



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: CA & R: 142/2023

Delivered on 5 September 2023

In the matter between:

THE STATE

and

ATHI MBALEKWA

REVIEW JUDGMENT

Bloem J

1. The presiding magistrate sent the record of proceedings before him on review with the request that the accused's conviction and sentence be set aside since the accused was convicted under a statutory provision when the facts admitted by him and on which he was convicted, did not support the conviction.
2. The accused was charged with having contravened section 65(2)(a) of the National Road Traffic Act 93 of 1996 (the Act), which provides that no person shall drive a vehicle on a public road while the concentration of alcohol in any specimen of blood taken from any part of his or her body is not less than 0,05 gram per 100 millilitres, or in the case of a professional driver referred to in section 32, not less than 0,02 gram per 100 millilitres.

3. The accused's legal representative handed a written statement by the accused into court, in which the accused set out the facts which he admitted and on which he pleaded guilty. The written statement was on a roneo form. Therein the accused admitted that on the day in question he drove a vehicle on a public road. A traffic officer stopped him. He furthermore admitted that a specimen of his exhaled breath was correctly taken and that "*the specimen of my breath taken from my body was correctly analysed and the concentration of alcohol in my breath at the time that I drove the said motor vehicle was 0.07 milligrams per 100 milliliters of breath.*" The magistrate was "*satisfied that the accused is guilty and he is accordingly convicted as charged*". The accused was sentenced to pay a fine of R1 000 or undergo four (4) months' imprisonment of which R500 or two (2) months' imprisonment was suspended for three (3) years on condition that the accused not be convicted of "*excessive amounts of alcohol in blood in contravention of section 65(2)(a) of Act 93 of 1996, committed during the period of suspension*".
4. I had a difficulty with the conviction in that the admitted facts contained in the accused's statement under section 112(2) of the Criminal Procedure Act 51 of 1997 did not support a conviction under section 65(2)(a) of the Act. It appears that the intention was for the accused to be convicted under section 65(5)(a) of the Act. He was not charged under section 65(5)(a), which reads as follows:

"No person shall on a public road-
(a) drive a vehicle; or
(b) occupy the driver's seat of a motor vehicle the engine of which is running, while the concentration of alcohol in any specimen of breath exhaled by such person is not less than 0,24 milligrams per 1 000 millilitres, or in the case of a professional driver referred to in section 32, not less than 0,10 milligrams per 1000 millilitres."
5. I requested the Director of Public Prosecutions in Makhanda to express an opinion on the magistrate's request, particularly whether the charge sheet could, at this stage, be amended, since section 86 of the Criminal Procedure Act allows for the amendment of a charge "at any time before judgment". I also sought her opinion as to what should happen to the conviction and sentence if the charge could not be amended at this stage.

6. The Director of Public Prosecutions provided this court with an opinion prepared by Mr Maarman of that office. I expressed my gratitude to Mr Maarman for his helpful opinion. He agreed that, on the facts which the accused admitted and on which he pleaded guilty, he could not have tendered a plea of guilty under section 65(5)(a) of the Act. The reason therefor is that, for a person to be convicted under section 65(5)(a), the concentration of alcohol in any specimen of breath exhaled by such a person should not be 0.24 milligrams per 1 000 milliliters or more. The accused said that the concentration of alcohol in his breath when he drove the said motor vehicle *“was 0.07 milligrams per 100 milliliters of breath.”* The magistrate could not have satisfied himself that the accused was guilty of an offence under section 65(5)(a) because it was unclear, on the accused’s plea, what the concentration of alcohol was in his breath when he drove the vehicle.

7. The opinion continued as follows:
 - “4. The fault lies not with the charge sheet but with the shoddy draftsmanship of the plea. It is unknown what was read into the record by the accused’s legal representative as it was not recorded.
 5. In the circumstances, based exclusively on the written plea, the magistrate could not have been satisfied of the accused’s guilt on a charge of contravening section 65(2)(a) of the Act, even though an attempt was made by the accused’s legal representative to adapt the form to reflect that the accused was pleading guilty to a contravention of section 65(2)(a) rather than section 65(5)(a) of the Act.
 6. It is submitted that the conviction and sentence should be set aside and the matter remitted to the trial magistrate to clarify with the accused’s legal representative to which section of the Act the accused intended to plead guilty. If the intention was always to plead guilty to a contravention of section 65(2)(a) of the Act, as seems to be the case, the plea must be amended to reflect that a specimen of blood, and not breath, was drawn from the accused.”

8. I agree with Mr Maarman that the conviction and sentence should be set aside. However, I do not agree that the matter be remitted to the trial magistrate the Director of Public Prosecutions should decide whether or not the accused should be recharged and, if so, under which section of the Act. If he is recharged, he must appear before a magistrate other than the magistrate who convicted and sentenced him. If convicted, the period of imprisonment that the accused might have served, should be taken into account when he is sentenced.

9. In the result, it is ordered that the accused's conviction and sentence be and are hereby set aside.

GH BLOEM
Judge of the High Court

I agree.

NG BESHE
Judge of the High Court