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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: A134/2013

In the matter between: Reportable

REAGAN GREEFF **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: SALDHANA & ROGERS JJ

Heard: **6 SEPTEMBER 2013**

Delivered: **10 SEPTEMBER 2013**

JUDGMENT

ROGERS J:

[1] The appellant was charged in the court a quo with a contravention of s 65(2)(a) of the National Road Traffic Act 93 of 1996 ('the Act') in that on Saturday 30 July 2011 in Church Street Vanrhynsdorp he drove a vehicle at a time when the concentration of alcohol in his blood was 0,19 grams per 100 millilitres, in other words in excess of the limit of nought, 05 grams per 100 millilitres stated in s 65(2)(a).

[2] The matter came before the court *a quo* on 15 November 2012. The appellant was legally represented by Ms S Human. He pleaded guilty. A statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 was read into the record, handed up as an exhibit and confirmed by the appellant. The prosecutor accepted the plea. No previous convictions were proved. Ms Human made submissions regarding the appellant's circumstances and called the appellant to give evidence in which he confirmed what his attorney had said and provided further information. In her concluding submission Ms Human gave an indication of the sort of fine the appellant could afford to pay and asked in particular for an order in terms of s 35(3) of the Act that the automatic suspension of the appellant's driving licence for six months as specified in s 35(1)(c)(i) should not take effect. The prosecutor proposed a partially suspended fine but contended that there were no circumstances which justified an order that the driving licence not be suspended.

[3] The magistrate proceeded to impose the following sentence: [a] a fine of R3 000 or six months' imprisonment; [b] a further fine of R3 000 or six months' imprisonment, suspended for five years on appropriate conditions; [c] that in terms of s 35(1)(c)(i) the appellant's driving licence be suspended for six months.

[4] The appellant applied in the court *a quo* for leave to appeal only against the suspension of his driving licence. The application for leave was refused by the magistrate but on 11 March 2013 this court on petition granted leave to appeal on that aspect. In terms of s 309(4)(b) of the Criminal Procedure Act read with s 307 of that Act the execution of a sentence imposed by a lower court is not suspended by the noting of an appeal. There is authority that this does not apply to ancillary orders such as the suspending of a driving license and that in relation to such ancillary orders the common law that an appeal suspends execution prevails (see *S v*

Abraham 1964 (2) SA 336 (T) and cases there cited; *S v Kelder* 1967 (2) SA 644 (T) at 648H-649B; *Hiemstra's Criminal Procedure* p 30-53; Du Toit *et al Commentary on the Criminal Procedure Act* p 30-48C). Strictly speaking, the suspension of a driving license in terms of s 35(1) occurs *ex lege* unless a contrary order is made in terms of s 35(3) and the suspension is thus not pursuant to an order (cf *S v Wilson* 2001 (1) SACR 253 (T) at 259h). Since we were not addressed fully on the subject, I shall assume that the suspension of the appellant's license was itself suspended pending the outcome of this appeal, which is what the legal representatives on both sides seem to have believed. On this assumption the appeal has not been rendered academic by the passing of time. In any event, it is desirable that we should state our view on the substance of the appeal.

[5] Section 35 of the Act was among various provisions of the Act amended, with effect from 20 November 2010, by Act 64 of 2008. Prior to the amendments, sub-sections (1) and (3) read as follows:

'(1) Subject to subsection (3), every driving licence or every licence and permit of any person convicted of an offence referred to in –
(a) section 61(1)(a), (b) or (c), in the case of the death of or serious injury to a person;
(b) section 63(1), if the court finds that the offence was committed by driving recklessly;
(c) section 65(1), (2) or (5),
where a person is the holder of a driving licence or a licence and permit, shall be suspended in the case of –
(i) a first offence, for a period of at least six months;
(ii) a second offence, for a period of at least five years; or
(iii) a third or subsequent offence, for a period of at least ten years.
calculated from the date of sentence.

(2) …

(3) If a court convicting any person of an offence referred to in subsection (1), is satisfied that circumstances exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those

subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may deem fit.'

[6] By way of Act 64 of 2008 and with effect from 20 November 2010 the following amendments were made to these provisions. Firstly, a new paragraph (aA) was inserted into s 35(1) so as to incorporate, among the offences giving rise to the suspension of driving licences, certain speeding offences in contravention of s 59(4). That amendment is not relevant to the present appeal. Second, s 35(3) was amended to read as follows (for convenience, the new wording is underlined):

'(3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit.'

[7] The substitution of the word 'consider' for 'deem' in s 35(3) appears to be purely semantic. The other two alterations to the language of sub-section (3) are of greater moment. The requirement that non-suspension should not be ordered without the presentation of evidence under oath shows that the lawmaker was no longer content for non-suspension to be ordered on grounds which had not been properly established and tested under cross-examination. It should be emphasised, furthermore, that not only an accused person but the prosecution is entitled to lead evidence on the question whether non-suspension should be ordered. In several cases decided subsequent to the coming into effect of the amendments, non-suspension orders in lower courts have been set aside as irregular where they were made without the hearing of evidence (see, for example, *S v Ngqabuko* 2013 (1) SACR 275 (ECG); *S v Botha* 2013 (1) SACR 353 (ECP)).

