S v MAKUA 1993 (1) SACR 160 (T)

1993 (1) SACR p160

Citation	1993 (1) SACR 160 (T)
Court	Transvaal Provincial Division
Judge	Mahomed J
Heard	November 3, 1992
Judgment	November 3, 1992
Counsel	AJJ van Zyl for the appellant S le Roux for the State
Annotations	Link to Case Annotations

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Flynote : Sleutelwoorde

Traffic offences - Driving with an excessive concentration of alcohol in the blood - Contravention of s 122(2)(a) of Road Traffic Act 29 of 1989 - Sentence - Importance of evidence as to manner of accused's driving of J vehicle and traffic conditions reiterated.

1993 (1) SACR p161

MAHOMED J

A Traffic offences - Driving with an excessive concentration of alcohol in the blood - Contravention of s 122(2)(a) of Road Traffic Act 29 of 1989 - Sentence - Magistrate correctly holding that appellant to be discouraged from driving whilst under the influence of liquor or while concentration of alcohol in blood exceeding prescribed limit - Magistrate doing so by imposing fine and imprisonment suspended for five years on B condition that appellant did not drive a motor vehicle on a public road - Court on appeal finding it preferable to achieve same end by suspending imprisonment on condition that appellant not convicted of contravening s 122 of Act and by cancelling his driver's licence - Such sentence providing incentives for appellant to make sure he did not again drive in C circumstances which might endanger others without punishing him where he is able to drive soberly and lawfully, and also compelling him to re-apply for new driver's licence should he wish to drive again.

Headnote : Kopnota

The Court, in an appeal against a sentence imposed by a magistrate on the appellant's conviction of driving a motor vehicle while the concentration D of alcohol in his blood was not less than 0,08 grams per 100 millilitres in contravention of s 122(2)*(a)* of the Road Traffic Act 29 of 1989, reiterated the importance, for purposes of assessing an appropriate sentence, of evidence as to the accused's actual driving of the motor vehicle and of the location of the road upon which he had been driving and the traffic conditions thereon.

E The *dictum* in *S v Sinclair* 1963 (1) SA 558 (C) at 560A-D applied.
Where the court holds that the accused needs to be discouraged from driving a motor vehicle while he is under the influence of liquor or whilst the concentration of alcohol in his blood is not less than 0,08 grams per 100 millilitres (the court *a quo* having correctly so held in the case of the appellant *in casu)*, it is not necessary to impose a sentence of imprisonment (in addition to a fine) suspended for five years on F condition that the accused does not drive a motor vehicle again on any public road during the five year period, thereby preventing the accused from driving at all. The objective of the court can rationally and sensibly be furthered by other mechanisms. Firstly, it can be done by suspending the operation of the prison sentence on the condition that the accused does not during the period of suspension drive a motor vehicle G whilst under the influence of liquor or whilst the concentration of alcohol in his blood exceeds the statutory minimum. Secondly, it can be achieved by the mechanism of cancelling his driver's licence and compelling him to re-apply for a new licence and to satisfy the licence authorities that he should be issued with such a licence. Both of these mechanisms would provide formidable incentives for the appellant to make H sure that he does not again drive a motor vehicle in circumstances which might endanger others without punishing in the circumstances where he is able to drive a motor vehicle perfectly soberly and lawfully.

Case Information

Appeal from a sentence imposed in a magistrate's court. The facts appear I from the reasons for judgment.

A J J van Zyl for the appellant.

S le Roux for the State.

Judgment

Mahomed J: The appellant was found guilty in the magistrate's court at Middelburg on a charge of contravening s 122(2)*(a)* of the Road Traffic Act 29 of 1989 by driving a vehicle on a public road while the concentration J of alcohol in his

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MAHOMED J

A blood was not less than 0,08 grams per 100 millilitres. The evidence before the court *a quo* clearly established the guilt of the appellant. The alcohol concentration in his blood was found to be 0,33 grams per 100 millilitres and the appellant admitted that he had been driving the vehicle on a public road at the relevant time. He appeals only against his sentence.

B The sentence imposed by the magistrate was a fine of R1 000 plus imprisonment for two years. The imprisonment was suspended for five years on the condition that the appellant did not drive a motor vehicle again on any public road in the country during the five year period. In terms of s 55(1)*(b)* of Act 29 of 1989 his licence was also cancelled.

The facts of mitigation advanced on behalf of the appellant and accepted C by the magistrate disclosed that the appellant was a 74-year old pensioner. He had no previous convictions. He was married with five minor children. His pension was R325 per month. His wife did not work. He had R800 in his possession to pay a fine immediately. Any additional fine would be paid from his pension at the end of the month. He had drunk twelve 750 millilitre cans of beer on the relevant day.

In the notice of appeal filed on behalf of the appellant it was D contended, *inter alia*, that the conditions attached to the sentence of imprisonment were

> 'too harsh for a first offender of the appellant's calibre who needs the licence to augment his income as a fruit and vegetable vendor to maintain his children'.

There was, however, no evidence before the magistrate that the appellant operated as a fruit and vegetable vendor or that he needed to drive a motor vehicle for this purpose.

We especially called for a transcript of E the submissions on behalf of the appellant by his attorney in the court *a quo* and we are satisfied that no submission to this effect was made to the magistrate. In the result the magistrate cannot be blamed in any way whatever for failing to take into account the alleged need of the appellant to drive a motor vehicle in order to operate effectively as a vendor of fruit and vegetables.

