IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE-GRAHAMSTOWN)

Case No: CA&R

Review Case NO: 20110161

Date delivered: 30 November 2011

In the matter between:

THE STATE

vs

THAMSANQA PHALA

REVIEW JUDGMENT

MAKAULA J:

[1] The accused appeared before the magistrate, **Aliwal North** charged with the following counts viz:

1.1 Driving under the influence of liquor or drugs;

1.2 Negligent driving.

[2] Accused pleaded guilty to both counts and was questioned by the magistrate. After questioning, the magistrate found him guilty and fined him *'**R1 000.00** (one thousand rand) or 30 (thirty) days imprisonment suspended for 3 (three) years on condition accused is not convicted of an offence involving driving of a motor vehicle during the period of suspension'*. Both counts were treated as one for purposes of sentence.

[3] The matter came on automatic review. The reviewing judge had the following query;

> "1. I cannot find any indication in the record that the accused was informed of his Constitutional Right to legal representation. Was this in fact done?
>
> 2. In terms of section 112 (1) (b) of the Act the court is obliged to "question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits allegations in the charge to which he or she has pleaded guilty . . .". The court is obliged in this regard to determine whether the accused admits allegations in the charge sheet **and** to satisfy itself that the accused is in fact guilty. See, for example, **S v Nagel 1998 (1) SACR 219.** With regard to count 1, all the accused was asked was "You know that driving a motor vehicle while you are under the influence of liquor is unlawful don't you?". On count 2,, he was asked "And that is unlawful you know that?". Does the magistrate regard such questioning as sufficient? If so, how could he have satisfied himself *inter alia* as to the fact that the accused was indeed guilty?
>
> 3. In view of the lack of questioning it appears from the record that the

court was not appraised of the true nature of the two offences. For example, was there an accident involved, was anyone injured during the course thereof, to what extent was the accused under the influence of intoxicating liquor etc. This, in turn, left the Magistrate with a dearth of information relating to the nature of the offences when dealing with sentencing. In view of this, how could the magistrate had given the accused such a light sentence? There is absolutely no mention whatsoever made during the course of sentencing the accused of the nature of the offences, or the interest of society.

4. The accused was convicted of two separate offences. No mention of this is made during the course of sentencing the accused. Was the accused sentenced for one of the offences only, or both?"

[3] The response by the magistrate is as follows:

"Ad Para 1:

The presiding officer concedes that the record does not reflect that the accused's rights were explained and that this was mere oversight on his part. This occurrence is regretted.

Ad Para 2:

After reading the citations below the Presiding Officer realised that the questioning was insufficient and will henceforth follow the guidelines pronounced in the cases. The issue is respectfully left to the Honourable Judge to decide and give guidance.
Annotations:

(i) S v Nagel 1998 (1) SACR 219;
(ii) S v Khiba 1978 (2) SA 540
(iii) S v Rudman et alii v Van Wyk No. 1989 (3) 363, at 370 H;
(iv) S v Kester 1996 (1) SACR 461 at 473 c;
(v) S v Hlongwane 1982 (4) SA 321 (N) at 473 c.

Ad Para 3:

> The Presiding Officer, regrettably, concedes that this is insufficient information arising from lack of questioning. The presiding officer humbly apologises for the omission, and leaves the matter to the discretion and directive of the Honourable Judge.
>
> Ad Para 4:
>
> a) On perusing the reverse side of the J175 the Presiding Officer considered the endorsement "Guilty of Driving u / i and negligent driving" next to the word "Judgment" as adequate pronouncement. The "u / i" stands for "under influence".
>
> b) The Presiding Officer considered the endorsement under "Sentence" recorded as "Both cts treated as one for sentence" as complete sentencing. The word "cts" stands for "Counts".
>
> Notwithstanding the above replies the Presiding Officer shall gladly abide by any other legal prescripts the Honourable Judge may consider appropriate in the circumstances. The Presiding officer is very grateful to the Honourable Judge for bringing these issues to his attention."

[4] The concession by the presiding officer in respect of the queries raised by my brother **Griffiths J** is well appreciated. However, it should be stressed that it is disturbing that the magistrate can omit to comply with the basic requirements of our constitution and in particular the Criminal Procedure Act, that is, of advising the accused of his basic right to legal representation.

[5] **Section 73 (2A) of the Criminal Procedure Act 51 of 1977** provides:

> "Every accused shall –

a) . . .
b) . . .
c) . . .
d) . . .
(e) at his or her first appearance in court,
be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance."

[6] It is clear from the reading of the section that it is peremptory that the accused be apprised of this right and that the court should not only apprise him/her but also to precisely record what was conveyed to the accused and what his/her responses were.[1] It leaves no doubt therefore that the failure by the magistrate to give effect to the provisions of **Section 73 (2A) (e) of the Act** constitutes an irregularity.[2]

[7] It is further of very much concern that the magistrate can fail to properly question the accused in order to determine whether he is actually pleading guilty and thus admitting all the elements of the offence to which he is pleading guilty. I say so because the same magistrate, in the matter of ***State v Khomtso Lesiba Mmako***, **Review No 20110162** which also came on review before me failed to properly question the accused in order to determine his guilt.

[8] **Section 112 (1)(b) of the Act** provides as follows:

"(1)

1 *S v Sibiya* 2004 (2) SACR 82 (W) 90b-c
2 See *S v Sikhipha* 2006 (2) SACR 439 (SCA); S *v Owies & Another* 2009 (2) SACR 107 (C)

> *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 had pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence." (Emphasis added)

[9] The primary purpose of questioning in terms of **Section 112 (1)(b) of the Act** is to protect an accused against the consequences of an incorrect plea of guilty. The questioning entails two aspects about which the presiding officer must be convinced, namely, firstly, that the accused admits all the allegations in the charge and, secondly, that he is guilty of the offence.[3] The questioning by the magistrate in respect of both counts is as it appears on the query and no more. It can be gleaned from the paucity of the questioning that the magistrate did not appreciate what is expected of him and what the purpose of **Section 112 (1)(b) of the Act** is. The questioning as it appears, does not even come closer to proving the elements of the offences with which the accused was charged thus leading to the inevitable conclusion that the convictions cannot be sustained.

[10] The comments made by my brother in his query regarding sentence

3 *S v Nagel* 1998 (1) SACR 218 (O) (headnote thereof)

should be borne in mind by the magistrate for future purposes. I propose not to deal with them for purposes hereof because I am of the view that both convictions should be set aside and automatically the sentence meted out would fall by the wayside.

Consequently, I make the following order:

1. Both convictions in respect of count 1 and 2 are set aside.

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M MAKAULA

JUDGE OF THE HIGH COURT

I agree:

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E REVELAS

JUDGE OF THE HIGH COURT