

SOUTH AFRICA / JUDGMENT

Muller v S (A241/2018) [2018] ZAWCHC 155; 2019 (1) SACR 242 (WCC) (16 November 2018) [2018] ZAWCHC 155

COURT

Western Cape High Court, Cape Town

BEFORE

J I Cloete, M K Parker

CASE / FILE NUMBER

A241/2018

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Republic

of South Africa

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: A241/2018

In

the matter between:

MICHEAL

MULLER Appellant

and

THE

STATE Respondent

Court:

Justice J Cloete et

Justice M K Parker

Heard:

Friday 16 November 2018

Delivered:

Friday 16 November 2018

JUDGMENT

CLOETE J:

[1] The issues in this appeal against conviction and sentence, which is with leave of the trial court, are:

1.1 Whether a plea and sentence agreement concluded in terms of s 105A of the Criminal Procedure Act[1] may include an agreement that an accused's drivers licence is suspended for a particular period without it being incumbent upon the court to hold an enquiry in terms of s 35 of the National Road Traffic Act ("NRTA");[2]

1.2 If an agreed period of suspension cannot form part of a s105A agreement, whether a subsequent conviction under a different subsection of s 65 of the NRTA qualifies as a second offence for purposes of imposition of a mandatory period of suspension absent circumstances warranting a deviation; and

1.3 What circumstances should be taken into account in considering whether a deviation is warranted.

[2] The appellant was charged with contravening s 65(2)(a) read with ss 89(1) and (2) of the NRTA, it being alleged in the charge sheet that on 4 September 2016 and at Spine Road, Mitchells Plain, he wrongfully drove a motor vehicle while the concentration of alcohol in his blood exceeded 0.05g per 100ml, namely 0.13g per 100ml. The appellant has a previous conviction in 2010 for contravening s 65(1)(a) of the NRTA for driving a vehicle on a public road while under the influence of intoxicating liquor for which he was sentenced to a fine of R2 500 or 60 days imprisonment, plus a further R5 000 or 4 months imprisonment suspended for a period of 4 years on condition that he was not again found guilty of a contravention of s 65(1)(a) of the NRTA during the period of suspension.

[3] In terms of paragraph 7 of the s 105A agreement concluded on 17 November 2017 the appellant 'admits guilt in respect of the charge, as mentioned above, and pleads guilty thereto on the basis set out below'. The sentence portion of the agreement, from paragraph 19 onwards, recorded that 'the nature of the offence, the interests of the community and the personal circumstances of the accused have been duly considered and taken into account by both parties'. One aggravating factor was stated, being that offences of this nature are regarded in a serious light. Ten mitigating factors were listed.

[4] These included that there was no accident or any injuries, that the appellant had shown 'incredible remorse', was 53 years old and the sole breadwinner of his family, having been in fixed employment as an administrative clerk at Groote Schuur Hospital for 36 years, had recently lost his wife to cancer, was under debt review, and 'has one previous conviction for a similar offence'.

[5] The agreed sentence was a fine of R16 000 or 12 months direct imprisonment of which R12 000 was suspended for 5 years, and that the appellant would pay R4 000 on date of sentencing. He would also complete 60 hours of community service at SAPS in Strandfontein and his driver's licence would be suspended for 6 months.

[6] After convicting the appellant in terms of the s 105A agreement, the magistrate, without any prior warning, proceeded to hold an enquiry in terms of s 35 of the NRTA on the basis that 'his licence was automatically suspended and why the court should not uplift the suspension'. After certain questions were put to the appellant the magistrate enquired, for purposes of finalising the enquiry, whether the appellant had a previous conviction for a similar offence. After this was disclosed, the magistrate imposed the following sentence:

'Your fine as agreed to then is the twenty thousand rand (R16 000.00) or sixteen (16) months imprisonment of which twelve thousand rand (R12 000.00) and twelve (12) months is suspended for five (5) years...

As far as your licence is concerned, the section, the Act says it is automatically suspended for five (5) years.'

[7] It appears that the reference to 'twenty thousand rand' was a patent error. In his reasons for judgment handed down on 30 July 2018 the magistrate referred to the fine being one of R16 000. It is furthermore unclear why he imposed a sentence of 16 months imprisonment but I will assume, for present purposes, that this too was an error. The magistrate also stated that:

'It was further a term of the sentence agreement between the State and the accused that the accused shall complete 60 hours of community

service at the South African Police Services in Strandfontein. I did not confirm this part of the sentence agreement as I was of the view that the fine would serve as adequate punishment for the accused.

A further term of the sentence agreement was that the accused's driver's licence shall be suspended for a period of six months. I changed that period to five years for the reasons that follow hereunder.

