IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

20/06/14

DATE SIGNATURE

20/6/14

CASE NUMBER: A577/2013

In the matter between:

MICHAEL SIBUSISO SIFUNDA **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] The appellant was convicted of contravening section 65 (1) (a) of the National Road Traffic Act 93 of 1996 (the Act), by the District Court, White River. He was granted leave to appeal against both his conviction and sentence by the trial court.

[2] The charge on which the appellant was convicted reads as follows:

"That the accused is guilty of the offence of contravening the provisions of section 65(1) (a)/(b) read with sections 1, 33, 34, 35, 65(3), 65(4) ,65(8), 65(9), 69(1), 73 and 89 of the National Road Traffic Act 93 of 1996 – Driving under the influence of liquor or drugs In that upon or about 17/09/2011 and on Yaverland Road a public road in the District White River the accused did wrongfully

(a) drive a vehicle to wit BMW with registration number DFJ 839 MP whilst he was under the influence of intoxicating liquor or drug having a narcotic effect".

[3] At the hearing of the appeal the appellant abandoned his appeal against sentence. He contended for a new ground of appeal, not initially raised during the trial, nor in the notice of appeal, namely that the state had not proved that the road on which the offence was allegedly committed, was a public road. The court exercised its discretion to hear argument on this aspect, and afforded the state an opportunity to file supplementary written argument. Mr *Molatudi*, counsel for the State, obliged, and we are grateful for his helpful submissions. This new ground of appeal is in addition to the original ground that the state had failed to prove that the appellant was driving under the influence of intoxicating liquor. These were the only issues the court had to decide on appeal.

[4] The appellant did not testify at the trial nor did he call any witnesses to testify on his behalf. The state's evidence that is relevant to the conviction is that of the arresting officer, Constable Aubrey Patrick Malumane and of Dr Gary Peiser who took the blood alcohol sample of the appellant. I will only deal with this evidence.

[5] Constable Malumane testified that on 17 September 2011 he was on patrol duty and driving on Yaverland Road. He was driving behind the appellant's motor vehicle. He noticed that the appellant's vehicle was driving on the lane of oncoming traffic. The appellant's vehicle moved back to its correct lane and then drove off the road. He signaled for the appellant to stop. He approached the appellant's vehicle and found him in the driver's seat. The appellant smelled of alcohol and apologized for being drunk. The appellant came out of the vehicle and was not able to stand unaided. He placed the appellant in the police van and took him to hospital to have blood drawn from him. The appellant was so drunk he did not realize they were in hospital.

[6] The appellant was legally represented at the trial. During cross-examination, his legal representative never challenged Constable Malumane's evidence the appellant was drunk, and that he apologized for being drunk or that he drove in the manner as alleged. As stated earlier, the appellant did not testify to refute any of the serious allegations made against him.

[7] Dr Peiser testified that he was a medical doctor since 2008 and according to his experience the appellant was under the influence of liquor. Similarly, his evidence was never disputed.

[8] It was contended on behalf of the appellant that the observations of Dr. Peiser in respect of the appellant are not indicative of a person under the influence of liquor and did not corroborate the evidence of Constable Malumane. Whilst the evidence of Constable Malumane was not corroborated there is no reason to disbelieve or disregard it as it was not refuted by the appellant nor can it be said that the evidence is unreliable or not credible. The evidence is not so far-fetched or clearly untenable as to be rejected on its own. It certainly cried out for an answer, which the appellant did not proffer as he elected not to testify, to which he is perfectly entitled. However, that does not mean there are no consequences to that election.

[9] In *S v Boesak* 2001 (1) SA 912 (CC) at 923E – F the court said the following about the right to remain silent and the need to testify:

"*The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to the decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion will be justified will depend on the weight of the evidence.*

[10] Our courts have accepted as honest evidence indicating that an accused person involved in an accident was under the influence of liquor because he smelled very strongly of liquor and swayed on his feet: *Rex v Spicer* 1945 AD 433. Although medical evidence is not a requirement to sustain a conviction under section 65 (1)(a) it may be essential to discharge the onus of proof depending on the circumstances of each case: *S v Mhetoa* 1968 (2) SA 773 (O), *Rex v Brorson* 1949 (2) SA 819, *Rex v Spicer*(supra). In my view the circumstances of this case did not require medical evidence to establish whether the appellant was under the influence of liquor and the appellant was correctly convicted of driving under the influence of liquor.

[11] I am of the view that the unchallenged evidence of Constable Malumane was sufficient to establish that the accused drove the vehicle under the influence of liquor.

[12] An offence under section 65(1)(a) has to be read *inter alia* with section 69(1) of the Act. Section 69(1) reads:

"Where in any prosecution in terms of this Act it is alleged that an offence was committed on a public road, the road concerned shall, in the absence of evidence to the contrary, be presumed to be a public road".

[13] In support of the argument that the state had not proved that the offence was committed on a public road the court was referred to the appeal court decision in *S v Botha* 1967 (1) SA 569 (O). That case is distinguishable from the present case. It dealt with a similar provision to section 65(1)(a) contained in section 111 (1) of Ordinance 17

of 1956 (O). There, unlike the present case, there was neither an allegation in the charge sheet that the street concerned was a public road, nor was there any evidence led to that effect. The appeal was upheld on the ground that the presumption would not apply where there was no allegation in the charge sheet that the road concerned was a public road.

[14] In *R v Bender* 1938 TPD 263 at 268 the appeal court dealing with a similar provisions in issue in this appeal contained in section 31(1) of the Motor Vehicle Ordinance (Transvaal) No 17 of 1931 held that in order to justify a conviction under section 31 there must be proof either by direct evidence or because of the statutory presumption, that the act complained of took place on a public road.

[15] I have not been able to find any decided cases dealing with the presumption in section 69(1) of the Act. In my view a rational interpretation of section 69(1) is that the state merely has to allege in the charge that the road concerned is a public road. Once the allegation is made the presumption kicks in and the road is presumed to be a public road. It is then required of the accused to adduce contrary evidence to dispute the alleged fact. If at the end of his case the accused has placed such contrary evidence before the court, the court has to weigh that evidence against the evidence of the state in order to determine whether the state has indeed proved beyond a reasonable doubt that the road concerned is a public road. An interpretation that would require the state to establish that the road concerned is a public road where there is no contrary evidence would render the presumption superfluous and meaningless.

[16] It should follow that where the presumption in section 69(1) applies and the accused fails to lead contrary evidence as required by section 69(1) then the presumed fact is taken as proved and the court would be entitled to convict the accused if all the other elements of the offence have been established beyond a reasonable doubt. See also *S v Ras* 1964 (4) SA 502 (T), *R v Scheepers* 1956 (3) SA 573 (C).

[17] The appellant did not testify at the trial and no contrary evidence was presented on his behalf to suggest that the road on which the offence is alleged to have been committed is not a public road. The argument that the state did not prove that the offence was committed on a public road is therefore without merit.

[18] For all the above reasons the appeal has to fail. In the premises the following order is made:

1. The appeal against the conviction is dismissed.

A L C M LEPHOKO
ACTING JUDGE OF THE HIGH COURT

I AGREE:

T M MAKGOKA
JUDGE OF THE HIGH COURT

Heard on: 24 April 2014.

Judgment delivered on: 20 June 2014

For the Appellant: Adv.: J De Necker

Instructed by: Thobela Attorneys

For the Respondent: Adv M R Molatudi

Instructed by: Director of Public Prosecutions