

SOUTH AFRICA / JUDGMENT

S v Dlamini (R52/21) [2021] ZAKZPHC 10 (12 December 2021)

[2021] ZAKZPHC 10

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi, Chili

CASE / FILE NUMBER

R52/21

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

REVIEW

CASE NO.: R52/21

MAGISTRATES

COURT CASE NO.: R581/20

In

the matter between:

THE
STATE
and
XOLANI
GODFREY DLAMINI
REVIEW

JUDGMENT

Delivered on

Mngadi, J

[1] This is an automatic review in terms of s 302(1)(a)(ii) of the Criminal Procedure Act, Act 51 of 1977 (the Act) emanating from Madadeni Magistrate's court (Mr. G E Godden). The section provides that if upon consideration of the record of the proceedings, it appears to the judge that the proceedings are not in accordance with justice, he shall obtain from the judicial officer a statement setting forth the reasons for convicting the accused and for the

sentence imposed whereupon the record of the proceedings and the statement by the judicial officer shall be considered by the court of appeal having jurisdiction over the court which convicted and sentenced the accused.

[2] On 12 May 2021, I received the record of the proceedings from Madadeni Magistrate's court. I perused the record and I doubted whether the sentence imposed on the accused was appropriate.

[3] The charge against the accused alleged the following. He was guilty of contravening the provisions of s50 (1) read with ss1,64,74, 76, 90(1)(a), 90(2)(a) and 90(3) of the National Land Transport Act No. 5 of 2009 (the NTLA). It alleged that upon or about 16 December 2020 the accused did wrongfully and unlawfully operate a road-based public transport service by conveying for reward fare paying passengers by means of a Toyota Minibus Hiace motor vehicle having a licence number NN42518 on or upon an unnamed road which is a public road in the magisterial district of Madadeni without being a holder of a permit or operating licence issued in respect of the vehicle or in the case of a temporary replacement of the vehicle; the necessary written authorisation in terms of s74 of the NTLA.

[4] The accused elected to conduct his own defence. The charge was put to him. He pleaded guilty to the charge. The magistrate advised the accused that he would put certain questions to the accused in order to ascertain whether he admitted all the allegations in the charge and whether he is guilty in law of the offence. Further, the learned magistrate explained to the accused that if the court is not so satisfied, a plea of not guilty shall be entered and thereafter the State shall be afforded a chance to lead evidence against him. The learned magistrate omitted to advise the accused that he had a right to elect not to answer any question put to him.

[5] The learned magistrate proceeded to question the accused as follows:

'Court: Do you know why you are before this Court today, sir ?

Accused: Yes.

Court: Why are you here, sir?

Accused: The motor vehicle was found operating without the permit.

Court: Are you the owner of this vehicle?

Court: When was it found?

Accused: 16 December 2020.

Court: Were you driving this vehicle on the day in question?

Accused: No, I was not the driver.

Court: But the vehicle belongs to you?

Court: What is the registration number of this vehicle?

Accused: NN 42518.

Court: And where was this vehicle apprehended, sir?

Accused: Section 1 by the robot.

Court: Is that at Madadeni ?

Court: And it is within the jurisdiction of this Court?

Court: What was this vehicle doing, sir?

Accused: It was operating loading passengers.

Court: Why was it loading passengers?

Accused: I was desperate; I am still trying to fix up the necessary documents for this motor vehicle. I was desperate so, I needed money to continue fixing the necessary documentation for the motor vehicle.

Court: So, you are operating a taxi ?

Court: That was for reward?

Court: And you knew your conduct was unlawful ?

Accused: Yes. I knew.

Court: It is punishable by law?

Accused: Yes I knew that it is punishable by law.'

[6] The learned magistrate after the prosecutor indicated that the facts were in accord with the facts in possession of the State, indicated that he was satisfied that the accused admits all the elements of the offence, and found the accused guilty as charged.

