

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)**

CASE NO: CA&R 303/2009

DATE HEARD: 25/08/2010

DATE DELIVERED: 13/9/10

NOT REPORTABLE

In the matter between

MZAMO NGCAWANA

Appellant

and

THE STATE

Respondent

JUDGMENT

PLASKET J:

[1] The appellant was convicted in the Magistrate's Court, East London of the offence of driving a motor vehicle on a public road while the concentration of alcohol in his blood was in excess of 0.05 grams per 100 millilitres. This is a contravention of s 65(2)(a) of the National Road Traffic Act 93 of 1996. He was sentenced to a fine of R1000,00 or three months imprisonment, suspended conditionally for five years. He appeals against his conviction only.

[2] In the appellant's explanation of his plea of not guilty, he outline the basis of his defence as being first, that while he admitted driving his vehicle, he was not under the influence of liquor and that 'I didn't consume alcohol on the day in question'; and secondly, that 'the blood samples were drawn ... from my body after two hours after I was arrested'.

[3] The appellant had no objection to the admission of an affidavit in terms of s 212(4) of the Criminal Procedure Act 51 of 1977. This established that, when a blood sample was taken from him, the concentration of alcohol in his blood was 0.21 grams per 100 millilitres, well over the limit of 0.05 grams per 100 millilitres.

[4] Apart from this, the State relied on the evidence of Ryno Wessels, a traffic official, who testified that he stopped the appellant in a road block at about 02h30 on 23 November 2008; that as the appellant opened the window of the vehicle he became aware of a strong smell of alcohol; that the appellant had a bottle of beer between his legs; that, when he blew into a breathalyser, it indicated that he had been drinking and was over the limit; and that he was unsteady on his feet, his speech was slurred and he smelt strongly of alcohol.

[5] As a result of all of this, Wessels arrested the appellant. He did so, he said, at 02h35. From the site of the road block, he took the appellant to the Fleet Street Police Station and, when a docket had been opened, to the Traffic Department. A nurse who was supposed to be present to draw a sample of the appellant's blood had left so Wessels took him to the Frere Hospital where a blood sample was drawn at 03h55. According to Wessels an hour and twenty minutes elapsed from the time that the appellant was driving his vehicle to the time that the sample of blood was taken.

[6] The appellant, who represented himself, squarely put in issue when he cross-examined Wessels the time at which the blood sample was taken. Wessels was the only witness called by the state.

[7] When the appellant testified, he deviated from his plea explanation to the extent that he admitted that he had consumed one beer during an evening spent at a casino, and that he had consumed a second beer in his vehicle when he left the casino. He had consumed part of a third beer when he was stopped at the road block.

[8] The only defence that remained in issue was whether the blood sample

had been taken from him within two hours of him driving his vehicle, thus activating the presumption created by s 63(3) of the National Road Traffic Act. This provision is to the following effect:

‘If, in any prosecution for an alleged contravention of a provision of subsection (2), it is proved that the concentration of alcohol in any specimen of blood taken from any part of the body of the person concerned was not less than 0,05 gram per 100 millilitres at any time within two hours after the alleged contravention, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,05 gram per 100 millilitres at the time of the alleged contravention’

[9] The appellant stated that he left the casino at 01h30. As he left, he stopped to give a lift to four women. He proceeded down Oxford Road but they then said that they wanted to go to Quigney. He changed his route and this led him into the road block. Although the time he says that he took to travel from the casino to the roadblock seems to be unduly long, this issue was not canvassed properly with him and it is also irrelevant to the central issue of how long it took to take a sample of his blood.

[10] The appellant said that he was arrested at 02h10 but was made to wait at the road block for half an hour. He was taken to the Fleet Street Police Station at 02h40. After a docket was opened, he was taken to the Traffic Department at 03h25. A nurse who was on duty was unable to draw blood from him, so he was taken to Frere Hospital. He arrived there at 04h00 and the sample of blood was drawn at 04h15. According to the appellant, two hours and five minutes elapsed from when he was driving his vehicle until when the sample of blood was taken.

[11] He stated that, having worked (in an administrative capacity) for a firm of attorneys for 13 years, he was aware of the so-called two hour rule that has its origin in s 65(3) of the Act. With this in mind, he kept a check on the time from when he was arrested until the blood sample was taken.

[12] Faced with the contradictory versions of Wessels and the appellant, the magistrate simply accepted the version of the State without giving a reason. He was required to justify his decision. In order to do so, he had to apply his mind to not only 'the merits and demerits of the State and defence witnesses but also to the probabilities of the case' in order to determine whether the State had discharged the onus of proving the guilt of the appellant beyond reasonable doubt.¹ That necessarily involved making credibility findings as well as an assessment of the evidence of Wessels in the light of the cautionary rule applicable to a single witness.

[13] The position when a court of appeal is faced with the problem of a trial court not having made credibility findings was captured by Leach J in *S v Frazenburg and others*² as follows:

'To summarise, as the trial Court made no findings as to the credibility of the witnesses who testified, this Court, on appeal, has to do its best on the material on record; cannot proceed on the assumption that there was no misdirection or irregularity in the process of reaching the decision that was reached by the Court *a quo* ; cannot assume that the Court *a quo* had cogent reasons for seemingly accepting the witnesses who implicated the appellants; and should have regard only to the question of the *onus* of proof once all the relevant evidence has been examined to see whether there is any doubt as to which version is acceptable.

[14] In this case, the credibility of Wessels and the appellant is central to whether the State has proved its case beyond a reasonable doubt. The probabilities are evenly balanced as to when the blood sample was taken, especially in the light of the prosecutor's inexplicable failure to lead evidence of the times entered in the occurrence book, the pocket book of Wessels and, perhaps most importantly, the documentation completed by the doctor who took the blood sample.

¹ See *S v Singh* 1975 (1) SA 227 (N), 228G; *S v Bhengu* 1998 (2) SACR 231 (N), 235i-236b.
² 2004 (1) SACR 182 (E), 188b-c.

[15] The version of the appellant, while it may be open to criticism in some respect, cannot be said to be so improbable that it can be rejected as false beyond reasonable doubt. As a result, it should not have been rejected by the magistrate.

[16] This means that the State has not proved that the appellant's blood sample was taken within two hours of him driving his vehicle and so the presumption that the concentration of alcohol in his blood at the time that he was driving his vehicle was 0.21 grams per 100 millilitres does not operate. As no other evidence was led to establish the concentration of alcohol in his blood when he was driving his vehicle, the State has not proved its case beyond reasonable doubt.

[17] In the result, the appeal succeeds and the appellant's conviction is set aside.

C. PLASKET

JUDGE OF THE HIGH COURT

I agree.

E. REVELAS

JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant: Mr A. De Jager of the Justice Centre, Grahamstown

For the respondent: Mr D. Els of the office of the Director of Public Prosecutions, Grahamstown