[8] The other important alteration is that whereas previously there was no limit on the circumstances to which a court could have regard in determining whether a non-suspension order was justified, the lawmaker has now limited the circumstances which may be taken into account to 'circumstances relating to the offence' (my

emphasis). Since the suspension of a driving licence in terms of s 35(1) serves not only to protect the public but to punish the offender (see *S v Van Rensburg* 1967 (2) SA 291 (C) at 296E-F), the circumstances which – prior to the amendment – could properly be taken into account would have included all the circumstances relevant to the imposition of a sanction of that kind: not only the circumstances of the crime would have been relevant but also the personal circumstances of the accused and the interests of the community. That is why one will find, in cases decided prior to the amendment, weight being attached, for example, to the importance to the accused person of having a driving licence for purposes of his work or family commitments, the fact that the accused was a first offender and so forth. It is perfectly clear that the lawmaker, by now confining the relevant circumstances to those 'relating to the offence', has deliberately narrowed the circumstances to which regard may be had. Unless a particular circumstance can properly and rationally be said to relate to the offence, it must be left out of account.

[9] In my view, the fact that the holding of a driving licence is of particular importance to an accused person for work or family reasons is not a circumstance that can properly be said to relate to the offence. The same is true of the fact that the accused might be a first offender. Indeed, s 35(1), in setting out the periods of automatic suspension, expressly takes into account whether the accused is a first, second or multiple offender. The fact that the accused is a first offender is recognised by limiting the automatic period of suspension of such a person's licence to a period of six months – if he were a second offender, the automatic suspension would be five years.

[10] I must emphasise that I am talking only about the automatic suspensions for which s 35(1) provides read with s 35(3). In terms of s 34(1) the court has discretionary powers which include an order suspending a person's driving licence for such period as the court deems fit. It is notionally possible that a first offender whose licence would be automatically suspended for six months in terms of s 35(1) might have his licence suspended for a longer period in terms of s 34(1). We are not concerned in the present appeal with the circumstances which might be relevant to the exercise of the power under s 34(1). In *S v Van Rooyen* 2012 (2) SACR 141 (ECG), which was cited to us in argument, the appellant's counsel conceded that

there were no circumstances relating to the offence which justified an order that the automatic six-month suspension in s 35(1) not take effect (at 155e). What the court on appeal proceeded to consider was whether a longer suspension was justified in terms of s 34(1). It was in that context that the court referred *inter alia* to the personal circumstances of the appellant, the hardship which the suspension of his driving licence might cause him and his previous conviction (a driving-related conviction which was nevertheless found not to be a first offence for purposes of s 35(1)) and the interests of the community. (I mention, in passing, that the unamended version of s 35(3) is incorrectly quoted in para 5 of the *Van Rooyen* judgment: the words 'relating to the offence', which have been included in the text of the old s 35(3) as quoted, did not appear in the unamended version.)

[11] There was evidence in the present matter that the appellant required his driving licence for work purposes and might lose his job if the licence was suspended. He had a four-year-old child in respect of whom he paid maintenance of R500 per month. He also testified that he drank only on weekends and that subsequent to the incident he has given up alcohol altogether. He was, furthermore, a first offender. Whatever the relevance of these circumstances might be if a court were considering a suspension in terms of s 34(1), they cannot in my view be regarded as circumstances 'relating to the offence' as contemplated in the amended s 35(3), ie circumstances relating to the fact that on 30 July 2011 the appellant drove a vehicle in Church Street Vanrhynsdorp at a time when the alcohol in his blood exceeded the limit specified in s 65(2)(a).

[12] There are nevertheless certain circumstances which do relate to the offence and which might be thought to justify the non-suspension of the appellant's licence or the shortening of the period of suspension. The circumstances are the following:

[a] The accused drank a case of beer on the evening of Friday 29 July 2011 and testified that on the morning of Saturday 30 July 2011 he drank a three 'dumpies' of beer. It was past 18h00 on the evening of 30 July 2011 that he got into his friend's car to drive to the supermarket in order to buy chicken for his girlfriend. It would thus appear that he had had nothing to drink for about five to six hours before driving.

[b] He testified that when he got into the car he did not feel that he was under the influence of alcohol and did not know that the alcohol would still be in his blood. He felt normal.

[c] He admitted that the blood specimen as analysed showed that the alcohol level was 0.19 grams per 100 millilitres – that is just under four times the legal limit. There was no expert evidence as to whether a person with the appellant's build and metabolism was likely to suffer significant effects from that level of alcohol in his blood. His evidence that he did not feel himself to be under the influence was, however, not challenged by the prosecutor in cross-examination. One also knows that one often encounters cases where the level of alcohol in an accused person's blood is significantly higher than in the appellant's case.

