



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Not Reportable

Case no: R19/21

In the matter between:

THE STATE

and

RITESH BHEAM SINGH

ORDER

On review from the Bergville Magistrate's Court (sitting as the court a quo):

1. The conviction and sentence is set aside.
2. The matter is remitted back to the Bergville Magistrate's Court to commence de novo before a different presiding officer.

REVIEW JUDGMENT

MOSSOP AJ:

[1] This matter is before me on automatic review from the Bergville Magistrate's Court in accordance with the provisions of section 302 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused was charged with contravening section 65(1)(a) of the National Road Traffic Act 93 of 1996 (the Act) in that he allegedly drove a motor vehicle on a public road whilst under the influence of alcohol. He was not legally represented and pleaded guilty to the charge.

[3] The learned magistrate, presiding in the matter, proceeded to question the accused in terms of the provisions of section 112(1)(b) of the CPA to ascertain whether he correctly admitted all the essential allegations of the charge.

[4] The accused admitted that whilst driving his car on the evening in question on a public road that he was involved in a motor vehicle collision. On the question of what he had consumed, the following was said:

COURT Tell me, sir, had you been consuming alcohol during the day?

ACCUSED No, ma'am, it was just in the evening after work.

COURT Okay, so you went for after dinner drinks?

ACCUSED Yes.

COURT How many drinks did you have, sir?

ACCUSED I had four beers, ma'am.

COURT Four beers?

ACCUSED Yes.

COURT And were you aware of the fact that consuming beers could influence your ability to drive properly and react to the necessary absence of other drivers?

ACCUSED Yes, ma'am.

COURT Were you taking any medication or anything at that stage or was it just the beers?

ACCUSED During lunch time I did have a few pain tablets that was for my knees.

COURT What type of pain tablets?

ACCUSED I am not sure now. That was a while ago.

COURT Is it something like a Panado or a Myprodol?

ACCUSED It is a specific tablet that I got from my pharmacy just for my knee pains.

COURT Over the counter medication?

ACCUSED Yes

COURT Not prescription?

ACCUSED No.'

[5] That constituted all the questioning by the learned magistrate of the accused on this issue. In questioning the accused, the learned magistrate failed to ascertain from him the circumstances under which he consumed the alcohol, including:

- (a) what type of beer he had been drinking and what the alcoholic content of the beer was, it being common knowledge beer with varying concentrations of alcohol is sold these days, including beer with zero alcohol;
- (b) what effect the beer actually had on him and his ability to drive;
- (c) the period over which he had consumed the four beers;
- (d) when the collision that he was involved in occurred relative to his drinking of the beers; and
- (e) precisely what medication he had taken and what its possible effects were.

[6] Regarding the collision itself, the accused said the following:
 'I was on my home [sic] and due to being in the evening and the bright lights and possibly the alcohol that I had consumed I turned into the other vehicle.' [Emphasis added]

[7] In my view, this did not constitute an unequivocal admission by the accused that his ability to drive his motor vehicle was impaired by the intake of an excessive amount of alcohol. No questions were asked of the accused by the court regarding his ability to drive his motor vehicle on the evening in question. Whilst the learned magistrate did ask the accused whether he appreciated that the consumption of the beers could have impaired his ability to drive his motor vehicle, the questioning, in my view, needed to go further. The learned magistrate ought to have ascertained that the accused admitted that the consumption of alcohol did impair his ability to drive his motor vehicle, not merely that

it could have impaired his ability. The effect of the medication consumed by the accused also should have been explored further.

[8] In my view, based on the foregoing, the learned magistrate ought not to have been satisfied that the accused admitted that he was under the influence of alcohol when he drove his motor vehicle.

[9] In sentencing the accused, the learned magistrate found that circumstances existed which did not justify the suspension of his driver's license. How this was ascertained is not clear.

[10] Section 34(1)(a) of the Act provides as follows:

'(1) Subject to section 35, a court convicting a person of an offence in terms of this Act, or of an offence at common law, relating to the driving of a motor vehicle may, in addition to imposing a sentence, issue an order, if the person convicted is-

- (a) the holder of a licence, or of a licence and permit, that such licence or licence and permit be suspended for such period as the court may deem fit or that such licence or licence and permit be cancelled, and any such licence shall be dealt with as provided in subsection (3) . . .'

