

SOUTH AFRICA / JUDGMENT

S v Mabidi (242/2011) [2012] ZAGPJHC 61 (17 April 2012) [2012] ZAGPJHC 61

COURT

South Gauteng High Court, Johannesburg

BEFORE

D S S Moshidi, N Pandya

CASE / FILE NUMBER

242/2011

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

High Court Ref No: 242/2011

Magistrate's Serial No: 18/2011

Review Case No: 4/853/2011

Magistrate

RANDBURG

THE STATE v MABIDI JOSEPH

REVIEW JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] This matter was placed before me on automatic review in terms of section 304 of the Criminal Procedure Act 51 of 1977 ("the Criminal Code").

THE CRISP ISSUE

[2] The crisp issue in this review is the reasonableness of the sentence imposed as well as the conditions attached to the suspended sentence.

THE PROCEEDINGS IN THE COURT BELOW

[3] Mr Joseph Mabidi (“the accused”), was charged in the Magistrate’s Court Randburg, with contravening section 59(4)(a) of the National Road Traffic Act No. 93 of 1996. The section provides that:

“(4) No person shall drive a vehicle on a public road at a speed in excess of –

the general speed limit which in terms of subsection (1) applies in respect of that road.”

In the present matter it was alleged that on 17 September 2011 on Beyers Naude, Randburg, the accused unlawfully drove a motor vehicle, to wit Nissan Maxima with registration number HCB 181 GP, exceeding the speed limit of 60 km/h as indicated on a road traffic sign, in that he drove at a speed of at least 102 km/h.

[4] The accused, who elected to conduct his own defence, pleaded guilty to the charge in terms of section 112(1)(b) of the Criminal

Code. Pursuant to questioning by the magistrate, the accused was found guilty as charged. He was sentenced to a fine of R8 000,00

(Eight Thousand Rand) or 12 (twelve) months imprisonment. The whole of the sentence was suspended for a period of 5 (five) years on condition that the accused:

“1) Not be committed of c/s 59(4)(a) of the National Road Traffic Act 93 of 1996 which is committed during the period of suspension.

2) Complete 80 (Eighty) hours of community service under the supervision of NICRO.

3) Attend a Nicro Adult Life Skills Program for a period of 10 weeks commencing on the 18th October 2011 at the Nicro Randburg office.

4) Report to the NICRO Office, (GO 015) Randburg Magistrate Court on the 17th October 2011 at 8h30 in possession of the sentence.”

INITIAL RESERVATIONS IN REGARD TO THE CONVICTION

[5] When I initially received the review, I was concerned about the correctness of the conviction, the sentence imposed, as well as the conditions attached to the suspended sentence. Consequently, I referred the matter to the Deputy Director of Public Prosecutions of this High Court for his comments. I have since received rather promptly, the invaluable comments of the Deputy Director himself, Adv Khanyile, assisted by Adv V Maphiri of his office. I remain grateful to them for their opinion.

[6] I am now convinced that the conviction was correct, and in accordance with justice. This view is indeed supported by the Deputy Director of Public Prosecutions. Consequently, the conviction falls to be confirmed.

EXCESSIVE SENTENCE AND PERSONAL CIRCUMSTANCES OF THE ACCUSED

- [7] However, the sentence imposed, as well as the conditions attached thereto, are in my view, excessive and unfair, respectively. The assessment report prepared by the National Institute for Crime Prevention and Reintegration of Offenders (“NICRO”), dated 13 October 2011, shows that the accused was 44 years old. He was a widower with four adult children, two of whom lived with the accused. The children living with the accused were unemployed. The accused himself was unemployed, but occasionally repaired motor vehicles from which he earned about R200,00 on irregular basis. Prior to that, the accused was employed at a firm called All Star but he was compelled to leave his employment when he became ill. The accused also sold tomatoes from his home. The State proved no previous convictions against the accused. The NICRO report showed that on the day of the offence in question, the accused was travelling to his home in Cosmo City. The accused was caught by camera and was immediately arrested by the traffic officers. The report also noted that the accused, a Grade 10 dropout due to financial constraints, “readily acknowledged guilt without rationalising his behaviour or displaying a defensive attitude”. The NICRO social worker also noted generally, that the accused appeared impressive, with no history of criminal tendencies in his family, and that the accused was committed to supporting his family financially.

MISDIRECTION IN REGARD TO SENTENCE

- [8] The magistrate, during sentencing provided reasons for the sentence imposed. It was therefore unnecessary, for review purposes, to request from the magistrate further reasons for the sentence imposed. During sentencing the magistrate said:

“... and when being questioned by the court it had come to light that you would not be in a position to pay a fine in this matter and that it would be in your interest that you be given an opportunity to serve an alternative sentence.”

- [9] The record of the proceedings shows that the magistrate’s enquiry into the accused’s ability to pay a fine was rather perfunctory. The accused himself made it difficult by providing vague answers to the questions posed about his income. However, once convinced that the accused was unable to pay any fine, the magistrate’s decision to proceed and impose a fine of R8 000,00 (Eight Thousand Rand) was, in my view, a misdirection. It was contradictory in terms. This Court, on review, is therefore at large to consider afresh what fine to impose.