Section 35 of the National Road Traffic Act, Act 93 of 1996 regulates the suspension of an accused person's driver's licence upon conviction for, amongst others, a contravention of Section 65(1), (2) and (5)... The Section 35 procedure is a post-sentence procedure... the court is required to hold an enquiry to determine whether circumstances relating to the offence exist which would justify the court to order that the ex lege suspension shall not take effect, or shall take effect for a shorter period than that prescribed by Section 35(1). The Section 35 enquiry is a function given to the court by the legislature. As such I am of the view that the State and the defence cannot agree to a shorter period of suspension of an accused's driver's licence in terms of an agreement under the provisions of Section 105A of the Criminal Procedure Act...'

- [8] One of the grounds of appeal is that the magistrate misdirected himself in unilaterally altering the terms of the plea and sentence agreement in relation to the period of suspension of the appellant's drivers licence without informing the parties prior to the commencement of the proceedings of his intention to do so.
- [9] In *State v DJ*[3] it was held that where a presiding officer is of the view that the sentence proposed in a s105A agreement is unjust, he or she must, at the outset of the trial, inform the parties of this view and also of the sentence which is considered to be just. In that matter both the State and defence contended before the Supreme Court of Appeal, that the trial court had committed a fundamental irregularity by failing to comply with the peremptory provisions of s 105A(9)(a)-(d) of the Criminal Procedure Act which read as follows:

‘(9)(a) If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just.

(b) Upon being informed of the sentence which the court considers just, the prosecutor and the accused may---

(i) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or

(ii) withdraw from the agreement.

(c) If the prosecutor and the accused abide by the agreement as contemplated in paragraph (b) (i), the court shall convict the accused of the offence charged and impose the sentence which it considers just.

(d) If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (b)(ii), the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.’

[10] The Supreme Court of Appeal stated:

‘[19] Under this provision the parties have an election. The court must first inform the prosecutor and the accused of the sentence that it considers just. Upon being informed of the sentence which the court considers just, both parties may decide to abide by the agreement subject to the right to lead evidence and to present argument relevant to sentencing, or withdraw from the agreement. If both parties decide to abide by the agreement after being advised by the trial court that it intends imposing a different sentence to the one agreed upon, the court will be at large to impose a sentence which it considers just. In that event the parties cannot then complain that they have been prejudiced, because they would have been given adequate notice. As soon as the trial judge formed the view that the sentences proposed in the plea agreements were unjust, he should have so informed the parties, and also of the sentence he considered just, at the outset of the trial. This would have afforded them an opportunity to consider their options. This is

especially so because, after convicting them, there is nothing that they could do, save to appeal the decision. They were thus denied the option of making an informed choice.

[20] This approach is clearly contrary to the objectives of the Act. In *S v Solomons* para 11 Moosa J held as follows:

“The purpose of making such information known is to enable the parties to make an informed choice whether to abide by the plea bargaining

process or to resile therefrom. The failure on the part of the presiding officer to do so, in my view, constituted non-compliance

with the peremptory provisions of s 105A(9)(a).”

For all the abovementioned reasons the appeal must be upheld and the answer to the question of law is that the High Court was wrong, as indicated above.’

[11] The State and defence agree that in the present case the magistrate did not comply with s 105A(9). The issue which nonetheless falls to be determined is whether he was obliged to do so in respect of the period of suspension of the appellant’s drivers licence.

[12] In *S v Greeff*[4] Rogers J (Saldanha J concurring) stated obiter as follows:

‘[4] The appellant applied in the court a quo for leave to appeal only against the suspension of his driving licence. The application for leave was refused by the magistrate, but on 11 March 2013 this court on petition granted leave to appeal on that aspect. In terms of s 309(4)(b) of the Criminal Procedure Act read with s 307 of that Act, the execution of a sentence imposed by a lower court is not suspended by the noting of an appeal. There is authority that this does not apply to ancillary orders such as the suspending of a driving licence, and that in relation to such ancillary orders the common law, that an appeal suspends execution, prevails (see *S v Abraham* 1964 (2) SA 336 (T), and cases there cited; *S v Kelder* 1967 (2) SA 644 (T) at 648H-649B; *Hiemstra Criminal Procedure* p 30-53; *Du Toit et al Commentary on the Criminal Procedure Act* p 30-48C). Strictly speaking, the suspension of a driving licence in terms of s 35(1) occurs ex lege unless a contrary order is made in terms of s 35(3) and the suspension is thus not pursuant to an order (see *S v Wilson* 2001

(1) SACR 253 (T) at 259h). Since we were not addressed fully on the subject, I shall assume that the suspension of the appellant’s licence was itself suspended, pending the outcome of this appeal, which is what the legal representatives on both sides seem to have believed. On this assumption the appeal has not been rendered academic by the passing of time. In any event, it is desirable that we should state our view on the substance of the appeal.’

[13] However in *S v Lourens*[5] Savage J (with whom Henney J concurred) held that:

‘[7] Section 276 of the CPA details the sentences that may be passed upon a person convicted of an offence. While the suspension or cancellation of a driving licence is not a sentence provided in s 276, in terms of s 35 of the Act it is clearly a punishment imposed consequent to an offence

committed under s 65 (as is s 34 in relation to the offences cited in that provision). With sentences often combined by judicial officers in order to arrive at an appropriate punishment, a decision to cancel or suspend a driving licence is integral to such a determination. A suspension or cancellation order is therefore not a purely administrative adjunct to the sentence but constitutes a significant part of the punishment imposed.’