The issue which nevertheless needs to be addressed is whether his F sentence of two years' imprisonment suspended for five years on the condition that the appellant does not drive a motor vehicle at all during the five year period of suspension is justified by the evidence. In ordering this condition the magistrate concluded that one third of the appellant's blood consisted of alcohol. This is not a conclusion justified by the evidence. The evidence was simply that the alcohol concentration in his blood was 0,33 grams per 100 millilitres. To say that this constitutes G a third of his total blood content is in my view a major misdirection.

The magistrate also concluded that before the appellant began drinking he knew very well that he was going to drive the vehicle and the consequences were foreseeable. Again there is no evidence to support this. Moreover, there is no evidence that the appellant's judgment or driving skills were in fact so severely impaired that he could not drive the motor H vehicle properly or that he did so in a manner which constituted a visible danger to others. The appellant was apparently confronted by the police not because they observed anything unsatisfactory in the manner of his driving but because the police suspected that he might be driving a stolen motor vehicle. The similarity of the appearance of the appellant's motor vehicle with ordinary police vehicles had caused the police to suspect that perhaps the appellant had been driving a stolen motor vehicle and I this was the reason why he was stopped.

In a prosecution such as the present the remarks of the Court in the case of *S v Sinclair* 1963 (1) SA 558 (C) at 560A-D are to be borne in mind. In that case it was said by the Court as follows:

'When one looks at the record before us we find that the investigation as to the actual driving of the car and the place where it was driven, apart from the fact that it was a public road, leaves much to be J desired. The magistrate was simply

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A told that the car zig-zagged over the road, that it was then stopped and the appellant got out. Whether this was in a busy thoroughfare at the time is not stated; whether it was a lane carrying traffic in only one direction was not stated; whether the zig-zagging was a danger to other users of the road is not stated; nor is it stated for what distance this car was seen to travel on the public road or the extent to which it deviated from a straight course. Unless those aspects are properly B investigated and unless from an investigation of those aspects it should appear that the appellant was in fact a danger to other users of the road or, as stated by the magistrate, it indicates a wilful disregard of other users of a public road, I feel that the magistrate should not regard it as a reason for imposing a severe sentence.'

(See also the case of *S v Lambrecht; S v Van Rensburg; S v Van der Hoven;* C *S v Geyser* 1970 (3) SA 141 (T) at 146H-147A.)

The magistrate correctly held that the appellant needed to be discouraged from driving a motor vehicle while he is under the influence of liquor or whilst the concentration of alcohol in his blood is not less than 0,08 grams per 100 millilitres. But why was it necessary to prevent the appellant from driving the vehicle at all in order to achieve this D objective? Such an objective can rationally and sensibly be furthered by other mechanisms. Firstly, it can be done by suspending the operation of the prison sentence on the condition that the appellant does not during the period of suspension drive a

motor vehicle whilst under the influence of liquor or whilst the alcohol concentration in his blood exceeds the statutory minimum referred to in Act 29 of 1989.

E Secondly, it can be achieved by the mechanism of cancelling the appellant's driving licence and compelling him to re-apply for a new licence and to satisfy the licence authorities that he should be issued with such a licence.

Both of these mechanisms would provide formidable incentives for the appellant to make sure that he does not again drive a motor vehicle in circumstances which might endanger others without punishing him in the circumstances where he is able to drive a motor vehicle perfectly soberly F and lawfully.

I am therefore satisfied that both a suspended term of imprisonment and a cancellation of the appellant's driving licence is perfectly justified. I am for the reasons discussed not satisfied with the conditions of suspension imposed by the magistrate. Nor am I satisfied with the period of two years' imprisonment imposed by the magistrate. It is a sentence G which is strikingly disparate from the sentence I would have imposed as a trial Judge on a first offender on the facts accepted as common cause in the present case.

It is true that the whole of the imprisonment was and is to be suspended but that does not relieve the court of the duty to ensure that the substantive term of imprisonment is justified by the circumstances of the case. I refer in this regard to the case of *S v Setnoboko* 1981 (3) SA 553 H (O) at 554 where the headnote reads as follows:

> 'In a determination of what is an appropriate sentence in a particular case and whether a portion of the sentence should be suspended, it would be wrong to look at part of the sentence only as though the suspended portion does not have to be served. Of the suspended portion it can only be said that it does not *necessarily* have to be served. It remains, however, part of the sentence of the court and, indeed, a part which I will possibly have to be served. The need for careful consideration of the sentence which, as a whole, is appropriate cannot be relaxed merely because there is a possibility that the suspended portion of the sentence will eventually not have any real effect in the sense that it will not have to be served. It remains important to bear in mind throughout that the full sentence imposed might have to be served in the end and accordingly the period of the suspended punishment should be J carefully considered in the context of

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> A the unsuspended punishment. The unfairness of too long a term of imprisonment which is imposed on the first offence obviously does not fade into nothingness because the accused himself is to blame for the breach of the condition of suspension.'

In the result I would make the following order:

1. The conviction of the appellant is confirmed. B
2. The sentence imposed by the magistrate is set aside and substituted by the following:
   - *(a)* The accused is sentenced to pay a fine of R1 000.
   - *(b)* In addition to the fine the accused is sentenced to six months' imprisonment, the whole of which is suspended for five years on C the condition that the accused is not convicted of contravening s 122 of the Road Traffic Act 29 of 1989, or any statutory substitution thereof, committed during the period of suspension.
   - *(c)* In terms of s 55(1)*(b)* of Act 29 of 1989 the accused's driving licence is cancelled.

D Goldstein J concurred.

Appellant's Attorney: *Mike Mphela*, Groblersdal.

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