

SOUTH AFRICA / JUDGMENT

S v Ngwenya (R50/22;) [2022] ZAKZPHC 84 (9 September 2022)

[2022] ZAKZPHC 84

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi, Bezuidenhout

CASE / FILE NUMBER

R50/22

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REVIEW NO.: R50/22

MAGISTRATE'S CASE NO.: A590/21

MAGISTRATE'S SERIAL NO.: 13/22

THE STATE

And

MDUDUZI INNOCENT NGWENYA

REVIEW

JUDGMENT

MNGADI J

[1] This is an automatic review in terms of s302 (1) (a) (ii) of the Criminal Procedure Act 51 of 1977 (the Act) emanating from Newcastle

Magistrate's Court (Mr B.S Zondi). 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 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 13 April 2022, I received the record of the proceedings from Newcastle 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 (i) read with s51,64,74,76,90(i)
 - (a) , s90 (2)(a) of the National Land Transportation Act no5 of 2009 (the NLTA). It alleged that upon or about 16 December 2021 the accused did wrongfully and unlawfully operate a road based public transport service conveying for reward fare paying passengers by means of a Toyota Minibus Hiace motor vehicle having a license number [...] on or upon P42 road Ingogo which is a public road in the magisterial district of Newcastle without being a holder of a permit or operating license issued in respect of the vehicle or in the case of a temporary replacement of the vehicle the necessary written authorization in terms of s74 of the NLTA.
- [4] The record shows that the accused, after he was informed of his rights to legal representation, elected to conduct his own defense.
- [5] Before the accused pleaded to the charge, the learned magistrate advised the accused that if he pleads guilty he shall be asked questions in terms of s112
 - (1) (b) of the Criminal Procedure Act 51 of 1977 (the CPA) and that if he answered the questions satisfying the court that he admits all elements of the charge, the court will find him guilty as charged, if the court is not so satisfied, it will change the plea of guilty to a plea of not guilty, then the matter will go to trial. That means, explained the magistrate, that the matter shall be adjourned to allow the state to call witnesses to come and give evidence, and that his motor vehicle currently impounded shall remain impounded until the case is finalized.
- [6] The charge was then put to the accused and he pleaded guilty. The accused admitted that on 16 December 2021 on a public road within the jurisdiction of Newcastle his driver drove the motor vehicle

registration [...] carrying fifteen (15) passengers who had each paid R290.00 without the necessary permit issued in terms of the NLTA and he knew that to be a contravention of s50 (1) read with s90(A) and (B) of the NLTA. The court then convicted the accused as charged.

- [7] The state produce a record of the previous convictions of the accused which the accused admitted. The learned magistrate then said : 'Mr Ngwenya, you are now given an opportunity to place this court a mitigating factor for the court to consider before imposing sentence'.
- [8] The accused then addressed the court. He stated that he was asking for a leniency, he had made a mistake. He said he had children, the eldest child was 21 years old and at a university, the second child was 19 years old and in matric, the third child was three (3) years and in grade 4 and the youngest child was in pre-school.
- [9] The accused stated that he supported his family with the vehicle. He added that he was asking the court to waive the pounding fees, which had accumulated, and he did not have the money to pay them. He asked that the court order him to pay a fine of R5 000 which was the money he had.
- [10] The Prosecutor addressed the court stating that the offence was very serious and prevalent; many people loose their lives in taxi wars between those with licenses and those without licenses. He asked the court to impose a sentence, which reflects the public interest.
- [11] The learned magistrate then asked the accused the following questions:

'Court: How do you earn a living Mr Ngwenya?

Accused: The taxi that I own.

Court: How many taxis do you own?

Accused: Three

Court: Do you belong to a particular taxi association?

Accused: Yes, Sizwe association.

Court: Where is it base?

Accused: From wanderers to KZN.

Court: KZN is very big, is wanderers in England, sir/ so be more specific, I know that the taxi association issue is a certificate which allows you to move from a particular taxi rank to a particular taxi rank, if you say KZN, you are indirectly telling me that your certificate allows you to operate through the KZN province, which is not, which is impossible.

Accused: from Wanderers to Emondlo.

Court: Emondlo in Vryheid?

Accused: Emondlo is between Nqutu and Vryheid.

Court: So your certificate allows you to travel between Nqutu, between Wanderers and Vryheid?

Accused: I do not have a certificate as yet.

Court: so you are operating without an operating certificate?

Accused: that is correct and it was a great mistake.

Court: That makes a lot of sense, because otherwise you would not have been arrested or your driver will not have been arrested, if that certificate was in existence. Why will the police or law enforcement agencies arrest someone who has a certificate to operate between wanderers to Emondlo[indistinct]. How then you obtain did you obtain or gain membership of this taxi association if you do not have a certificate?

Accused: We are still on the waiting list to receive certificates,

Court: Again, you are not a member, you are not an official member of this taxi association. You are an applicant. You are merely an applicant, a person who is still waiting to be allocated a space or a certificate

Accused: Yes.

Court: Why then did you tell me that you are a member of this association?

