REPORTABLE /BH

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
CASE NO: A691/06
JUDGMENT DELIVERED: 27 NOVEMBER 2007

IN THE MATTER BETWEEN:

BERNARD ERNEST MUHL **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

LEGODI, J

A INTRODUCTION

1. This is an appeal against conviction only on charges of driving a motor vehicle whilst blood alcohol content in the body of the appellant was more than the permitted limit in contravention of section 65(2) of Act 93 of 1996 and reckless or negligent driving in contravention of section 63(1) of Act 93 of 1996.

The state also sought to have the decision of the trial court acquitting the appellant on the main charge be reviewed and set aside.

B BACKGROUND

2. The appellant initially appeared in the Magistrates Court for the district of Christiana on a charge of driving a motor vehicle under the influence of alcohol in contravention of section 65(1) of Act 93 of 1996 as the main charge, the first alternative thereto being driving a motor vehicle in contravention of section 65(2) as referred to in paragraph 1 above, and the second alternative to the main charge being contravention of section 63(1), of Act 93 of 1996 referred to 1 above herein.

3. He was acquitted on the main count, but found guilty as charged on both the alternative counts. On the first alternative; he was sentenced to R2 500 or two

years imprisonment; wholly suspended on certain conditions. On the second alternative he was sentenced to one year imprisonment; wholly suspended for five years on certain conditions.

C GROUNDS OF APPEAL

4. The appellant's grounds of appeal are set out in his notice of appeal as follows:

4.1 That the court erred in convicting the accused on both alternative counts, being alternative charges to the main count.

4.2 That the court erred in finding that the blood analysis certificate received as evidence; materied to prove the alcohol content in the blood of the accused was properly linked and referred to the blood sample taken from the accused on the day in question.

4.3 That the court erred in paying no sufficient attention to the evidence of Dr. Leon Wagner.

4.4 That the court erred in finding that the blood sample of the accused was properly extracted by the medical officer.

4.5 That the court erred in accepting the evidence of the truck driver Johannes Toli Sithole and in finding that the accused's version corroborated the evidence of the truck driver.

4.6 That the court erred in finding that because the accused admitted that his eyes, were red, that such admission corroborated the police evidence.

4.7 That the court erred in finding that the accused was on his incorrect side of the road when the collision occurred and that the accused was therefore guilty of negligent driving.

4.8 That the court paid no sufficient attention to the facts depicted on the photographs handed in as exhibits of the defence case where it is clearly indicated that the accused was immediately prior to the impact on his correct side of the road.

C FACTS OF THE CASE

5. The trial court in convicting the appellant as it did, relied on both the state and defence case; which was briefed to the following effect:

STATE CASE

5.1 That on the morning of 18 June 2004, one Johannes Sithole (hereinafter referred to as the truck driver) was driving a twenty metre long truck along the road Christiana/Bloemhof. He was driving from Bloemhof to Christiana. The truck in

question consisted of a horse and two trailers. It is called a “combination” which makes the truck not to swerve on the road. Another truck approached from the opposite direction, that is, from the direction of Christiana to Bloemhof. Behind the said truck he saw a white bakkie pulling out. It proceeded onto his side. He was about 36 metres away form it at the time. He tried to avoid the collision by swerving to his left and the appellant also tried to swerve to his left. The bakkie was fully on its incorrect side. The collision could not be avoided. The truck was struck on the front right part of the horse at the corner. The bakkie was also struck on the front right side around the door. He lost control of the truck and the truck swung and later came to a standstill across the road. From there; he saw nothing.

5.2 The police arrived at the scene a few minutes thereafter. The police identified the point of impact by pieces of glass on the road. The

appellant was approached by the police. His eyes were red, he smelt of liquor. His speech was slurred. As a result, the police took the accused to the hospital for blood drawing. Blood was extracted from the appellant by the doctor at the hospital. The blood sample was extracted into a syringe which was supplied to the doctor by the police. Blood was extracted from the appellant in the presence of the police. The unit was sealed after extraction of the blood samples. The closing seal number was H/G13167076/7 with the opening seal being as H/G13167036.

On 12 July 2004 the syringe marked; the seal number HS/13167037 was delivered at the forensic laboratory. The result of the analysis contained in exhibit C indicates that the concentration of alcohol in the blood specimen was 0,22 grams per 100 millilitres.

