IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. A33/12

In the matter between:

JAMIE ROSS Appellant

and

THE STATE Respondent

Coram: BOZALEK J et OLIVIER AJ

Judgment: BOZALEK J

Heard: 14 & 20 SEPTEMBER 2012

Delivered: 25 SEPTEMBER 2012

For the Appellant:	***Adv TR Tyler***
As instructed by:	***Vreugde Attorneys***
	(ref: Ms J Vreugde)
For the Respondent:	***Adv S Raphels***
As Instructed by:	***n/a***

REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

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In the matter between:

JAMIE ROSS Appellant

versus

THE STATE Respondent

JUDGEMENT: 25 SEPTEMBER 2012

BOZALEK J:

[1] The appellant was convicted in the Worcester Magistrate's Court on 29 July 2011 of contravening s 65(2)(a) of Act 93 of 1996 in that he drove a motor vehicle on a public road with an alcohol concentration in his blood of 0.17g per 100ml. He was sentenced to a fine of R2000 plus a further fine of R2000 or 12 months imprisonment conditionally suspended for a period of five years.

[2] The appellant pleaded not guilty and was legally represented at the trial. With the leave of the magistrate he now appeals against his conviction.

BACKGROUND

[3] In brief the state's case comprised the evidence of the arresting officer, Mr D Williams, Dr Murray, the district surgeon who examined the appellant and took a blood sample from him, and the handing in of a certificate in terms of s 212 of the Criminal Procedure Act 51 of 1977 ("the Act"), which purported to record *inter alia* the result of the blood specimen test. Although the appellant himself did not testify, the evidence of a medical practitioner was led on his behalf.

[4] By way of plea explanation the Court was advised that the district surgeon's report i.e. his clinical examination, did not give *"sufficient suggestion ... that the accused was under the influence of alcohol while the blood alcohol report says something completely different."* It was added that the appellant was "*not satisfied with the blood alcohol analyses (sic)".*

[5] The s 212 certificate stated that the relevant sample had been tested by one Ms Pakama Pati, a Forensic Analyst at the Forensic Chemistry Laboratory of the National Department of Health in Cape Town who held a National Diploma in analytical chemistry from the Cape Peninsula University of Technology. It stated further that upon analysis the relevant blood specimen was found to have a concentration of alcohol therein of 0.17g per 100ml.

[6] At the conclusion of the evidence it was contended on behalf of the appellant that Dr Murray's conclusion that the appellant was lightly under the influence of alcohol was unsupported by his clinical findings, was

irreconcilable with the state's case that the appellant's blood alcohol concentration was 0.17g per 100ml and, as such, was a sufficient basis to rebut the *prima facie* evidence of the appellant's blood alcohol content contained in the s 212 certificate.

[7] In convicting the appellant the magistrate noted that the evidence of the circumstances in which the appellant was stopped and arrested by the traffic officer, as well as the *"chain evidence"* pertaining to the blood sample, stood undisputed. He observed, furthermore, that the certificate relating to the blood sample complied with the requirements of s 212(4) and therefore upon its production the contents thereof had been *prima facie* proved. The magistrate found that the appellant had not rebutted such *prima facie* evidence nor the balance of the state's evidence and therefore that his guilt had been established beyond reasonable doubt.

[8] On appeal the same argument as was advanced at trial was put up on behalf of the appellant, but counsel also raised a fresh technical point, namely, that the s 212(4) certificate had impermissibly purported to prove incompetent matter i.e. that both the gas chromatograph and the ion selective meter used by Ms Pati for the analysis of the appellant's blood specimen had been properly calibrated. This, it was contended, could only have been proved by way of an affidavit in terms of s 212(10) of Act 51 of 1977.

[9] Section 212 provides for the proof of a wide range of facts, primarily within the domain of expert evidence, by way of affidavits or certificates. Although the provisions of s 212 do not relieve the state of the burden of proving its case (*S v Vumba* 1964 (1) SA 642 (N)), when the requirements of

s 212 are met the affidavits or certificates are received upon their production as *prima facie* proof of their contents. Subsection 4 stipulates that whenever any fact established by an examination or process requiring any skill in a range of fields, including chemistry, is relevant to the issue in criminal proceedings, such fact may be *prima facie* proved by the production at such proceedings of an affidavit by a suitably qualified person in the service of the state or certain other institutions to the effect that he/she has established such fact by means of the necessary examination or process. The proviso to ss 4 allows for that same process of proof but by way of a certificate where the deponent lays claim to the skill in the fields of chemistry, anatomy or pathology. The proviso was, no doubt, introduced to alleviate the state's burden of securing affidavits in the numerous instances in which forensic facts are required to be proved in criminal proceedings.

