

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH
(WESTERN CAPE HIGH COURT,



AFRICA
CAPE TOWN)

High Court Ref No: **13125**

Case No: **A2404/2013**

Magistrates Serial No: **001/2013**

In the matter between:

THE STATE

and

SIMPHIWE JUSTICE KUMKANI

REVIEW JUDGMENT: 21 MAY 2013

MANTAME, J

1. This matter came before me on 12 February 2012 in terms of Section 304 of the Criminal Procedure Act 51 of 1977.

2. Upon perusing the record, I noted that the proceedings were mechanically recorded. The accused was charged with contravening the provisions of Section 65(2)(a) read with Section 1, 65(3), 65(4), 65(8), 65(9), 69(1), 73 and 89 of the National Road Traffic Act 93 of 1996, that is, driving with excessive amount of

alcohol in blood. Accused drove the vehicle whilst the concentration of alcohol in his blood was not less than 0,05 gram per 100 millilitres, to wit, 0,28 gram per 100 millilitres.

3. On 3 January 2013, accused pleaded guilty to the charge and made a statement in isiXhosa in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977. In the said statement, accused pleaded guilty and admitted all the elements of the crime. The magistrate then found him guilty in terms of the plea and sentenced accused as follows:

“R6000.00 fine or twelve (12) months imprisonment of which R3000.00 or six (6) months is suspended for five (5) years on condition that the accused is not convicted of contravening Section 65 Act 93 of 1996 committed during the period of suspension. In terms of Section 35(3) suspension of drivers licence shall not come into effect. Deferred fine granted”.

4. At page 11, at the end of the sentencing proceedings, the magistrate asked a question: *“Do you understand?”*- and would glean from the record that she was referring to the accused payment of deferred fine as the prosecutor broke down the monthly payments into specific dates. At line 16 the magistrate said something on record, but was captured as inaudible.

5. It therefore appeared that the accused was not advised of his rights after sentencing. On the same day, I returned the record back to the magistrate with the following remarks:-

“The record does not reflect that the accused person was advised of his rights after sentencing. Magistrate is requested to explain if that explanation ever took place”.

6. The response took quite some time to get to my chambers. On 20 May 2013, I received the magistrates’ response dated 16.04.2013 with a cover letter from the Judicial Head Strand – A Farber, explaining the reasons for the delay on responding back. Mr. Faber explained that Ms Mpande, the magistrate, was a contractual appointee whose contract ended on 11 January 2013 at Strand Magistrate Court. The magistrate has since been appointed at Cape Town Magistrate’s Court as a magistrate, also on contractual basis. That resulted in their communication not being easy, hence the delay. In my view, such explanation is reasonable in the circumstances.

7. I now turn to deal with the magistrates’ response that reads as follows:-

“Re-review

I refer to the query, dated 12 February 2013 by the Honourable Judge.

I confirm that as appears in the records, no explanation was made to the accused person, regarding his rights to review and/or appeal. I accept that this was a mistake from my side. Should it be the Honourable Judge’s opinion that this amounts to the irregularity of the proceedings, I will leave it in her hands to deal with this matter accordingly.

I will therefore be amenable to whatever decision the court deems appropriate

in this case, i.e. to let the matter start denovo.

Yours truly,

Ms N Mpande.”

I have taken due notice of the fact that though the magistrate had intimated that if there are any irregularities in the proceedings, she is leaving it in my hands to deal with the matter. In the next line, the same magistrate advises that she is amenable to whatsoever decision the court deems appropriate in this case i.e. to let the matter start *de novo*.

8. Section 304 lays down the procedures to be followed in automatic reviews. Even where sentences were competent and regularly imposed, a reviewing court may intervene wherein subsequent events, if no interference occurs, would lead to a miscarriage of justice – **See S v Z & 23 similar cases 2004(1) SA 400 E.**

9. In the present matter, the magistrate, on her own admission, has failed to explain to the accused of his rights of review and appeal after sentencing. This error or mistake infringes upon accused rights as entrenched in The Constitution of the Republic of South Africa, 1996, Chapter 2 of the Bill of Rights, Section 35(o) which reads as follows: *“Every accused person has a right to a fair trial, which includes the right to appeal to, or review by a higher court”*.

In my view, if these rights are not adhered to that would be tantamount to a travesty of justice.

10. In my view, accused has been deprived the constitutionally entrenched right by the magistrate. This was an unrepresented accused who knew nothing about the rule of law. It was therefore incumbent upon the magistrate to inform the accused of his rights, so as to make up his mind both on conviction and sentence. It is my judgment that the accused cannot be double penalised due to the error committed by the magistrate. It would be unfair for this court to refer the matter to the magistrate's court for the proceedings to start *de novo* due to no creation of the accused.

11. Consequently the proceedings in this case appear not to be in accordance with justice. In the interest of justice, the conviction and sentence is set aside and the accused is entitled to a refund of his deferred fine already paid.

MANTAME, J

I agree, and it is so ordered.

HENNEY, J

Judgment by : MANTAME, J

Nature of case : REVIEW JUDGMENT

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Judgment delivered on : TUESDAY, 21 MAY 2013