ANDERSON v THE PEOPLE (1968) ZR 46 (HC)
HIGH COURT
SCOTT AG J
13th JULY 1968

Flynote and Headnote

[1] **Criminal procedure - Appeal against sentence - Discretion of trial court.**
An appeal court may only override the discretion as to sentence vested in the trial court when that discretion is exercised on a manifestly wrong basis.

[2] **Criminal procedure - Sentencing - Modification of sentence by appellate court.**
If the trial court exercises its sentencing discretion on a manifestly wrong basis, the Court of Appeal has power to fix an appropriate sentence.

[3] **Criminal procedure - Sentencing - Drunken driving.**
Sentence for the offence of drunken driving is very much dependent on the circumstances of the case - past record, mental history, manner of driving when drunk are all relevant - and a prison sentence is not always proper.

SCOTT Ag J

[4] **Criminal law - Drunken driving - Sentence.**
See [2] above.

[5] **Criminal procedure - Sentencing - Fines - Ability to pay related to amount of fine.**
When a sentence of a fine is imposed, it should be within the means of the accused to pay.
Cases cited:

(1) *Axel Guldberk Jensen,* HPR 333/1962, unreported.

(2) *Hallet v Newton* (1951) 95 S. J 712.

(3) *Walisko v R* Federal Supreme Court, Judgment No. 60 of 1962, unreported.

(4) *R v Munroe* SJNR 11/64, unreported.

(5) *R v Seventy* 1963 R & N 8.

Simanowitz, for the appellant
Zulu, Director of Public Prosecutions, for the respondent.

Judgment

Scott Ag J: The appellant Ian Anderson pleaded guilty before the subordinate court of the first class, Livingstone, to the offence of driving a motor vehicle whilst under the influence of intoxicating liquor or drugs, and he was sentenced to three months' hard labour with his driving licence suspended for one year.
He appeals against sentence on the grounds that it is excessive in all the circumstances in view of:

(a) his medical history;

(b) the fact that he is a first offender;

(c) the fact that no person was injured nor damage caused; and

(d) the fact that he is not a regular drinker.

It is also advanced that the accused should not go to gaol because his medical condition and that the magistrate has chosen an inappropriate person of whom to make an example. These grounds have been supplemented and expanded in argument by Mr Simanowitz.
In the case of *Axel Guldberk Jensen* [1], the offender had driven motor vehicle on Richmond Smith Drive, Ndola, so erratically that the vehicle went into the ditch, and he was found to be unsteady on his feet, his speech slurred, and he admitted having been drinking. In mitigation he said it was his first conviction, he did not normally drink, and he had been driving for about twenty years. Having been found guilty of this same offence

on his own plea he was sentenced to a fine of £35 and his licence suspended for twelve months. On review, Conroy, CJ, having referred to the remarks of Lord Goddard, CJ, in *Hallet v Newton* [2] 40 at page 712, said that drunken driving is a selfish offence which puts the lives of innocent users of the road in jeopardy. Considering the prevalence of this crime in this country and the fact that fines have proved to be an ineffective deterrent, he increased the sentence to a fine of £150, though the accused was a married man with the pay of £100 per month, but remarked that had he been the magistrate he would have sent the accused to gaol for three months without the option. This judgment was given on the 14th September, 1962.

On the 1st day of October, 1962, the Federal Supreme Court in Salisbury heard the appeal of *Walisko v R* [3]. He was a Polish doctor aged fifty who on the occasion of his offence had been very drunk, and at a busy time in a main road in Lusaka he reversed his car on to the wrong side of the road, nearly hitting the cars parked there. He manoeuvred his car at a slow pace on the wrong side of the road having on occasions to stop and cause other cars to stop. He then slumped over the steering wheel and was taken from his car by a police officer. The magistrate who tried him sentenced him to three month's imprisonment with hard labour and suspended his driving licence for twelve months, but the Federal Supreme Court, observing that the magistrate had proceeded on a wrong principle and, having commented on a directive issued by Conroy, CJ, on the subject of sentencing in such cases, altered Dr Walisko's sentence to one of a fine of £75, upholding the suspension of the driving licence.

On the 9th April, 1964, Conroy, CJ, instead of confirming the magistrate's fine of £150 and a suspended sentence of three months' imprisonment imposed on Robert Eward Munroe (*R v Munroe* [4]), considered the sentence wrong in principle and substituted one of four months' hard labour without the option, but in *Munroe*'s case the accused had only been driving for four months after the expiration of his previous suspension from driving following the conviction in which he was fined. It was in any event a bad case, in that he had ploughed into an island in the middle of the road, and the Chief Justice observed that he had not profited by the opportunity afforded him on his previous conviction when he was fined.