[10] Where a fact is sought to be proved by a reading from a measuring instrument, the calibration and accuracy of such instrument is dealt with by s 212(10) which states as follows:

> *"10*
>
> *a) The Minister may in respect of any measuring instrument defined in section 1 of the Trade Metrology Act, 1973 (Act 77 of 1973), by notice in the Gazette prescribe the conditions and requirements which shall be complied with before any reading by such measuring instrument may be accepted in criminal proceedings as proof of the fact which it purports to prove, and if the Minister has so prescribed such conditions and requirements and upon proof that such conditions and requirements have been complied with in respect of any particular measuring instrument, the measuring instrument in question shall, for*

the purposes of proving the fact which it purports to prove, be accepted at criminal proceedings as proving the fact recorded by it, unless the contrary is proved.

b) An affidavit in which the deponent declares that the conditions and requirements referred to in paragraph (a) have been complied with in respect of the measuring instrument in question shall, upon the mere production thereof at the criminal proceedings in question, be prima facie proof that such conditions and requirements have been complied with."

[11] As is apparent from these provisions, ss 10 does not allow for *prima facie* proof of the calibration and/or accuracy of any measuring instrument by way of certificate. Notwithstanding this, the certificate proffered in the present matter purported to deal with the accuracy and calibration of the measuring instruments used in the blood specimen test as follows:

"5. The concentration of ethanol (hereinafter referred to as 'alcohol') in blood specimens and other fluids of biological origin, is established by using gas chromatography. This blood specimen (CTN-DD00812/2010) was analysed in duplicate using the following method (CT-B-005):

5.1 The gas chromatographs are calibrated before the specimens are analysed. Calibration is done by using certified alcohol standards of different conditions to obtain a calibration curve. The certified standards are supplied by the National Metrology Institute of South Africa (NMISA), which is the custodian of national measuring standards in South Africa.

.....

6. The concentration of the sodium fluoride in blood specimens and other fluids of biological origin is established by using a fluoride electrode

connected to an ion selective meter. This blood specimen (CTN-DD00812/2010) was analysed using the following method (CT-B-006)

6.1The ion selective meter is calibrated by using certified reference standards of different concentrations, which are obtained from the National Metrology Institute of South Africa (NMISA). "

[12] The *"evidence"* in question quoted above was inadmissible since it was not proved by means of an affidavit, *viva voce* evidence nor was it admitted by agreement. In argument it was conceded on behalf of the state that this evidence should have been proved by way of an affidavit but it was contended that the state should be permitted to rectify this omission by remitting the matter back to the magistrate's court with instructions as to the taking of further evidence from the forensic analyst, Ms Pati. In this regard we were advised in argument that she is also the person who calibrated the gas chromatograph and the ion selective meter according to certified standards and that she is still in the employ of the National Department of Health. This remittal, of course, will have to be preceded by the setting aside of the conviction and sentence.

[13] The power of a High Court, sitting as a court of appeal, to hear further evidence derives from s 309(3) read with s 304(2)(b) of the Act as well as s 22 of the Supreme Court Act, 59 of 1959. See *S v M* 2002 (2) SACR 411 (SCA) 419 I – 420 B. The Court need not hear the evidence itself but may remit the matter to the magistrate's court with instructions regarding the hearing of new evidence. A court of appeal will generally only allow the leading of new evidence in exceptional circumstances. See *S v Sterrenberg* 1980 (2) SA 888 (A) 893 G. In the normal course, remittal for the hearing of further evidence

will only be indicated where the proposed evidence is of a formal or technical nature or such as would prove the case without delay and without dispute. See S v Mokgeledi 1968 (4) SA 335 (A).

[14] In S v De Jager 1965 (2) SA 612 (A) Holmes JA set out the basic requirements which must be satisfied before an application for the reopening of a case and its remittal for the hearing of further evidence can succeed (at 613 C – D):

> *"a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.*
>
> *b) There should be a prima facie likelihood of the truth of the evidence.*
>
> *c) The evidence should be materially relevant to the outcome of the trial.*

In S v M 1988 (supra) at 458 E – 459 A Corbett JA quoted with approval the following statement of Holmes JA:

> *"It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be reopened and amplified. And there is always the possibility, such being human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty."*

and added that:

> *"(a)... the study of the reported decisions of this Court on the subject over the past 40 years shows that in the vast majority of cases relief has been refused; and that where relief had been granted the evidence in question is related to a single critical issue in the case..."* .

[15] In *S v Smit* 1966 (1) SA 638 (O) 641 C – F it was suggested that where the state wished to supplement a gap in the evidence it had presented in the trial, it should bring a substantive application to the court of appeal requesting it to hear this evidence. No such procedure was followed in the present matter, the state's application being made informally in argument.

[16] Be that as it may, I am prepared to accept that the second two requirements set out in *S v De Jager* (supra) have been met, namely, a *prima facie* likelihood that the evidence sought to be led is true and that it is materially relevant to the outcome of the trial. The central issue before us is whether the state has advanced a *"reasonably sufficient"* explanation why the evidence in question was not led at the trial.

