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**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH GAUTENG DIVISION: JOHANNESBURG)**

Appeal Case no: **A 345/2010**
Date heard: **29 / 11 / 2010**
Date delivered: **29/11/2010**

In the matter between:

NKALA JOHN MOTATA

Appellant

and

THE STATE

Respondent

Coram: Lacock J et Kruger J

JUDGMENT

LACOCK et KRUGER JJ:

[1] The appellant was convicted in the regional court, Johannesburg, for contravening the provisions of section 65(1) of the National Road Traffic Act, No. 93 of 1996 (driving a vehicle while under the influence of intoxicating liquor), and sentenced to payment of a fine of R20,000.00 or 12 months imprisonment. With leave of the High Court

(leave to appeal having been refused by the presiding magistrate) the appellant now appeals against his conviction.

- [2] The accepted and undisputed factual circumstances that led to the arrest and subsequent charges proffered against the appellant, can be summarised as follows:-

2.1 Shortly after midnight and during the early hours of the morning of 6 January 2007, the appellant was apparently driving his jaguar motor vehicle down Glen Eagles Road, Hurlingham, Johannesburg. The said public road was at the time barricaded by a boom gate at a spot approximately 60 meters from the property known as 20 Glen Eagles Road.

Since the gate was closed at that time of the night, the appellant apparently executed a u-turn, and in the process reversed his vehicle through the precast boundary wall of the property known as 20 Glen Eagles Road.

2.2 After having received a phone call from the tenant of the said property, Mr Lucky Melk, the owner of the property, Mr. Richard Baird, arrived at the scene of the accident. He took a number of photographs with his

digital camera of the vehicle as he found it, as well as the driver of the vehicle (the appellant), who was still seated uninjured behind the steering wheel of the jaguar.

2.3 Later on two metro police women arrived on the scene. Because of difficulties they encountered to persuade the appellant to co-operate with them, they called for assistance, whereupon two male metro policemen arrived on the scene. These two gentlemen handcuffed the appellant whilst still seated in the driver's seat of the jaguar, and removed him to one of the vehicles of the metro police. From here the appellant was taken by the metro police to a hospital where a blood sample was taken. He was thereafter taken to a police station and charged with *inter alia* drunken driving.

2.4 After the arrival of the metro police women on the scene of the accident, Mr. Baird used his Microsoft based cellphone to audio/video record what was being said on the scene. He made five such recordings. In other words, he did not make one continuous recording, but he recorded for a while, then switched off the phone, and then started to record again. This resulted in five different clips of audio recordings.

2.5 The appellant did not testify.

- [3] The appellant was also charged for contravening the provisions of section 65(2) of Act 93 of 1996 (excessive alcohol content in his blood), negligent or reckless driving of a motor vehicle, defeating or obstructing the ends of justice, and resisting arrest, but was acquitted on all these charges.
- [4] The conviction of the appellant by the learned magistrate was primarily based on the evidence of Mr. Baird, the contents of the aforesaid audio recordings, the photographs taken on the scene by Mr. Baird, a note (exhibit E) allegedly completed by the appellant on the scene, and the failure of the appellant to testify. To our minds the findings of the magistrate and the conclusions he came to, are beyond criticism.
- [5] The magistrate found that Mr. Baird was a credible and reliable witness. We could find nothing in the record to negate this finding. Mr. Baird presented as an intelligent, self-assured witness with a good memory of the relevant events. We did not form the impression that he laid on his evidence, or that he deliberately portrayed a worse impression of the appellant's conduct on the scene other

than an honest and impartial one. The criticism levelled against the credibility of this witness is unwarranted.

5.1 In regard to the appellant's state of inebriety, Mr. Baird testified that the appellant uttered "racial slurs and derogating language and swearing", that "he could not stand up without holding on to his car", he "smelt of alcohol", "he had a glazed look on his face", that "... his eyes they were swimming they were not focused...", "his co-ordination was not good", that he was unbalanced, "trying to grab onto steadiness", that "his speech was very drawn out, laboured and his word construction was inadequate" and that he "put emphasis on certain words, drawing the words out". He described the movements of the appellant when he got out of his car as unsteady "in a sense as a much older person is unsure of their footing and they hold on to railings and things as they move around..." and "similar to a much older person who does not have balance, who is unsteady, that type of motion". He further produced a note (exhibit E) on which the appellant- so he testified- wrote his particulars. The contents hereof are barely legible and contains a number of spelling mistakes.

5.2 This witness was subjected to vigorous cross-examination over a number of days, but could not be shaken. He throughout confirmed and adhered to his original version of the events and his observations. He did not contradict himself in any material respect, and neither did he adjust his testimony.

5.3 The evidence of Mr. Baird is corroborated by the contents of the audio recordings. These recordings had been admitted as relevant evidence in a trial within a trial. It is not in dispute that the words used by the appellant during the said audio recordings were correctly transcribed in the transcription of the recordings (exhibit 'C'). The swearing and incoherent speech of the appellant are clearly captured on the transcription of the recordings, and no purpose will be served to repeat same herein.

5.4 To my mind, the aforesaid demeanour of the appellant as described by Mr. Baird is clearly that of an intoxicated person.

