THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

Case no: 687/2008

PIETER ETTIENNE JAFTHA **Appellant**

and

THE STATE **Respondent**

Neutral citation: ***Jaftha v S*** **(687/08) [2009] ZASCA 117 (25 September 2009)**

CORAM: **LEWIS and MLAMBO JJA and LEACH AJA**

HEARD: **8 September 2009**
DELIVERED: **25 September 2009**

SUMMARY: Court of appeal entitled to consider new evidence on appeal and to impose a new sentence in exceptional cases where circumstances have changed after conviction and sentence.

ORDER

On appeal from the Cape High Court (Uijs and Horn AJJ) sitting as a full bench.

(a) The appeal is upheld.

(b) The judgment of the high court is set aside and in its place substituted an order allowing the appeal against the magistrate's sentence. In its stead the following sentence is imposed:

'The accused is sentenced to payment of a fine of R10 000 or to two years' imprisonment.'

JUDGMENT

Lewis JA (Mlambo JA and Leach AJA concurring)

[1] The appellant, Mr Pieter Jaftha, was charged with a contravention of s 122(1)(a) of the Road Traffic Act 29 of 1989 – driving a vehicle while under the influence of alcohol – on 29 November 1997. He pleaded guilty and was convicted on 22 April 1998 in the Montagu Magistrates' Court. He was then 32 years old. It was the third time that he had been convicted of driving when under the influence of alcohol. Indeed, the third offence was committed after he had been convicted but before being sentenced for the second offence. The trial court sentenced Jaftha to three years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977.

[2] In respect of the first offence, committed in May 1991, Jaftha was sentenced to pay a fine of R600 and to a period of six months' imprisonment, wholly suspended for five years on the usual conditions. The second offence was committed on 23 August 1997: Jaftha was convicted on 13 October and sentenced on 10 December 1997 to a fine of R6 000, R4 000 of which was suspended, or three years' imprisonment, two of which were suspended also on the usual conditions. Jaftha's driving licence was also suspended for a period of five years. He paid the fines imposed on both occasions. The third offence, now in issue, was committed, as I have said, on 29 November 2007.

[3] For this third offence, understandably, the magistrate considered that only a sentence of direct imprisonment under s 276(1)(h) was appropriate. Both a correctional supervision officer and a social worker recommended correctional supervision under s 276(1)(i) (that is with no prior period of imprisonment) as an appropriate sentence. They considered that Jaftha did not have a 'drinking problem', drinking only socially to relax; that he came from a stable family; worked for the family flower business (principally as a driver); had two young children who were financially dependent on him and could easily be monitored.

[4] The magistrate took all these factors into account, but considered that a fine was not appropriate, and that correctional supervision under s 276(1)(h) was not sufficient in the circumstances. He regarded the two previous convictions as seriously aggravating. Moreover, Jaftha, when apprehended the third time, had a blood alcohol level four times above the legal limit. He had driven with two passengers and had committed the offence within a month of being apprehended and charged with the same offence of driving when drunk. The prior convictions and sentences had not deterred Jaftha and a more effective sentence was required.

[5] Jaftha lodged an appeal against the sentence and instructed his attorney to proceed with it. He was released on bail of R2 000. His appeal was dismissed by the Cape High Court in 1999. But for some unexplained reason the magistrates' court in Montagu was not informed by the Cape High Court that the appeal had been dismissed. Some nine years later, in July 2008, Jaftha's brother was called by the investigating officer in Montagu, Captain Peterson: he had a warrant of arrest for Jaftha. Peterson advised Jaftha that his appeal had been unsuccessful.

[6] Jaftha immediately applied to the Cape High Court for leave to appeal against the dismissal of his 1999 appeal. Uijs AJ, who had heard the appeal with Horn AJ, granted the application for leave to appeal to this court (Veldhuizen J concurring) in September 2008. The court condoned the late

filing of the application for leave to appeal, taking into account that Jaftha was in no way to blame for the fact that he had never been advised that the appeal had been dismissed.

[7] In that application Jaftha explained that he had assumed, when he heard nothing from his erstwhile attorney, that the appeal had been successful. The high court said that while it could not admit evidence as to what had transpired in the years since Jaftha had been convicted, it considered that another court might well take these factors into account, and that there was a good prospect that Jaftha might succeed on a further appeal. It therefore granted leave to appeal to this court.

[8] Jaftha seeks to place further evidence as to his personal circumstances, in the form of an affidavit, before this court. He also argues that the trial court misdirected itself in imposing sentence. I shall deal first, briefly, with the argument that there were misdirections in the imposition of sentence by the trial court, warranting interference in the sentence by this court, and then turn to the further evidence.

[9] Counsel for Jaftha argues that the magistrate did not give sufficient weight to the fact that Jaftha had shown remorse by pleading guilty. In my view that is of no consequence given that he had been apprehended when driving under the influence of alcohol, and had no real choice as to pleading guilty.

[10] Second, it is argued that no account was taken of the fact that the suspended sentences imposed for the second offence would have come into operation and that Jaftha would have had to pay the fine of R4 000. Again I consider that to be irrelevant. It has no bearing on the third offence.

[11] Third, no account was taken of the suspension of Jaftha's licence for five years on his second conviction. I do not consider this to be a misdirection. It was not merely a part of the punishment, but also an important and justifiable measure taken in order to ensure that Jaftha did not endanger himself and others again.