In the case of *R v Seventy* [5], a driver by the name of Chisala Seventy had, just before midnight, driven a lorry along Richmond Smith Drive, Ndola, swerving from side to side and ultimately stopping across the road blocking the traffic. A police vehicle stopped and the accused was found to be slumped across the steering wheel. His breath smelled of liquor, he was unsteady on his feet, and his speech was slurred. Conroy, CJ, considered that a sentence of six weeks' simple imprisonment without the option was a proper one for the offence committed.

In *Anderson*'s case now before me the appellant had, at about 6.30 p.m., driven a Rolls - Royce motor vehicle along St James Road, Livingstone, swerving from one side to the other, approached the main gate of the Livingstone Municipal Water Works, entered there, turned right on to a dirt road, swerved hard right and headed for a large concrete water tank which was surrounded by a deep ditch. The front wheels of the vehicle entered the ditch and the vehicle stopped. He was smelling strongly of drink, was unsteady on his feet and apparently unaware of how he entered the ditch or where he was. He pleaded guilty and had no previous offences.

[1] It is one of the essential elements in the proper administration of the criminal law that there should be a discretion as to sentence in the judicial officer who tries the case. It is because of this discretion that courts of appeal, when they are asked to interfere with a sentence, are slow to do so. They are interfering in a discretionary matter if they alter the sentence, and so it is that rules have been laid down that there will not be interference unless it may be shown that the discretion has been exercised on a wrong basis and unless the sentence is shown to be so severe that it causes a sense of shock. The latter is the same as saying that the sentence is so unreasonable that, again, it cannot be said to have been passed in a proper exercise of the discretion. [2] If the discretion has been exercised on the wrong basis the Court of Appeal is free to fix a sentence which it considers appropriate (*Walisko*'s case [3]). In his case the principal reason why the sentence was altered was, because being a permanent and pensionable federal civil servant, it was too

severe because he would lose his employment and his pension, suffering financial loss far in excess of the maximum fine for the offence.
[3] [4] There is no rule that there should be imprisonment without option in absence of extenuating circumstances, nor on the other hand is there any rule that a first offender should only be fined. Every case must be looked at upon its merits, and the fact that the accused pleaded guilty and is a first offender are always matters to be taken into account in assessment of sentence. The sentence of imprisonment may have effects quite beyond the purpose which such a sentence is intended to serve. This could well be the case here in the light of the medical facts put before the court. If the magistrate had doubts about those facts he could have invited evidence on them, but, as no objection was taken by the public prosecutor, I think the learned resident magistrate should have given them further thought. This court now has affidavit evidence to which no objection has been taken. It is also a matter for consideration how the offender drove when under the influence. *Walisko's* [3] case was a bad case as far as the degree of drunkenness was concerned, but the Federal Supreme Court remarked that the manner of driving is more important. Clearly a difference must be drawn between the driver who, though under the influence of drink, slowly makes his way homeward and the one in similar circumstances who drives at speed and crashes. The general conditions and usage of the road are also factors to be considered. In the present case I understand St James Road to have been a quiet road in that there was no evidence to the contrary. There was no evidence of speed or indeed damage. He just drove into the ditch and stopped there. As in *Walisko's* [3] case I would say this was a bad case so far as the degree of incapacity was concerned. The magistrate gave careful consideration to a defence counsel submission on the subject of special reasons for not suspending the licence, but, having found no special reasons, he did not apparently direct his mind on the matter of sentence to the various factors which I have been discussing. He remarked that the accused was a potential danger to society and that there was nothing to be said in his favour except that the incident did not result in loss of lives. In my opinion if an offender is thought to be a potential danger to the public, the proper course is to safeguard the public from him by suspending his licence to drive on the roads for a period even longer than the period stipulated by law. In this case I feel that the magistrate, having been giving careful attention to the question of the suspension of his licence, did not then give sufficient weight to those factors which could be and should be advanced in his favour - namely his plea, previous good behaviour, the fact that no serious damage was done to any property nor to any person and his speed must have been moderate. On top of this there is the fact more clearly emphasised before this court that the appellant was not in the best of mental health. There is no excuse for the accused's behaviour, but if something can be done to assist rather than prevent cure then that surely is a matter to be given weighty consideration. In my opinion it was wrong in principle to impose a sentence on this appellant of imprisonment without the option for the reasons urged in this appeal which will be allowed and a fine substituted. The suspension of his licence was obligatory; though it could well have been for a longer duration. I shall leave it as it stands.
There does not appear to be anything on the record to indicate his financial circumstances.
Defence counsel: His gross salary is K235, nett K200. Occupation: accountant, not married.
Court: [5] When a sentence of a fine is imposed it should be within the means of the convicted person to pay. The fine for such an offence as this must be a substantial one, and therefore I order he be fined K300, in default three months' simple imprisonment, time allowed to pay, two months. The appellant would be wise to treat this case as a serious warning and not to expect any leniency in future, as it is extremely unlikely that such leniency would be extended by any court.
Appeal allowed