

REPORTABLE

**IN THE KWA-ZULU NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

High Court Ref No: R278/12

Magistrates Serial No: A53/12

Case No: 16/2012

THE STATE

versus

SIYABONGA VINCENT MZIMBA

REVIEW JUDGMENT

Delivered on: 7 June 2012

STEYN, J

- [1] The accused in the present matter was convicted in the Magistrates' Court Kokstad, in the district of Mount Currie on contravening section 65(1)(a) of the National Road Traffic

Act,¹ No. 93 of 1996, in that he drove a motor vehicle while under the influence of intoxicating liquor. The conviction follows on the accused's plea of guilty and the subsequent questions asked to him and his admissions in terms of section 112(1)(b) of the Criminal Procedure Act, No. 51 of 1977 ('the Act'). The accused was sentenced on the same day to a fine of R3000.00 (three thousand rand) or to undergo twenty-four (24) months' imprisonment. No order was made in terms of section 35 of the NRTA.

[2] The matter was automatically reviewable under section 302 of the Act and the record was placed before a reviewing judge of this division to determine whether the proceedings were in accordance with justice.

[3] On 16 March 2012, Booyens AJ asked the Magistrate for reasons and to explain the following:

"The Magistrate is requested to indicate why she convicted the accused of drunken driving on his section 112 statement. The accused did not admit all the elements of the offence driving under the influence of liquor. He did admit that he did drink some liquor but he does not admit that his driving was affected by that, nor is the reading of

1 The 'NRTA'.

the breathalyser or the blood alcohol sample attached to the judgment.

The Magistrate is requested to supply her reasons for convicting the accused in this matter.”

- [4] The learned Magistrate proffered the following explanation, which was received by the Registrar of this Court on 29 May 2012:

“I kindly acknowledge the Honourable Mr Acting Justice Booyens (Acting) requests.

I admit that I have made a mistake by not asking the question about whether accused mental facilities were impaired by driving under the influence of liquor which is one of the elements of driving under the influence of liquor.

I humbly request Honourable Mr Justice Booyens (Acting) to confirm the sentence imposed has (sic) an option of a reasonable fine on traffic offences of this nature.”

- [5] I shall now turn to the reasons of the learned Magistrate which in my view fail to deal with the misdirection of the accused being convicted without questioning him on the effect that the alcohol had on his ability to drive the motor vehicle or him acknowledging that he lacked the necessary skill to drive the motor vehicle. In *S v Engelbrecht*² Knoll J,

² 2001 (2) SACR 38 (C).

after considering a host of relevant cases pertaining to the offence of driving under the influence of alcohol, refers to the essential elements of the crime as follows:

*“That the accused (i) drove; (ii) a vehicle; (iii) on a public road; (iv) while under the influence of liquor or drugs; (v) mens rea.”*³

- [6] It is evident from the query raised by the reviewing judge that he was not convinced that the accused admitted that he was driving his motor vehicle while ‘under the influence.’

This element of the crime requires an impairment, not only of an accused’s mental state of mind, i.e. that the alcohol induced him to a state that he was prepared to take risks, but that his driving ability was impaired. It is therefore necessary that an accused 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.⁴

³ *Ibid* at 46i-j.

⁴ See *S v Henning* 1972 (2) SA 546 (N); *S v Engelbrecht supra* and *Milton and Cowling* South African Criminal Law and Procedure vol III, Statutory Offences at 45 et seq.

[7] The learned Magistrate in this instant case, in my view, erroneously holds the view that the accused should have been questioned on his mental ability which is not sufficient for a conviction on a count of drunken driving. Secondly, the learned Magistrate had lost sight of the fact that the conviction must be overturned since the accused failed to admit that the alcohol had an influence on his driving ability. It is trite that when an accused does not admit all the elements of an offence charged with, that a court cannot be satisfied with his guilt and that a plea of not guilty should be entered. The learned Magistrate's request to confirm the sentence cannot be adhered to because no court would be competent to confirm a sentence in the absence of a conviction. The Magistrate also failed to conduct an enquiry as is required by the NRTA or issue an order in terms of section 35 of the NRTA. In my view the learned Magistrate was obliged to inform the accused, who was unrepresented, of the provisions of section 35(1) and (2) of the Act, before imposing sentence.⁵ It is important to state that the record is

5 See section 35(4) reads as follows:

“(4) A court convicting any person of an offence referred to in subsection (1) shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and of

silent on the issue whether the accused is the holder of a driver's licence.

- [8] Importantly it is the duty of each and every presiding officer to duly inform an accused of his/her rights and not to delegate that duty to others. *Ex facie* the record the Magistrate clearly entrusted another officer with this duty. The record reads as follows:

*“COURT: Can you please advice the accused person of his right to review as well as the appeal rights. [Pause]
INTERPRETER: The review and appeal rights have been fully explained to the accused person. He declines to lodge an appeal.”*⁶

The system of automatic review⁷ is valued as a form of protecting fundamental rights⁸ of an unrepresented accused and it should not be compromised by presiding officers who fail to inform accused persons of their rights to forward written submissions to the clerk of the Court within three (3) days of the imposition of sentence, so that such submission may be considered by a judge in chambers.⁹

subsection (3) to the notice of such person.”

6 See page 5 of the record.

7 See s 302 of the CPA.

8 See section 35(3)(o) of the Constitution of the Republic of South Africa, 1996.

9 See section 303 of the Act.

[9] In the light of the aforesaid I cannot confirm that the proceedings were in accordance with justice. The irregularities relate to a failure to comply with section 112(1)(b) of the Act and therefore the matter should be remitted to the court *a quo* in terms of section 312 of the Act. I am mindful of the Supreme Court of Appeal's interpretation of the said provision and that the course of the provision should not be followed if compliance with the section would be unfair.¹⁰ In my view justice would be served if the matter is remitted to the trial court. I find the dictum of *S v Mshengu* apposite, especially para 8 that reads:

*"The course 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 a remittal if the circumstances of the case are such that the remittal will be inappropriate."*¹¹

[10] Magistrates have an essential role to fulfil and dispense justice. Unrepresented accused persons are extremely vulnerable and it is the duty of a presiding officer to assist an unrepresented accused and inform him of his rights. In the

10 2009 (2) SACR 316 (SCA).

11 *Ibid* at 322e-f.

present matter the learned Magistrate has failed to inform the accused of his rights to a review, she also failed to inform him of his right to make submissions in regard of section 35 of the NRTA. This case might be an isolated case, but I am of the view that it requires scrutiny of the Magistrates' Commission to offer assistance to the Magistrate, should it be appropriate or necessary.

[11] Accordingly the following order is made:

- i) The accused's conviction and sentence are set aside.
- ii) The case is remitted to the court *a quo* on the ground that a plea of not guilty be entered in terms of section 113 of the Act, and that the prosecution be given an opportunity to proceed with prosecution.
- iii) The Registrar is directed to send a copy of this judgment to the Chair of the Magistrates' Commission.

Steyn J

Jappie J: I agree

Jappie J