

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

High Court Reference Number: **0402509**
Case Number: **24/127/2004**
Magistrate's Series Number: **241/2004**

In the matter between:

THE STATE

and

GREG PAUL ROOI

REVIEW JUDGMENT : 21 SEPTEMBER 2004

BOZALEK J:

This matter comes before us by way of review from the Magistrates' Court, Cape Town, where the accused was found guilty of contravening section 65(2)(a) read with section 89(1) and 89(2) of the National Road Traffic Act, 93 of 1996 ('the Act'). The accused was found to have driven a motor-vehicle on a public road whilst the concentration of alcohol in his blood was 0.22 grams per 100 millilitres.

The accused was sentenced to a fine of R20 000 or twelve months imprisonment suspended for five years on condition that he was not convicted during that period of contravening section 65(1)(2)(1)(b)(sic),(2)(a) or (2)(b) of the Act.

The accused's driver's licence was not suspended but he was also sentenced to undergo 240 hours of periodical imprisonment at Pollsmoor Prison over a series of five weekends. I raised as a query with the magistrate the extremely heavy fine imposed which, albeit suspended, appeared disproportionate both to the accused's income and to the general "tariff" of fines imposed in such matters.

In his reply the magistrate relied on the fact that the accused had a previous conviction for a similar offence in 1999 when he was sentenced to a fine of R4 000 or eight months imprisonment, half of which was suspended. The magistrate also stated that in sentencing he had proceeded from the premise that the accused could be fined R1 500, 00 "for each gram (sic) in excess of 0.05 grams per 100 millilitres". Apart from the fact that the magistrate did not follow his own sentencing prescription (this would have produced a fine of R25 500, 00), it goes almost without saying that any such mechanistic sentencing formulation is completely inappropriate. A sentence based on such an approach, where the sentencing officer in effect fetters his or her discretion, would be irregular and liable to be set aside. Finally, the magistrate also placed reliance on the Adjustment of Fines Act, 101 of 1991, as authorising him to impose a fine of up to R60 000 or three years imprisonment and expressed the view that the fine of R20 000,00 was "in perfect harmony" with that act. In my view, for the following reasons, the magistrate was incorrect not only in the view which he expressed, but also in his understanding of the jurisdiction which he enjoyed.

Section 89(2) of the National Road Traffic Act provides for a penalty of a fine, in

an indeterminate amount, or imprisonment for a period not exceeding six years for contravention of, *inter alia*, section 65(2)(a) of the Act, namely, driving with a motor vehicle with an excessive concentration of alcohol in one's blood. In terms of section 89(7) of the Act a Magistrate's Court is competent to impose the aforesaid sentence of imprisonment notwithstanding any other jurisdictional limitation it may be subject to. In terms of section 92(1)(a) and (b) of the Magistrate's Court Act, 32 of 1944, read with the relevant government notice, viz Government Notice R1411 (Government Gazette 19435 of 30 October 1998), a District Magistrate's Court may presently impose a fine not exceeding R60 000 and imprisonment not exceeding three years.

The Adjustment of Fines Act makes provision for the calculation of the amount of the fine which may be imposed by a court where the empowering legislation does not stipulate the amount thereof. Section 1(1)(a) of the Adjustment of Fines Act, read with the aforementioned provisions of the Magistrate's Court Act and the relevant gazette, establishes the rate between the sentence of imprisonment and the permitted fine. As the permitted sentence of imprisonment is six years, it follows that a District Court may impose a fine of up to R120 000 for a contravention of section 65(2)(a) of the National Road Traffic Act.¹ Accordingly, the District Court's jurisdiction in respect of sentence for such a contravention provides for a maximum fine of up to R120 000 and not R60 000 as the magistrate considered.

¹ See Terblanche *Guide to Sentencing in South Africa*, 1999 Butterworths pp 50 and 51 and *S v Viljoen* 1999 (1) SACR 128 (W). Terblanche makes the following apt remark regarding the wording of s1(1)(a) "Reading through it, though, leaves one with the district impression of an abstract painting – the colour and

The fact that the fine imposed by the magistrate in the present matter falls within the limits of a district court's jurisdiction, is by no means the end of the matter. The maximum fine is not itself a bench mark, as the magistrate appears to have reasoned. Any fine imposed must bear a relation to the convicted person's means and must fall, all things being equal, within the parameters established by sentences imposed in similar matters where guidelines have evolved. See in this regard *S v Serabo and five similar cases* 2002 (1) SACR 391 (E) where it was held that the "norm" for such sentences is a fine of R4 000 to R6 000 with an alternative of imprisonment for a period of between six and eighteen months. While the suspension of the sentence does soften the punishment, the fact remains that the sentence may at a later stage be carried into effect, and it must therefore be appropriate having all regard to the circumstances of the case, regardless of the fact that it is suspended." See *S v Boks* 2003 (1) SACR 176 (C) at 184f-h.

In the present case the evidence was that the accused earned R4 000 per month. Although the alcohol content in the accused's blood sample was significant, being 0,22 grams per millilitre, and he had a previous conviction, there were no further circumstances which justified the imposition of such an extraordinarily high fine. In the normal course I would have considered that a fine of R6 000, with a portion suspended, together with some non-custodial punishment, as an appropriate sentence. The magistrate, however, sentenced the accused to periodical imprisonment which he has now served. In the circumstances it would be inappropriate and in fact impermissible for the

sentence to be altered in such a way that the accused is required to pay a fine, any part of which is not suspended, since this would have the effect of rendering the sentence more severe.

In the result I consider that an appropriate sentence in these circumstances is a fine of R6 000 or twelve months imprisonment totally suspended for a period of five years together with the periodical imprisonment imposed. The sentence imposed in this matter is set aside and replaced by the following:

- 1. A fine of R6 000 or twelve (12) months imprisonment suspended for five (5) years on condition that the accused is not convicted of contravening sections 65(1)(a) or (b) or 65(2)(a) or (b) of Act 93 of 1996 which is committed during the period of suspension.**
- 2. The accused is sentenced to undergo 240 hours of periodical imprisonment at Pollsmoor Prison, commencing Friday:**

18/06/2004	on	18:00
25/06/2004	on	18:00
02/07/2004	on	18:00
09/07/2004	on	18:00 and
16/07/2004	on	18:00.

- 3. The accused's drivers licence shall not be suspended.**

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L BOZALEK

BUDLENDER AJ: I agree.

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G M BUDLENDER