IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: A53/2021

In the matter between:

BETRUM ERNEST VAN DER BANK Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 10 DECEMBER 2021

NYATI AJ

Introduction

[1] This is an appeal against conviction and sentence from the Magistrates Court, Worcester. The appellant, Mr Betrum Van der Bank, was convicted of contravening section 65(2)(a) of the National Road Traffic Act 93 of 1996 (*"the NRTA"*), in that on

04 May 2019 he unlawfully drove a motor vehicle on a public road while the concentration of alcohol in any specimen of blood taken from his body was not less than 0,05 grams per 100 millilitres and it was 0,09 grams per 100ml. He was found guilty as charged and was sentenced to a fine of R3000.00 (*Three thousand rand*) or to undergo imprisonment for a period of 6 (six) months, half of which was suspended for 3 (three) years on condition that he was not convicted of contravening section 65 of the NRTA committed during the period of suspension. In the exercise of its discretion, the trial court did not suspend the appellant's driver's license as envisaged in section 35 of the NRTA.

Preliminary Point

[2] Before I can consider this appeal on the merits, it is worth mentioning that the appellant applied for condonation for the late filing of his appeal as same was filed out of time. The respondent opposed this application and contended among others, that it was not served with the appellant's condonation application. However, after a detailed explanation by the appellant, it became clear that service of the condonation application was properly effected by email. The email was sent to the respondent's erstwhile legal representative (Adv. Maria Marshall). It also became apparent during argument that the current representative who took over the matter had no knowledge of such service and therefore could not dispute that indeed service was effected on the respondent's erstwhile attorneys of record.

[3] Furthermore, during these proceedings the court received a service affidavit which confirmed that Advocate Marshall, who previously represented the respondent, acknowledged receipt of the appellant's condonation application. This court therefore

is satisfied that the condonation application was properly served on the respondent. In his condonation application, the appellant avers that on or about November 2021 he served his notice to appeal on the respondent and same was filed at Worcester Magistrates Court on 12 November 2020. The applicant addressed a number of correspondences to the NPA inquiring on the progress of the appeal and for a date of hearing and there was no response forthcoming. The applicant explained in detail in his condonation application the efforts he made to prosecute this appeal. On a conspectus of all the evidence placed before court, I am satisfied with the appellant's explanation as to why he failed to prosecute his appeal timeously as detailed in his condonation application. In the result, the appellant's condonation application must succeed.

Factual Matrix

[4] For the sake of completeness, I deem it prudent to briefly summarise the facts for the purpose of the order that follows hereunder. The record of the trial court reveals that the appellant was legally represented at the trial and pleaded not guilty to the charge. During the course of the trial, the appellant made the following admissions: (a) he conceded that on the night in question, he drove the motor vehicle (a bakkie) on a public road in the district of Worcester; (b) that he was arrested by a traffic officer and he was taken to hospital where his blood sample was drawn by Dr Naidoo. What remained in dispute was whether his blood sample was drawn within two hours of driving the motor vehicle and also whether the presumption in section 63 of NRTA applies under the present circumstances.

[5] The only evidence tendered by the State was that of the arresting traffic officer Mr Siswana (Mr Siswana). The gist of his evidence was that he was on duty that day and at about 01h15, he saw a white LDV bakkie driven by the appellant approaching. His evidence was that the appellant's vehicle stopped without being signalled by the witness to do so. He testified that he was with his colleague and the latter was busy with the arrest of another suspect when the appellant's bakkie appeared.

[6] In his testimony, the witness gave an estimation of the distances between the point where the witness was standing with his colleague when he first saw the appellant's vehicle approaching and the point where it stopped but the magistrate omitted to formally record such estimations. According to Mr Siswana, he arrested the appellant at 01h30 but it is not indicated from the record as to what happened between 01h15 and 01h30. His evidence was that he first tried to do a breathalyser test on appellant but it was unsuccessful. After the failed breathalyser test, Mr Siswana testified that he then took the appellant to the hospital for his blood to be drawn by a doctor and the blood was drawn at 03h29. He testified that he was certain that the blood was drawn at 03h29 because he looked at the time and also wrote it on his worksheet.

