

SOUTH AFRICA / JUDGMENT

S v Vekeni (CA & R 248/2011) [2011] ZAECHGC 56; 2012 (1) SACR 458 (ECG) (21 September 2011) [2011] ZAECHGC 56

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.M. Roberson, J.J. Nepgen

CASE / FILE NUMBER

CA & R 248/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – GRAHAMSTOWN)

Case No: 20110142

CA & R 248/2011

Date Delivered: 21/09/11

In the matter between

THE STATE

and

VUYANI VEKENI

REVIEW JUDGMENT

ROBERSON J:-

- [1] The accused was correctly convicted in the Magistrate's Court for the district of East London of a contravention of s 65 (2)(a) of the National Road Traffic Act 93 of 1996 ("the Act"), driving a motor vehicle on a public road when the concentration of alcohol in his blood was not less than 0,05 gram per 100 millilitres of blood, specifically 0,29 gram, just short of six times the legal limit. He was sentenced to two years' imprisonment in terms of s 276 (1)(i) of the Criminal Procedure Act 51 of 1977.

- [2] The accused had three previous convictions for contravening s 65 (1) (a) of the Act, driving a vehicle under the influence of intoxicating liquor, two in 2003 and one in 2006. For the first conviction a fine with an alternative of imprisonment was imposed, which was wholly suspended. For the second conviction twelve months' direct imprisonment was imposed. For the third conviction, two years' imprisonment was imposed, half of which was suspended.
- [3] A correctional supervision report was obtained in respect of the current conviction and the recommendation was that the accused was a suitable candidate for a sentence of correctional supervision. Considering the accused's previous convictions and the very high level of alcohol in his blood, I am of the view that the sentence imposed was appropriate.
- [4] The record reflects that at the commencement of sentence proceedings the Magistrate explained the provisions of s 35 (1) of the Act to the accused. S 35 of the Act provides as follows:

On conviction of certain offences licence and permit shall be suspended for minimum period and learner's or driving licence may not be obtained

Subject to subsection (3), every driving licence or every licence and permit of any person convicted of an offence referred to in –

.....

(aA)

.....

Section 65 (1), (2) or (5),

where such person is the holder of a driving licence or a licence and permit, shall be suspended in the case of –

a first offence, for a period of at least six months;

a second offence, for a period of at least five years; or

(iii) a third or subsequent offence, for a period of at least ten years, calculated from the date of sentence.

Subject to subsection (3), any person who is not the holder of a driving licence or of a licence and permit, shall, on conviction of an offence referred to in subsection (1), be disqualified for the periods mentioned in paragraphs (i) to (iii), inclusive, of subsection (1) calculated from the date of sentence, from obtaining a learner's or driving licence or a licence and permit.

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.

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 of subsection (3) to the notice of such person.

.....

- [5] For the purposes of mitigation, the accused elected not to testify and merely addressed the court. During his address he stated that he did not have a driving licence because it had previously been suspended, and that he was a mechanic and sometimes had to test drive a vehicle. The accused was also invited to address the court specifically with regard to suspension or disqualification from obtaining a driving licence and declined to do so.
- [6] Although the accused said that he did not have a driving licence, a notification by the clerk of the court to the Provincial Department of Transport, reflected that he has a Code B driving licence and also reflected the licence number. It is therefore not clear whether or not the accused has a driving licence. The notification also wrongly recorded that the accused had been convicted of driving under the influence of intoxicating liquor and had been sentenced to two years' direct imprisonment.
- [7] The Magistrate made the following order:

"In terms of section 34 (1)(c) accused is disqualified from obtaining a licence or a permit for a period of 10 (ten) years from date of sentence."

S 34 of the Act provides that a court convicting a person of any offence in terms of the Act may order the suspension or cancellation of a licence or permit, or disqualify a person from obtaining a licence or permit. S 34 is however expressly subject to s 35 of the Act.

- [8] I addressed the following query to the Magistrate:

"According to the J 175, the accused was disqualified from obtaining a licence in terms of section 34 (1) (c) of Act 93 of 1996."

Should not section 35 (2) have been applied, and in that case, the provisions of section 35 (3) have been brought to the attention of the accused, and evidence under oath heard?"

- [9] In his reply, the Magistrate said that the mistake (presumably his reference to s 34 of the Act) was a clerical error, and that the provisions of s 35 of the Act were explained to the accused. I assume from this reply that he decided not to order that disqualification should not take effect, in other words the accused was disqualified from obtaining a driving licence for ten years in accordance with s 35 (2) of the Act.
- [10] Although the Magistrate said that he explained the provisions of s 35 to the accused, the record only reflects that he explained the provisions of s 35 (1), and not s 35 (2) and s 35 (3), as he was required to do. It is not clear therefore that the accused was aware of the power of the court to order that suspension or disqualification should not take effect, or should be for a shorter period than that prescribed. Had s 35 (3) been explained, he may have elected to give evidence under oath and request that suspension or disqualification not take effect. I am of the view that because of this apparent omission to explain the provisions of s 35 (3), the proceedings in relation to the provisions of s 35 of the Act were not in accordance with justice.
- [11] An amendment to s 35 (3) of the Act came into operation on 20 November 2010. This amendment provided, inter alia, for the presentation of evidence on oath before a court could order that the provisions of s 35 (1) and (2) should not take effect.

Prior to the amendment, evidence under oath was not a requirement before the court could make such an order. In his reply the

Magistrate stated that the offence was committed on 23 May 2010, and that there was therefore no requirement for the presentation of evidence under oath, because the amendment only came into operation on 20 November 2010. I disagree with this interpretation of the amendment. The amendment was purely procedural, in that it provides for the presentation of evidence under oath before a court may order that the provisions of s 35 (1) or s 35 (2) should not take effect. The court's power to make such an order and an accused's right to seek such an order, were unchanged in substance.¹ It is therefore my view that the provisions of s 35 (3), as amended, apply, irrespective of when the offence was committed.

[12] The following order is made:

12.1 The conviction and sentence are confirmed.

12.2 The order made by the Magistrate in terms of s 34 (1) (c) of Act 93 of 1996 is set aside.

12.3 The matter is remitted to the Magistrate to ascertain whether or not the accused has a driving licence, to explain the provisions of s 35 (2) (if applicable) and s 35 (3) of Act 93 of 1996 to the accused, and thereafter to make such order as he considers appropriate.

12.4 The clerk of the court is thereafter to issue a fresh notification to the Provincial Department of Transport, containing the correct particulars.

J.M. ROBERSON

JUDGE OF THE HIGH COURT

NEPGEN J-:

I agree

J.J NEPGEN

1 See Minister of Public Works v Haffeejee NO [1996] ZASCA 17; 1996 (3) SA 745 (AD) at 753B-C

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