turned to Mr Nzuza who said “I was waiting for the court’s verdict. Since the State accepted the plea, then – or should I just proceed with mitigation Your Worship?” The court answered in the affirmative.

- [19] Mr Nzuza then made his address dealing essentially with the personal circumstances of the accused. The prosecutor addressed briefly on the subject of sentence and asked for one which would deter Mr Mthethwa from committing the same offences again.
- [20] The court then delivered its reasons for the sentence it proposed to impose which turned out to be a fine of R3000 or three weeks' imprisonment.
- [21] The charge was never put to Mr Mthethwa. No verdict was pronounced. The proceedings were not in accordance with justice.

THE MATTER OF SIBIYA

- [22] Mr Sibiya said initially that he would conduct his own defence because he intended to plead guilty, but Mr Nzuza was called in to assist. When he said that s 112(1)(a) would apply the State said that it was willing to accept the plea in terms of s 112(1)(a). On this occasion the charge was put to the accused.
- [23] On this occasion the magistrate delivered a seven line judgment before expressly finding Mr Sibiya guilty of the offence. The final sentence of the judgment is the one which apparently justified the plea of guilty. It reads as follows.

'Having heard the submissions by your defence attorney and by the State, therefore the court is satisfied that you are admitting all the elements of this offence.'

In fact no submissions were made by either Mr Nzuza or the prosecutor.

- [24] There were then submissions on the subject of sentence, both Mr Nzuza and the prosecutor accepting that the offence is a serious one. In effect Mr Nzuza's submission was that whilst it was well known that a lot of violence in the taxi industry emanates from disputes over the use of routes, and that those who render a service without an operating licence contribute to that phenomenon, in this particular case, he said, no such violence had arisen as a result of Mr Sibiya's conduct. The prosecutor acknowledged the phenomenon and made the submission that the fact that violence had not occurred in this case did not excuse the fact that the lives of passengers had been put in danger. In the judgment on sentence the court recorded that it considered this all important factor and imposed a fine of R3000 or imprisonment for three months.
- [25] On this occasion one is just able to reach the conclusion that the proceedings were in accordance with justice, but only insofar as the material discussed above addresses the concerns of Mr Nhleko, which arose in the four other matters.

SECTION 112(1)(a) OF THE CRIMINAL PROCEDURE ACT

'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-

- (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit 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, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-
 - (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or
 - (ii) deal with the accused otherwise in accordance with law;
 - (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.’
- [27] The amount of the fine determined by the Minister for the purpose of this section is R5000.
- [28] Section 112(1) of the Criminal Procedure Act deals with guilty pleas unaccompanied by a written statement such as is contemplated by s 112(2). The purpose of s 112(1)(a) is in general to promote efficiency in court proceedings in respect of minor offences. The section does not in so many words refer to minor offences, but instead confines the power of the court to convict on a plea of guilty alone to cases where the magistrate is of the opinion that the offence does not merit punishment of imprisonment (or any other form of detention) without the option of a fine or a fine in excess of R5000. (See *S v Gumede and Others* 2020 (1) SACR 644 (KZP)). The magistrate “may” convict on the plea of guilty without further ado in those circumstances. The word “may” conveys that the magistrate does not have to do so. The magistrate may proceed under s 112(1)(b) even if she or he is of the opinion that the conviction will not merit punishment of imprisonment without the option of a fine, or of a fine in excess of R5000.
- [29] The pleas conveyed by Mr Nzuza in these cases – “guilty in terms of s 112(1)(a)” - come perilously close to what is clearly not permitted, that is to say a plea tendered on condition that the magistrate does not question the accused. The magistrate should not let that pass. A plea of guilty which may be regarded as conditional should not be permitted.

[30] The decision as to whether a conviction may follow a plea of guilty without more is one for the magistrate, unless the prosecutor requests that the accused be questioned as contemplated by s 112(1)(b). Again, it is not appropriate for the prosecutor to state that the plea is accepted in terms of s 112(1)(a). If all that it is intended by that is to convey that the prosecutor is not going to request that the accused be questioned, then that is the way it ought to be put by the prosecutor to the court.

[31] In Gumede at paragraph 41 (d) the following conclusion was reached concerning represented accused persons.

‘In the case of a represented accused, the default position is that the magistrate may rely on the competence of the advice given by a legal representative to the accused person who pleads guilty. However, it cannot be regarded as compulsory for a magistrate to proceed without questioning a represented accused.’

(Own emphasis.)

[32] When a magistrate is of the opinion that a conviction on a plea of guilty alone would generate a sentence falling within the range permitted by s 112(1)(a) she has a discretion as to whether, despite that opinion, the accused person should be questioned. The discretion is to be exercised judicially. (See Gumede at paragraphs 41 (a) and (b)). Whilst the fact that an accused person is legally represented is clearly a factor that has to be taken into account when exercising that discretion, that factor is not decisive.