D DEFENCE CASE

5.3 The appellant was driving from Christiana to Bloemhof. It was round about 9:00. He was driving at the speed of about 110 km/h. The truck driver's truck approached from the opposite side. Because of the road being narrow and the truck big, the truck was more to the middle of the road. He observed that the truck was more to his side when he was at a distance of about 50 metres away. One rear trailer of the truck hit his bakkie on its right portion. The right wheels of his bakkie were pulled and it swerved across the road. The defence also relied on the evidence of Dr Wagner with particular reference to the main charge and the first alternative thereto. His evidence was to the following effect: The fact that a person smells of alcohol would not necessarily mean that such a person is under the influence of liquor. The redness in one's eyes could be as a result of a

number of factors and not necessarily liquor or drunkenness. Slurring in one's speech is not necessarily an indication that a person is drunk. It depends merely on how well one knows a person. Regarding the expiry date, he indicated that it is also important for the examining doctor to look for expiry date before anything is done. If the crime unit or tube shows that it has expired, then it should be completely discarded. The effect of expired equipment, containers or apparatus is that, after an expiry date the manufacturer of that product cannot guarantee at all whether the apparatus will be as effective as it should be and cannot exclude the possibility that the product or preservatives is still effective. If the container or valu-tube in which the blood has been sampled, the expiry date had passed, it would mean that the preservation is not as effective as it was at the time of manufacturing and before the expiry date. The container or vacu-tube in which the blood is

sampled, must contain a preservative. Two substances are important. The one is sodium fluoride. There must be at least 100 milligrams of sodium fluoride which is a preservative that no fermentation can occur with the formation of alcohol which may increase the blood alcohol level. The other preservative is or substance is potassium oxalate, which is an anti-coagulant because it is important to realise that if you examine blood and it is whole blood versus blood which has coagulated, as soon as blood coagulates, the serum comes free. Serum has a much larger water content than the whole blood, about 15% to 17% so that if you examine the whole blood which has not been coagulated and you examine the serum, you would find that the serum would have a higher alcohol level than the whole blood which had been analysed. Having said all of these, Dr Wagner concluded by saying that you will never find that coagulated blood can

be examined; but that in any form, it should be stated whether it has been plasma which has been analysed or whether it has been the whole blood which had been analysed. Whole blood is said to mean that no coagulation had occurred and that the result upon which the state sought to rely, only makes reference to blood and not “the whole blood”. This allegation, according to Dr. Wagner; should put a question mark as to whether sufficient anti-coagulant had indeed been present.

E ISSUES RAISED

6. In my view, the following issues had been raised before us:

6.1 Whether or not a conviction of the appellant on the alternative counts could be substituted on appeal by conviction on the main count, and

6.2 If so, whether or not the evidence tendered during trial; supports a conviction on the main charge,

and

6.3 If not, whether the trial court was right in convicting the appellant on both the alternatives in respect of one main charge, and

6.4 If not, whether the evidence tendered during trial justified a conviction on both the alternatives, or any one of the alternatives?

F DISCUSSIONS, SUBMISSIONS AND FINDINGS

7. Starting with the issue raised in 6.1 above, this issue was raised by the state. We were urged by counsel for the state, (the respondent); to find that a court of appeal has inherent jurisdiction to substitute a conviction on a lesser charge with a conviction on a more serious charge. The state sought to rely in this regard, on the provisions of section 22(b) of the Supreme Court Act 59 of 1959; section 309(3) and

section 304(2)(c)(iv) of the Criminal Procedure Act 51 of 1977. We were also referred to the matter of *S v E* 1979 (3) SA 973 (A). For the sake of clarity and completeness the sections read as follows:

> "Section 22(b) of Act 59 of 1959*:- The appellate division or a provincial division or a local division; having appeal jurisdiction should have power to confirm, amend, or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances require."*
> (My own emphasis.)

"Section 309(3) of Act 51 of 1977: The provincial or local division concerned should thereupon have the power referred to in section 304(2), and, unless the appeal is based solely upon a question of law, the provincial or local division shall, in addition to such powers, have the power to increase any sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or

altered by reason of any irregularity of a effect in the record or proceedings, unless it appears to such division that a failure of justice has in fact, resulted from such irregularity or defect."