[emphasis supplied]

[14] Support for the view taken by Savage J in Lourens (supra) is to be found in *S v Jaftha*[6] where the Supreme Court of Appeal stated:

‘[11] Third, no account was taken of the suspension of Jaftha’s licence for five years on his second conviction. I do not consider

this to be a misdirection. It was not merely a part of the punishment, but also an important and justifiable measure taken in order to ensure that Jaftha did not endanger himself and others again.’

[15] I agree with the above reasoning and finding of the Full Bench in Lourens (supra). It is accordingly my view that the s 35 enquiry indeed forms an integral part of the determination of an appropriate sentence. This being the case, it was open to the parties to include an agreed specific period of suspension of the accused’s drivers licence in the s 105A agreement. It is therefore also my view that the magistrate erred in concluding that the s 35 enquiry was merely ‘a post-sentence procedure’. Because he did not consider the sentence agreed upon in the s 105A agreement to be just, the magistrate was duty bound to follow the peremptory provisions of s 105A(9). His failure to do so has the consequence that both the conviction and sentence must be set aside.

[16] In *S v DJ* (supra) the Supreme Court of Appeal held that the matter should be remitted to the trial court de novo before another presiding officer[7], and I will therefore follow this approach.

[17] This dispenses with the need to consider the remaining issues in this appeal, including what circumstances should be taken into account in considering whether a deviation from the prescribed periods of suspension is warranted.

[18] However, it needs to be brought to the attention of the Director of Public Prosecutions Western Cape (DPP) that there are two lines of conflicting decisions within this Division on this issue. On the one hand there are *S v Greeff* (supra) and *S v De Bruin*[8] in which the Full Bench held that the amendments made to s 35 of the NRTA with effect from 20 November 2010[9] have the consequence that, whereas previously there was no limit on the circumstances to be taken into account, they are now restricted

to those relating to the offence itself, and unless a particular circumstance can properly and rationally be said to relate to the offence, it must be left out of account.

[19] On the other are *S v Lourens* (supra), *S v Brink*[10] and *S v Stockenstroom*,[11] in which the Full Bench held that the circumstances are not limited in this manner but include traditional sentencing factors, such as the personal circumstances of the accused.

[20] Of course no appeal lies from one Full Bench to another. The two lines of conflicting decisions, without the DPP having approached the Supreme Court of Appeal to obtain clarity, has led to the most unsatisfactory result that lower courts are left in the dark as to which authority they are bound by. This is illustrated by the magistrate's finding that:

'Section 35(3) places an onus on the accused to prove circumstances relating to the offence, and not personal circumstances to enable a court to make a determination under that section. This view is supported by case law: *Greeff v S* 2014 (1) SACR 74 (WCC) and *S v Enoch De Bruin*... This latter judgment clearly sets out the intention of the legislature. In arriving at my decision I was persuaded by these two judgments, as opposed to the judgment of the Honourable Judge Savage in *S v Werner Lourens*...

I am of the view that *Greeff v S* and *S v Enoch De Bruin* correctly reflect the intention of the legislature. I am particularly persuaded by the views expressed by the Honourable Judge Rogers in paragraphs [6], [7] and [8] of his judgment in *S v Enoch De Bruin*...'

[21] I thus intend directing that a copy of this judgment is forwarded to the DPP for attention. I accept, of course, that the present matter is not one in which this issue falls to be determined, but believe that it is in the interests of the proper administration of justice for the DPP, when the opportunity again arises, to approach the Supreme Court of Appeal in order for this issue to be clarified.

[22] In the result I propose the following order:

1. The appeal is upheld.
2. The conviction and sentence are set aside.
3. The matter is remitted to the District Court Mitchells Plain for the trial to commence de novo before another magistrate.
4. The Registrar is directed to forward a copy of this judgment to the Director of Public Prosecutions, Western Cape.

J I CLOETE

PARKER J

I agree.

M K PARKER

CLOETE J

It is so ordered.

- [1] Act 51 of 1977.
 - [2] Act 93 of 1996.
 - [3] 2016 (1) SACR 377 (SCA).
 - [4] 2014 (1) SACR 74 (WCC).
 - [5] 2016 (2) SACR 624 (WCC).
 - [6] 2010 (1) SACR 136 (SCA).
 - [7] At 384b-c.
 - [8] Unreported decision of Rogers J (Saldanha J concurring) in Western Cape High Court automatic review reference no. 141270 of 29 January 2015.
 - [9] Amended by the National Road Traffic Amendment Act No 64 of 2008.
 - [10] 2018 (2) SACR 6 (WCC) of Davis AJ (Allie J concurring).
 - [11] Unreported decision of Thulare AJ (Bozalek J concurring) under case no. A24/2018 of 9 March 2018.
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