Bb 121/85

AGRIPPA MUSAWENKOSI NDLOVU APPELLANT

and

THE STATE RESPONDENT

CASE NO. 251/84
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

AGRIPPA MUSAWENKOSI NDLOVU APPELLANT

and

THE STATE RESPONDENT

CORAM: KOTZé, TRENGOVE et BOSHOFF JJA

HEARD: 9 SEPTEMBER 1985

DELIVERED: 27 SEPTEMBER 1985

J U D G M E N T

TRENGOVE, JA:

On/ .....

On 6 June 1983 the appellant was convicted in the magistrate's court at Melmoth of driving under the influence of liquor in contravention of section 140(1)(a) of the Road Traffic Ordinance, 21 of 1966 (Natal). He was sentenced to 12 months' imprisonment and his drivers licence was suspended for a period of two years. An appeal was lodged with the Natal Provincial Division against both the conviction and the sentence. At the hearing of the appeal, counsel for the appellant abandoned his appeal on the merits and only attacked the sentence of imprisonment on the ground that it was unduly severe. The appeal was dismissed but, by leave of the Provincial Division,

the matter has been brought on appeal before this court on the ground that the sentence is excessively severe. That is the only issue before us.

The facts of the case so far as relevant are these. The appellant is about 34 years old. He is a married man with three children and he also supports his mother. He is an extension officer in the Department of Agriculture and Forestry of the Kwa Zulu Government and at the time of the commission of the offence his salary was R250 per month. He had no previous convictions.

At about 17h00 on 30 May 1983 the appellant was driving his car, a Chevrolet, from

Empangeni towards Melmoth. There were three passengers in the car. At Nkwalini he turned onto the Melmoth-Eshowe road and proceeded to drive up the Nkwalini mountain pass road. This was described as being an extremely busy, narrow and dangerous road, with a large number of hairpin bends and blind corners. Indeed, on the day and at the time in question there was a considerable amount of traffic on the road. There were several cars immediately behind the appellant and also a number of vehicles approaching from the opposite direction. Despite these hazardous conditions, the appellant drove his car in a most erratic manner as he was

going/ .....

going up the mountain pass. He kept on swerving to and fro across the road. The driver of the car immediately behind him tried to overtake him several times but he was unable to do so on account of the erratic movement of the appellant's car. And, on at least four occasions, approaching vehicles were obliged to move off the road, on their correct side, so as to avoid colliding with the appellant's car.

After he had been driving in this grossly negligent, or even reckless, fashion for some 5 kms, the appellant encountered a huge articulated horse and trailer coming from the opposite direction. Although his car was straddling the middle of the road, the

appellant made no attempt whatsoever to move back on-
to his correct side. The driver of the articulated
vehicle was then obliged to swerve off the road up a
bank to his left, but he was unable to avoid a colli-
sion. The appellant's car simply continued on its
course and collided with the rear wheels of the
mechanical horse. The rear end of the mechanical
horse lifted over the nose of the car as it jack-
knifed, and the driver of the horse was flung from his
seat thereby losing control of the vehicle completely.
The momentum and mass of the trailer, combined with
the locking of the right wheels of the horse, caused
the vehicle to veer across the road, from left

to/ .....

right, and to plunge down the precipice on that side of the road. The trailer, which had remained attached to the mechanical horse, fortunately came to a standstill at the edge of the cliff, being held back by the barrier of the safety railings at the side of the road. If the horse, which was suspended in the air, had not been held back by the trailer, the whole combination would have crashed to the bottom of the mountain side, some 100 metres further down. The appellant's car was pinned down under the rear wheels of the trailer.

It was indeed a miracle that no one was killed or seriously injured in this accident. The appellant was found sitting behind the wheel of his car. Although

he was not injured or trapped in the car, he made no attempt at all to get out of the car. He had to be helped out by some of his friends. It then appeared that he was heavily under the influence of liquor. His breath smelt strongly of intoxicating liquor; his speech was slurred and he was incapable of speaking coherently; he could not stand on his feet, and he staggered and stumbled when he tried to walk. And, when the police van arrived on the scene of the accident about 45 minutes later, he had the greatest difficulty in climbing into the police van. These, then, are the facts.

It is now necessary to consider whether,

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in the circumstances of this case, the sentence of 12 months' imprisonment is excessive. The first question is whether there should have been a sentence of imprisonment at all. Counsel for the appellant submitted that as he was a first offender the trial court should not have imposed a prison sentence but rather a heavy fine, with alternative imprisonment, and the suspension of the appellant's drivers licence. I am unable to accept this contention. The general policy of our courts has hitherto been that a sentence of imprisonment without the option of a fine will not be imposed on a first offender convicted of driving under the influence of liquor unless there are

aggravating circumstances in the offence (see: R v Poezyn 1947(2) S A 262(C); R v de Villiers 1949(3) S A 149 (E) at 154; R v Oshman 1962(3) S A 643 (O) at 643H-644A; S v Langeveldt 1970(3) S A 438(C) at 440B-441E; S v Roux 1975(3) S A 190 (A) at 196H - 197E; S v Maseko 1983(4) S A 882 (N) at 883F - 884E). I do not consider it necessary or desirable to attempt to define the extent of the circumstances of aggravation which would justify imprisonment, without the option of a fine, for any period in the case of a first offender. Some of the relevant factors are referred to in the Oshman case, supra, at 643H - 644A. Each case must be dealt with on its own particular facts and no general yardstick

should be employed.