"Section 304(2)(c)(iv) of Act 51 of 1977: such court, whether or not it has heard evidence, may, subject to the provisions of section 312, generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question."

8. The state also relied on the matter of *S v E* referred to in paragraph 7 of this judgment, wherein it was held that where a court of appeal is convinced that the trial court, because of a wrong finding of fact or a mistake of law; convicted the appellant of a less serious offence than that which, in terms of the indictement, he should have been convicted of, the court of appeal had the power, in terms of section 322 of Act 51 of 1977 to alter the conviction accordingly. It was further held that in such a case, the court of appeal has the power to set aside the sentence or conviction and either refer the

case to trial for that court to impose an appropriate sentence or itself to impose a sentence and that this will depend upon the circumstances; which of the options the court will take, section 322 provides as follows:

(1) In the case of an appeal against a conviction or if any question of law reserved, the court of appeal may-

a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of wrong decision of any question of law or that on any ground; there was failure of justice or

b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial or,

c) *make such other order as justice may require. Provided that, notwithstanding that the court of appeal is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence should be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appear to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect."*

9. My brother; also drew my attention to another matter in which it was found that a court of appeal has the competence to substitute a conviction of a lesser offence with a conviction on a more serious offence, (*S v E* 1979 (3) SA 973 (A).) In the instant case; being driving a motor vehicle whilst the alcohol content exceeds the permitted limit; to a conviction on driving a motor vehicle whilst under the influence of liquor in

contravention of the provisions of Act 93 of 1996.

10. It was common cause during the discussion that the powers which this court has on appeal, regard being had to the provisions of section 304 are the same as those of the Supreme Court of Appeal has and that this court is bound by the interpretation of section 322 by the Supreme Court of Appeal. It was therefore submitted that the provisions of section 304(2)(c)(iv) should be restrictively interpreted and along the line of the well established principle that an acquittal of a competent court in a criminal trial is final and should not be used to opening the door to appeals by the prosecution against acquittals contrary to the traditional policy and practices of our law. In this regard; counsel for the appellant also sought to rely on two case laws:

Magmoed v Jansen van Rensburg **1993 (1) SA 777 (A) at 815 J-816J.**

***S v Moyan and Others* 1993 (2) SACR 134 (A) 160**

11. Before I deal with this aspect, I need to refer some background to this matter. The appellant was convicted on 20 February 2006. His sentencing took place on 28 February 2006. Immediately thereafter, an application for leave to appeal was launched which application was upheld. Subsequent thereto; the appeal was then set down for hearing on Monday 8 October 2007. On 27 September 2007; the state delivered its heads of argument dated 26 September 2007. The issue relating to the substitution of a conviction on a lesser offence to a more serious offence was raised for the first time in his heads of argument. Consequent thereto, the appellant delivered further heads of argument which was handed in court on the hearing of this appeal. The state sought to respond to further heads of argument which was done after judgment in this matter was reserved, with no objection by counsel for the appellant. During discussions and

submissions on 8 October 2007, the issue which was raised by this court was respondent's entitlement to raise the issue in the manner in which it did.

12. Before the court's power can be exercised in terms of section 304 referred to earlier in this judgment, a statement setting further his reasons for the conviction and or sentence, shall be obtained from the trial court. (See sub-section 304(2)(a)). This was not done. Secondly, section 310 of Act 51 of 1977, sets out the circumstances and manner in which the state would be entitled to appeal. Firstly; it has to be on a question of law and secondly; the trial court must be requested to state a case, setting further the question of law and his decision thereon and if evidence has been heard, his finding of fact, insofar as they are material to a question of law. This too has not been done. In terms of section 310(3) an appeal under this section is subject to the provisions of section 309(2) of Act 51 of 1977. This section,

provided that an appeal should be noted and prosecuted within the period and in the manner prescribed by the rules of court. This should relate to rule 67 of the Magistrates Court Rules. This too did not happen. I requested both parties to address us fully on these aspects in the form of written heads of argument despite the fact that the issue was earlier raised during the decision. I still do not think that the procedural requirements are of no consequence. It is good practice before setting aside a judgment, in the instant case, magistrate court's judgment to require further reasons if any.

