

SOUTH AFRICA / JUDGMENT

S v Swartz (86/2013) [2013] ZAFSHC 93 (13 June 2013)

[2013] ZAFSHC 93

COURT

Free State High Court, Bloemfontein

BEFORE

L.J. Lekale, A. Kruger

CASE / FILE NUMBER

86/2013

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Special Review No. : 86/2013

In the review between:

THE STATE

versus

SIMON SWARTZ

CORAM: KRUGER, J et LEKALE, J

JUDGMENT BY: LEKALE, J

DELIVERED ON: 13 JUNE 2013

- [1] On 10 March 2011 the accused appeared before the Hennenman Magistrates' Court on the charge of contravening the provisions of section 59(4) of the National Road Traffic Act 93 of 1996 (the Act) in that he exceeded the prescribed speed limit on a public road by travelling at 150 km per hour in a 100 km per hour zone. He, thereupon, paid the R2 000,00 fixed by the prosecutor as an admission of guilt fine. The presiding magistrate, thereafter, confirmed the admission of guilt fine and, as such, did not hold an enquiry in terms of section 35(3) of the Act to determine whether or not there existed cause, in law, for not suspending the accused's driving licence as directed by section 35(1) (aA) (ii) of the Act insofar as the accused exceeded the applicable speed limit by more than 40km per hour.

- [2] The learned magistrate has since realised that, in terms of the practice obtaining in his district, an admission of guilt should not have been fixed in the instant matter because the accused exceeded the speed limit by more than 40 km per hour and, further, that an enquiry in terms of section 35 of the Act should, in the circumstances, have been held. He, therefore, invokes the provisions of section 304(4) of the Criminal Procedure Act 51 of 1977 as amended (the CPA) and requests that:

“The admission of guilt payment be set aside to enable the court to attempt to trace Mr Swartz and hold the enquiry.”

- [3] The learned magistrate, further, opines that:

“The other option I have is to trace Mr Swartz and request him to present himself here at court for the enquiry to be held. (This could be done without having the admission of guilt set aside.)”

- [4] Section 304(4) of the CPA is a vehicle through which matters which are not reviewable in the ordinary course may be brought to the attention of the reviewing court if the proceedings, in which sentences were imposed, were not in accordance with justice. (See Hiemstra’s Criminal Procedure at 30-24.)
- [5] Where suspension of a licence or permit is mandatory, a court convicting a person of the relevant contravention is obliged, as of law, to comply with the prescripts of the law without any prompting from the prosecution, unless there exists cause, in the form of evidence under oath, for deviating therefrom. Failure to comply amounts to a failure of justice warranting special review in terms of section 304(4) of the CPA. (See *S v Botha* 2013 (1) SACR 353 (ECP) and *S v Tshabalala* 2011 (2) SACR 505 (KZN).)
- [6] An enquiry is, therefore, indicated in the instant matter insofar as, upon conviction, suspension of a driving licence or permit follows as a matter of law in the absence of sworn evidence to the effect that it is not justified. The option of requiring the accused to appear for an enquiry in terms of section 35(3) of the Act without confirmation of the admission of guilt fine first having been set aside is not available in the instant case, because the learned magistrate is rendered functus officio thereby. (See *S v Van Wyk* 2000 (1) SACR 590 (T) at 591d.)
- [7] Such an option is, further, not indicated in the present matter because an enquiry should precede the imposition of the sentence insofar as section 35(4) of the Act provides that:
- “(4) A court convicting any person of an offence referred to in subsection*
- (1) *shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and subsection (3) to the notice of such a person.”*
- [8] The question arises what factors the court takes into account in deciding that the prescribed suspension or disqualification shall not take effect as contemplated in section 35(3) of Act 93 of 1996:

“(3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit.”

Only persuasive facts which are adduced by way of evidence under oath may influence a court to order that the suspension prescribed in section 35(1) and (2) should not be imposed (*S v Botha*, supra, at par [5]); (*S v Van Rooyen* 2012 (2) SACR 141 (ECG) par [6]). The words “after the presentation of evidence under oath” were inserted in section 35(3) by section 12(b) of Act 64 of 2008.

[9] Points of departure:

The cancellation or suspension of a licence is not simply an administrative adjunct to the sentence. Its aim is to advance the public good. It is regarded as a significant part of the sentence (*S v Van Rooyen*, supra, at par [29]).

Although suspension of the licence is in the nature of punishment (*S S Terblanche*, Sentencing in South Africa, 2nd Ed 401) its prime objective is to protect the public (*S v Maloney* 1968

(2) SA 281 (O) at 282 F – G; *R v Retief* 1960 (3) SA 258 (O) at 262 D – E).

