

SOUTH AFRICA / JUDGMENT

Van Wyk v S (CA 56/09) [2010] ZANWHC 2 (18 February 2010)

[2010] ZANWHC 2

COURT

North West High Court, Mafikeng

BEFORE

M J Mpshe, Samkelo Gura

CASE / FILE NUMBER

CA 56/09

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NORTH WEST HIGH COURT, MAFIKENG

CA 56/09

In the matter between:

WILLIAM JOHANNES VAN WYK APPELLANT

and

THE STATE RESPONDENT

J U D G M E N T

MPSHE AJ:

[1] This is an appeal against a sentence of twelve (12) months imprisonment imposed on the appellant by the presiding magistrate

sitting in Lichtenburg. The appellant was convicted on a plea of guilty.

[2] He was charged for driving with an excessive amount of alcohol in his blood to wit 20 gram per 100 millilitres in contravention of section 65 (2) (a) of the National Road Traffic Act 93 of 1996.

[3] The appellant was 46 years of age at time of imposing sentence. He is engaged but has no children nor dependants. Appellant is employed and earns ± R8 000-00 per month as a truck driver. Of relevance to sentence is the following:

He has a total of 14 previous convictions for crimes ranging from fraud, theft and driving under the influence of alcohol.

On 02 April 1985 he was convicted for driving under the influence of alcohol and was sentenced to R800-00 or 8 months imprisonment,

R400-00 or 4 months suspended on conditions for 5 years.

On 03 April 2001 appellant again was convicted of driving under the influence of alcohol and sentenced to R1 000-00 or 4 months imprisonment wholly suspended on certain conditions and had his driver's licence endorsed.

On the 06 August 2002 he was again convicted of driving under the influence of alcohol and sentenced in terms of section 276 (1) (h) of the Criminal Procedure Act 51 of 1977 to 2 years correctional supervision made up of house arrest and community service of 16 hours per month.

- [4] It is common cause that he is dependent on alcoholic liquor and that he had been abusing same for a long time as stated by counsel for the appellant. It needs to be mentioned further that the suspended sentence imposed on 03 April 2001 was further suspended for 1 year on 21 January 2003 due to his breach of conditions under correctional supervision.
- [5] Counsel for appellant contended that the court a quo erred or misdirected itself by finding that correctional supervision was not an appropriate sentence for the appellant. Counsel for the appellant contended further that the court a quo did not take into consideration the fact that appellant was attending rehabilitation and was responding well thereto. It is further argued that the court a quo misdirected itself by not committing the appellant to a treatment centre in terms of section 296 of the Criminal Procedure Act 51 of 1977.
- [6] It is trite law that a court of appeal has the power to interfere with sentence imposed by the court a quo. However, this cannot be lightly done at the simple request by appellant for a reduction or setting aside nor by the respondent for increase thereof. In the authoritative decision of *S v Anderson* 1964
- (3) SA 494 (A) at 495 C – L the following is apposite.

“The sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his direction by the trial judge” In the S v Pillay 1977

- (4) SA 531 (A) at 535 E – F the same sentiments as in *S v Anderson* were followed.
- [7] Advocate Zwiigelaar, for the appellant contended that appellant is and will respond positively to a rehabilitation program. It needs to be noted that appellant at the time of trial in this matter had subjected himself to a rehabilitation centre namely SANPARK to which he responded positively. It is further argued that since the rehabilitation program, appellant is an abstainer from alcohol. The decision in *S v Schlebusch* 1993
- (2) SACR 662 (A) was extensively referred to by counsel for the appellant. This judgment, although distinguishable from the present as well as that in *S v Majodima* 1996

(2) 369 (A), cannot be ignored.

[8] In casu two of the appellant's previous convictions are more than 10 years old i.e previous conviction dated 02 April 1985 (which is 23 years old) and that of the 03 April 2001 (which is 16 years old).

Taking further into consideration that appellant is not convicted for drunken driving but for driving a motor vehicle whilst his blood alcohol content was in excess of the prescribed statutory limit, this court is persuaded that he is a person suitable for rehabilitation.

[9] Consequently the appeal against sentence is upheld. The sentence of 12 months imprisonment is set aside and in its stead the following is imposed:

In terms of section 296

(1) of Act 51 of 1977 the accused is committed to a rehabilitation centre established in terms of the Prevention and treatment of Drug Dependency Act 20 of 1972.

In addition the accused is sentenced to 12 months imprisonment wholly suspended for three years on condition that he

cooperates fully with the rehabilitation program as shall be prescribed by the centre;

both during his detention in such centre and upon his discharge, submits to and complies with any regime of after-care rehabilitation prescribed by the centre;

is not convicted of contravention of section 65 (2) (a) of the National Road Traffic Act 93 of 1996 committed during the period of such suspension;

that the driving licence be endorsed with particulars of conviction and sentence.

M J MPSHE

ACTING JUDGE OF THE HIGH COURT

I agree.

SAMKELO GURA

JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING : 05 FEBRUARY 2010

DATE OF JUDGMENT : 18 FEBRUARY 2010

COUNSEL FOR THE APPELLANT : ADV C J ZWIEGELAAR

COUNSEL FOR THE RESPONDENT : ADV M M M MOROKA

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C/O HERMAN SCHOLTZ

REF: FJVT/djvr/VA399

ATTORNEYS FOR THE RESPONDENT: STATE ATTORNEYS

REF: 9/2/5/1-63/09

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