IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)

Case No. 13/2018

THE STATE

and

LUNGA MANTAKANA Accused

REVIEW JUDGMENT

HARTLE J

[1] This matter came before me by way of automatic review.

[2] The accused was convicted on 19 February 2018 by the Zwelitsha Magistrate's Court of the offence of contravening section 65 (1) (a) of the National Road Traffic Act Act 93 of 1996 ("NRTA"), colloquially referred to as "drunk driving," pursuant to his plea of guilty to the "main count" and sentenced to pay a fine of R4 000.00 or in default of payment to undergo twelve months' imprisonment of which R1 000.00 or two months' imprisonment was suspended for three years on condition that he is not convicted of driving a motor vehicle

under the influence of intoxicating liquor or drug having a narcotic effect, committed during the period of suspension.

[3] What is customarily put to an accused person as an alternative to a main charge of drunk driving, namely a contravention of section 65 (2) (a) of the NRTA (driving with an excessive concentration of alcohol in any specimen of blood taken from his body), was deleted on the charge sheet and deliberately not put to the accused to plead to. Since he was unrepresented when he pleaded guilty to the only charge, the court put certain questions to him to determine his guilt in this respect.[1]

[4] The nature of the questioning which ensued however gives the impression that the magistrate believed the accused's plea to be a guilty one to the alternative charge despite asking how he wished to plead to the "main count." He was probed for example, concerning how long after he was arrested at a roadblock near the Bhisho High Court he was taken to a medical doctor to have his blood drawn. (It appears that when he was stopped at the roadblock a breathalyzer test was undertaken which indicated immediately, according to his own admission, that the limit of alcohol in his blood was above the legal limit.) He agreed that a blood

[1] The questioning was conducted pursuant to the provisions of section 112 (1) (b) of the Criminal Code, which provides that:

> "**112. Plea of guilty.**—(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea—
>
> (*a*) ……
>
> (*b*) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence."

specimen had been extracted within two hours of his arrest. He also agreed, on the assumption that a certificate exists to this effect, that the concentration of alcohol in his blood was not less than 0.05 grams per 100ml, namely 0.20 grams per 100 ml.[2] Asked if he knew that it was unlawful to drive a motor vehicle well knowing that he had "partaken in liquor," he answered affirmatively.[3] He clarified that he had consumed five "dumpies" of 750ml Heineken beers.

[5] The state was thereupon asked to indicate if the facts were "in line", pursuant to which the conviction was recorded.[4] Sentence proceedings then ensued.

[6] It is self-evident that not one iota of evidence was recorded to indicate that the accused's driving ability was impaired by the consumption of alcohol, even by any of his admissions elicited during the questioning. No collision had taken place and it was further not evident that the manner in which he had driven endangered anyone else.

[7] The magistrate simply failed to elicit the proper admissions which were required to sustain the conviction on the "main count" if it could be sustained at all

---

[2] He was asked if he manage(d) to get the results pursuant to the extraction of blood which he conceded had been "done within two hours". He answered in the negative. There is no further discussion about the forensic analysis result, neither does it form part of the record. Her next question was whether he disputed that the concentration of alcohol in the specimen was not less than 0,05 grams per 100 ml. He answered that he could not. It is a trite principle that the certificate ought to be entered into evidence, well at least assuming the questioning concerns a likely conviction to the alternative charge.

[3] It is obvious that this answer could never establish the element of unlawfulness on either the main or the alternative charge.

[4] This question would only be necessary to determine if he was pleading to an offence of which he may be convicted on the charge. See S v Dyantiyi [2012] JOL 28943 (ECG) at par [10]. Since the alternative charge was deleted, it is not sure why the question was asked, but the fact that it was suggests that the magistrate was focused on convicting him on the alternative charge. She yet went on to convict him on the main count however on the basis that she was satisfied that he had admitted to all the elements of such offence. She was either confused or failed to appreciate the distinction between the two offences which each have their own separate elements.

given that the only indication was that the accused was arrested at a roadblock and failed a breathalyzer test.

[8] The fact that the accused's blood test co-incidentally revealed an alcohol concentration of 0.20 grams per 100 ml does not *per se* warrant an inference that he was incapable of exercising proper control over his motor vehicle, even if the result is on its own a high one. There must be some self-standing indication that his driving ability was impaired by the consumption of alcohol.[5] Indeed the magistrate ought by her questioning to have established the element of "under the influence of intoxicating liquor" referred to in section 65 (1) (a) of the NRTA.[6]

[9] Absent effective questioning to determine whether the accused admits all the allegations in respect of the "main count" the conviction (and consequentially the sentence imposed) falls to be set aside and remitted to the magistrate to be dealt with on the basis provided for by section 312 of the Criminal Procedure Act, no 51 of 1977.[7]

[10] In the result the following order issues:

---

[5] S v Masumpa 2005 (2) SACR 512 (Ck); S v Smith 1993 (1) SACR 208 (C).

[6] S v Fasi 2010 JOL 2594 (ECG) at para [2] and [3].

[7] The section provides as follows:

> **"312. Review or appeal and failure to comply with subsection (1) (*b*) or (2) of section 112.**—(1) Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1) (*b*) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.
> (2) When the provision referred to in subsection (1) is complied with and the judicial officer is after such compliance not satisfied as is required by section 112 (1) (*b*) or 112 (2), he shall enter a plea of not guilty whereupon the provisions of section 113 shall apply with reference to the matter."

(a) The conviction and sentence are set aside;

(b) The matter is remitted to the magistrate for proper questioning in terms of section 112 (1) (b) of the Criminal Procedure Act, no 51 of 1977.

_____

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

_____

I STRETCH

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 12 July 2018