

SOUTH AFRICA / JUDGMENT

S v Sepotokela (A177/18,1346/2017,326/2017, 07/2017) [2018] ZAGPPHC 604 (23 April 2018) [2018] ZAGPPHC 604

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis, C.J Van der Westhuizen

CASE / FILE NUMBER

A177/18,1346/2017,326/2017, 07/2017

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HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)

NOT

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NOT OF

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(3)

REVISED.

A177/18

CASE NO: 1346/2017

High Court ref. no. 326/2017

Magistrate Serial No: 07/2017

Date:23/4/2018'

In

the matter between: THE
STATE
and
BOB BUTINYANA
SEPOTOKELA
REVIEW

JUDGMENT

DAVIS, J:

[1] The accused appeared in person in the Magistrates Court for the District of Emfuleni held at Sebokeng on 1 September 2017.

[2] Ex facie the charge sheet, he was charged as follows:

Count 1

DRIVING UNDER THE INFLUENCE OF LIQUOR OR DRUGS

THAT the accused is guilty of the offence of contravening the provisions of Section 65 (1)(a)(b) read with sections 1,33, 34, 35, 65(3), 65(4), 65(8), 65(9), 69(1), 73 and 89 of the National Road Traffic Act 93 of 1996 - Driving under the influence of liquor or drugs.

IN THAT upon or about 1910712015 and on Golden Highway a public road in the District of Emfuleni the accused did wrongfully drive a vehicle, to wit white Polo with registration number [...] whilst he was under the influence of intoxicating liquor or a drug having a narcotic effect.

FIRST ALTERNATIVE-EXCESSIVE AMOUNT OF ALCOHOL IN BLOOD

THAT the accused is guilty of the offence of contravening the provisions of Section 65(2)(a) read with Sections 1, 65(3), 65(4), 65(8), 65(9), 73 and 89 of the National Road Traffic Act 93 of 1996 - Excessive amount of alcohol in the blood

IN THAT upon or about 19/07/2015 and on Golden Highway a public road in the District of Emfuleni the accused did unlawfully (a) ...

(b) sit in the driver's seat of a motor vehicle to wit White Polo with registration number [...] the engine of which was running whilst the concentration of any specimen of blood taken from any part of his body was not less than 0,05 gram per 100 millilitres to wit 0,16 gram per 100 millilitres.

Count 2

RECKLESS/NEGLIGENT DRIVING

THAT the accused is guilty of the offence of contravening the provisions of section 63(1) read with sections 1, 63(3), 69, 73, 89(1) and 89(5) of the National Traffic Act 93 of 1996 - Reckless or Negligent Driving.

IN THAT upon or about 19/07/2015 and on Golden Highway a public road in the District of Emfuleni held at Sebokeng the accused did wrongfully drive a vehicle to wit White Polo Registration Number [...] recklessly or negligently.

- [3] The main charge in respect of count 1 was never put to the accused, only the alternative thereto as well as count 2.
- [4] The accused pleaded guilty to the charges put, was convicted of those charges and sentenced as follows:

COUNT 1:

The Accused is fined R 10 000, 00 (Ten Thousand Rand) or 3 (Three) month's imprisonment.

A further R20 000, 00 (Twenty Thousand Rand) or 6 (Six) month's imprisonment which is suspended for 5(five) years on condition that the accused is not convicted of Section 65 (1) and/or (2) of the National Road Traffic Act 93 of 1996 to drive a motor vehicle or to be in the driver's seat of a motor vehicle which engine is running while under the influence of liquor or drugs having a narcotic effect while the concentration of alcohol in any specimen of blood not less than 0,05 gram per 100 millilitres, committed during the period of suspension.

COUNT 2:

The accused is fined R 40 000, 00 (Forty Thousand Rand) or 12 (Twelve) months imprisonment which is wholly suspended for a period of 5 (five) years on condition that the accused is not convicted of Section 63(2), (3) of the National Road Traffic Act 93 of 1996 to drive a motor vehicle and/or motor cycle recklessly and/or negligently on a national and/or public road committed during the period of suspension. .

IN TERMS OF SECTION 35 NATIONAL ROAD TRAFFIC ACT 93/1996:

IN TERMS OF SECTION 103(2) ACT 60 OF 2000:

The accused is not declared unfit to possess a fire arm.