Reverting to the facts, this case was manifestly a very serious case of driving under the influence of liquor. The appellant was heavily under the influence of liquor and completely incapable of driving a motor vehicle safely, let alone up a very narrow, winding mountain pass at a time when there was a considerable volume of traffic on the road. His erratic and dangerous course has already been described. On at least four occasions the drivers of oncoming vehicles were obliged to take evasive action suddenly and at danger to themselves. And at the time of colliding with the articulated horse

and/ .....

and trailer, he appears to have been completely oblivious of its presence on the road. The appellant clearly placed the lives of a number of people in danger. Indeed, the passengers in his car and the driver of the articulated vehicle were most fortunate in escaping without any serious injury. As to the damage caused in the collision, it appears that the appellant's car was wrecked and that the horse and trailer were also damaged though there is no evidence of the extent of the damage. And finally, on this aspect, it appears from the magistrate's reasons that this type of offence is prevalent in his district. Looking at the facts of this case, and having regard

to all the relevant circucmstances - including the personal circumstances of the appellant to which I shall presently revert - I am of the view that the magistrate was fully justified in imposing a sentence of imprisonment without the option of a fine in this instance.

The next question is whether a sentence of 12 months' imprisonment is too severe. It was contended on behalf of the appellant that this was an appropriate case for the imposition of periodical imprisonment. This alternative form of imprisonment was considered by the magistrate but he decided against it on the grounds, it seems, that the appellant's

offence was considered to be so serious that it would not be adequately punished by a sentence of periodical imprisonment for the maximum period permitted by the Criminal Procedure Act, 51 of 1977, namely, a period of 2 000 hours. I fully agree with the magistrate's views in this regard.

However, from an examination of the cases referred to above, and certain other cases to which I need not now refer, I have come to the conclusion that a sentence of 12 months' imprisonment for a first offender, in the circumstances of this case, is excessively severe. I have been unable to find any instance of a sentence of more than 6 months

imprisonment on a first conviction of driving under the influence of liquor being confirmed on appeal, unless someone was seriously, or fatally, injured (cf Maseko's case, supra, at 884 D - E). As I have already mentioned, the appellant is about 34 years old, he is in fixed employment, he supports his wife, three children, and his mother, and he is a first offender. Should he be imprisoned, he may lose his job and his dependants would probably suffer as a result. For a man in that position having to go to prison is in itself a very serious punishment. In Maseko's case, the seriousness of the offence was comparable to that of the instant case. In that instance, Milne JP

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said at p 884 D - F:

> "It is apparent, however, from an examination of the cases, including those which the magistrate refers to, that the sentence of 12 months is, having regard to the circumstances in this case, excessively severe for a first offender. I would have imposed a sentence of 12 months' imprisonment, half suspended. That, from a practical point of view, makes a sufficiently substantial difference to the appellant to warrant interference by this Court."

and in granting the appellant leave to appeal against the severity of his sentence, in this case, Milne JP observed:

> "It appears that the judgment in Maseko's case was not reported at the time when the judgment of the Natal Provincial Division was given on appeal in this case. That judgment was given on the 27th of October 1983, and Maseko's case

> appears only in the October - December Law Reports. In all the circumstances, it appears to me, that there is a reasonable prospect that the Appellate Division might find that although the Appellant should undoubtedly go to prison, the period is excessively severe ...."

It is not at all unlikely that, if the magistrate had been aware of the judgment in the Maseko case, he would have imposed a shorter term of imprisonment.

To conclude. In the light of what has been said above, and in view of the desirability that there should be a reasonable degree of consistency in the sentences imposed by the courts in respect of offences of the same nature committed under comparable circumstances, (see comments by Corbett J in Langeveldt's case, supra, at 440 D - E), I have come to the conclcusion that the sentence of 12 months' imprisonment is unduly severe, and that

half should be suspended.

The appeal accordingly succeeds to the extent that the sentence is altered to 12 months' imprisonment, half of which is suspended for five years on condition that the appellant is not convicted of driving under the influence of liquor within the meaning of section 140(1) of Ordinance 21 of 1966 (Natal) or a contravention of any of the equivalent provisions in any of the other provinces of the Republic of South Africa, committed during the period of suspension.

TRENGOVE, JA

KOTZé JA)
) CONCUR
BOSHOFF, JA)