[11] Section 35 of the Act provides as follows:

(1) Subject to subsection (3), every driving licence or every licence and permit of any person convicted of an offence referred to in-

- (a) section 61(1)(a), (b) or (c), in the case of the death of or serious injury to a person;
- (aA) section 59(4), in the case of a conviction for an offence, where-
 - (i) a speed in excess of 30 kilometres per hour over the prescribed general speed limit in an urban area was recorded; or
 - (ii) a speed in excess of 40 kilometres per hour over the prescribed general speed limit outside an urban area or on a freeway was recorded;
- (b) section 63(1), if the court finds that the offence was committed by driving recklessly;
- (c) section 65(1), (2) or (5),

where such person is the holder of a driving licence or a licence and permit, shall be suspended in the case of-

- (i) a first offence, for a period of at least six months;
- (ii) a second offence, for a period of at least five years; or
- (iii) a third or subsequent offence, for a period of at least ten years,

calculated from the date of sentence.

(2) . . .

(3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit.'

[12] Of these two sections, section 34 is the dominant section. By the use of the words, '(s)ubject to section 35' in section 34, the legislature sought to qualify the unlimited discretion of a court to order the suspension of an offender's driving licence 'for such period as the court may deem fit'. The limitation is that in the case of an offender who has contravened any of the provisions of the Act specified in section 35(1), the court may not, subject to sub section (3), suspend the offender's driving licence for any time period shorter than the periods specified in sub sections (i) to (iii) of section 35(1).¹

[13] The accused was convicted of contravening section 65(1)(a) of the Act, an offence that falls within the provisions of section 35(1)(c) of the Act. Being a first offender insofar as the offence contemplated by the provisions of section 65(1) of the Act is concerned,² the accused was faced with the compulsory suspension of his driving licence for a minimum period of at least six months in terms of the provisions of section 35(1)(i) of the Act. The only way that consequence could be avoided was if the accused placed evidence

¹ *S v Van Rooyen* 2012 (2) SACR 141 (ECG), para 12.

² *S v Van Rooyen*, supra, para 27.

under oath before the learned magistrate that was sufficiently compelling to justify not suspending his driving licence, alternatively shortening the period of suspension.

[14] After conviction, the court addressed the accused as follows:

COURT Sir, you may now address me in mitigation of sentence. What that means is that you must place personal circumstances before me which will enable me to arrive at an appropriate sentence. You may do so by giving evidence under oath and/or calling witnesses.

ACCUSED Yes, ma'am.

COURT If you do so you will be cross-examined by the State. You may also address me from where you stand. Do you understand, sir?

ACCUSED Yes, ma'am.

COURT How old are you, sir?

[15] It is evident that after explaining to the accused that he had two alternatives, the court did not ask the accused what his election was, but assumed that he chose to address the court from the dock and not give evidence under oath. Significantly, the court did not inform the accused of the mandatory suspension of his driving licence and that to convince the court not to suspend his licence, it was necessary that he place evidence before the court under oath. The accused did not advance any reasons why his licence should not be suspended nor was he asked any questions, whether under oath or not, regarding whether his driving licence should be suspended or not. It is important to bear in mind that the suspension of a driving licence is not simply an administrative act but it is an integral part of the punishment meted out to an accused person.³ How the learned magistrate arrived at the conclusion that she did is accordingly not clear.

[16] From the transcript of proceedings it appears that the accused was 'in a bit of a hurry to fetch children from school' and the matter appears, generally, to have been approached with some degree of haste by the court. Magistrates are enjoined to take

³ *S v Mpongoshe* [2002] 2 All SA 88 (E).

their time in dealing with matters to ensure that there is no failure of justice. Whilst the convenience of the accused is a valid consideration amongst other issues, the proper administration of justice must not be sacrificed at the altar of such convenience.

[17] I am accordingly not satisfied that the proceedings were in accordance with justice. In the result, the following order is made:

1. The conviction and sentence is set aside.
2. The matter is remitted back to the Bergville Magistrate's Court to commence de novo before a different presiding officer.

MOSSOP AJ

I agree:

SEEGOBIN J