Accused: Because my taxi was travelling from wanderers to Inkandla, emondlo, pardon me, your worship, but it was a great mistake for me to travel without a permit.

Court: Yes, I am saying, I asked you if you are a member of a taxi association, and you said, yes. You should have said, "No, I am not. I am an applicant, I am still, I have applied I am still awaiting for a location, I have not been admitted into this association".

Accused: Understood, I humbly apologize.

Court: So you are not a member of any association? Because you do not have a certificate?

Accused: Yes.'

[12] The learned magistrate in the judgment on sentence said

:' The court must stress that this is a very dangerous practice, because it means despite the fact that our government is trying by all means to regulate the taxi industry, but there are people who are willing to take a risk operating their motor vehicles without holding a valid permit. Therefore, stealing business from the rightful people, who are allowed to operate under law from a particular taxi association, a particular taxi rank to a particular taxi association. On the day in question, it means the accused stole business from Wanderers taxi rank and a particular association. And he also stole or offended people who are operating at Emondlo taxi rank. By doing so, he was on the verge of provoking two taxi associations who might find themselves at locked horns, fighting each other, shooting each other, just because of the accused's behavior. And the court intervened that this accused care less, he just does not care what happens when he operates his taxi because of his greediness, all he wants is to have a source of income. As to what happened or what consequences, he just does not care. I am saying this, because looking at his previous convictions, the accused has been convicted on two occasions for contravening a

similar provision in 2014, 3 January 2014. He was found guilty and convicted. Contravening the same provisions, section 50(1) of the National Land Transport Act. He was sentenced to pay a fine of R5 000.00 or undergo 90 days imprisonment. He did not stop there. Two years later, he committed a similar offence. Contravention of s50 (1) of the nation Land Transport Act. Sentenced to pay a fine of R6 000 00 or undergo 2 months imprisonment. He did not stop there, today, yet again, he is convicted of a similar offence. This is a man who does not learn from his mistakes. Actually, this is a man who just does not care. In his mitigation factors he had an audacity to tell the court, 'I have R5 000.00 in my possession and which I can pay as a fine'. For him to walk away from this problem and go, go back and commit further offences. This is a man who believe that he had enough money to buy his way out, he can keep contravening the laws of this country. He can keep operating his taxi between taxi ranks under which he has no permission, no authority whatsoever. Because he just has money to pay. This offence is a very serious offence. You do not buy your way out by paying R5 000.00 fine and walk away, go back to old ways. And operate your taxi without a permit. It does not work that way. The accused person told the court that the person who was operating the motor vehicle on the day in question was his driver, which therefore tells the court that the accused is an employer. He further told the court that he owns three taxis, which I assume that these taxis, other two taxis, also has other two drivers. People who depends on the accused person with regards to their source of income. Our society looks up to our courts to protect them from people like you, Sir. People who behave negligently and carelessly, people who do not care about other people's lives, because when the taxi wars erupt, when the taxi wars start. And when you start shooting at each other, it is the members of the public who suffers the most, because they get killed while travelling on your taxis, without knowing that you do not own a permit to travel from point A to point B. You did not learn from the first mistake. You refused to learn from your second mistake. Maybe you will learn from this third mistake. Therefore, the court will impose a sentence, which is tougher. However, the court will have leniency, considering that this offence is an offence which carries a fine of up to R100 000 or 2 years imprisonment. However, the court will impose the following sentence, your sentence is as follows: **YOU ARE SENTENCED TO PAY AN AMOUNT OF FORTY THOUSAND (R40 000) OR IN DEFAULT OF PAYMENT, TO UNDERGO TWELVE (12) MONTHS' IMPRISONMENT.**"

[13] The magistrate after imposing sentence, ordered that from the date the motor vehicle impounded to the date the accused made his first appearance in court impounding fees are not waived, but from after that date impounding fees of the vehicle were waived.

[14] On 13 April 2022 I addressed the following query to the learned magistrate: "The learned magistrate is requested to address the following:

1. The court sentenced the accused for inter alia in that by his activity he was stealing business from a particular association. What evidence was presented before court in this regard?
2. What evidence was presented before the court that the accused by operating as he did on that particular day he was provoking a conflict between the taxi association?

3. Previously fined between R6 000 and R5 000 for similar contravention were imposed on the accused; why instead of a gradual increase a fine in the amount R40 000 was fixed?
4. What information was before the court relating to the accused's ability to lawfully raise the fine?
5. The court was concerned by the accused repeating the commission of the crime, why was part of sentence not suspended for five years to keep the accused in a straight line?
6. The court dealt with the impounding fees. Were the provisions of s87 of Act 5 of 2009 referred to in the charge and explained to the accused on the commencement of the trial? If not, was the court not bound to waive impoundment fees?

[15] On 30 August 2022, I received the file. It shows that on 27 June 2022, the Registrar received the learned magistrate's statement, but up to 30 August 2022, the Deputy Director Public Prosecutions had not responded. In my experience, despite timeous specific requests to the OPP to provide this court with its comment after receipt of the magistrate's response, it ignores regrettable the requests. In the statement, the magistrate said the following:

"1. I humbly concede that no direct evidence was presented before court in this regard. I humbly submit that, the court took judicial notice that accused was operating his motor vehicle for a gain in an area in which he does not have a permit to operate.

2. I concede that, there is no evidence on the record that, the accused as he did on that particular day he was provoking a conflict between the taxi associations. I hereby humbly submit that in determining, considering and imposing sentence I was guided by three guiding principles, collectively known as "trial of Zinn", thereby, paying more attention on the road public interest.
3. In respect of sentence. The Honorable Judge is humbly referred to exhibit A of the record as well as the provisions of S90
- (2) (a) of Act 5 of 2009 and paragraph 25, page 13-14 of the record. The court, respectively, considered the above mentioned aspects in imposing sentence.
4. In respect of accused of accused ability lawfully raise the fine: I humbly refer the Honorable Judge to page 8, paragraph 20-25 F of the record".
5. In respect of a possible suspended sentence that would have been imposed to keep the accused on the line. I humbly refer the Honorable Judge to page 13 paragraph 25 of the record, the court adopted a different approach, an approach of clearly reminding the accused that an offence of which he was convicted carries a fine of up to R100 000 or 2 years imprisonment, however, the court had leniency by not imposing the full sentence, thereby keeping him in a straight line that should he commit a similar offence Honorable court still has room to increase the sentence.

6. in respect of the provisions of s87 of Act 5 of 2009. I concede that, they were not referred to in the charge itself. Further, I hereby humbly refer to the Honorable Judge to annexure F of the record, page 16. I do concede that the question of a deferred fine was not fully addressed on record and that oversight will never happen again.
- [16] A court conducting a criminal trial wherein the accused is not legally represented need to be cautious. In this matter, the following is noted:
1. The accused before he pleaded the magistrate told him that if he did not plead guilty and admit all the elements of the crime, it will cause a delay in finalizing the case, and his motor vehicle impounded with impounding fees accumulating shall remain impounded until the case is finalized. The learned magistrate did not tell the accused that if he is found not guilty he shall not be required to pay the impounding fees or that court, whether convicted or not, had a discretion to waive all or part of the impounding fees. The result is that the court put on undue pressure on the accused to plead guilty.
 2. The court before the accused pleaded made no indication relating to what sentence could be imposed. The record of the previous convictions shows that previously on 03 January 2014 and 31 March 2016 for similar contraventions the accused was sentenced to R5 000.00 or 90 days imprisonment and R6 000 or 2 months imprisonment respectively. This explains that in mitigation of sentence, the accused asked to be fined R5 000.00.
 3. The learned magistrate failed to explain to the accused how he could present his case for sentence.
 4. The learned magistrate after both the accused and the state had addressed the court on sentence embarked on questioning the accused without explaining to the accused the reason for his questions and that the accused had a right not to answer those questions.
 5. The learned magistrate questioned the accused relating to the extent of the accused's operation without a license or permit. This is despite the fact that the accused pleaded, admitted all the elements of the crime, the plea was accepted by the state and the accused was found guilty on the basis of his plea.

[17] The learned magistrate in his

judgment

on sentence relied on aggravating factors not based on any evidence.

- [18] The passing of sentence is primarily in the discretion of the trial court. The appeal court can only interfere with the sentence imposed by the trial court on limited grounds, namely; where the sentence is disturbingly inappropriate, or it is vitiated by a material misdirection or it is so severe that it induces a sense of shock.

- [19] The court in *S v Dlamini* (R52/21) [2021] ZAKPHC10 12 December 2021 set out the correct approach in determining an appropriate sentence in similar crimes.
- [20] In my view, the sentence imposed by the learned magistrate is vitiated by material misdirection, which justify that it be interfered with. It failed to take into account the personal circumstances of the accused, the fact that he was a small scale operator and he played open cards with the court. The aggravating factor is that he had two previous convictions for a similar offence. However, the accused had applied for a permit to regularize his operation.
- [21] I am of the opinion that an appropriate, proportionate, fair and just sentence is a fine of R10 000.00 or 6 months imprisonment, half suspended for a period of 3 years on condition that the accused is not convicted of contravening s50(1) read with s90 (1) (a) (b) of the National Land Transportation Act No 5 of 2009 within a period of three
- (3) years.

I propose the following order.

1. The conviction is confirmed.
2. The sentence is reviewed and it is set aside. It is replaced with the following:

"The accused is sentenced to pay a fine of R10 .000.00, failing which to undergo eight (8) months imprisonment. Half of the sentence is suspended for a period of three(3) years on condition the accused is not convicted of contravening s50(1) read with s90 (1) (a) (b) of the National Land Transportation Act No 5 of 2009 within the period of suspension.

The accused in terms of s103 (2) of the Firearms Control Act No 60 of 2000 is not declared unfit to possess a firearm.

Mngadi J

I agree, it is so ordered.

Bezuidenhout, J

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