[7] The appellant had no questions for Mr Siswana in cross-examination. At the closure of the State case, the appellant applied for his discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 ("CPA"). The grounds for his application were that the two-hour period contemplated in section 65 started running at the commission of the offence. He contended that his blood sample was drawn outside the prescribed two-hour period. In his ruling, the magistrate found that the state had presented a prima facie case against the appellant and the application for discharge

was refused. After the refusal by magistrate to discharge the appellant, the latter closed his case without testifying nor presenting any evidence to court.

[8] At the conclusion of the trial, the court was confronted with two contradictory versions in relation to the two-hour period. The State was adamant that the blood sample was taken within two hours as prescribed by the Act and also that the two-hour period commenced at the time of arrest. The appellant, in his plea explanation and in argument maintained that the two-hour period commenced at the commission of the offence, when he was driving and not when he was arrested. The magistrate interpreted sections 65 (2) (a) and 65 (3) NRTA to mean that the two-hour period commences from the time the person driving the motor vehicle is arrested and not at the time of driving the motor vehicle.

[9] In his finding, the magistrate was alive to the fact that the State was relying on the evidence of a single witness as envisaged in section 208 of the CPA. The learned Magistrate considered the totality of the evidence before him and found that the state established the guilty of the accused beyond reasonable doubt. The court below accepted the version of the State and rejected the appellant's version and accordingly convicted the appellant as charged. Subsequent thereto, the court sentenced the appellant accordingly. It is that decision and the sentence impose that the appellant seeks to impugn.

Applicable legal principles and Discussion

[10] Section 65 (3) NRTA states provides as follows:

"if in any prosecution of an alleged contravention of a provision of ss (2), it is proved that the concentration of alcohol in any specimen of blood taken from any part of the body of the person concerned was not less than 0,05 grams per 100millilitres at any time within two hours after the alleged contravention, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,05 grams per 100 millilitres at the time of the alleged contravention".

[11] Meanwhile section 65 (2) (a) NRTA reads as follows:

"No person shall on a public road (a) drive a vehicle or (b) occupy the driver's seat of a motor vehicle while 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 millilitres".

[12] In my view, these sections must be interpreted purposively to promote the spirit, purport and objects of the Bill of rights as articulated in 39(2) of the Constitution. Section 39(2) of the Constitution requires courts or tribunals to read legislation, in this case the NRTA in ways which give effect to its fundamental values and in conformity with the Constitution.

[13] The NRTA does not specify as to when the two hours contemplated in section 65(2) starts running. In my view, the main offence that is being punished in section 65 (2) (a) is the driving of a vehicle while the alcohol content in one's blood that is drawn within two hours of driving exceeds 0,05 per 100 millilitre. The facts of this appeal clearly indicate that there is a general misconception or misunderstanding that the two hour-period mentioned in section 65(2) of the NRTA is calculated from the time of

arrest. To my mind, the two hour-period envisaged in section 65(2) commences immediately when the engine of the vehicle stops from running. Ordinarily, a prudent law enforcement officer in such a case is expected to take the suspected driver to a medical centre immediately after the driving has stopped for the extraction of blood sample. It is imperative for the law enforcement officer to record the time when he or she stops the driver, as this is the critical moment terminating the contravention.

[14] In my opinion, the time of arrest can be delayed by various aspects. If the prescribed two-hour period were to be calculated from the time of arrest, the test results would be compromised due to the process not meeting the prescript of "within two hours" after the alleged contravention.

[15] I wish to emphasise the fact that the two hours-period should be calculated from the moment the driver ceases to drive or when the engine stops running to the time the medical practitioner inserts a needle and draws blood on any part of the body of the driver. The purpose of drawing the blood is to determine the alcohol content of the driver immediately after the driver was stopped driving the vehicle. It is for this reason that the blood sample has to be taken as soon as possible from the time the driver was driving. To this end, I agree with the views expressed by Cooper *et al* in Alcohol, *Drugs and Road Traffic (1979* Juta Legal and Academic publishers) where the author notes that the period between driving and drawing of blood must be clearly recorded and must not be delayed.

[16] In *casu*, the difficulty this court has with the magistrate's credibility finding is that the State witness did not record the time the driving stopped. The state witness gave an estimation being "around 01h15". This time estimation is unreliable and

unsatisfactory. The distance Mr Siswana walked from the point where he was when he spotted the appellant and to the point where the vehicle stopped is also not indicated. There is no indication of the distance or the time that Mr Siswana spent travelling to get to the point where blood was drawn from the appellant.