13. Even if I was to be wrong, in this regard, I did not deem it necessary to give the state chance to remedy the procedural non-compliances, particularly that the state insisted that there was no need to comply therewith, I also do not deem it necessary to deal in this judgment with the first issue raised in paragraph 6.1. Rather I prefer to deal with the issue raised in paragraph 6.2.

Once it is found that the evidence tendered during trial; did not support a conviction on the main charge, the issue raised in 6.1 above becomes academic.

14. During trial, the state sought to prove that the appellant drove a motor vehicle under the influence, by relying on the evidence which was to the following effect: That the appellant attempted to overtake a truck which was in front of him at an inopportune time, that the appellant's eyes were red, that his speech was slurred and that he smelled of liquor. All of these alone, can never serve to prove beyond reasonable doubt that the appellant was under the influence of liquor. The state's counsel urged us to find that, the fact that the alcohol blood content showed far beyond the limit, should serve as an indication that the appellant's capability to drive, should have been seriously impaired. The concentration of alcohol in the blood specimen was found to be 0,22 grams millilitres.

15. Before dealing with alcohol blood content, it is important to mention in regard the main charge that the state sought to rely on the evidence of the police officer who interviewed the appellant at the scene and the doctor who extracted blood from the appellant. Both of them said his eyes were red, and that he smelled of liquor. The appellant did not dispute the fact that his eyes were red. He attributed this to the fact that he did not have a good sleep. He woke up very early in the morning. He denied the suggestion that his eyes were red because of the effect of liquor. The doctor who testified on behalf of the state noted that the redness of the eyes could be due to other factors and not necessarily because one is under the influence of liquor. This was also confirmed by Dr. Wagner, an expert on behalf of the appellant. The smell of liquor was according to the appellant attributable to the fact that the previous day; he drank about two beers. This however, did not make him drunk and he denied the suggestion that the collision

occurred because his driving ability was impaired due to the intake of liquor. Regarding slurred speech, it was suggested to the state witnesses that, this could not be attributable to drunkenness; especially; that non of the state witnesses were acquainted to the appellant. This too was conceded by the state witness. All these observations were said by Dr. Wagner not to have been sufficient to suggest that the appellant's driving ability was impaired to the extent that he made himself guilty of driving the motor vehicle under the influence of liquor. I tend to agree with this opinion by Dr. Wagner. Remember at the scene, the appellant was observed by a police officer. He said nothing; for example; about the appellant staggering or the appellant not being in a position to stand on his feet. The doctor who examined or extracted blood from the appellant, despite the examination; made no test, to determine the appellant's ability to drive. For example, he could have asked the appellant to walk around, stand on one leg etc. He too did not observe anything

beyond the smell of liquor, and eyes being red.

16. According to dr. Wagner any alcohol blood content of between 0,01 to 0,30 is analysed and described as:

"*Disorientation, mental confusion, dizziness, exaggerated, emotional state, such as fear, rage. or grieve. Disturbance of vision and perception of colour, motion dimensions, increased muscular in coordination, staggering gait, slurred speech, apathy and lethargy".*

It was the state's submission that the fact that the appellant undertook or attempted to overtake at an inappropriate time and that his alcohol blood content was said to be 0,22, should be found to have proved beyond reasonable doubt that the appellant drove whilst under the influence of liquor. I come to the issue of the analysis of certificate in terms of section 212 later in this judgment. However; Dr. Wagner indicated that the result of 0,22 per 100 mm was not

recommendable or not supported by the evidence which was being presented during trial. According to him if the appellant was so drunk that his alcohol blood content had reached 0,22, it should have been so obvious. I understood this to suggest that more would have been observed than just mere red eyes, slurred speech and the smelling of liquor. I tend to agree with this intention of dr. Wagner. But even most importantly, reliance on the analysis was challenged by the defence during trial and also in the appeal before us. This should immediately bring us to consider the issue raised in paragraph 6.4 of this judgment .

17. Challenge against reliance on the blood analysis was to the following effect:

17.1 that it has not been proved that the blood so analysed was that of the appellant;

17.2 that the expiry date on the syringe into which

blood was extracted was not proved

17.3 that it was not proved that the alcohol blood content could not have been affected by other substances.