[12] Fourth, the magistrate in his reasons for judgment had placed emphasis on the prevalence of the crime of drunken driving and its effects on society: no opportunity was given to Jaftha to respond to the information that the magistrate took into account. I do not understand the argument: it is common for judicial officers to take note of the prevalence of the crime in issue and to seek to deter not only the accused but also others from committing that crime. This does not amount to taking judicial notice of a particular fact, or relying on personal knowledge which has a bearing on sentence. There was nothing for Jaftha to respond to.

[13] Fifth, and lastly, the court had accepted the views of the social worker and the correctional supervision officer that Jaftha did not have an alcohol problem, when it is apparent that he did. The misdirection lies, it is argued, in the fact that the magistrate was not bound by the views expressed in the reports, and in failing to take note that Jaftha did indeed have a serious drinking problem. But no evidence to that effect was led and I think the magistrate should not have made any finding of the kind.

[14] Accordingly, there are no misdirections to be found in the magistrate's sentence and this court would not ordinarily interfere with the sentence, as indeed the high court did not on appeal to it.

[15] I turn then to the second argument on appeal – that new evidence ought to be admitted to show that the sentence imposed ten years previously is now inappropriate. Ordinarily, of course, only facts known to the court at the time of sentencing should be taken into account.[1] But the rule is not invariable. Where there are exceptional or peculiar circumstances that occur after sentence is imposed it is possible to take these factors into account and for a court on appeal to alter the sentence imposed originally where this is justified.[2]

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[1] *R v Verster* 1952 (2) SA 231 (A), *R v Hobson* 1953 (4) SA 464 (A) and *Goodrich v Botha* 1954 (2) SA 540 (A) at 546A-D.
[2] *S v Karolia* 2006 (2) SACR 75 (SCA).

[16] In this case, ten years had elapsed after conviction and sentence before a warrant for the arrest of Jaftha was issued. Miscommunciation between the officials of the high court and of the magistrates' court was the cause of this extraordinary delay. Jaftha seeks now to explain why he did not question the outcome of his appeal to the high court, and to place before this court facts that show that imprisonment is no longer warranted. The State does not object to the application to place Jaftha's evidence before us in the form of an affidavit. And it does not question the truth of the allegations. The State also accepts that the ten year delay is exceptional and that the sentence should be revisited. In my view, the sentence imposed ten years ago should be set aside and a new sentence considered.

[17] I turn then to the evidence presented by Jaftha as to events in the ten year period between conviction and sentence and the lodging of this appeal. After his conviction, and during the course of 1998 Jaftha moved to Prince Alfred Hamlet. He had been contacted by his attorney for the payment of additional funds for the appeal, but cannot remember whether that was before or after he moved. He did not hear from the attorney again. He assumed that he would be contacted if his appeal to the high court were unsuccessful. He eventually assumed that he had succeeded and was thus a free man. He did not attempt to recover the R2 000 paid as bail since he had agreed that it would be used by the attorney for his fees.

[18] On being told that a warrant for his arrest had been issued, Jaftha immediately contacted Peterson, the investigating officer. He was advised that it was only when there was an inspection at the Montagu Magistrates' Court in May or June of 2008 that it was discovered that his appeal had been unsuccessful, and that that had not been communicated to the magistrates' court. As I have said, Jaftha's application for condonation for the late application for leave to appeal was granted as was leave to appeal.

[19] The evidence that has a bearing on sentence, and is not contested by the State, is that after his conviction and sentence, Jaftha realized that he had a drinking problem. He has given up drinking altogether. He and his brothers

have taken over their father's business and now export flowers overseas. They have built up a successful business. He has married the mother of his children and they have a stable family life. All these facts were placed before the high court in the application for leave to appeal, as well as before the Director of Public Prosecutions: Western Cape, and the Clerk of the Montagu Magistrates Court. They were not contested.

[20] This court debated with counsel for both Jaftha and the State whether the matter ought to be referred back to the trial court to hear evidence as to whether Jaftha has in fact been rehabilitated, and as to an appropriate sentence. However, since the State accepts the truth of Jaftha's evidence that he no longer drinks alcohol, and since there seems to be no purpose in imposing a custodial sentence on Jaftha some ten years after his conviction and sentence, there appears to be no reason why this court should not itself impose an appropriate sentence.

[21] The crime of which Jaftha was convicted is a serious one, made worse by the fact that it was his third conviction for driving when drunk. Accepting that he has been rehabilitated, we must nonetheless impose a sentence that will have a genuine deterrent and punitive effect. I consider that he should be sentenced to payment of a fine of R10 000 or imprisonment of two years.

[22] (a) The appeal is upheld.
(b) The judgment of the high court is set aside and in its place substituted an order allowing the appeal against the magistrate's sentence. In its stead the following sentence is imposed:
'The accused is sentenced to payment of a fine of R10 000 or to two years' imprisonment.'

C H Lewis

Judge of Appeal

APPEARANCES:

For Appellant:	P A Botha
	Instructed by: De Vries, De Wet Krouwkam Cape Town Symington & De Kok Bloemfontein
For Respondent:	M O Julius
	Instructed by: The Director of Public Prosecutions Cape Town The Director of Public Prosecutions Bloemfontein