

SOUTH AFRICA / JUDGMENT

S v Zerky (R421/09) [2009] ZAKZPHC 17; 2010 (1) SACR 460 (KZP) (29 April 2009)

[2009] ZAKZPHC 17

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Wallis, Koen

CASE / FILE NUMBER

R421/09

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

IN THE KWAZULU-NATAL HIGH COURT

PIETERMARITZBURG

R421/09

In the matter between :

THE STATE

versus

CHRIS ZERKY

REVIEW JUDGMENT

28 April 2009

WALLIS J.

[1] On 25 October 2008 Mr Chris Zerky, who hails originally from Ghana, was involved in a motor collision on Allen Street, Newcastle. He was at the time driving a BMW saloon car. Apparently the collision occurred when another vehicle collided with the rear of his motor vehicle. For reasons that do not emerge from the record

Mr Zerky's blood alcohol was tested and the concentration was found to be 0.07 grams per 100 milliliters. That resulted in the criminal proceedings that give rise to this judgment being brought against him.

[2] On 20 February 2009 in the Magistrates' Court, Newcastle, Mr Zerky pleaded guilty to a charge formulated in the following terms:

"BLOOD ALCOHOL CONCENTRATION NOT LESS THAN 0,05 OR 0.02 PER 100 ML.

BLOOD ALCOHOL CONCENTRATION NOT LESS THAN 0,05 OR 0.02 PER 100 ML.

05 OR 0.02

That the accused is guilty of contravening Section 65(2) read with Sections 1, 65(3), 65(4), 69, 73, 74 and 89 of the National Road Traffic Act 93 of 1996.

Sections 1

National Road Traffic Act 93 of 1996

In that on or about 25 October 2008 the said accused did unlawfully drive or occupy the driver seat of a motor vehicle, the engine of which is running, to wit BMW ND 556056, upon a public road to wit Allen Street within the District of Newcastle while the concentration of alcohol in a specimen of blood taken from his/her body was not less than 0.05 gram per 100 milliliters, or in the case of a professional driver, not less than 0.02 gram per 100 milliliters, to wit 0,07 gram per 100 milliliters."

In that on or about

25 October 2008

the said accused did unlawfully drive or occupy the driver seat of a motor vehicle, the engine of which is running, to wit

BMW ND 556056

, upon a public road to wit

Allen Street

within the District of Newcastle while the concentration of alcohol in a specimen of blood taken from his/her body was not less than 0.05 gram per 100 milliliters, or in the case of a professional driver, not less than 0.02 gram per 100 milliliters, to wit
gram per 100 milliliters."

After Mr Zerky entered his plea of guilty the magistrate questioned him in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977, as amended, in accordance with a standard list of questions that is used in this type of case. Three of these questions and answers are relevant. They read as follows:

section 112(1)(b)

Criminal Procedure Act, 51 of 1977

“Q. What type of vehicle did you drive?”

Q. What type of vehicle did you drive?

A. A BMW vehicle, private vehicle.

A BMW vehicle, private vehicle.

Q. Are you a professional driver?

Are you a professional driver?

A. Yes.

Q. Do you admit that the concentration of alcohol in your blood was in excess of the prescribed limit of 0,02/0,05 to wit 0,07 grams per 100 ml?

A Yes”

In regard to this last question there is nothing in the record to indicate when the deletion was effected or that the magistrate told Mr Zerky of the deletion and its potential significance. It is probable that he merely intended to admit that his blood alcohol level had been correctly measured not that the prescribed limit was the lower one applicable to professional drivers.

[3] The magistrate recorded that she was satisfied that the accused admitted all of the elements of the charge against him. She then recorded on the J.15 that he was found guilty of contravening section 65(2) of the Road Traffic Act 93 of 1996 and added the note: “Convicted as a professional driver”. There is, however, nothing in the record to indicate whether this was conveyed to Mr Zerky. Be that as it may, Mr Zerky then addressed the court in mitigation of sentence and explained that he was a teacher working for the Department of Education. He added the following:

“I lost my driver’s licence. I do have a professional driving permit.”

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A little later he said that he wanted the court to note that he does have a licence and that a copy of it can be obtained. At the end of this the magistrate imposed a sentence of a fine of R6000.00 or 6 months’ imprisonment, of which R2000.00 or 2 months’ imprisonment was suspended for three years on certain conditions. The fine was not paid, which is hardly surprising as Mr Zerky had indicated that he had no money with him, and he was not released.

