

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE STATE Appellant

and

IVOR H WELLS Respondent

Coram: JOUBERT, HEFER, MILNE, STEYN JJA

et FRIEDMAN AJA.

Hearing: 17 November 1989

Delivered: 27 November 1989

J U D G M E N T

JOUBERT JA:

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On Tuesday afternoon, 26 January 1988, the Respondent ("Mr Wells") drove his motor car on the N1 Freeway, a public road, in the Randburg district. Appropriate road traffic signs en route indicated that the general speed limit of 120 km per hour was applicable to the road and that speed law was enforceable by camera. He unwittingly drove through a speed trap on the road without being apprised thereof by a traffic officer. He was subsequently charged in the Randburg Magistrate's Court with the contravention of sec 102 of the Road Traffic Ordinance No 21 of 1966 (T) in that he had exceeded the general speed limit on the road by having driven his motor car at a speed of at least 137 km per hour. He pleaded not guilty but he was convicted as charged and sentenced to a fine of R60 or 30 days imprisonment.

Mr Wells, a practising attorney, conducted his own defence during the trial. Apart from the formal

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admission that the road in question was a public road, he also admitted "that the apparatus which was used in regard to the matter is a measuring instrument for purposes of Section 212(10)(a) and that it mechanically speaking was functioning correctly" (Record vol 1 p 11). His reference to sec 212 (10)(a) of the Criminal Procedure Act No 51 of 1977, (hereinafter referred to as "the Act") as well as his address to the Magistrate on the merits of his defence, indicates that he erroneously believed the State's case was based on it, thereby placing an onus on him to refute the correctness of the recorded speed of 137 km per hour. Sec 212(10)(a) was, however, inapplicable since the Ministerial conditions and requirements prescribed in terms of it in regard to velocity measuring instruments had been withdrawn by Government Notice R 1611 published in Gazette No 7688 on 31 July 1981. The prosecution quite correctly placed no reliance on sec 212(10)(a).

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Accordingly the onus was on the State to prove the criminal charge against Mr Wells beyond a reasonable doubt. S v Sinkankanka & Another, 1963(2) SA 531(A) at p 541 A, S v Fouche, 1974(1) SA 96 (A) at p 101 G.

Mr Wells pointedly informed the Magistrate that the basis of his defence was that the speed measuring apparatus had not been correctly set up at the scene of the speed trap.

Hence it followed that it was the duty of the State to prove beyond a reasonable doubt by means of expert evidence that the speed measuring apparatus had been set up correctly in such a manner as to record a correct measurement of the speed travelled by Mr Wells.

Mr Van Heerden, a traffic officer, testified on behalf of the State. As operator of the Truvelo speed measuring instrument, as well as the camera used in

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conjunction with it to photograph simultaneously vehicles from their rear, he alone was in control of the said speed trap on 26 January 1988. He described in detail how he had set up the entire speed measuring apparatus and how he checked it every hour to satisfy himself as to its proper functioning. The position of the sensor cables of the speed measuring apparatus on the road surface was checked and measured by him half-hourly. To illustrate how he set about positioning the sensor cables across the two lanes of the road surface he handed in Exhibit "C" (Record vol 1 p 39-40). (I may add in parenthesis that Exhibit "C" was a portion of the withdrawn Ministerial conditions and requirements referred to supra). He also handed in an operator's certificate issued to him by Truvelo Manufacturer as proof of his expertise in the theory and operation of Truvelo speed measuring instruments (Exhibit "G". Record Vol 1

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p 44). In cross-examination Van Heerden admitted not having stopped Mr Wells after passing through the speed trap.

His explanation why he did not do so was as follows:

"Edelagbare, omdat dit te gevaarlik is op 'n snelweg om 'n voertuig te stop. Dit is hoekom die kamera net op snelweë gebruik word om voertuie af te neem." (Record Vol 1 p 20).