[d] The appellant was driving the car for a relatively short distance in a country town. There was nothing to indicate that the roads on which he travelled were particularly busy. It was not put to him in cross-examination that he had driven fast or recklessly or had been zigzagging around.

[e] The appellant testified that a minor collision occurred at a stop street while he was driving the car. There was some damage to the car he was driving (the car belonged to a friend) but no damage to the other vehicle. The appellant testified that he stopped at the intersection and then pulled slowly away but that the other car entered the intersection without stopping. The other driver was under the influence of alcohol. The incident as he described it was not one which showed negligent or reckless driving on his part.

[13] This court would be reluctant to send out a message to drivers that light and flimsy circumstances can be relied upon to escape the automatic suspensions laid down in s 35(1). Drunk driving is an enormous problem in South Africa. The deaths and injuries which are caused by the scourge have a huge personal and economic toll on the country. This is no doubt why s 35 has recently been made even stricter. In the present case the accused's evidence was dealt with in cross-examination somewhat perfunctorily and the prosecutor did not adduce any evidence on behalf of the State to counteract that evidence. For example, medical evidence may have

established that the appellant could not have had the blood alcohol level he did if he had last had a drink six hours before driving. I venture to suggest that prosecutors should test evidence adduced on behalf of accused persons under s 35(3) with appropriate vigour and should also consider whether evidence should be adduced on behalf of the State to show why an order of non-suspension is not justified.

[14] Nevertheless, on the facts of this particular case the circumstances relating to the offence to which I have made reference justify, in my opinion, the making of an order in terms of s 35(3). It is debatable whether, when such a question arises on appeal, the test for interference is the same as in cases of the exercise by a trial court of its ordinary sentencing discretion – it may be that the appellate court is entitled to form its own view on the merits as to whether relevant circumstances exist and is not confined to interference based on material misdirection and so forth (see the majority judgment in *GK v S* [2013] ZAWCHC 76 paras 3-7, where a similar question was considered in relation to the approach on appeal to a trial court's find on whether substantial and compelling circumstances exist under s 51(3)(a) of Act 105 of 1997 to depart from a minimum sentence). On the assumption that on appeal a court is not entitled simply to form its own view as to the existence or non-existence of relevant circumstances, it is my opinion that the magistrate in this case misdirected himself by failing to attach proper weight to the circumstances I have mentioned and in particular the period which elapsed from the time the appellant stopped drinking to the time he got into the car.

[15] The magistrate also misdirected himself, in my respectful view, by stating that the appellant's version that he was not the cause of the collision at the intersection was merely an allegation by him and that the other driver disputed the appellant's version. The appellant did not merely make an allegation; he gave evidence under oath as to the circumstances of the collision and his version was not challenged. The prosecutor did not call the other driver as a witness. The magistrate seems to have relied in this regard on his knowledge of other civil proceedings pending in the same court rather than on evidence adduced before him in the appellant's case.

[16] The magistrate said that there was no necessity for the appellant to drive the car. That is true but s 35(3) does not go as far as positing a test of necessity before

an order under that subsection can be made – if necessity were the test the circumstances in which an non-effect order could be made would be exceedingly rare.

[17] The magistrate emphasised the seriousness of drink-driving offences. While such offences are undoubtedly serious, the fact is that s 35(3) envisages that there may be circumstances relating to such offences which nevertheless make non-suspension of the license justifiable. Furthermore, in the range of offences specified in s 35(1) for which an automatic six-month suspension is decreed for first offenders, s 65(2)(a) is generally by its nature less serious than, for example, driving under the influence of alcohol in contravention of s 65(1) or reckless driving in terms of s 63(1) or failing to stop in terms of s 61(1)(a) after an accident in which someone has been killed or seriously injured.

[18] The fact that an order is justified under s 35(3) does not necessarily mean that there should be no suspension at all. The court may order a period of suspension shorter than six months. In considering the shorter period, the court is obliged, in my view, to confine itself to the circumstances which make it justifiable to depart from the automatic suspension, ie 'circumstances relating to the offence'. One cannot, when considering the shorter period, bring in other considerations such as the personal circumstances of the accused. That would defeat the manifest purpose of the amended s 35 as a whole, which is that there should be an automatic suspension of the driving license for the specified offences unless the circumstances relating to the offence justify no suspension or a shorter period of suspension. As it happens, in the present case I consider on balance that the circumstances relating to the offence warranted a complete non-suspension of the appellant's driving licence.

SADANHANA J:

[19] I concur. The appeal is upheld. The order of the court *a quo* in terms of section 35(1)(i) is set aside and replaced with the following order: 'In terms of s 35(3) the period of six months for which the accused's driving licence would otherwise be suspended in terms of s 35(1)(i) is ordered not to take effect.'

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SALDHANA J

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ROGERS J

APPEARANCES

For Appellant:	Adv JC Louw
	Cape Town
For Respondent:	Adv SFA Raphels
	Office of the Director of Public Prosecutions
	Cape Town