[7] The State proved against the accused two previous convictions, namely; a previous conviction of reckless or negligent driving committed on 12 May 2006 and one for driving a vehicle whilst concentration alcohol in blood was more than the prescribed maximum allowed which was committed on 19 December 2009. The accused in mitigation of sentence addressed the court and placed on record his personal circumstances. The learned magistrate asked the accused how many vehicles he had; whether they operated as taxis, how long he had the vehicle in question and where did he get it from, and whether he has

been operating the vehicle in question as a taxi since he got it two years ago without a licence. In my view, since the accused addressed the court, it was uncalled for and irregular for the learned magistrate to ask the accused the questions about other vehicles and for how long he had been operating the vehicle in question without a permit.

- [8] The accused stated that he earned R1 000 per month from repairing vehicles for other persons. The Prosecutor did not lead any evidence in aggravation of sentence and he did not address the court opting to leave the matter in the hands of the court. The learned magistrate in the judgement on sentence as aggravating factors stated the following:
1. The crime was prevalent in the district. There are two or three matters on the roll daily in each of the three courts sitting.
 2. The offence contributes in creating wars between taxi associations resulting in civilians and taxi owners hurt or killed. The taxi associations are partaking in the commission of the crime in that they place vehicles on the routes without permits.
 3. There is resistance to the type of crime in that they are usually repeat offenders. Perpetrators plead guilty for their vehicles to be released to them. They resume operating and they used the income to pay off the fine. It is a lucrative business for them.
 4. The court is concerned to bring the issue under control but there is strong resistance from the taxi associations and the taxi owners.
 5. The court has to create a deterrence and hand down sentences to gain trust of the community before the community takes the law into their own hands.
- [9] The learned magistrate did not in the judgment on sentence indicate any factors he found to be mitigating factors. The fact that the accused could be regarded as a first offender and that he pleaded guilty and played open cards with the court were not mentioned. The learned magistrate imposed on the accused the following sentence: 'Ordered to pay a fine of ten thousand rand (R10 000) or twelve months imprisonment and a further two years imprisonment, which is wholly suspended for a period of five (5) years on condition that you are not again found guilty of contravening section 50 of the National Road Transport Act 5 of 2009 or competent offence during the period of suspension.'
- [10] The learned magistrate when I enquired whether the sentence was appropriate stated in his statement the factors he mentioned in the judgement on sentence as aggravating factors. He added that he took judicial notice of the inherent problems caused by taxis operating without permits. He said he was a product of the taxi industry in that his parents were in the taxi industry. He was raised in and exposed to the taxi industry. He added that to mitigate the severity of the sentence for the accused he waived the payment of impounding fee.

- [11] In my query to the magistrate dated 19 May 2021, I requested the Deputy Director of Public Prosecutions in the province to furnish a memo whether the sentence imposed by the learned magistrate was appropriate or not after considering the statement of the learned magistrate. I had not, as on 11 November 2021, received any memo. The magistrate's response was received on 25 October 2021 and the delay was attributed to systematic matters. The courts repeatedly implore that delays in dealing with automatic reviews should be avoided. It follows that those in charge with the administration of justice must enforce consequence management measures to ensure that there are no delays.
- [12] The sentence in the transcript of the record of the proceedings differs from the sentence recorded in the J4 (the review case covering sheet). The transcript indicates a fine in the sum of R10 000 whereas J4 indicates a fine of R8 000. In the transcript, nothing is recorded relating to impound fees. J4 indicates that impound fees were not waived. In the statement in response to the query the learned magistrate stated that impound fee was waived. As one of the condition for the suspended portion of the sentence reference is made to a competent offence. There is no explanation of what is meant as a competent offence.
- [13] The learned magistrate in his statement concedes that the sentence imposed is incompetent in that it exceeds the maximum penalty prescribed in the NLTA. In addition, the learned magistrate concedes he had no basis to declare the accused in terms of s103 of the Firearms Control Act 60 of 2 000 unfit to possess a firearm licence.
- [14] In *S v Mhlongo* 2016(2) SACR 611(SCA) at [9], the court held that a sentencing court has a duty to impose sentence in accordance with the principles of punishment and judicial discretion. In *S v Zinn* 1969(2) SA 537(A) the court held that court in determining an appropriate sentence considers a triad consisting of the crime, the offender and the interests of the society. The purposes of punishment are deterrence, prevention, retribution and rehabilitation.
- [15] Section 90(2)(a) of the NLTA prescribes on conviction a penalty of a term of imprisonment not exceeding two years, or a fine not exceeding one hundred thousand rand. Therefore, the sentence imposed by the learned magistrate is irregular on two fronts. Firstly, it exceeds the maximum penalty of a term of imprisonment not exceeding two years. Secondly, it combines imprisonment and a fine. The court in the exercise of its judicial discretion, (within the terms of the penalty clause), can either impose a fine, or impose imprisonment with no option of a fine, or impose imprisonment with an option of a fine. It cannot impose both a fine and a period of imprisonment. See *S v Arends* 1988(4) SA 792e AT 794-5.