17.4 That the appellant's blood was not taken within two hours after the collision.

18. Starting with the two hour issue, according to the truck driver, the collision occurred between 9:00 and 10:00. The police official, who attended at the scene, had received a report about the collision after 9:00. The doctor who extracted blood from the appellant did this at about 10:50. When the appellant took the witness stand he indicated that the collision occurred at about ±9:00. I understood the submission by counsel on behalf of the appellant to be that the state had failed to prove beyond reasonable doubt the exact time at which the collision took place. I don't expect any person in a

collision to be able to give the exact time of the collision. The time of the extraction of blood from the appellant was not in dispute. It was at 10:50. The effect of the defence's submission was that the collision could have occurred anytime before 9:00. On the available evidence tendered during trial; I am satisfied that the trial court was right in finding that the state had proved beyond reasonable doubt that blood was extracted within two hours.

19. I must immediately then deal with the issue whether the state had proved that the result of the analysis as indicated in the certificate in terms of section 212 which was handed in as an exhibit during trial, relates to the appellant. The defence sought to suggest that the syringe unit into which the appellant's blood was sampled, was not properly marked. The effect of this was that the blood analysed, which resulted in 0,22 grams per 100 millilitres could have been of another person. This

submission was based on the fact that for one reason or the other letters H/G was added; just before the seal number B167037. The seal number on the certificate is indicated as H/G B167037. According to the police official who packaged and despatched the crime unit to the forensic laboratory, had received the sample on 18 June 2004, that is, the date on which blood was extracted from the accused and sampled into the crime unit.

19.1 In his police statement; which he had in his possession when he was giving evidence, the seal number was recorded as H/GB167037. However, the statement which the defence had indicated the seal number as B167037. The defence had a copy which copy did not have the letters H/G. The doctor in his statement to the police indicated the seal number as H/G B167036/7. Again here, the defence copy did not have number 7 after a stroke. The seal number ending with 6 was said to

be the opening seal number and the seal number ending with 7 was said to be closing seal number. That is, the syringe unit had two numbers. The seal number appears on the syringe unit before blood being sampled into the unit and the seal number to close when the blood is sampled into the syringe unit. Whilst the defence had certain copies which differed in certain respect from the one the state witnesses had, for two reasons, I am satisfied that the blood analysed was that of the appellant.

19.2 Firstly; it was the doctor who placed the seal number or numbers on the syringe unit. In his statement to the police, he indicated both numbers by using a stroke in between numbers 6 and 7. The certificate from the forensic laboratory shows only the closing seal number. I can find nothing wrong with this. Regarding H/G letters, there is no explanation why the defence's copy of

the document/statement did not have these letters. However, the original statement shows the number as in the certificate and also as testified by the doctor regarding the opening seal number. Secondly, the chain of events was that after blood was extracted the doctor gave the syringe unit to the police official who was present when blood was extracted from the accused. The syringe unit was given to the police official who packaged and despatched the syringe unit after he had added the police docket number to the syringe unit, that is, MAS 84/6/2004. All of these; were found by the trial court to have left no doubt that the certificate related to the blood extracted from the appellant. I find nothing wrong with this finding.

20. I now turn to deal with the two remaining issues regarding the certificate and reliance thereon. The submission was that with the uncertainty regarding the

expiry date on the syringe unit and insufficient evidence regarding sodium fluoride concentration, the trial court should have found that the state had failed to prove that there was no contamination and of wrong results due to a possible expired syringe unit. Regarding the expiry date on the syringe unit, I understood the submission of the state to be, that; this was never specifically challenged by the defence during trial and that in any event, the evidence tendered during the trial did not suggest that the crime unit had expired. Firstly, it appeared to have been common cause that once the syringe unit had expired, analysis of any blood sampled therein cannot be relied upon. This; was conceded by the doctor who extracted blood from the appellant. In his evidence, he indicated that after the expiry date, the equipment referring to the syringe unit, cannot be used. Dr. Wagner on behalf of the defence testified that it was also the responsibility of the doctor extracting blood or sampling blood into the syringe unit to ascertain whether the expiry date has been met or not. After the expiry date, the

manufacturer of the product or apparatus cannot guarantee at all whether the apparatus will be as effective as it should be and cannot exclude the possibility that the preservation as in the instant case was still effective.

Once the apparatus has expired, using such apparatus should be discarded immediately; and efforts should be made to get another one. During the cross-examination of Dr Mohapa who testified for the state, the following were elicited as it appears on page 78 and 79 of the typed record:

"Q: *Doctor that unit that you got, that you received from police, did it have an expiry date on?*

A: Yes, but I do not remember what the expiry date was.

