CA

NO. 16/2001

IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

THE STATE

and

KAIZER PHELANE @ NONO

REVIEW JUDGMENT

MOGOENG J.

[1] The accused in this matter was convicted of negligent driving. A wholly suspended sentence was then imposed on him.

[2] The presiding Magistrate subsequently realised that he had convicted and sentenced the accused in circumstances where he should not have done so. As a result when he sent the record for review he attached an explanatory letter alerting me to the 'fatal error', as he put it, and how it came about.

[3] The accused appeared before Court on 08 August 2000. He pleaded guilty. He was then questioned in terms of s 112(1)(b) but did not admit all the elements of the offence. His plea of guilty was then corrected to that of not guilty in terms of s 113. The matter was then postponed.

[4] On 16 January 2001 the case proceeded before another Magistrate in terms of s 118. The Prosecutor was also not the same Prosecutor who handled the case on 08 August 2000. The State then closed its case without leading any evidence whatsoever. Instead of explaining the accused's rights after the closure of the State case or discharging the accused in terms of s 174, the Court allowed him to testify. His entire evidence is as set out below:

"Accused D.U.O:

I admit that I consumed liquor while driving CGV 492 NW on Station road, Mmabatho, on 11 December 1999. I drunk [sic] two dumpies of Hansa beer.

Q. Do you admit acting wrongfully
A. Yes
Q. Is it your fault that the collision occurred?
A. Collision occurred.

COURT: The Court finds you guilty of negligent driving."

[5] The failure to explain to this unrepresented accused his rights after the State had closed its case, in particular his right against self-incrimination and the right to apply for a discharge in terms of s 174, is in itself a gross irregularity which justifies the setting aside of the conviction and sentence. The accused had only admitted that he had consumed two 340 ml dumpies of Hansa beer more than two hours before the accident took place. He denied that his power of observation or ability to

drive properly was affected by the beer. He did not accept any responsibility for the accident that apparently took place. In fact he seemed to be blaming the high speed at which the other driver was driving for the accident. The learned Magistrate should, therefore, have discharged the accused *mero motu* at the close of the State case.

[6] His testimony, after the State case was closed, did not take the State case any further. It is not clear from his admission that he acted 'wrongfully' whether the wrongfulness relates to the consumption of liquor or that the accident occurred as a result of his negligence. Even when he was asked whether it was his fault that the accident occurred, his response was 'Collision occurred.' This unintelligible response is not an admission of guilt. He should therefore have been found not guilty and discharged.

[7] In the result the conviction and sentence are set aside.

M.T.R. MOGOENG
JUDGE OF THE HIGH COURT

DATED: 03APRIL 2001