

SOUTH AFRICA / JUDGMENT

Toni v S (CA&R199/17) [2020] ZAECHGHC 10; 2020 (1) SACR 369 (ECG) (13 February 2020) [2020] ZAECHGHC 10

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S.M. Mfenyana, J.E. Smith

CASE / FILE NUMBER

CA&R199/17

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No: CA & R 199/17

IN THE MATTER BETWEEN:

MZIKAYISE TONI

APPELLANT

And

THE STATE

RESPONDENT

APPEAL JUDGMENT

MFENYANA AJ

- [1] The appellant was convicted by the Magistrate's Court, Grahamstown, of:
- (a) driving whilst under the influence of liquor in contravention of section 65(1)(a) of the National Road Traffic[1] (the Act); and
 - (b) driving without a valid driver's licence in contravention of section 12(a) of the Act.

- [2] He pleaded guilty to both counts and was sentenced to 5 years' imprisonment in respect of count 1, and a fine of R1000 or 3 months' imprisonment in respect of count 2. He brought an application for leave to appeal against the sentence which was refused. Upon petitioning the Judge President of this court, he was granted leave to appeal against his sentence. He is currently on bail pending the outcome of his appeal.
- [3] The issue on appeal is whether the sentence imposed by the court a quo was appropriate.
- [4] In sentencing the appellant, the presiding magistrate held that the court must ensure that it protects members of society from wrongdoers lest they lose confidence in our courts. He considered that the appellant did not only drive a motor vehicle while under the influence of liquor, but also without a driver's licence. He further considered that the appellant collided with a pedestrian, one Mr Phikani, who sustained serious injuries, some of which are still being treated.
- [5] Mr Geldenhuys, contended on behalf of the appellant, correctly in my view, that the trial court erred in not fully considering other sentencing options which would have been more appropriate than a custodial sentence in the circumstances. He further pointed out that alternative sentencing options such as correctional supervision, a fine or suspended sentence, would not only reflect the seriousness of the offence, but would also serve as a deterrent. These sentencing options should have been considered by the trial court. He submitted that the sentence imposed by the magistrate is thus shockingly inappropriate and a less severe sentence would be appropriate.
- [6] On the other hand, Mr Sinclair, counsel for the respondent, while admitting that the sentence is harsh, submitted that if regard is had to the aggravating circumstances, including the fact that the appellant drove without a licence, that his blood alcohol content was 0.36 grams per 100 ml, and that an elderly victim sustained injuries, the harsh sentence is appropriate in the circumstances.
- [7] It is an established principle that a court of appeal will not interfere with a sentence imposed by a trial court, unless it is of such a nature that no reasonable court ought to have imposed it, and is thus grossly excessive, or there was an improper exercise of its discretion by the trial court, or the interests of justice requires it.[2] The Appellate Division(as it then was) held that it is not the fact that the court of appeal would have imposed a lighter sentence if the punishment were within its discretion that would entitle it to intervene, but that the sentence must reflect the blameworthiness of an offender and should be proportional to what an offender deserves. It should have regard to and serve the interests of society.
- [8] It is essential therefore to maintain the balance between the competing interests at play while keeping in mind that sentencing is not there to satisfy public opinion, but to serve the interests of the public[3]. In striking this balance, the triad set out in *S v Zinn*[4], being the crime, the offender and the interests of society is of particular relevance.

[9] It cannot be disputed that the offences for which the appellant has been sentenced are serious. Despite the seriousness of the offences the courts still take into account various criteria when determining sentence. These criteria include, inter alia, the degree of intoxication, the accused's behaviour in the circumstances, the accused's personal circumstances, including his age, whether the drunken driving resulted in injuries to persons or damage to property, and any previous convictions for the same

offence.[5]

[10] In *Gouws v The State*[6] Lowe J held that the magistrate committed a material misdirection in, inter alia, failing to consider the totality of the evidence and other possible sentence alternatives. In that matter the appellant's reckless

driving had resulted in the death of a cyclist. The trial court considered and ruled on the culpability of the appellant and sentenced him to seven years' imprisonment, with two years conditionally suspended. On appeal, the sentence was reduced to four years. In that matter, the appellant failed to stop at the scene of the accident and render assistance to the victim in direct contrast to the appellant's conduct in the present matter. The court, having taken into account the appellant's degree of culpability held that

direct imprisonment was not an appropriate sentence. The facts of that case are, however, distinguishable.

[11] In the specific circumstances of this matter it is relevant to note that no finding of culpability was made by the trial court against the appellant. That is not to say that the offence committed by the appellant is not serious, there is no gainsaying that. However, I am not persuaded that the appellant, given all the circumstances of this matter, both in mitigation and aggravation, is beyond rehabilitation. In so far as his personal circumstances stand, he was 36 years at the time of sentencing, he has two children one of whom lives with him and his girlfriend, he is a productive member of society and earned a gross salary of R13 000.00 per month at the time. The level of alcohol in his blood was very high at 0.36 grams per 100ml, his

reckless driving and unlawful conduct resulted in serious and permanent injuries to another person. All these factors count against

him. In his favour is that he is a first offender; he is employed; he pleaded guilty and cooperated with the police and the court. It is trite that our courts are loathe to impose custodial sentences to first offenders. Here, I immediately put a disclaimer that, 'unless the specific facts of particular case warrant it'. I have not found that to be the case in the present matter. In considering what could be the appropriate sentence, all factors must be looked at as a whole and balanced against each other.

[12] In my view the totality of the factors which I have mentioned above tip the scales in favour of a lesser sentence. It is imperative, while seeking to send a message that unlawful conduct will not be tolerated by the courts, also to afford the appellant an opportunity to rehabilitate.

In my view the magistrate overemphasised the seriousness of the offences above all other factors. I am thus inclined to agree that in the circumstances of the present matter, the sentence imposed by the court a quo in respect of count 1 is excessive. I am not persuaded that the same is true in respect of count 2.

In the result the following order is made:

1. The appeal is upheld.
2. The sentence imposed by the trial court in respect of count 1 is set aside and replaced with the following:

"The accused is sentenced to three years' imprisonment in respect of count 1, wholly suspended for a period of five years on condition that the accused is not found guilty of contravening section 65(1)(a) of the National Road Traffic Act, No. 93 of 1996 during the period of suspension".

3. The sentence in respect of count 2 is confirmed.
4. The sentence is ante-dated to 17 July 2017.

S.M. MFENYANA

ACTING JUDGE OF THE HIGH COURT

I agree.

J.E. SMITH

JUDGE OF THE HIGH COURT

Heard on: 5 February 2020

Delivered on: 13 February 2020

Appearing on behalf of the Appellant: Adv. Geldenhuys

Instructed by: Legal Aid, South Africa

Appearing on behalf of Respondent: Adv. Sinclair

Instructed by: National Director of Public Prosecutions, Grahamstown

[1] Act 93 of 1996

[2] S v Snyders 1982 (2) SA 694 (A); [1982] 4 All SA 215 (A) at 216.

[3] S v Mhlakaza 1997 (1) SACR 515 (SCA); [1997] 2 All SA 185 (A) at 189

[4] S v Zinn 1969 (2) SA 537 (A); [1969] 3 All SA 57 (A)

[5] S v Greef; S v James; S v Theron 2001 (1) SACR 214

[6] Case No: CA10/2015, ECHCGHT

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2020/10.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/toni-v-s-unknown-topic-aecghc-2020>

Prepared on 12 October 2026 · Esheria