Q: It had an expiry date on but you cannot tell this court what the date was is that so?

A: Yes

Q: And lastly, doctor you will agree with me that after the expiry date one cannot use equipment in the medical field, do you agree with me?

A: Yes, but it depends on the equipment, but yes, generally speaking, yes.

20.1 On page 96 of the typed record during his evidence in chief, Dr Wagner was asked a question as follows:

"Q: The bottom line is we do not have the expiry date despite questions being asked in this regard from the doctor and in your expert opinion of summarising it correct, we cannot rely on these might be, the analysis might be affected?

A: That is correct your worship. When I was still teaching at the university, one of the aspects which I taught the students was to always

ascertain whether the tube is sterile and there are methods of which you can ascertain that, that tubes are usually sterilised by auto clawing and on the tube there is a red dot which turn green indicating it has been sterilised sufficiently and I also taught them to look for expiry dates and if the expiry date has been met to discard the container immediately and to insist on a container which has not yet met the expiry date.

20.2 Doctor Wagner further indicated he did not think medical students are anymore or today taught to look out for all these pitfalls. I understood counsel for the state to suggest that we should despite; all these factors; raised in the cross-examination of Dr. Mohapa and the evidence of Dr. Wagner find that there has not been a proper challenge to the fact that the syringe unit might have expired. I have serious difficulties with this suggestion. Clearly; the questioning of Dr. Mohapa suggested unless the

expiry date is proved, there can be no reliance to the analyses. Secondly, for one reason or the other the prosecution in re-examination decided not to pursue this aspect. But, even most importantly it became very clear during the evidence of Dr. Wagner that the issue whether or not the syringe unit had expired was raised. Still; the state decided to do nothing about it. For example, after the evidence of Dr. Wagner; if the state was indeed uncertain as to the stance adopted by the defence during cross-examination of the state witnesses; the prosecution could have applied for reopening of its case after the defence case. This too did not happen. I find the state case in this regard to have been wanting.

21. I now come to the other issue raised as an attack on the certificate in terms of section 212. In paragraph 4.2 of the certificate it is stated as follows:

"The sodium fluoride concentration was found to

be sufficient to prevent alcohol being formed therein.

Remember, it was Dr. Wagner's evidence that the container in which blood is sampled must contain preservatives. The one is sodium fluoride which is a preservative to ensure that no fermentation can occur with formation of alcohol which may increase the blood alcohol level. There must be at least 100 milligrams of sodium fluoride. Referrence to sodium fluoride indicated no quantity of sodium fluoride concentration and that the trial court should not have placed reliance on outcome of the analysis. Dr Wagner's expertise in this regard was not challenged at all. His opinion in this regard therefore; could not have been doubted without any evidence to contradict him. The effect of his evidence in this regard was that no sufficient evidence was tendered by the state to show that there was sufficient sodium fluoride concentration to prevent alcohol being found therein. In my view, anything

which falls short of the evidence of Dr. Wagner; should have created a doubt on the reliability of the outcome of the analysis which recorded concentration of alcohol in the blood specimen of the appellant to have been 0,22 grams per millimetres.

22. The other substances of importance to prevent fermentation; was said to be potassium oxalate which is an anti-coagulant. Dr Wagner indicated that it was also important to mention in the report; whether it had been the plasma which has been analysed or whether it had been the whole blood which had been analysed. I must immediately; state that from the certificate in terms of section 212, it is not apparent whether this was done. The whole blood is said to mean that no coagulation had occurred. The quantity of the potassium has also not been provided by the state; despite the fact that such information was specifically requested by the defence; that is, the levels of potassium oxide has not been verified. Dr Wagner concluded by saying that without

this; it cannot be said sufficient anti coagulants had been taken care of. Based on this, the accuracy of the level of alcohol in the blood of the appellant at the time of the collision cannot be verified. This evidence by Dr. Wagner has also not been challenged. In the absence of any challenge to his evidence, in this regard, I do not think that the trial court, could have found the report or certificate to be reliable.