[4] When the matter came on review the Reviewing Judge queried the basis upon which Mr Zerky had been convicted as a professional driver and also queried the sentence suggesting that had he been convicted as an ordinary driver, a far lower sentence would have been imposed. He also asked why the deferred fine was not granted in order to avoid

Mr Zerky being detained in prison.

[5] The magistrate's response reads as follows:

"(a) Indeed he was convicted as a professional driver on the basis that he was the holder of a Professional driving permit as he stated.

(a) Indeed he was convicted as a professional driver on the basis that he was the holder of a Professional driving permit as he stated.

This set of circumstances required clarity as to whether such a conviction as a professional driver could follow on these facts alone. In the past I have convicted such drivers as 'ordinary drivers' even though they did have a professional driving permit because the facts indicated that when they were stopped they had been driving in a private capacity, however I have had some reservations in this regard since the holder of a professional driving permit should be subject to the more stringent provisions of the said Act – it appeared to subvert the clear wording of the Act to hold that such drivers should be convicted as 'ordinary drivers' although they were professional drivers on account of being holders of a professional driving permit.

I accordingly sought some guidance in this regard from the automatic Review process and leave the matter to your Honour to decide upon.

If your Honour maintains the view that he should only have been convicted as an ordinary driver then I must agree that the fine as it stands is high and should be reconsidered. I would then suggest a suspension of half of the total fine imposed as fair.

(b)The accused was advised of his right to apply for a deferred fine as indicated on the record, however he did not bring such an application, same would have been favourably considered had he made such an application."

The accused was advised of his right to apply for a deferred fine as indicated on the record, however he did not bring such an application, same would have been favourably considered had he made such an application."

[6] When the case came before me on review I made enquiries and directed that should Mr Zerky still be in prison he should be released immediately. I was subsequently informed by the Clerk of the Court, Newcastle, that he was released on a warrant of liberation on 20 April 2009 at approximately 15h30. The position is therefore that he spent two months in prison in consequence of his conviction by the magistrate. Even if it had been correct to convict him as a professional driver, in the circumstances of this case where Mr Zerky was plainly involved in domestic pursuits unrelated to any

professional driving responsibilities that he may have and where his blood alcohol level was only marginally higher than the permissible

limit for a conventional motorist driving a conventional saloon car as he was, it is plainly wrong that he should have been sentenced on a basis that resulted in him being imprisoned for two months. The sentence was manifestly excessive and, bearing in mind that he had clearly told the magistrate that he had no money with him on the day of his trial, the magistrate should of her

own volition have deferred the payment of the fine in order to ensure that he was not detained in prison where that was unnecessary[1]. The magistrate had evidence that Mr Zerky was employed in the important job of a teacher and was in receipt of a salary of R9000.00 per month. There can be no real doubt that if he had been afforded the opportunity of paying a deferred fine he would not have had to undergo imprisonment and the magistrate's failure to ensure that he was given every opportunity to avoid imprisonment is to be deprecated. The fact that it is possible that such imprisonment might result in his losing his employment appears not to have been taken into account at all by the magistrate.

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[7] The approach by the magistrate is even more disturbing in view of the fact that she records in her response to the query by the Reviewing Judge that this case involved a departure from the view that she had previously taken that where a person was found driving a private motor vehicle in a private capacity whilst his or her blood alcohol level exceeded 0,05 grams per 100 ml, they should be treated as an ordinary motorist notwithstanding the fact that they were the holder of a professional driving permit. She did not deliver a reasoned judgment or give any explanation that would have alerted Mr Zerky to the fact that he had become a guinea pig for her musings on the implications and purpose of the legislation. Her response to the reviewing judge is unreasoned and unhelpful. As will become apparent the answer to

the question she raised depends on a careful consideration of the provisions of the statute in the light of the principles governing the interpretation of statutes. Instead there is no indication why the magistrate initially took one view and later revised that view or of her reasons for doing so. This is a wholly unacceptable basis upon which to subject people to imprisonment.