Section 34 (discretionary suspension) and section 35 (mandatory suspension) are to be read together and are not mutually exclusive (*Van Rooyen*, supra, par [10] – [12]).

The point of departure is that the licence should be suspended for the prescribed period. Courts should be reluctant to order non-suspension (*S v Wilson* 2001 (1) SACR 253 (T) at 259 g – h).

[10] In the United States of America it has been held that the following factors are considered in determining discretionary suspension of a driver’s licence:

the nature and circumstances of the accused’s conduct, including whether the conduct posed a high risk of danger to the public or caused physical harm or damage to property;

the accused’s driving record, including age and duration of time as a licensed driver, and the number, seriousness, and frequency of previous infractions;

whether the accused did not commit any driving offences for a substantial period before the most recent violation or whether the nature and extent of the driving record indicates that there is a substantial risk that he or she will commit another violation;

whether the character and attitude of the accused indicate that he or she is likely or unlikely to commit another violation;

whether the accused’s conduct was the result of circumstances unlikely to recur;

whether a licence suspension would cause excessive hardship to the accused and/or dependants; and the need for personal deterrence;

any other relevant factor clearly identified by the court may be considered as well.

(State of New Jersey v Laura Moran 202 N.J. 311; 997 A. 2nd. 210; 2010 NJ Lexis 588.)

[11] The Supreme Court of New Jersey adds that what is important is not necessarily the number of factors that apply, but the weight to be attributed to a factor or factors.

[12] Other factors are:

the traffic conditions at the time of the offence;

whether or not an accident occurred;

whether the life of a road user was placed in danger;

speed of travel;

the number and ages of passengers in the accused's vehicle;

driving ability of the accused (S v Mofokeng 1964 (1) SA 242 (O) at 243 H).

[13] Two aspects of South African road traffic legislation point to the fact that at the consideration of suspension of drivers' licences, the offence is central, and little, if any, weight is given to the personal circumstances of the accused. The first aspect relates to the endorsement of a licence which existed under former legislation, and the other to the new points-system, which is only partially in operation. I refer briefly to both:

The points demerit system is provided for in the Administrative Adjudication of Road Traffic Offences Act 46 of 1998, chapter IV, which is in operation in Pretoria and Johannesburg only. The points are subtracted from a driver's licence taking into account only the offence.

Under previous legislation endorsement was a substantive sanction which a court had the power to order irrespective of whether suspension or cancellation was ordered (Section 146(a) of Ordinance 21 of 1966 of the four provinces which existed at the time. See W.E. Cooper, Motor Law (1982) volume 1, p 30 – 32, 614). Suspension and cancellation of licences were dealt with in section 146(b) of Ordinance 21 of 1966 which provided that the order of suspension or cancellation had to be endorsed on the licence.

[14] The prime consideration at section 35 is the offence and the aspects thereof highlighted above. However, the suspension is part of the sentence and the question whether or not to suspend and the duration of the suspension, must be considered together with the sentence. The court suspending a licence must take into account the effect such suspension will have on the daily life of the accused (S v Phago 1996 (2) SACR 631 (T) at 635 d – e). Patel J, in S v Tshabalala 2011 (2) SACR 505 (KZP) par [10] referred only to "circumstances". He did not limit them.

[15] Courts often decide to order non-suspension because the accused needs the licence for work purposes (S v Wilson 2001 (1) SACR 253 (T) at 259 f – g). In view of the fact that section 35 refers expressly to “circumstances relating to the offence”, personal factors, if relevant at all, play a minor role.

[16] To summarise:

The starting point is that courts should be reluctant to order non-suspension under section 35.

The suspension is a significant part of the punishment and exists to protect the public.

The fact that the accused needs the licence for work purposes, is a minor consideration and by itself not sufficient to justify

non-suspension.

In the enquiry, using evidence under oath, the court must enquire into the circumstances listed above and, on a consideration of all relevant circumstances, decide whether to suspend or not.

[17] In the circumstances of the present case, where no enquiry has been conducted, we are in respectful agreement with the learned magistrate that confirmation of the admission of guilt fine is not in accordance with justice and, as such, falls to be set aside.

ORDER

[18] The magistrate’s confirmation of the admission of guilt fine is set aside.

[19] The matter is remitted to the magistrate to deal with it as provided by section 57(7) of the Criminal Procedure Act 51 of 1977.

L.J. LEKALE, J

I concur.

A. KRUGER, J

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