[6] The attack on the authenticity of the recordings is without substance. Almost all the persons whose voices were captured on the recordings, testified in the trial within the

trial, and confirmed the correctness of the recordings. The testimony of these witnesses was not challenged in this regard, and neither was it refuted by the Appellant. The admissibility of copies of the recordings had already been decided in the favour of the State in **Motata v Nair N.O. and Another**, 2009 (1) SACR 263 (TPD) at paragraph 29.

- [7] It was submitted that the magistrate should have found that Mr. Baird tampered with the audio recordings and therefore misdirected himself for relying on the contents thereof. This submission is founded on the evidence of Mr. Baird that the audio recordings were copied to a hard drive on his computer, and to a SD memory card, and that the footage of the recordings in the original memory card of the cellphone on which the recordings were captured, was lost; as well as the evidence of messrs. De Jongh and Van der Merwe. There is no substance in these submissions.

7.1 Mr. Baird explained in great detail how the copies were made and saved on his computer, and denied that he tampered with either the audio recordings or the photographs. We could find no reason to question the reliability of his evidence in regard hereto.

7.2 The evidence of the experts fall short of proving or even suggesting that any tampering took place. The high water mark of their evidence was that it was possible to tamper with the recordings, but they were unable to detect any such tampering in the absence of the original data base. To our minds this evidence is entirely insufficient to impair the veracity of Mr. Baird's evidence.

[8] Although the metro police officials were hesitant to express an opinion on the inebriety of the appellant, one cannot ignore the following undisputed evidence:-

8.1 Mr. Madibo smelled alcohol on the appellant, and testified that his speech was impaired.

8.2 The appellant refused to alight from his vehicle when requested to do so by the metro police officials. They eventually had to handcuff him in his vehicle and lift him out of the vehicle.

8.3 The metro police took the appellant to a hospital for a blood sample to be taken, and thereafter charged him for *inter alia* drunken driving. Why would they have

done this if they did not suspect that the appellant committed the crimes he was charged for?

8.4 Although the officials were hesitant in expressing an opinion on the inebriety or sobriety of the appellant, it was not their evidence that he was not under the influence of liquor.

[9] The probabilities favour the State's case.

9.1 We find it extremely improbable that any High Court judge in his or her sober senses would use the kind of foul language used by the appellant in the presence of – to him – unknown members of the public and police officers – some of whom being women. As was pointed out by the magistrate, the F-word was repeatedly used towards Mr. Baird and even to a lady metro police officer.

9.2 Likewise we find it extremely improbable that any High Court judge in his or her sober senses would make the kind of racist remarks uttered by the appellant in public. In this regard we refer to the following remarks as transcribed in exhibit 'C':

"MR MOTATA: Yes, but you know all of you, let me tell you, most of us this is our world, it is not the world of the boers. Even if they can have big bodies, South Africa is ours.

WITNESS 1: But sir, the problems is you drove into his wall.

MR MOTATA: Even if I can drive into it I will pay it. It is not a problem that I can pay for the wall but he must not criticize me. There is no Boer who will criticize me, (indistinct) what he thinks.

WITNESS 1: But Mr you of the law person.

MR MOTATA: Yes I am a man of the law, I am saying if I knocked his wall ...(intervenes).

WITNESS 1: Do you know the law of ...(intervenes).

MR MOTATA: Yes I know the law. Let me go to the law. I do not care about him. Yes he must not look at me as a black man. Let me go before the law. That how much I owe him for the wall which I broke down.

WITNESS 1: But then it is not good to insult him.

MR MOTATA: Fuck him, fuck him, he must not insult me. I say fuck him. Any body who insults me, I say fuck you."

Even if it is accepted that the appellant was insulted by Mr. Baird when he referred to him as a drunk, it remains improbable that he would use this type of language unless he was under the influence of liquor.

- [10] Advocate Takota SC on behalf of the appellant submitted that the magistrate wrongly compartmentalised the evidence tendered by the State. We do not agree with this submission. To our minds, the judgment however, reveals the exact opposite. The magistrate was correct in his finding that the totality of the evidence tendered by the State, required a response from the appellant and, in the absence thereof, to have drawn an adverse inference against the appellant. (**S v**

Boesak, 2001 (1) SA 912 (CC) at par. 24; **Hendricks v S**, [2010] 4 All SA 184 (SCA) at paragraphs 19 to 22).

What called for a response were the following:

10.1 What caused the appellant to have driven his vehicle through the boundary wall of Mr. Baird's property?

10.2 Why did the appellant refuse to co-operate with the metro police officials?

10.3 Why was it necessary for the appellant to steady himself against his vehicle when he alighted therefrom?

10.4 What caused the impairment of the appellant's speech and the glazy look in his eyes?

10.5 How much alcohol did he consume earlier that night?

10.6 What was his state of sobriety when he drove his vehicle through the boundary wall of Mr. Baird's property?

10.7 Did he write his particulars on exhibit "E"?

In view of the State's strong *prima facie* case, and in the absence of rebutting evidence, the magistrate was entitled to conclude that the appellant's guilt had been proved beyond a reasonable doubt.

[11] Wherefore the appeal is dismissed.

HJ Lacock
JUDGE

G Kruger
JUDGE

<p><u>On behalf of Appellant:</u> Adv. B.R. Tokota SC o.i.o. S Ngomane Attorneys, Pretoria</p> <p><u>On behalf of Respondent:</u> Adv. Z.J. van Zyl SC o.i.o. The NPA</p>