- [5] After an enquiry in terms of Section 297
- (5) of the Criminal Procedure Act 51 of 1977 an application to pay the imposed fine was granted with the effect that the accused had to pay the R 10 000 fine by way of a payment of R 2000.00 on 01/09/2017 and the balance of R 8000 to be paid in monthly instalments of R 1 333.33 each on 01/10/2017, 01/11/2017, 01/12/2017, 02/01/2018 and 01/02/2018.
- [6] It is these convictions and sentences which have been sent for review in terms of Section 302(1)(a) of the Criminal Procedure Act 51 of 1977.

[7] Upon a perusal of the record, the following appears:

7.1 A forensic chemistry laboratory report was handed in in terms of Section 212 of the Criminal procedure Act no 51 of 1977 and was accepted as Exhibit A. This indicated a blood alcohol level of 0,6 grams per 100 millilitres;

7.2 A JBS form regarding a medical examination of a pedestrian was similar handed in and accepted as Exhibit B. This showed some injuries sustained by the pedestrian.

[8] The questioning of the accused by the learned magistrate in terms of section 112(1)(b) of the Criminal Procedure Act indicate the following:

8.1 On the date, time and place in question, the accused was indeed the driver of the motor vehicle mentioned in the charge sheet;

8.2 At a four-way stop intersection, the accused ran over a pedestrian. He stated, in response to questioning that he had "bumped" the pedestrian and, upon realising this, had pulled to the side of the road and proceeded to call both the South African Police Services and an ambulance. Last-mentioned was called as the pedestrian could not walk (having sustained a fractured leg).

8.3 Further enquiries elicited admissions that the accused had consumed some 2,5 litres of umqombothi prior to the incident. He was arrested at the scene and taken to the Kopanong Hospital some 2 hours later where a sample of his blood was taken and sealed in his presence.

[9] The review initially came before Petersen AJ who commented as follows on 24 October 2017:

The accused was questioned at length by the learned magistrate within the purview of section 112(1)(b) of Act 51 of 1977. At times the learned magistrate interjected, proposed certain scenarios to the accused and intimated at some point that "I am going to record a plea of not guilty on both charges. The court will prove all this stuff, then you will have to prove the contrary . ..". See page 17: Lines 18 - 25 and page 18 to 21. Did the questioning comply with the intention of the legislature as set out in the said section and should a plea of Not Guilty have been noted when the aforementioned was said by the magistrate instead of continuing the questioning? See *S v Williams* 2008

(1) SACR 65 (C) at [4] - [7], particularly para 7.

Please comment on the use of language such as "Sir you are sitting the whole pot miss, according to the Law, if you climb into the vehicle, start, nobody forces you, it is internationally".

[10] The learned magistrate responded hereto as follows:

3.1 On face value it might look like if I might have badgered the accused but this because of the defective interpretation by the interpreter

not properly explaining the correct interpretation ... see page 7 line 2 - 5 where I corrected the interpreter not interpreting everything and page 8 line 10 - 22;

Slow lane left and fast lane right the interpreter did not explain the accused correctly and in line 21 the interpreter confirms ... Yes rectify. ...see page 16 line 15 mother not mentally okay but when later confronted on page 17 line 3 not about mentally but mother is muted or deaf person, which also not correct interpretation;

3.2 The reasons for these questions asked by myself is to allow the accused to explain in his own laymen understanding but the interpreter was not 100% explaining the contents;

3.3 I indeed studied S v Williams 2008 (1) SACR (C) case about the line of questioning by presiding officers which is improper out of order and bombarding an accused to make a trial unfair;

3.4 Again I honestly believe the page 18 line 6 "sitting the pot miss" not correct and the correct version is "missing the whole point";

3.5 I repeat myself I enquired these questions and scenarios to get a better understanding in the light what the accused wanted to say and the incorrect interpretation and not to force the accused to admit something he was admitting to;

I justly believe the questioning was not intended to bombard or badger the accused into submission or answers what a presiding officer wants to hear to convict but lure an informal question for a informal laymen's answer.

I also thank the Honourable Judge for the tutoring on this point in asking questions in term of section 112(1)(b).

