

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 26/2015

In the review between:-

STATE

and

IBRAHIM JUMANE MAHOMED

Accused

CORAM:

G.J.M. WRIGHT et S.J. REINDERS AJJ

JUDGMENT:

G.J.M. WRIGHT, AJ

DELIVERED ON:

19 MARCH 2015

REVIEW JUDGMENT

- [1] The Accused was found guilty of contravening the National Road Traffic Act, Act 93 of 1996 (“the Act”) in that he exceeded the general speed limit. Although the charge sheet refers to various applicable sections of the Act, the Accused’s conduct falls specifically within the provisions of section 59(4)(a).

- [2] The Accused pleaded guilty and the magistrate proceeded to question him in terms of section 112 of the Criminal Procedure Act. Thereafter the magistrate found the Accused guilty as charged and sentenced him to a fine of R 10 000,00 or 12 months imprisonment, of which half is suspended for a period of five years on condition that the Accused is not convicted of contravention of section 89(1) of the Act during the period of suspension.
- [3] It might have been more appropriate for the magistrate to convict the Accused of contravention of the specific section of the Act that the Accused is found to have contravened (59(4)(a)). However, the conviction in itself is not the cause of concern in this matter. As will be shown later, the reference to section 89(1) does create practical problems for sentencing purposes.
- [4] The Accused not only pleaded guilty but expressed remorse for his actions. It is not evident from the sentencing judgment that this was in any way considered as mitigating. The Accused explained that he speeded because he desperately needed to find a bathroom where he could relieve his upset stomach. The plea was accepted by the State. This explanation by the Accused of the reasons for his conduct further mitigates his blameworthiness. It is not clear from the judgment that the magistrate took this into account.
- [5] In the circumstances of this case it is the nature and (especially) wording of the imposed sentence that causes the most concern.

- [6] The magistrate clearly foresaw the imposition of a fine as being an appropriate sentence. He went as far as enquiring from the Accused as to how much the Accused would be able to afford. The Accused's response of "R 700,00" is so far removed from the amount that the magistrate had in mind, that the magistrate should have further investigated the Accused's ability to pay a substantial fine. The ability of an accused to pay a particular fine must be enquired into properly. See: **S v Sithole** 1979 (2) SA 67 (A) at 69 H.
- [7] The magistrate also failed to consider the possibility of deferment of payment of the fine. In **S v Maluleke** 2002 (1) SACR 260 (T) it was decided that, whenever a court has imposed a fine, it is obliged to consider the provisions of section 297(5). As the Accused was undefended, the magistrate was under a particular obligation to assist him and to hold, *mero motu*, an enquiry into his capacity to pay over a period of time. See: **S v Dandiso** 1995 (2) SACR 573 (W) at 577 f; **S v Zwane** 1997 (1) SACR 326 (W) at 329 d. Deferment may have softened the effect of the amount of the fine.
- [8] In considering the appropriateness of a suspended sentence, regard should be had to the whole sentence, including the part that is suspended. The reason being that a situation may arise where the Accused may eventually have to serve the suspended part of the sentence. See: **S v Rooi** 2007 (1) SACR 668 (CPD) at 671 a – b. It is thus the whole of the sentence that should be appropriate in the circumstances of the matter. Against the

background of these general principles the sentence seems unduly harsh and inappropriate.

- [9] One condition of suspension has been imposed, namely non-contravention of section 89(1) of the Act. Section 89(1) is a general provision that reads as follows:

“Any person who contravenes or fails to comply with any provision of this Act or with any direction, condition, demand, determination, requirement, term or request thereunder, shall be guilty of an offence.”

[own emphasis]

- [10] Suspension of part of the sentence subject to such a generalized condition is overly broad and unfair to the Accused. It creates the possibility of a situation where a contravention of one of the less serious provisions of the Act may result in the suspended sentence being put into operation. As a result the Accused are punished more severely than appropriate for the specific crime that he has now be found guilty of.
- [11] The primary aim of a suspensive sentence with negative conditions is to deter the offender from committing similar offences. Courts have insisted in a large number of judgments that the offences mentioned in the suspensive condition must be connected to the offence for which the sentence was imposed. See for example: **S v Mjaware** 1990 (1) SACR 388 (N) at 389 g.
- [12] The case of **S v Van Rooyen**; **S v Jantjies en ‘n Ander** 1974 (3) SA 319 (NC) provide general guidelines when imposing

conditions for suspension. The following are useful in the circumstances of the present matter:

- (i) The conditions must refer to one or more specific offences, not to a group of offences;
- (ii) Only offences which are substantially related to the nature and the circumstances of the offence of which the Accused has been convicted should be referred to.

[13] The condition must be clear and an accused should know exactly what conduct may lead to his having to serve the sentence. See: **S v Valashia** 1973 (1) SA 934 (O); **S v Makgetha** 1980 (1) SA 130 (O). By not properly defining and limiting the conditions of suspension, the Accused was dealt with unjustly.

[14] The period of suspension ordered by the magistrate is five years which is the maximum period allowed for suspension. In **S v Nabote** 1978 (1) SA 648 (O) at 650 H the view was expressed that, unless special circumstances are present, a sentence should not be suspended for the maximum period. This viewpoint differs from that in **S v Van Rensburg** 1978 (4) SA 481 (T) at 483 G – H. The sentiments expressed in the **Nabote** matter seem appropriate in the circumstances of the present matter and are worth following.

[15] In the circumstances of the case, it appears unfair and inappropriate to suspend the sentence for the maximum period of time. Suspension for a period of three years would be more appropriate.

ORDER

1. The sentence imposed on the Accused on 28 January 2015 is set aside and replaced with the following:

“A fine of R 7 500,00 or six (6) months imprisonment, half of which is suspended for a period of three (3) years on condition that the Accused is not convicted of the contravention of section 59(4)(a) of the National Road Traffic Act, Act 93 of 1996 committed during the period of suspension.”

G.J.M WRIGHT, AJ

I agree.

S.J. REINDERS, AJ