[16] Sentencing is a difficult task. It requires from the sentencing court an objective balanced approach. The learned magistrate holds certain views regarding the problems in the taxi industry. He because of the views he holds is in a crusade to impose certain penalties on those operating vehicles without prescribed permits. This results in over-emphasis of deterrence. The offender is sacrificed in the altar of deterrence. The fact that the taxi associations are complicit

in operating without permits indicates that the approach of the learned magistrate is misdirected. The causes of conflict in the taxi industry are multiple-faced and complex. The learned magistrate must disabuse himself of what is his knowledge of the causes of the conflicts in the taxi industry and he must avoid taking into consideration for sentences purposes issues not properly raised and debated before him. It may result in treating accused persons as means to an end. In *S v Dodo* 2001 (1) SACR 549 (CC) at [38] it was held that accused persons ought to be treated as ends in themselves whereas a sentence solely focused in eliminating a particular evil or perceived evil treats the offender as a means to an end which infringes his constitutional right to human dignity.

[17] The accused was convicted of a single incident of operating a vehicle without a permit. There was no evidence of any harm caused by his particular conduct. He pleaded guilty and he played open cards with the court. He had no relevant previous conviction. It is illogical to impose on him the most severe sentence of imprisonment prescribed. The sentence imposed must focus on dealing with the offender before the court not to address general ills found in the taxi industry.

[18] The accused was in the fringes of those operating vehicles without operating permits. He was a small player. In determining an appropriate fine his particular circumstances must be considered. Individualisation is a recognised sentencing principle. In his situation, it must be determined what would be an appropriate fine. The NLTA equates a R100 000 fine to two years imprisonment. Therefore, it is illogical to impose two years imprisonment in the circumstances where a fine of R10 000 would be appropriate. There must be some correlation between the fine and the period of imprisonment.

[19] The purposes of punishment includes reformation. Reformation entails teaching the offender to mend his ways and giving him an opportunity to do so. One starts with the less severe sentence not with the most severe sentence. The approach affords the court the opportunity to gradually increase the sentence if the behaviour of the offender does not improve.

[20] In the result, I am satisfied that the sentence imposed by the learned magistrate is not in accordance with justice and it falls to be set aside. It is so severe that it induces a sense of shock. Further, it is disturbingly inappropriate and it is founded on a misdirection.

[21] I propose the following order:

1. The conviction is confirmed.

2. The sentence imposed by the learned magistrate is set aside and it is replaced with the following sentence; ‘The accused is sentenced to a fine of four thousand rand (R4 000) or eight (8) months imprisonment. Half of the sentence is suspended for a period of three (3) years on condition that the accused is not convicted of contravening the provisions of s50(1) of the National Land Transport Act No. 5 of 2009 committed during the period of suspension.

The accused in terms of section 103(2) of the Firearms Control Act No. 60 of 2000 is not declared unfit to possess a firearm.

Mngadi , J

I agree, and it is so ordered.

Chili, J

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