THE UNFAIR AND UNJUST CONDITIONS OF SUSPENSION

- [10] The imposition of what appeared to be an excessive fine coupled with the conditions of its suspension, was unjust and unfair in the circumstances of the matter. The Deputy Director of Public Prosecutions supports this view. Community service on its own is a form of punishment. Section 297(1)(a)(i)(cc) of the Criminal Code gives the court the discretion to suspend a sentence on conditions, including “(cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organisation or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as

community service)". In *S v Fraser* 2005 (1) SACR 455 (SCA), and dealing with community service in regard to a conviction of kidnapping, Farlam JA at para [26] said:

"In addition, every time he performs community service, he will perforce be reminded of his offence and the necessity to refrain from similar conduct in the future."

Community service has all the advantages of a non-custodial sentence whilst remaining a form of punishment, and meeting most of the purposes of sentence. This view was succinctly set out by Goldstone J in *S v Khumalo* 1984 (4) SA 642 (W) at 644H-I. See also *S v Bock* 1963 (3) SA 163 (GW) at 164C-D. It is therefore plain that community service on its own constitutes punishment. When coupled with such excessive

suspended fine, as was the case in the instant matter, it constitutes future unfairness and injustice to an accused person. In the event of the accused re-offending immediately or within the period of suspension, he will automatically become liable to pay the fine of R8 000,00 (Eight Thousand Rand), which in the view of the magistrate, he was unable to do. In terms of the provisions of section 35(3) of the Constitution, an accused person's right to a fair trial, includes the right not to be punished harshly for unfounded reasons.

[11] In support of the view which I take in the matter, the Deputy Director of Public Prosecutions has referred me to several decided cases dealing with the purpose of a suspended sentence, and the correct formulation of conditions of a suspended sentence. These cases include *S v Burger* 1975 (4) SA 877 (A); *S v Allart* 1984 (2) SA 731 (T); *S v Koko* 2006 (1) SACR 15 (C); and *S v Benn*; *S v Jordaan*; *S v Gabriel* 2004

(2) SACR 156 (C). In *S v Koko* the accused was charged and found guilty of having contravened section 1(1) of the Trespass Act 6 of 1959. He was sentenced to a fine of R1 000,00 or 100 days' imprisonment plus a further nine months' imprisonment suspended for five years on condition that he was not found guilty of the same offence during the suspended period and on condition that he vacated the premises on a specified date. However, the accused defaulted and was brought back to court for the magistrate to bring into operation the suspensive condition. In upholding the conviction, but reviewing the sentence, the High Court at para [21] said:

"The purpose of suspending the whole or any part of a sentence, on condition that an accused is not during the period of suspension

found guilty of the offence of which he or she has been convicted, is twofold. The first is to avoid a repetition in the future of the criminal conduct of which an accused has been found guilty and the second is to obviate the deleterious consequences that direct imprisonment may have. See the authorities quoted in S v Daniel 1995

(2) SACR 502 (C) at 512f-g."

These principles are, with respect, equally applicable to the facts of the present matter. The Director of Public Prosecutions has observed, correctly so in my view, that in the event the suspended sentence of a fine of R8 000,00 (Eight Thousand Rand) or 12 months imprisonment being put into operation for the same offence (section 59(4)(a) of the National Traffic Act 93 of 1996), in respect of the accused as a first offender, it will, prove to be disproportionate. As a consequence, the Director of Public Prosecutions has suggested that the conditions of the suspended sentence imposed by the magistrate must be reviewed by this Court. The Director of Public Prosecutions has not made any specific proposals. However, I am of the view that it will be fair and just that condition 2 only of the conditions of suspension imposed by the magistrate ought to be reviewed and set aside in part. In addition, the fine of R8 000,00 (Eight Thousand Rand) ought to be reviewed and reduced to R4 000,00 (Four Thousand Rand).

ORDER

[12] In the result I make the following order:

The conviction is confirmed.

The sentence imposed by the magistrate is reviewed and set aside and substituted with the following sentence:

3. “The accused is sentenced to a fine of R4 000,00 (Four Thousand Rand) or 6 (six) months imprisonment. The whole of the sentence is suspended for a period of four years on the following conditions:

That the accused shall not be convicted of contravening section 59(4)(a) of the National Road Traffic Act 93 of 1996 which is committed during the period of suspension.

That the accused shall attend the NICRO Adult Life Skills Program at the NICRO Offices, Randburg, for a period of 10 (ten) weeks commencing on 18 October 2012.

That the accused shall report to the NICRO Offices, GO 015, Randburg, in possession of a copy of this court order for his intake interview on 17 October 2011.”

In the event of the accused not having complied with conditions 3.2 and 3.3 as set out above, he shall do so within forty eight (48) hours of being notified by the Clerk of the Court, Randburg.

D S S MOSHIDI

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

I agree:

N PANDYA

ACTING JUDGE OF THE SOUTH GAUTENG

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