Mr Wells testified that on the occasion in question he travelled along the road in a stream of traffic without paying specific attention to his actual speed at all times. He did not concede that he exceeded the speed limit. He was unaware of the fact that he had travelled through a speed trap. He saw no sensor cables across the roadway. Nor did he see the flash of a camera. The fact that he had not been stopped by the traffic officer in charge of the speed trap deprived him of the opportunity of inspecting the

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speed measuring apparatus and of checking the sensor cables.

This aspect became the cornerstone of his defence.

The Magistrate held that the State had proved its case beyond a reasonable doubt that the speed of Mr Wells was indeed 137 km per hour. I may add that the Magistrate in his summary of the evidence of Mr Wells mentioned his deprivation of an opportunity to inspect the speed measuring apparatus and to check the sensor cables. The Magistrate, however, did not comment on this evidence in the ratio decidendi of his judgment. He ignored it entirely.

The appeal of Mr Wells against his conviction and sentence to the Court of Appeal in the Witwatersrand Local Division was heard on 20 March 1989 by SPOELSTRA J and BREGMAN AJ. The ex tempore judgment upholding the appeal and setting aside the conviction and sentence was pronounced on the same day in open court by BREGMAN AJ (SPOELSTRA J concurring).

On 5 April 1989 the Registrar of the said Court released a written judgment endorsed by BREGMAN AJ as reportable in the Law Reports. On 15 May 1989 the Court a quo granted the State, in terms of sec 311(1) of the Act, leave to appeal to this Court on certain questions of law as set out in Annexure "A" (Record Vol 2 p 78-81).

Two documents were placed before this Court as copies of the judgment of the Court a quo. The one document is a typed transcript of the tape recording of the ex tempore judgment pronounced by BREGMAN A J in open court on 20 March 1989. This copy was not revised by BREGMAN A J. I shall hereinafter refer to it as the "unrevised judgment", a copy of which was included as Annexure "ZVZ1" in the Record (vol 2 p 103-107). The other document is a copy of the judgment released on 5 April 1989 by the Registrar of the Court a quo (Record vol 1 p 52-67). I

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shall hereinafter refer to it as the "revised judgment".

Which copy is in law the judgment of the Court a quo ?

Mr Von Lieres und Wilkau, on behalf of the State, contended that the unrevised judgment was the lawful one whereas Mr Wells, who appeared in person as the Respondent, submitted that the revised judgment was the lawful one.

Our common law authorities hold two diametrically opposed views on the matter. According to the strict approach a judicial official is functus officio upon having pronounced his judgment which is a sententia stricti juris and as such incapable of alteration, correction, amendment or addition by him in any manner at all. See D 42.1.55

(Ulpianus), D 42.1.62, Gail (1526-1587) Practicarum

Observationum lib 1 obs 116 nrs 1 et 3, Huber (1636-1694)

H.R. 5.37.2 - 6, Van der Linden (1756-1835) Judiciele Practijcq

3.5.10. In the case of In re Appeal: S v Stofile and Others,

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1989(2) SA 629 (CK GD) at p 630 I PICKARD C J would seem to prefer this strict approach. A variant of this strict approach permits a judicial officer to effect linguistic or other minor corrections to his pronounced judgment without changing the substance thereof. See Damhouder, Practycke in Civile Saecken cap 220 nr 1, Merula (1558-1607), Manier van Procederen titel 90 capittel 1 nr 2, Wassenaar (1589-1664) Practyk Judicieel cap 21 nr 21.

The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment provided that the sense or substance of his judgment is not affected thereby (tenore substantiae perseverante). See D42.1.46, Donellus (1527-1591) ad D42.1.45 nr 4, 1 Hollandsche Consultation c 290 and especially Voet (1647-1713) 42.1.27. The relevant portion of Voet's text reads as follows:

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& post pronunciationem ejus judex etiam
supplere possit eodem die reliqua omnia,
quae ad consequentiam quidem jam statutorum
pertinent, sed sententiae adhuc desunt
nec non explicare ea, quae in sententia
obscura sunt posita, & ita actorum verba
emendare, tenore sententiae perseverante.

