

IN THE HIGH COURT OF SOUTH AFRICA

BISHO

CASE NO: CA&R 65/2004

In the matter between:

WALASE MESHACK MASUMPA

Appellant

and

THE STATE

Respondent

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APPEAL JUDGMENT

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**EBRAHIM J:**

1. In the court *a quo* the appellant was convicted of contravening s 65(1)(a), read with s 89(1), of the National Road Traffic Act, 93 of 1996 ('National Road Traffic Act'), namely that he drove a motor vehicle while under the influence of intoxicating liquor, and the following sentence was imposed: 'To undergo 3 years imprisonment alternatively a fine of R1 500,00; furthermore a suspended period of 6 months is put into operation. Accused is declared unfit to possess a driver's licence.'

2. The appellant was unrepresented at the trial but subsequently obtained legal representation in order to appeal against his conviction and sentence. Neither the appellant nor any legal representative from the firm of attorneys, Zepe & Company, who lodged the appeal on his behalf, is before the Court today to argue the appeal. The Court has also not been furnished with any explanation for the non-appearance of the appellant's legal representatives. The Registrar of the Court is accordingly enjoined to obtain an explanation within ten days from Zepe & Company, to be furnished on affidavit, for their absence from Court today and their failure to safeguard the interests of the appellant including their remissness in not pursuing the appeal. Upon receipt thereof this issue will receive the Court's further attention.
3. I return to the appeal. In my view the appellant's conviction is improper and cannot be sustained. The Court has consequently deemed it necessary to exercise its inherent powers of review and to dispose of the appeal in accordance therewith.
4. The appellant initially appeared before a magistrate D R Krummeck on 5 May 2004 and tendered a plea of guilty to the main charge. There were two alternative charges, the first being that he contravened s 65(2)(a), read with s 89(2), of the National Road Traffic Act, namely that he drove a motor vehicle while the concentration of alcohol in his blood was not less than 0.05 gram per 10 millilitres. The second alternative was that he contravened s 65(2)(b) read with s 89(2) of the

National Road Traffic Act, namely that he occupied the driver's seat of the motor vehicle while the concentration of alcohol in his blood was not less than 0.05 grams per 100 millilitres.

5. In view of the appellant's plea of guilty Magistrate Krummeck questioned him in terms of the provisions of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 ('CPA'). The record reflects that the appellant was allowed to furnish the Court with a very lengthy explanation of the events that had given rise to the charge against him. At the conclusion of this explanation a few specific questions were posed by the magistrate and replies obtained from the appellant. These were:

'Q: Were you under the influence of intoxicating liquor on the day in question?

A: I was just a normal person.

Q: You were not drunk?

A: No.

Q: Did the alcohol affect you when drunk?

A: No, it did not affect me.'

6. The magistrate then conveyed the following to the appellant:

'Your plea of guilty has been altered to one of not guilty in terms of Section 113 of the Criminal Procedure Act, as the court this stage is in doubt whether you are in fact guilty of the offence to which you have pleaded guilty, the court will request the prosecutor to continue with the prosecution. I wish to bring to your attention the provisions of Section 113 which provides that any allegation in the charge which you have admitted up to this stage which is not inconsistent with the charge stands as proof of the allegation and it will not be necessary for the prosecutor to lead evidence in this regard to prove that allegation.'

7. Thereafter the appellant's case was remanded to 24 June 2004 for trial. On that date it was remanded to 27 July 2004 and the proceedings were continued before a magistrate L Mbetane instead of magistrate Krummeck who had presided at the s 112(1)(b) proceedings.
8. In terms of s 118 of the CPA a trial may be continued before another magistrate if the magistrate before whom the accused pleaded is no longer available to continue with the trial and no evidence has been adduced. There is no indication, however, whether or not magistrate Krummeck was indeed unavailable to continue with the trial. This information should have been recorded and the failure to do so is an irregularity which, in certain circumstances, could lead to the proceedings being void. See *S v Mkhuzangewe* 1987 (3) SA 248 (O). In view of the conclusion I have arrived at on the merits of the conviction, however, I refrain from any further comment on this aspect.
9. The only evidence tendered by the State was that of a police officer, Inspector Godfrey Bokuva. The gist of his testimony is that after he received a report he attended an accident scene and found that two motor vehicles had collided with each other. The drivers were blaming each other for causing the collision and were also accusing each other of being drunk. He and the drivers then went to the police station where blood specimens were taken from each of them. These specimens were placed in two bottles and labelled with the respective drivers' names and despatched for analysis.