[33] It is clear from the records in all five cases placed before the court on review that the magistrate was dealing with accused persons whose primary goal was getting in and out of court as quickly as possible. Whilst each record reveals that Mr Nzuza had instructions on the personal circumstances of each accused which might have a bearing on sentence, there is no sign that he had instructions, except perhaps in the case of Ntanzi, of the facts of each case as far as the merits of the plea were concerned. (Of course that does not mean that Mr Nzuza did not in fact canvass those issues.)

[34] In my view there are a number of factors which lead me to the conclusion that the magistrate misdirected herself in not questioning the accused in terms of s 112(1)(b) in each of these cases.

[35] The first of these is the concept of a fair trial which, in terms of the Constitution, is the bedrock of our criminal justice system. The following passage from paragraph 11 of the judgment in *S v Dzukuda and Others*; *S v Tshilo* [2000] ZACC 16; 2000 (2) SACR 443 (CC) states the principle which should underlie the exercise of a judicial discretion as to whether an accused person who pleads guilty should be questioned.

‘In considering what, for the purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused.’

[36] The court in Gumede was dealing with seven cases in which an accused person was convicted on a plea of guilty alone. They were all shoplifting cases. One item was stolen in each case. The values of the stolen items ranged between R25 and R270. In each of those cases the prosecution did not request the court to question the accused in terms of s 112(1)(b). In each case the court’s

opinion that the sentence the offence would generate would be well within the bounds set by s 112(1)(a) was absolutely solid.

Furthermore the elements of the crime of theft are easily understood and each of the accused persons was legally represented. This case differs markedly from those considered in Gumede.

[37] In terms of s 90(2) of the National Land Transport Act, 2009, on conviction of the offence with which each of the accused in these matters was charged, a term of imprisonment not exceeding two (2) years, or a fine not exceeding R100 000, may be imposed. Given the purpose for which the carefully constructed system of operating licences was established under that Act, and the potential consequences of breaches of the system which were discussed by defence counsel and the prosecutor alike only in the case of Mr Sibiya, the magistrate ought not to have entertained an opinion as to the potential sentences with the same level of certainty as she would have done if these were minor shoplifting cases. The less certain the opinion, the more that factor points to the exercise of a judicial discretion in favour of questioning the accused to ensure that an innocent person is not going to be convicted.

[38] The five cases that serve before this court are not sufficient on their own to establish that there is a general shortcoming in the Empangeni Magistrates’ Court concerning the attention being given to sentencing in matters such as these. Nevertheless one may observe that it may be so that the sentences meted out in these cases are disproportionately low when measured against the seriousness of the offence, its prevalence and the penalties contemplated by the statute. If that is so, the question would arise as to whether in such cases an opinion that a conviction is going to generate a sentence which puts the case within s 112(1)(a) of the Criminal Procedure Act is one formed according to law. The pursuit of efficiency must not be allowed to compromise justice.

[39] The elements of the offence with which each of these accused were charged are by no means simple. Only the most basic elements of the charge are expressed in the charge sheet, leaving the rest to be uncovered by reading the sections to which reference is made. The central feature of the charge sheet is that the accused is charged with “operating” a public transport service. As pointed out earlier in this judgment a person who “operates” the

transport service is the person who carries on the business of operating the particular public transport service. An employed taxi driver does not carry on the business of operating the service. Neither is it necessarily so that the owner of the vehicle carries on the business. The person guilty under s 50(1) of the National Land Transport Act in each case is the person carrying on the business in which the taxi was being used when it was stopped on the road and found not to have an operating licence authorising what it was about. A simple plea of guilty to the charge sheet employed in each of these five cases would not suffice, and could not suffice to establish to the reasonable satisfaction of the magistrate that she had before her the person who was conducting the business in which the taxi was being used at the time and at the place stipulated in the charge sheet. In my view it was necessary for this reason alone to question each accused, if on no other subject, then on his or her conduct in connection with the operation of the taxi to be certain that the accused was the operator, that is to say the person conducting the business in which the taxi was being employed.

[40] For all the foregoing reasons under the present heading I conclude that all five of these cases were not conducted in accordance with justice because the accused person was not questioned, and should have been questioned, in order to ensure that he or she did indeed admit all the essential elements of the offence.

THE FOLLOWING ORDER IS MADE.

The proceedings, and the convictions and sentences imposed, in each of the following matters are reviewed and set aside, and the matters remitted to the Magistrates Court sitting at Empangeni.

- (a) The matter of Mbhekiseni Siboniso Ntanzu decided on 3 January 2024, case number DCB 30/2024.
- (b) The matter of Joyce Sbhongile Oliphant decided on 3 January 2024, case number DCB 40/2024.
- (c) The matter of Mbhekiseni Mbuyisani Buthelezi decided on 3 January 2024, case number DCB 35/2024.
- (d) The matter of Lizwi Mesuli Mthethwa decided on 3 January 2024, case number DCB 36/2024.
- (e) The matter of Jabulani Simphiwe Sibiya decided on 2 January 2024, case number DCB 31/2024.

OLSEN J

I agree

BEDDERSON J

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