[11] The Deputy Director of Public Prosecution seized with the matter commented on both the initial reviewing judge's as well as the learned magistrate's comments. The Senior State Advocate who prepared the comments correctly pointed out that the J4 (the Review Case cover sheet) incorrectly reflects the sentence imposed. He further (correctly) observed that the formulation of the first alternative charge has certain formal defects. They are these: in the heading to the first alternative charge contravention of section 65(2)(a) of the National Road Traffic Act is mentioned as the charge but the corresponding par (a) of the printed charge sheet has not been completed. Section 65(2)(b) of the National Road Traffic Act is not mentioned in the first alternative charge, although the corresponding part (b) of the printed charge sheet has been completed.

Both the incorrect section and the completed mis-matching portion of the charge sheet had been put to the accused (to which he had pleaded guilty). The Senior State advocate opined that the accused had preferred a plea of necessity and opined that a plea of not guilty should have been noted in terms of section 113 of Act 51 of 1977.

[12] The DDPP's comments were as follows:

1.

I agree that the convictions and sentences should be set aside and the matter should be remitted to the court a quo in terms of section 312 of CPA. The magistrate should be directed to act in terms of section 113 of the CPA;

2.

The accused was undefended and it is submitted that the presiding officer's questions to establish the elements of the offences in question were rather confusing. The accused raised a defence that the magistrate simply ignored. Furthermore, it is not clear whether the accused, an unsophisticated and unrepresented person, understood the difference between reckless and negligence as a form of intent. It is also dubious whether the blood sample was indeed taken within the prescribed period.

3.

It is a pity that the accused has most probably already paid his fine and he will endure further hardship by returning to court. However, given the improper questioning there is doubt as to whether the accused had a valid defence and the state will have to prove the offences.

[13] I agree with the comments and submissions of the Senior State advocate and the DOPP for the following reasons:

13.1 The first alternative charge putt to the accused suffers from the formal defects set out above (the learned magistrate, in his response to the initial reviewing judge's comments, undertook to bring these defects to the attention of the Senior prosecutor to have the printed charge sheets rectified);

13.2 The accused testified that he had been attending a traditional "function" (the interpreter's description) at his

father's house where traditional liquor had been consumed during the course of the afternoon and evening. He had no intention of driving his vehicle which had been parked at a nearby sports field. His mother, who lives in Bophelong Township and in whose care his minor daughter had been left, telephoned him and requested him to urgently take the daughter to her grandmother as she had fallen ill. He viewed the matter as extremely urgent and described it as a matter of life and death. He responded so quickly that he did not even think his actions through properly. At the intersection in question he yielded as there was no other traffic when the pedestrian moved over from the slow lane into the accused's lane of travel and he "bumped" him. After the accused had himself called an ambulance and the police, he was arrested on the scene whereafter he was driven around town for about two hours before the blood sample was taken. This was of because the police first had to "off- load" other occupants of their vehicle in Sebokeng before proceeding to Vereeniging.

13.3 The questioning of the accused by the magistrate spanned some 16 typewritten pages. Apart from questioning, it also included accusations levelled by the magistrate to which the unrepresented accused, after some badgering, conceded. In respect of many others he displayed a lack of intent. Some examples are the following:

13.3.1 "Court: You confirm not to stop at the stop street is reckless driving?

Accused: Yes I confirm your Worship.

Court: You wilfully did not stop?

Interpreter: Your worship?

Court: Willfully did not stop?

Interpreter: Wiillfully?

Court: Willfully, intentionally did not stop at the stop street?

Accused: I did that your Worship I did not stop but it was unintentionally

Court: It was unintentionally? Now where were you going? You were going on your way to where?"

12.3.2 "Court: You admit you acted wrongful to drive a motor vehicle whilst the alcohol level exceeds 0, 05 millilitre per grans, 0,05 per 100 millilitre (sic)?

Accused: Yes, your Worship, I know but it was not intentionally, I had no choice.

Court: No choice?

Accused: Yes, your Worship.

Court: So, it is not intentionally? Why do you say you did not have a choice? ...

Accused: It was an emergency your Worship and the child was sick and I had to take the child to another place.

Court: Are you the only one in your household having a driver's license?