- [8] There is no indication that the magistrate was in the slightest bit concerned about the implications of her decision. In view of the potentially serious adverse consequences for the accused arising from the change in her view of the relevant legislation, it would have been more appropriate for her, after convicting Mr Zerky as a professional driver, to have sent the matter on review before sentence in terms of the provisions of section 304A(a) of the Criminal Procedure Act. This she was entitled to do on the basis that, as appears from her response to the reviewing judge, she was clearly in doubt whether convicting Mr Zerky as a professional driver was correct and accordingly whether it would be in accordance with justice. By adopting that approach I have little doubt that the incarceration of Mr Zerky would have been avoided. In part, at least, that would have been the result of the conviction as a professional driver being set aside, which, for the reasons that follow, it should be.

section 304A(a)

Criminal Procedure Act. This

- [9] Section 65(2) of the National Road Traffic Act 93 of 1996 (“the RTA”) provides that:

“No person shall on a public road:

No person shall on a public road:

(a) drive a vehicle; or

drive a vehicle; or

(b) occupy the driver’s seat of a motor vehicle the engine of which is running,

while the concentration of alcohol in any specimen of blood taken from any part of his or her body is not less than 0,05 grams per 100 ml, or in the case of a professional driver referred to in section 32, not less than 0,02 grams per 100 ml.”

It is plain that it is the driving of the motor vehicle or the occupancy of the driver’s seat whilst the engine is running and hence when it can be inferred that it has either been driven or is about to be driven, that constitutes the offence, not the status of the driver or the type of licence possessed by that driver. The law demands a certain level of sobriety from all drivers. In the case of a professional driver a greater level is demanded. The obvious reason for this is that when a professional driver is about his or her business the nature of their work poses greater perils to life, limb and property than is the case with the driving of a conventional motor vehicle. It is not obvious that when they are about their ordinary day to day

lives they should be treated any different from any other driver.

- [10] A professional driver is defined in section 1 of the RTA as meaning the driver of a motor vehicle referred to in section 32. Again the emphasis is on the fact of driving not on the type of licence or permit possessed by the person concerned. In terms of section 32(1) it is provided that:

“no person shall drive a motor vehicle of a prescribed class on a public road except in accordance with the conditions of a professional driving permit issued to him or her in accordance with this Chapter and unless he or she keeps such permit with him or her in the vehicle: ...”

no person shall drive a motor vehicle of a prescribed class on a public road except in accordance with the conditions of a professional driving permit issued to him or her in accordance with this Chapter and unless he or she keeps such permit with him or her in the vehicle: ...”

As with section 65(2) it is the driving of a vehicle of the prescribed class that constitutes a contravention of this section. Section 32(2) provides that the class of vehicle the driving of which requires possession of a professional driving permit and the categories of professional driving permits are to be as prescribed. Accordingly in order to identify both the category of professional driving permit and the nature of the motor vehicle to which it applies one must have resort to the regulations promulgated under the RTA.

- [11] The regulations in question are the Road Traffic Regulations 2000 published in GNR.225 of 17 March 2000. Regulation 99(4)(a) sets out different categories of driving licences. They are referred to as A1, A, B, C1, C, EB, EC1 and EC. Categories A1 and A relate to the driving of motor cycles and category B to motor vehicles the tare of which does not exceed 3500 kg or a minibus, bus or goods vehicle, the gross vehicle mass of which does not exceed 3500 kg. A licence in category B is the conventional driver's licence held by ordinary motorists. It was the only driver's

licence Mr Zerky required in order to drive a BMW saloon. The other categories of licence relate to various larger motor vehicles, but possession of a licence in those categories authorises the holder to drive any motor vehicle for which a code B driving licence is required.

- [12] The requirement that a person hold a professional driving permit relates to the driver of a goods vehicle, the gross vehicle mass of which exceeds 3500 kg; a breakdown vehicle; a bus; a minibus the gross vehicle mass of which exceeds 3500 kg or which is designed or adapted for the conveyance of 12 or more persons including the driver; a motor vehicle used for the conveyance of persons for reward or operated in terms of an operating licence issued for that purpose; a motor vehicle the gross vehicle mass of which exceeds 3500 kg to which certain other regulations apply and a motor vehicle conveying 12 or more persons including the driver.[2] Regulation 116 then describes three categories of professional driving permit, namely categories G, P and D each of which relates back to one or other of the categories of motor vehicle referred to in regulation 115(1). Lastly under regulation 117(a) a person cannot obtain a professional driving permit unless they are in possession of a valid driving

licence for a motor vehicle in respect of which the permit is applied for. Other possibly than a licence in respect of conventional saloon cars operated as taxis, those are all licences other than type A1, A or B motor vehicle driving licences.

