

SOUTH AFRICA / JUDGMENT

S v Omar (R31/18) [2018] ZAFSHC 63 (6 April 2018) [2018] ZAFSHC 63

COURT

Free State High Court, Bloemfontein

BEFORE

P.E. Molitsoane, N.M. Mbhele

CASE / FILE NUMBER

R31/18

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: R31/18

In

the matter between:

THE
STATE
and
GOLAM MOHAMMED SHAIK
OMAR

CORAM:

MBHELE, J et
MOLITSOANE,
AJ

JUDGMENT

BY: MOLITSOANE, AJ

DELIVERED ON: 6 APRIL 2018

REVIEW IN TERMS OF SECTION 304(2)

OF THE CPA 51/1977

[1] This matter came before us on review in the ordinary course in terms of section 304(2) of the Criminal Procedure Act of 1977 (the CPA).

[2] The accused herein was convicted and sentenced to R4000 or 12 months imprisonment of which half thereof was suspended for a period of four months on certain conditions. The court also ordered that the suspension of the licence should not take effect.

[3] Upon receipt of the review record I sent a query to the trial court as follows:

- Did the accused admit that he drove his vehicle on a public road?
- Did the accused admit the applicable general speed limit on the said road?
- Did the accused admit that the speed measuring device herein used was in a proper working condition? Is it not a requirement that before he could be convicted on the strength of the speed measuring device the accused must admit this requirement.”

[4] The Magistrate has since responded to the query raised above as follows:

- By implication the accused knew that he was driving at 164 km/h and he knew it was unlawful see page 5 line 15-20.
- I would further refer you to page 5 line 15-20 addresses your concerns in bullet 2.
- In respect of bullet 3 calibration is not an issue the accused admitted wrongfulness hence conviction followed.

[5] It is apposite to repeat part of the proceedings in page 5 referred to in the response of the presiding officer on which essentially the conviction was based:

“ACCUSED: It was almost sunset time and I was pulled over by

5 Police. There was half an hour left for prayer when I was pulled over.

COURT: Why did they pull you over?

ACCUSED; Sorry Madam?

COURT: Why did they pull you over?

10 ACCUSED: Because of the speed I was doing Madam, at 164

COURT: You confirm you were driving a Fortuna?

ACCUSED: Yes Madam

COURT: With registration number [ND.....]?

15 COURT: Do you confirm that what you did, in fact that the speed that you were driving on the day in question it was unlawful and you intentionally drove the vehicle knowing that-with 164 knowing that it was wrong?

ACCUSED: Yes , your worship.

20 COURT: And that you confirm that you exceeded the general speed limit?

ACCUSED:Yes your worship

COURT: Yes Sir?

Thank you Your Worship the state accepts the plea Your Worship.”

[6] The purpose of questioning in terms of s112(1)(b) of the Criminal Procedure Act 51 of 1977 was explained as follows in *Negodeni v State* (00093/15)

[2015] ZASCA 132 at par [10]:

“As was stated in Nyanga ‘section 112(1)(b) questioning has a twofold purpose. To establish the factual basis for the plea of guilty and secondly to establish the legal basis for such plea. In the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning...The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions of unlawfulness, actus reus and mens rea. These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty.”

[7] It is the duty of the presiding officer to satisfy him/herself that the accused admits all the elements of the offence. Questioning of the accused acts as a measure against unjustified convictions. See *S v Naidoo* 1989(2) SA (A) at 121 E.

[8] In order to return a verdict of guilty on a charge of contravention of s59(4) of the National Road Traffic Act 93 of 1996(the Act), the court must be satisfied that:

- The accused;
- Drove the vehicle;
- On a public road;
- At a speed in excess of (1) the general speed limit applicable to that road, or(2) the speed limit as regulated by an appropriate road traffic sign in respect of the particular road, or(3) the speed limit as prescribed by the Minister of Transport in respect of the class of the vehicle concerned.

[9] In this case the accused did not admit that he drove on a public road. Admittedly the charge sheet indicates that the accused drove on the N1 National Road. Allegations in the charge sheet must be admitted or proven. It is my considered view that the court in this case cannot take judicial notice that the N1 National Road is a public road and thus absolve the state from proving that the accused drove on a public road. It has to be borne in mind that the accused did not admit that he drove on the N1. For the court to take judicial notice that N1 is a public road the accused should have at least admitted that he drove on the N1 road. This

element was consequently not admitted.

- [10] A contravention of s59(4) of the Act must be read together with regulations 292-295 of the Act. Regulation 292 regulates the general speed limit on the roads. A speed limit does not have to be displayed by a road traffic sign. The applicable speed limit depends on the type of the road, with the highest maximum speed limit on a freeway being 120 km/h. A general speed limit is applicable on all roads not displaying a specific speed limit.
- [11] In this case it is true that the accused admitted that he drove at an excessive speed of 164 km/h, way above all the general speed limits referred to in regulation 292. The presiding officer in this case on the question whether the speed measuring device used was in a proper working condition submits that "calibration" is not an issue as the accused admitted wrongfulness. This court, in the unreported case of *The State v Carsterns* (143/2011) delivered on 25 August 2011, dealing with a similar issue of a speed measuring device, said in par [9]:

"A radar is a measuring instrument. It is, to state the obvious a machine and machines malfunction if not properly maintained. The

precision of the radar is, like most measuring instruments, dependant on how regularly it is calibrated. If it is not calibrated regularly, as per the instructions of its manufacturer, it will malfunction. It is therefore important for the judicial officer to enquire from an unrepresented accused whether s/he admits that the device was functioning properly at the relevant time and whether the calibration certificate was shown to him/her. If it was not shown to him/her, s/he must be asked whether s/he admits that it was calibrated as required."

- [12] Clearly, questioning on the calibration of the speed measuring device is intended to satisfy the court of the integrity of the reading sought to be admitted. Mere admission of the speed of 164 km/h by an accused will thus fall short of satisfying the court that the speed measuring device was properly calibrated and was indeed in a proper working condition.
- [13] The court should also be satisfied that the speed measuring device was at the material time operated by a properly trained person. This, the court also failed to establish.
- [14] Upon conviction the court also failed to hold an enquiry into the cancellation or suspension of the drivers licence. It would seem that the court just *mero motu* ordered that the suspension of the licence shall not take effect. No evidence relating to the commission of the offence was led to satisfy the court that the suspension or cancellation of the drivers licence should not take effect. In view of the order I propose, I find it unnecessary to deal with this aspect any further.
- [15] I am of the considered view that this conviction cannot stand and I accordingly propose the following order:

ORDER

1. The conviction and sentence are set aside.

P.E. MOLITSOANE, AJ

I concur and it is so ordered.

N.M MBHELE, J

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Prepared on 9 October 2026 · Esheria