10. Inspector Bokuva confirmed that he received a written report setting out the results of the blood tests and this document was tendered by the State in evidence, without objection from the appellant. The report is a certificate in terms of s 212 of the CPA reflecting that the concentration of alcohol in the person's blood was 0.06 grams per 100 millilitres. The certificate reveals that the specimen of blood received by the laboratory 'was sealed with H/G a 488065 and bearing identification mark: WHITTLESEA CR 13/064/2001 (DRIVER B)', but there is no indication of who Driver B is. Although 'W M Masumpa' was written on the certificate it was never clarified who did so or when this was done. Finally, in reply to a question from the presiding magistrate the witness stated that it was the other driver who had been negligent.
11. The appellant elected to remain silent and did not tender any evidence in his own defence.
12. On the basis of the State's evidence the magistrate convicted the appellant on the main count, namely that he drove a motor vehicle while under the influence of liquor.
13. In response to the appellant's Notice of Appeal the magistrate has furnished 'Reasons for Judgement' and stated, *inter alia*, the following:  
  
'**State** led the evidence of a single witness being Inspector Godfrey Bokuva to tell court what exactly happened. His questions and answers appear on the record. Accused did not cross-examine the witness and after the State case accused elected to remain silent.  
The court then finds accused guilty on the main count on the following reasons:

**AD MERITS**

- (i) Accused admitted that the concentration of alcohol found in his blood was 0.06g per 100ml.
- (ii) There is no dispute that he was the driver of the vehicle on the charge sheet on the day in question.
- (iii) All what is in dispute by the Accused was that he was not negligent at the time of the accident which element was not material for the present case.'

14. It is evident from the magistrate's reasons that he has misdirected himself in concluding that the evidence established all the essential elements necessary for a conviction in respect of the main count. The inference that the appellant was the driver of one of the motor vehicles was certainly justified, but there is no evidence of the manner in which the appellant drove, save that the motor vehicle had been involved in a collision. The fact that a collision occurred cannot in itself be regarded as proof that the appellant was under the influence of liquor. It should be noted that the witness Bokuva, in reply to a question from the magistrate, had stated that it was the other driver who had been negligent.

15. More importantly, there is no evidence that the appellant was in fact under the influence of liquor. There is no evidence either that he was incapable of exercising proper control over the motor vehicle, or that his ability to drive had been impaired due to the consumption of liquor.

16. It appears from the evidence, moreover, that the appellant was allowed to drive his motor vehicle to the police station and that the other driver did so too. If there was any suggestion that the appellant was under the

influence of liquor it is hardly likely that the witness Bokuva would have permitted him to drive. In short, there is no evidence of any nature that the appellant was under the influence of liquor when Inspector Bokuva arrived at the scene or at the time that he drove the motor vehicle.

17. The fact that the results of the blood tests indicated that the percentage of alcohol was 0.06 grams per 100 millilitres does not warrant the inference, nor the conclusion, that the accused was under the influence of liquor to the extent that he was incapable of exercising proper control over the motor vehicle.
18. Moreover, there is no evidence that the specimen of blood was properly taken and that it was not contaminated when this occurred. The State has also failed to properly identify the blood specimen as being that of the appellant. Since the integrity of the entire process has been compromised the validity of the blood test has also been brought into question. In view thereof it is evident that the evidence can also not sustain a conviction on either of the alternative charges.
19. In the circumstances, the conviction of the appellant on the main count cannot be sustained. In the result, the appellant's conviction and the sentence imposed are set aside.
20. It follows, as the appeal has succeeded, that the suspended sentence which the magistrate brought into operation and which forms part of the

sentence that he imposed is also of no effect and is accordingly set aside. The additional order that the appellant was declared unfit to possess a driver's licence is similarly set aside.

  
**Y EBRAHIM**  
**JUDGE OF THE HIGH COURT, BISHO**

**11 February 2005**

I agree  
  
**D VAN ZYL**  
**JUDGE OF THE HIGH COURT, BISHO**

**11 February 2005**