According to Voet a judge may also, on the same day, after
the pronouncement of his judgment add (supplere) to it all
remaining matters which relate to the consequences of what
he has already decided but which are still missing from his
judgment. He may also explain (explicare) what has been
obscurly stated in his judgment and thus correct (emendare)
the wording of the record provided that the tenor of the judgment
is preserved.

In my judgment Voet's approach should

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be accepted as a correct statement of our common law on this matter. It moreover accords with South African practice. In criminal matters it should be read in conjunction with sec 176 of the Act if necessary. In the present matter the provisions of sec 176 are not applicable. In England the Court of Appeal in Bromley v Bromley, [1964] 3 All E R 226 (C A) adopted an approach which essentially accords with Voet's approach.

A careful comparison of the unrevised and revised judgments establishes that both of them basically dealt with the same rationes decidendi excepting that the revised judgment did so in much greater elaboration but without changing or violating the tenor of the unrevised judgment. In my judgment the revised judgment must therefore be held to be the judgment of the Court a quo.

I now turn to consider the legal questions

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raised by the State as appellant. The first legal question is whether or not Mr Wells should have been afforded an opportunity to inspect or check the speed measuring apparatus and its set-up immediately after having passed through the speed trap. The Court a quo held that he was entitled to have been afforded such an opportunity by the traffic officer Van Heerden. Mr Wells in support of his contention that he was entitled to have been afforded such an opportunity relied on the following sentence in Hiemstra, Suid-Afrikaanse Strafbrosesreg, 4th ed. at p 468:

"Die beweerde oortreder word op die toneel geleentheid gegee om die lesings te inspekteer."

The learned author does not refer to any legal authority in support of his proposition. He, however, deals with the situation where a speed measuring apparatus is used without a camera. In such a situation it is necessary for the

traffic officer to stop the alleged offender in order to obtain from him particulars of his name and address. There is perhaps no reason why the practice suggested by the learned author should not be applied in such a case. This Court is, however, not called upon in the present case to decide upon the correctness or not of such practice. But what the learned author suggests cannot be applied to the situation which we have in this case viz. where a speed measuring apparatus was used in conjunction with a camera on a freeway where it would be dangerous to stop the alleged offender. Neither Mr Wells nor Mr Von Lieres und Wilkau could refer this Court to a legal rule or principle in support of the contention of Mr Wells. Contrary to what was held by the Court a quo there is in my judgment no rule or principle of law which entitled Mr Wells to be afforded an opportunity to inspect or check the speed measuring apparatus in situ. The first

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legal question is therefore decided in favour of the State.

As I indicated supra the reliance by Mr Wells on such an opportunity as a right of a motorist was really the cornerstone of his defence in the Magistrate's Court. It was also his main contention in the Court a quo.

The second question of law was whether or not it was correctly held by the Court a quo that expert evidence should have been placed before the Magistrate's Court by the State as regards the manufacturer's specifications of the speed measuring apparatus. It became quite clear during argument before this Court that the Court a quo had erred in having held that such expert evidence should in the circumstances of this case have been adduced by the State. Mr Wells correctly conceded that such expert evidence was unnecessary.

In the light of the foregoing it follows

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that the appeal must succeed and that this Court should in terms of sec 311(1)(a) of the Act re-instate the conviction and sentence of the Respondent. Mr Von Lieres und Wilkau informed this Court that in the event of the appeal being upheld the State would not seek an order for costs against the Respondent in terms of sec 311(2) of the Act.

In the result the following orders are granted:

1. The appeal succeeds.
2. The following order is substituted for the order of the Court a quo viz. .

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"(a) The appeal is dismissed.

(b) The conviction and sentence of the Respondent
are confirmed."

C. P. JOUBERT J A.

HEFER JA)

MILNE JA) Concur.

STEYN JA)

FRIEDMAN AJA)