[17] The magistrate's reasoning that the driver did not commit an offence until he was arrested is misplaced and cannot be sustained. The magistrate further found that the two-hour period commenced at the time of arrest and not at the time the driving stops. The time of arrest in this case was at 01h30 and the time the officer spotted the appellant driving was on or about 01h15. Hence the difference of about 15 minutes in this case between the time of driving stopped and the time of arrest he 15 minutes' difference is crucial in determining the actual time of arrest and when the two-hour period commenced. From the record, it appears that the magistrate overlooked that 15 minutes' difference.

[18] I must emphasise the fact that section 65(3) must not be read in isolation. It must be read together with section 65(2). The two sections complement and supports each other. In my view, the reading of these sections disjunctively or in isolation leads to absurdity. The alleged contravention referred to in section 65 (3) refers to the contravention of section 65(2) (a) which prohibits the driving of a motor vehicle or the occupation of the driver's seat of a motor vehicle whose engine is running and while the concentration of alcohol in any specimen of blood taken from the body of such a driver or occupier is not less than the prescribed legal limit. In order for the section 65 (3) presumption to kick in, the legislature has given the law enforcement officers a time frame of two hours from the time the driving or occupation as described stops. The

two hours' time frame is for the law enforcement officer to cause blood specimen to be drawn from the body of the driver.

[19] A purposive interpretation of ss 65 (3) and 65 (2) (a) clearly shows that, with regard to the presumption, the State must prove factors or elements antecedent and elements subsequent to the discontinuation of the alleged contravention. The antecedent factors that must be proved are that: the driver drove a motor vehicle on a public road. The subsequent factors that the State must prove are that a specimen of blood was taken from the driver within two hours from the time of driving and that such specimen was properly tested for alcohol concentration level and that test reveals that the alcohol concentration in such specimen was not less than 0,05 grams per 100 millilitres.

[20] Once all the above factors or elements are proved, the presumption envisaged in section 65(3) is then triggered. If all of the above elements are proved, then the alcohol concentration in the blood of the accused is presumed or accepted without further proof to have been not less 0,05 grams per 100 millilitres at the time of driving of a motor vehicle. The driver may rebut this presumption by proffering evidence to the contrary.

[21] One of the grounds of appeal in this matter is that one of the subsequent factors or elements for the presumption to apply is lacking. The appellant contended that the blood sample was taken outside of the prescribed two hour-period and that therefore, the presumption could not apply due to lack of the subsequent requirements or elements.

[22] In my view, this argument is correct and cannot be faulted. To this end, it is important to examine the rationale behind the fact that the two hour-period should commence at the time the driving stops. It must be borne in mind that the act that is being punished is the driving while the concentration of alcohol exceeds the legal limit. However, the specimen of blood, in the nature of things, cannot be obtained while the driving is taking place nor can it be delayed. It follows that the offence in fact involves the driving of a vehicle with a concentration of alcohol in the blood which is subsequently proved, by way of analysis of a specimen taken from the body of the driver, to contain alcohol in the specimen of blood taken from the body of the accused. It is essential to establish the concentration of alcohol at the time the accused drove.

[23] In *Rozier J D'Oliveira Boonzaaier and the State* 2014 WCHC at para 21, Rogers J stated that "the longer the period between the incident and the taking of the blood, the more difficult it becomes accurately to determine the alcohol concentration at the relevant time". I understand the reasoning of Rogers J, to support the view that the two-hour period should be considered from the time of the incident, for instance, if there was a collision arising from the driving of the vehicle or in instances where a driver is stopped by the law enforcement officer."

[24] In my view, the trial court erred in finding that the State had proved its case beyond reasonable doubt. From the totality of the evidence, it is evident that the offence was committed at 01h15 when the appellant brought his vehicle to a halt. The charge that was preferred against the appellant as discussed above was that he drove his vehicle with excessive alcohol content in his blood. The two-hour period that the state relied on began to run at 01h15. The appellant's blood sample was drawn at

03h29 long after two-hour period envisaged in the Act had expired. As a result, the state cannot rely on the section 65(2) presumption. Consequently, the presumption that the concentration of alcohol in the appellant's blood at the time that he was driving his vehicle was 0,09 per 100 millilitres cannot be sustained.

ORDER

[25] In the result, I would propose the following order:

"That the conviction and the resultant sentence is set aside"

N NYATI AJ

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

P A L GAMBLE J

JUDGE OF THE HIGH COURT