Accused: It is myself and my father, your Worship.

Court: Now again, you know you consumed alcohol, why did you not ask your father to drive?

Accused: My father, when I received the call, your Worship, he was drinking then."

13.3.3 "Court: If your mother is not mentally okay, do you think it is responsible to leave your child at a person who is not mentally okay?

Accused: Your Worship, it is not that my mother is mentally disorientated or is not mentally okay, but is that my mother is speaking in sign language because I grew up to where I am, it was under her guidance on under her control.

Court: What do you mean mentally, describing that your mother is speaking sign language now. Let us talk about your sister. What could your sister do, could she look after the child?

Accused: Your Worship the sister to take the child or look after the child?

Court: Look after the child. The child is now very sick, you are under the influence, wilfully climb into that vehicle, taking a risk, drive on a public road under the influence of alcohol during the evening?

Accused: Your Worship everything happened so quickly and realise now I had to go and take the child.

Court: It is not had to. There is no had to. So you say it is a 'had to' you are taking responsibility, so you admit that you are irresponsible, intentionally and wrongfully climbed into that vehicle and was the cause of the accident?

Accused: As I have made mention your Worship before, it was not intentional.

Court: Tell me what is intentionally? Define intentionally for me. Not intentionally. Define that with me"

13.4

The initial reviewing judge referred to *S v Williams* 2008 (1) SACR 65(C) at [4] - [7] in his request for comments to the magistrate. Par [7] of the said judgment reads as follows:

"It is irregular for a magistrate, regional magistrate or judge to subject an accused to critical questioning where the latter denies an element of the offence, or to ignore the denial and the attempt to convince the accused that such denial is improper or incorrect.[1] The questioning in terms of s 112(1)(b) of the Act should be aimed at determining what the attitude of the accused towards the allegations in the charge-sheet is, and not at a determination of what it ought to be according to the view of the judicial officer."

13.5 The "basic rules and principles governing questioning in terms of s112(1)(b)" have been set out by the learned authors Du Tait et al in *Commentary on the Criminal Procedure Act* with reference to various case law at 17 - 15 to 17 - 18. They are, briefly, the following:

13.5.1 The relevant section does not entitle the court to cross-examine the accused;

13.5.2 Leading questions should as far as possible be avoided;

13.5.3 It is improper to ask an accused whether he admits all the allegations made in the prosecution's informal outline of the facts and charges;

13.5.4 It is inadequate for the court to simply ask the accused whether, one by one he admits the allegations or individual components mentioned in the charge sheet;

13.5.5 The court should never attempt to persuade an accused that his denial of an incriminatory fact is incorrect or not valid;

13.5.6 The court should attempt to avoid the use of unnecessary legal terminology.

13.6 In questioning an accused, the presiding officer should bear in mind that the purpose is to obtain an evaluation of the tendered plea of guilty and to assess whether it has been properly tendered and covers all the elements of the charge with a full understanding and appreciation thereof. This should be done bearing in mind that the accused is in terms of section 35(3)(h) of the Constitution presumed to be innocent and has a right not to testify at his hearing. His plea of guilty is therefore at variance with this presumption and the validity and correctness of the variation is what is to be established by the questioning in terms of section 112(1)(b).

13.7 It is clear that the learned magistrate in this case did not approach his questioning of the accused in the correct fashion. He breached the "basic rules" referred to above, in particular those summarised in paragraph 12.5.1, 12.5.5 and 12.5.6.

[14] The proceedings were therefore not in accordance with justice and must be reviewed and set aside.

[15]

Order:

1. The convictions and sentences are set aside.
2. The matter is remitted to the court a quo in terms of Section 312 of the Criminal Procedure Act 51 of 1977.
3. If the matter proceeds a plea of NOT GUILTY should be recorded by the magistrate, who is directed to act in terms of Section 113 of the Criminal Procedure Act, 51 of 1977.
4. Any fine already paid by the accused is to be repaid to him and the clerk of the court is directed to bring the contents of this judgment to the notice of the accused and to see to such repayment.

N DAVIS

JUDGE OF THE HIGH COURT

I agree

C.J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

[1] See S v Jacobs 1978 (1) SA 1176 (C)

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