**THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

High Court Ref No: 17293

Khayelitsha Case No: 2/863/2015

In the matter of:

**THE STATE**

and

**ZOLANI TOKHWE**

**Coram**: GAMBLE & ROGERS JJ

**Delivered: 22 MARCH 2017**

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## DECISION

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**ROGERS J (GAMBLE concurring):**

[1] This matter comes before us on automatic review. The accused was charged in the court a quo with one count of contravening s 65(2)(a) of the National Road

Traffic Act 93 of 1996 (‘the Act’) by driving on a public road while the concentration of alcohol in his blood was more than 0.05 gr per 100 ml, to wit 0,31 gr. He pleaded guilty and was sentenced to a fine of R20 000 or 20 months’ imprisonment wholly suspended for five years on condition that he was not convicted of the same offence committed during the period of suspension.

[2] There is no difficulty with the conviction. The sentence, however, warrants interference.

[3] The offence was committed on 6 December 2014 in Mew Road Khayelitsha. The accused expressed regret for what he had done. He said he had not thought he would encounter the police as he was only driving a short distance. At that time the accused was 21 years old. This was his first offence. He was unmarried but had a son who was one. He passed grade 11 and did Level 4 Mechanical Engineering at False Bay College during 2014. He had a learner’s licence. He was seeking employment in positions which required a driver’s licence which he was wanting to apply for. He told the magistrate that he did not currently have money to pay a fine and was dependent on his sister.

[4] In his reasons for sentence the magistrate said that drunk driving was very prevalent in the Khayelitsha district, the level of alcohol was high and that the courts were frequently criticised for being very lenient in their sentences. He thought that a ‘huge amount’ of R20 000, and 20 months’ imprisonment in default thereof, wholly suspended for five years, was appropriate because it would not only have a deterrent effect on young offenders but send a clear message to the public that courts are losing patience with perpetrators of these offences.

[5] The magistrate was right to emphasise the scourge of drunk driving on our roads and the heavy toll it exacts. I would not wish to discourage lower courts from leaning in favour of heavier rather than lighter sentences for drunk driving and related offences. Nonetheless, courts must bear in mind the types of sentences which have been regarded as appropriate in the past and maintain a proper sense of proportion. And naturally the individual circumstances of the accused need to be taken into account. There can be no ‘one size fits all’ when it comes to sentencing.

[6] In *S v Wilson* 2001 (1) SACR 253 (T) the accused, a first offender, was sentenced to a fine of R6000 or 18 months' imprisonment, of which R5000/12 months were suspended for five years. The court discussed the usual sentencing range for this offence, ranging from R1000/six months wholly suspended to R3600/nine months partially suspended (256d-257c). The court emphasised the importance of license suspension as a deterrent (259f-g). The court concluded that the sentence imposed by the magistrate was exceptionally heavy and replaced it with a fine of R3000/ nine months' imprisonment, two-thirds of which was suspended.

[7] In *S v Serabo* 2002 (1) SACR 391 (E) the court said that sentences for first offenders were fines in the range of R4 000-R6 000 with the alternative of imprisonment generally not exceeding eight months, usually less (398a-400d).

[8] In *S v Rooi* [2004] ZAWCHC 40 the accused's alcohol level was 0,22 grams. He had one prior conviction. This court set aside a suspended sentence of R20 000 or 12 months' imprisonment and replaced it with R6 000 or 12 months' imprisonment wholly suspended. The court upheld, however, an order for 240 hours of periodic imprisonment.

[9] In *S v Kammies* [2011] ZANCHC 11 the accused was found guilty on two counts of contravening s 65(2)(a), the second offence having been committed four months after the first. The lower court took the counts together and imposed a fine of R50 000, failing which imprisonment of 60 months, half of which was suspended. The accused earned R7200 p/m gross. On review this was set aside and replaced with the following sentences: count 1 – R4000 or six months wholly suspended; count 2 – R8000 or 18 months of which R2000/six months suspended.