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- [13] When section 65(2) of the RTA mentions a professional driver as referred to in section 32 it is referring to a person who by virtue of the nature of the vehicle that they are driving at any particular time is required to be in possession of a professional driving permit of one or other type set out in the regulations. It is the driving of the vehicle that attracts the obligation to possess a professional driving permit. That is evidenced by the fact that the permit must be in the driver's possession on the vehicle. They are not required to have the permit when they are driving a conventional saloon car. In my view section 65(2) has nothing to do with the occupation of the person and the fact that they may earn their living as a professional driver. They are identified as a professional driver for the purposes of the section by the fact that they are driving a vehicle of the type specified in the regulations that requires them to be in possession of a professional driving permit.

Accordingly it is the nature of the vehicle that they are driving and the obligation to hold a professional driving permit that imposes stricter requirements in regard to a person's blood alcohol level and not their job description. The type of driver's licence that they possess and the fact that they may have a professional driving permit is irrelevant.

- [14] The notion that a person becomes a professional driver because of the nature of the motor vehicle that they are driving is reinforced by the definition of "professional driver" that I have already quoted. A person is a professional driver under that definition if they are driving a motor vehicle of a type specified in the regulations under section 32(1) of the RTA. Whether they in fact have a professional driving permit is neither here nor there. If they are driving a specified type of motor vehicle then they are a professional driver.

- [15] Consideration of all three relevant provisions of the RTA accordingly point uniformly to the conclusion that a person is only a professional driver for the purposes of the criminal offence set out in section 65(2) of the RTA if they are at the time driving a motor vehicle of the type specified in the regulations as requiring the driver to hold a professional driver's permit. The definition states that a professional driver is a person driving such a motor vehicle. Section 32(1) prohibits a person from driving a motor vehicle of the prescribed class on a public road except in accordance with a professional driving permit. The heading to this section is significant. It reads:

"Professional driver to have permit."

Professional driver to have permit."

In other words a person does not become a professional driver because they have a professional driving permit. They are a professional driver because they drive a motor vehicle of the prescribed class and it is because they are a professional driver that they are required to have a professional driving permit. Lastly, as pointed out, the offence established by section 65(2) is the offence of driving a motor vehicle or being in a position where the inference is that one has just driven or is about to drive a motor vehicle. The obvious reason why different blood alcohol levels are specified as between professional drivers and ordinary drivers is the potentially greater harm that can be occasioned by a professional driver when driving a vehicle of a specified class. This is not to discount the harm that can be caused by driving a conventional motor vehicle for private purposes. However the harm caused by a large commercial vehicle or the death and injury occasioned in the operation of passenger vehicles carrying more than 12 people is too well known and documented for it not to be apparent why the drivers of such vehicles are to be held to a stricter standard in regard to their blood alcohol levels.

- [16] There is also a perfectly good reason why the RTA formulates the prohibitions in section 65(2) in this fashion. It is that otherwise a person who did not possess a professional driving permit would, so far as their blood alcohol level was concerned, be able to drive a vehicle of the class requiring them to possess such a permit with a higher blood alcohol level than would be the case with a person holding such a permit. If such a person were not a professional driver for the purposes of the RTA they could drive a heavy vehicle with a blood alcohol level of 0.05 with impunity provided they did not possess a professional driving permit. That is manifestly absurd and an untenable situation. Accordingly the structure of the Act, as I have demonstrated, is that a person becomes a professional driver when they drive a vehicle of the specified class irrespective of whether they have complied with their statutory obligation to obtain a professional driving permit.

- [17] Mr Zerky was not driving a vehicle that required him to possess a professional driving permit. He was driving a private motor vehicle for private purposes. Accordingly his conviction on the basis that he was a professional driver was erroneous. That means that his conviction and, as the magistrate concedes, his sentence must be altered. Before dealing with that, however, I should say something about both the charge sheet and the questioning of Mr Zerky in terms of section 112(1)(b) of the Criminal Procedure Act.