[17] In motivating for the remittal of the matter back to the trial court it was contended on behalf of the state that the point regarding the correct calibration of the two measuring instruments was not specifically put in issue at the trial, nor did it appear in the appellant's notice of appeal and, in fact, was only identified by appellant's counsel in his heads of argument. I do not consider that these submissions carry great weight since they lose sight of the fact that the onus of proof remains on the state throughout and they disregard the various indications that the appellant was challenging the accuracy and reliability of the entire blood specimen measurement process. I have already set out what was stated by the appellant's legal representative at the stage of plea explanation. It is noteworthy, furthermore, that, in anticipation of meeting the appellant's challenge, the state had arranged for the forensic analyst to attend at court and give evidence. It would seem, however, that the prosecutor was ultimately guided by the magistrate's expressed view that

handing up of the certificate in terms of s 212 (4) would suffice to prove the state's case on a *prima facie* basis and therefore chose not to lead the evidence of the analyst. It is worth noting that had the magistrate exercised the discretion which he had in terms of s 212(12) to call the evidence of the analyst, it is most probable that all the doubts regarding the accuracy of the measuring instruments would have been resolved there and then.

[18] At the conclusion of the state case the appellant's legal representative again stated that she was not accepting the blood alcohol analysis as *"true"* and put in dispute that it was *"done correctly"*. To put the matter beyond any doubt, when the matter resumed after a postponement and before opening the defence's case, the appellant's legal representative put it on record that she had asked the state to call its witness to testify *"to the trustworthiness of the process or instrument in general and to the correctness of the particular instrument"*. All these indications, although perhaps not always a model of clarity, amounted, in my view, to a broad challenge to the state to prove its case in relation to the veracity and accuracy of the blood specimen test result and, as such, necessarily included the accuracy of the measuring instruments involved in the process.

[19] It is correct that, in response to the magistrate's question, the appellant's legal representative stated that the s 212 certificate complied with the requirements of the Act. If, however, as transpired was the case, the certificate was inadmissible in relation to its contents concerning the accuracy and calibration of the instruments involved in the blood specimen test, no

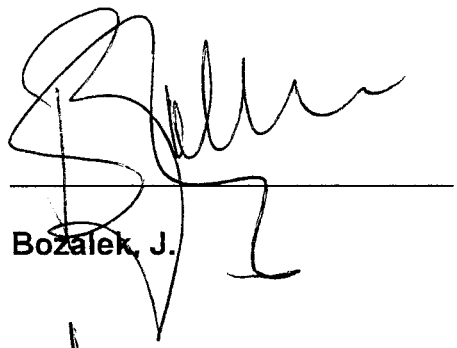
such concession by the appellant's legal representative could carry any weight since it was based upon a mutual error of law.

[20] In my view, therefore, the state's explanation for not leading the evidence in question, namely, that it was misled into believing this was not in issue or was lulled into a false sense of security by the appellant, is not borne out by the facts and is inadequate. In truth the evidence was not led because the state was mistakenly of the view that it had, through the analyst's certificate, proved, at least on a *prima facie* basis, the accuracy of the two instruments involved in the blood specimen analysis. No explanation has been proffered as to why it believed that it was entitled to do so by means of a certificate, notwithstanding the provisions of s 212(10) which require the use of an affidavit.

[21] The provisions of s 212 appreciably lighten the burden of the state in proving facts relating to forensic questions. It is vital that, in formulating and presenting the certificates and affidavits which are used to prove these facts in innumerable cases, the state ensures that the correct procedures are followed and such documents are properly and accurately drafted. S v Sikipha 2006 (2) SACR 439 (SCA) at [12]. Where, as in this matter, for reasons not explained, the state misconceives the requirements of s 212 and fails to follow these procedures with the result that it fails to make out its case against the appellant, I can see no reason why it should be afforded a second bite of the cherry by the quashing of the conviction and sentence and the remittal of the matter back to the magistrates court for the hearing of such evidence. Accordingly, the state's application to lead further evidence must fail.

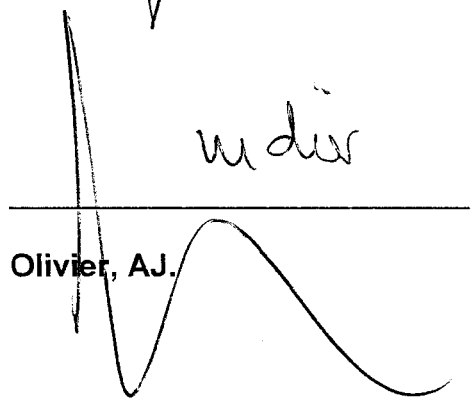
[22] In the light of this conclusion it is unnecessary to have regard to the question of whether the apparent result of the blood alcohol test was so at odds with the clinical symptoms observed that the test result could not be accurate. The results of the test have not been properly proved and the question simply does not arise.

[23] For these reasons I would uphold the appeal and set the conviction and sentence aside.



Bozalek, J.

I agree.



Olivier, AJ.