[10] Although the ameliorating effect of suspending a sentence is substantial, the sentence must nevertheless be appropriate, having regard to the *Zinn* triad. After all, the sentence might be brought into effect if the accused were to repeat the crime. In the present case, that could mean imprisonment of 20 months, given that the accused is currently not earning. Even if he were to get a job, a fine of R20 000 is,

as the magistrate himself put it, 'huge' (ie very large in relation to the accused's resources) and one which would almost certainly be beyond his capacity to pay.

[11] In terms of s 35(1)(c) of the Act the accused's conviction would automatically have resulted in the suspension of his licence for six months (or a disqualification against applying for a new licence for six months) were it not for the fact that the court a quo exercised its power in terms of s 35(3) to uplift the automatic suspension. The magistrate so acted because the accused was applying for jobs which required a driver's license. He considered that the sentence was a sufficient deterrent.

[12] In *S v Greeff* 2014 (1) SACR 74 (WCC) and *S v De Bruin* WCHC Ref 141270 (unreported judgment of 29 January 2015), in judgments concurred in Saldanha J, I analysed the legislative history of s 35 and concluded that it was no longer permissible to uplift the automatic suspension on the sorts of grounds mentioned by the magistrate. A different view was reached by Savage J (with Henney J concurring) in *S v Lourens* 2016 (2) SACR 624 (WCC), where it was held that in exercising its power under s 35(3) the trial court may take into account all factors traditionally affecting sentence.

[13] Unfortunately it appears that this difference of judicial opinion is not going to be resolved in this division because of a view that a judgment of a three-judge panel on appeal from the magistrate's court has no greater binding force than a judgment of a two-judge panel. The difference of opinion would thus not be settled by referring such a case to a three-judge panel. This view rests on the premise that the authority of a court depends on its status and not a counting of heads (see Hosten et al *Introduction to South African Law and Legal Theory* 2nd Ed at 413; Hahlo & Kahn *The South African Legal System and its Background* 1968 at 246-247). This rule certainly applies to the Supreme Court of Appeal – the binding effect of its judgments is unaffected by whether the court comprised three or five judges or whether the court was unanimous or split. Whether the same applies to two-judge and three-judge panels of the High Courts seems not to be settled (Hahlo & Kahn op cit at 252). Be that as it may, it seems that, unless and until the question is resolved

by the Supreme Court of Appeal, magistrates and judges in the Western Cape will be entitled to follow whichever decision they regard as correct.

[14] Although I adhere to the views I expressed in *Greeff* and *De Bruin*, it is not permissible on automatic review to alter the court a quo's decision adversely to the accused (see *Hiemstra's Criminal Procedure* at p 30/23-24). My own opinion is that in the circumstances of the present case the automatic suspension should not have been uplifted, even if the magistrate had the power to do so. Automatic suspension in terms of s 35(1) is intended as a deterrent. It will often be a more effective deterrent than a conventional criminal sentence. In the present case, the accused's lack of financial means coupled with the inappropriateness of direct imprisonment made suspension of his licence for six months (or disqualification from applying for a new licence for six months) entirely apposite.

[15] However this course is not open to us. It is also not open to us to impose an unsuspended but more modest fine with the alternative of imprisonment since any unsuspended sentence might be regarded as adverse to the accused. The only way of correcting the unduly harsh sentence imposed by the magistrate is to reduce the amount of the fine and alternative imprisonment. In my view, a suspended fine of R4000, failing which imprisonment of six months, would fit the case.

**GAMBLE J**

[16] I do not express an opinion on the difference of judicial opinion reflected in *Greeff* and *Lourens.* I was not party to either of these decisions and the matter has not been argued. Save as aforesaid, I concur in the above judgment.

[17] The following order is made: (i) The accused's conviction is confirmed. (ii) The sentence imposed by the court a quo is set aside and replaced with the following sentence: 'The accused is sentenced to a fine of R4000, failing payment of which six months imprisonment, the whole of which is suspended for five years on condition that the accused is not convicted of a contravention of s 65(2)(a) of Act 93 of 1996 committed during the period of suspension.'

GAMBLE J

ROGERS J