Criminal Procedure

section 65(2)

section 32(1)

section 65(2)

- [19] The result of the charge being formulated in this fashion is that the questioning under section 112(1)(b) of the Criminal Procedure Act is not, as that section provides, directed at the court satisfying itself that the accused understands the plea of guilty that they have entered and truly admits every element of the offence. Instead the purpose of the questioning is in part to ascertain what criminal offence the accused has committed. That is the function of the questions quoted at the outset of this judgment concerning the nature of the motor vehicle being driven and whether the person is a professional driver. Such questioning is not a permissible purpose of questions posed under section 112(1)(b) of the Criminal Procedure Act. It is accordingly improper and must be discontinued. If a person is to be charged as a professional driver and pleads guilty, appropriate questions to establish that the vehicle being driven at the time of the offence is of the class that requires possession of a professional driving permit must be put to the accused in terms of section 112(1)(b).

Criminal Procedure Act is

Criminal

Procedure Act. It

section 112(1)(b).

- [20] Apart from the impropriety of these questions the manner in which they have been formulated is thoroughly misleading. Questions put to an accused under section 112(1)(b) are questions about the factual elements of a criminal offence, not questions about conclusions of law to be drawn from facts. Whether a person is a professional driver within the meaning of that expression under the RTA is a conclusion of law to be derived from certain facts. When it is posed as a question of fact it is thoroughly misleading. No doubt if Mr Lewis Hamilton or Mr Felipe Massa or a humble truck driver were stopped whilst driving a conventional saloon car on South Africa's roads and asked if they were professional drivers, they would answer in the affirmative. However that accurate and innocent answer would not mean that they were required to be in possession of a professional driving permit in terms

of section 32(1) of the RTA. Nor could it have any bearing on any other provision of the RTA that draws a distinction between a professional

driver and other drivers.

[21] In this case Mr Zerky informed the court that he was in possession of a professional driving permit. It is not clear whether he meant that this is a professional driving permit issued under section 32(1) of the RTA, as there is nothing to indicate why he, as a teacher, would have obtained such a permit. His attention was not drawn to the provisions of section 32(1) of the RTA, or the definition of a professional driving permit in section 1 or to the relevant provisions of the regulations. In those circumstances the question was thoroughly misleading and the answer worthless. Had the charge sheet been drafted on the basis that he was an ordinary driver this question would not have arisen. When it arises in the context of a professional driver the questioning needs to be far more detailed than is at present the case.

section 1

[22] I have considered whether in the light of the form of the charge sheet the conviction of Mr Zerky should be set aside on the basis that the entire proceedings were irregular. Bearing in mind, however, that this form of charge sheet has been in use for some considerable time and has not hitherto occasioned problems or injustice, or been queried by judges including myself, I do not think that it is necessary to go further than to say that charges should no longer be laid in this form. Justice will be done to Mr Zerky in accordance with his plea if his conviction is altered by the deletion of the reference to his being a professional driver. As regards sentence the proper sentence would have been a fine, with imprisonment as an alternative, and the fine should have been deferred. However, too much water has flowed under the bridge for that to be done at this stage. He has served two months' imprisonment, which I regard as a far more salutary punishment than the payment of a fine of R4000.00. The answer in my view is to suspend two-thirds of the sentence imposed by the magistrate. On that basis Mr Zerky was entitled to his immediate release from prison as ordered by me.

[22] In the result Mr Zerky's conviction is altered to one of contravening section 65(2) of the National Road Traffic Act 93 of 1996 as an ordinary driver and not as professional driver. The sentence imposed by the magistrate is altered to read as follows :

National Road Traffic Act 93 of

A fine of R6000.00 or six (6) months' imprisonment of which R4000.00 or four (4) months' imprisonment is suspended for three years on condition that he is not convicted of an offence of contravening section 65(1), 65(2) or 65(5) of Act 93 of 1996 committed during the period of suspension. In terms of section 35 of Act 93 of 1996 it is ordered that the suspension of his driving licence is not to take effect.

A fine of R6000.00 or six (6) months' imprisonment of which

R4000.00 or four (4) months' imprisonment is suspended for

three years on condition that he is not convicted of an offence of contravening section 65(1), 65(2) or 65(5) of Act 93 of 1996 committed during the period of suspension. In terms of section 35 of Act 93 of 1996 it is ordered that the suspension of his driving licence is not to take effect.

section 65(1)

KOEN J.

[1] S v Kika 1998

(2) SACR 428 (W).

S v Kika

1998

(2) SACR 428 (W).

[2] Regulation 115(1)

Regulation 115(1)

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