23. The last issue, relates to the evidence around the second alternative. The question being whether the trial court was right in finding the appellant guilty of driving a motor vehicle recklessly or negligently in contravention of section 63(1) of Act 93 of 1996 as charged. Counsel for the appellant did not vigorously challenge the conviction of the appellant regarding the second alternative charge. In my view, rightly so. The truck driver was found by the trial court to have been a reliable witness who did not in any way contradict himself. His evidence is briefly set out in paragraph 5.1

of this judgment. The appellant firstly; sought to rely on a photo handed in as exhibit “E”. This photo; depicts a tarred road. The road is said to be the road where the collision occurred. There are marks on the road. These marks are said to be tyre marks. They are said to start from the side of the appellant. They are said to be brake marks caused by the appellant’s vehicle. I have some difficulty in attaching any weight to this evidence. Firstly, the photo is said to be a photo of the scene taken 20 minutes after the collision. There is nothing on record as to the identity of the person who took the photo. Secondly, the photo was obtained from e-mail. There is no evidence as to the circumstances under which the photo was obtained from the e-mail and the person to whom the e-mail in question belonged. No explanation as to why the photo if taken twenty minutes after the collision the two vehicles involved in the collision are not reflected on exhibit E. But, even most importantly, the photo was not introduced during the evidence of the truck driver. It was never put to him

that there were brake marks, for example, allegedly caused by the appellant's vehicle either on impact or before impact and no explanation as to why this was not done.

24. The appellant through his counsel initially in cross-examination of the truck driver, indicated the impact was on one of the trailers. This was denied. The truck driver persistently indicated that the collision or impact was on the front portion of the horse and the appellant's bakkie. It was like the appellant wanted to suggest that the trailers were swerving onto the side and as a result his bakkie collided with the rear trailer of the truck. The issue was put as follows to the state witness:

"*Ek wil aan u stel, die verdediging se weergawe is dit was nie die perd wat die bakkie getref het nie, dit was een van die waens wat die bakkie getref het.*"

I find it particularly strange that it was not specifically put to the truck driver that the impact on his truck was on the rear trailer. It looks like the appellant was somewhat on a fishing expedition, especially during the cross-examination of the truck driver. Firstly, it was suggested that the trailers were or could have been swerving onto the wrong side of the road or towards the middle lane. This was denied by the truck driver who indicated that the trailers were referred to as a "combination". They are solid on the road and do not swerve from one side to the other.

25. The appellant further suggested that the road was narrow and at the same time the truck was big with the result that it was more to the middle lane. This too, was denied by the truck driver who indicated that at all times he tried as far as he could to drive more to his left. According to the truck driver, the collision occurred simply because the appellant overtook when it was not safe to do so. The impact was on his side of the road i.e.

the truck driver's side. This version was to a certain extent corroborated by the police official who arrived at the scene. Pieces of glass were observed around the centre line more to the side of the truck driver. On record, the truck driver appeared to have performed well during cross-examination. I am satisfied that the trial court correctly rejected the version of the appellant.

26. The other issue is whether or not the trial court could have convicted the appellant on two alternative charges in respect of the main count. Once you prefer to charge an accused person on a main charge for example, and one alternative charge thereto, you cannot find the accused guilty on both the alternative and the main charges. Similarly, the state having decided to charge the appellant with two alternatives, it should be found to be bound by this. Any conviction on the one charge, it being either the main charge or the alternative, excludes conviction on the other. Had the state in the instant case for example, proved the first alternative charge of

driving a motor vehicle whilst alcohol content in the blood or body of the appellant exceeded the limit, the appellant could not have been found guilty of the second alternative charge, even if the state had proved a case on the second alternative charge. However, in the light of my earlier finding regarding the main and first alternative charges, the issue in this regard, has since become academic.

27. Consequently I would make an order as follows:

27.1 The state's request to substitute acquittal on the main charge with a guilty verdict is hereby refused.

27.2 The appeal against conviction on the first alternative charge and sentence in contravention of section 65(2), Act 93 of 1996 is upheld and conviction and sentence thereof is set aside.

27.3 Appeal against conviction on the second alternative charge in contravention of section 63(1) of Act 93 of 1996 is hereby dismissed and both conviction and sentence are hereby confirmed.

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M F LEGODI
JUDGE OF THE HIGH COURT

I agree

_____
A P LEDWABA

It is so ordered.

FOR THE APPELLANT:
INSTRUCTED BY:
FOR THE RESPONDENT:
INSTRUCTED BY: