

SOUTH AFRICA / JUDGMENT

S v Permall (171172) [2017] ZAWCHC 143; 2018 (2) SACR 206 (WCC) (8 December 2017) [2017] ZAWCHC 143

COURT

Western Cape High Court, Cape Town

BEFORE

DM Thulare, NP Boqwana

CASE / FILE NUMBER

171172

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Review High Court Ref 171172

In the matter between

THE STATE

And

GRAHAM THOMAS RAYMOND PERMALL

CORAM: BOQWANA J; THULARE AJ

JUDGMENT DELIVERED ON 08 DECEMBER 2017

THULARE AJ

- [1] The proceedings in this matter were considered on review in terms of section 304 of the Criminal Procedure Act No. 51 of 1977 and I had doubts as to whether the proceedings were in accordance with justice, with particular reference to the sentence imposed. The statement of the judicial officer who presided at the trial was obtained wherein he set forth his reasons for the sentence, and the matter lay for consideration by this court.
- [2] The accused appeared in person, pleaded guilty to the charge and after being questioned by the magistrate, he was found guilty of driving a vehicle on a public road in the district of Caledon whilst the concentration of alcohol drawn from his body exceeded the prescribed limit of 0.05g per 100ml, to wit 0.22g per 100ml, in contravention of the provisions of the National Road Traffic Act No. 93 of 1996 (the NRTA). The State had accepted that the accused

had consumed an unknown quantity of brandy and ciders the night before, and that on the day of his arrest he had made a u-turn in the road in a manner that drew the attention of the police whereupon he was stopped. The police detected that he smelt of liquor and took him to a hospital for his blood to be drawn, which led to his arrest and the charges against him.

[3] He was sentenced to a fine of R15 000-00 or 30 months imprisonment wholly suspended for five years on condition that he is not convicted of driving a vehicle on a public road whilst the concentration of alcohol in his blood exceeded the prescribed limit in contravention of section 65(2) of the NRTA. As a first offender who did not hold a driving licence, he was disqualified from obtaining a learner's or driving licence for a period of six months from the date of his sentence.

[4] In obtaining the statement from the magistrate, he was more specifically asked to comment on the sentence he imposed on the

accused, with his attention being drawn to the provisions of the Adjustment of Fines Act No. 101 of 1991 (AOFA).

[5] In his comments, rightly so, the magistrate made reference to section 89 of the NRTA. Section 89(2) of the NRTA provides as follows:

"89 Offences and penalties

(2) Any person convicted of an offence in terms of subsection (1) read with section 42(1) or (2), 44(1), 45(2), 46(1) or 65(1), (2), (5) or (9) shall be liable to a fine or to imprisonment for a period not exceeding six years."

[6] The magistrate, rightly so, also referred to section 1(1)(a) of AOFA which provides that:

"1. Calculation of maximum fine

(1)(a) If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92(1)(b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92(1)(a) of the said Act, where the court is not a court of a regional division."

[7] The ruling of the magistrate on AOFA is problematic. The magistrate's statement is that the sentence imposed is well within the court's sentence jurisdiction and that section 1 of AOFA does not prescribe a specific ratio between the fine and the alternative imprisonment imposed.

- [8] Section 92(1)(b) of the Magistrates' Courts Act No. 32 of 1944 (the MCA) to which AOFA refers, also refers to subsection (1)(a) thereof, and both reads as follows:

"92 Limits of jurisdiction in the matter of punishments

- (1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence –
 - (a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division;
 - (b) by fine, may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the Gazette for the respective courts referred to in paragraph (a);"

- [9] Government Notice 217 in Government Gazette 37477 of 27 March 2014 provides for the "Determination of monetary jurisdiction for causes of action in respect of courts for districts" and specifically under section 92(1)(b) of the MCA determined an amount of R120 000-00 where the court is not the court of a regional division, and R600 000-00 where the court is the court of a regional division.

- [10] In terms of AOFA, one has to determine the ratio between the amount which the Minister has determined in terms of section 92(1)(b) of the MCA which is R120 000-00 and the period of imprisonment as determined in terms of section 92(1)(a) which is three years imprisonment or 36 months. A simple mathematical calculation shows that 120 000-00 divide by 36 equals 3333.33, which is the ratio between the fine and the period of imprisonment. The maximum period of imprisonment of 6 years equals 72 months. The ratio, 3333.33 multiplied by 72 months gives a meticulously mathematically correct sum of 239 999-76 which should be a reasonably appropriate amount of R240 000-00. It is worth noting that dividing 240 000-00 by 72, also gives one the ratio of 3333.33. In terms of AOFA, the maximum fine which the magistrate was competent to impose was R240 000-00 on a term of imprisonment of 6 years. The ratio between the maximum fine to be imposed and the maximum period of imprisonment for the offence for which the accused was convicted, is 3333.33.

- [11] In my view, section 1(1)(a) of AOFA read with section 92(1)(a) and

- (b) of the MCA, provides a statutory rule which should guide

magistrates, who are both appointed in the districts and the regional divisions, not only to calculate the maximum fine or the term of imprisonment as the case may be, but also in the computation of the fine or term of imprisonment in the sentences that the courts impose. The statutory rule is a technique of mathematical legal science to be applied to the analysis and synthesis for the determination of fines and terms of imprisonment in the magistrates' courts. It follows that, in my view, AOFA provides a statutory rule of the computation of limits of jurisdiction in matters of punishment. Considering both provisions of AOFA and the MCA

referred to, the ratio between the amount of the fine and the term of imprisonment, in the magistrates' courts, is 3333.33, save as specially provided in any other law.

[12] Where a magistrate, like in the present case, had determined to impose a fine of R15 000-00, a simple meticulous mathematical

calculation shows that that amount divided by the ratio, 3333.33, determined the maximum period of imprisonment was 4.5 months. A reasonably appropriate term of imprisonment, on the fine determined, was either 4 or 5 months imprisonment. The learned magistrate was misdirected when he imposed an alternative imprisonment of 30 months. It is a ruling which bears no relation to the law, from which he departed without any valid reasons, which guided his computation of punishment. The magistrate quoted the correct law, but simply did not make proper rulings of the law and as a result did not apply the law correctly on his judgment on sentence. A sentence is in the discretion of the magistrate, however, that discretion does not enable courts to impose sentences which are more severe than the sentence which the magistrate was competent to impose, moreso where the severity is founded on a drastic and unexplained departure from principles and rules, which includes statutory rules of calculations and computation.

[13] The difference between a maximum of 5 months and 30 months is very huge. It is a full two years and one month's difference. The sentence imposed was wholly suspended for five years. The intervention of this court is not simply academic, as there is a risk to the accused being adversely affected by the magistrate's misdirection, unless the High Court intervenes, in the event of the suspended sentence being put into operation. The risk of the adverse consequences of this misdirection is not only to the accused. Where the magistrate unduly departed from what the Legislature has ordained on how fines and terms of imprisonment are to be calculated, for inexplicable reasons, and the sentence is put into operation because the accused is unable to pay the fine, the prison population run the risk of being increased for almost three years by a man who in accordance with the law, ought not to have been in prison for more than five months. The Department of Justice and Correctional Services is in recent years battling with prison overcrowding.

[14] Consequently, I am satisfied that the alternative sentence of 30 months imprisonment on a fine of R15 000-00, although wholly

suspended for five years on condition that the accused is not convicted of driving a vehicle on a public road whilst the concentration of alcohol in his blood exceeded the prescribed limit in contravention of section 65(2) of the NRTA, is unduly disproportionate and not in accordance with the provisions of the Adjustment of Fines Act, 1991. The proceedings, in my view, were not in accordance with justice and it warrants the interference of this court on review. In my view, it is only fair that the accused gets the benefit of the least severe of the period of imprisonment in the determination of what is an appropriate sentence.

[15] In the result, I would make the following order:

The sentence imposed by the trial court is set aside and substituted with the following:

“The accused is sentenced to a fine of R15 000-00 or four months imprisonment wholly suspended for five years on condition that the

accused is not convicted of contravening section 65(2) of the National Road Traffic Act, 1996 (Act No. 93 of 1996) committed during

the period of suspension. Accused is disqualified from obtaining a learner’s or driving licence for a period of six months.”

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DM THULARE

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

NP BOQWANA

JUDGE OF THE HIGH COURT

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