

SOUTH AFRICA / JUDGMENT

Lebetsa v S (CA&R118/16) [2017] ZAECHGC 63 (23 May 2017)

[2017] ZAECHGC 63

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Tilana-Mabece, Mbenenge

CASE / FILE NUMBER

CA&R118/16

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE HIGH COURT, GRAHAMSTOWN)

CASE NO: CA &

R 118/16

In

the matter between:

MAXWELL

LEBETSA

Appellant

and

THE

STATE

Respondent

APPEAL

JUDGEMENT

TILANA-MABECE AJ:

[1] The appellant was charged, before the Magistrate, Paterson, with culpable homicide, he having, whilst driving a motor vehicle, run over and killed the late Bianca Agherdon (the deceased). He pleaded guilty to the charge and, on the basis of the plea tendered, was found guilty and convicted. He was thereupon sentenced to undergo 3 years' imprisonment.

[2] This appeal is with the leave of this court, and is against sentence.

[3] The details of how the accident occurred can be gleaned from his statement, which reads as follows:

"On the 11 November 2014 I was the driver of motor vehicle [E...]. I drove the said vehicle upon the N2 road in the district of Alexandria. It was about 12:30 the time. It was a clear day and the road surface was dry. The visibility was good. I drove to Grahamstown.

On the aforementioned date and time and on the N2 a public road in the courts jurisdiction I decided to overtake a truck that was driving in front of me. At this particular section of the road in the middle of the road was a double barrier line. It was unsafe to overtake the truck in front of me as a result of the double barrier line clearly indicating that one cannot see oncoming traffic ahead at that particular stretch of the road.

Despite the double barrier line I overtook the truck in front of me. In the process of overtaking the truck another vehicle coming from the Grahamstown direction towards Port Elizabeth was approaching me head on. This other vehicle was in the correct lane and had the right of way.

The vehicle I drove collided with this other vehicle despite the fact that I tried to swerve and avoid the collision. The collision

occurred as a result of myself overtaking the truck on the double barrier line. The lady in the other vehicle sustained injuries in the collision. She later passed away as a result of the injuries sustained in the collision. The lady is Bianca Anne Harper Agherdien.

I admit that she died due to multiple organ injuries due to the motor vehicle collision. I admit through my actions I did wrongfully and negligently caused the death of the deceased. The reasonable man or person in my situation should have and would have foreseen that if you overtake a vehicle on a double barrier line you might collide with another vehicle approaching head on and that a person or persons might lose their life as a result of this conduct,

I acted contrary to the reasonable man or person in my situation. My conduct was negligent. I knew at all times that it is a criminal offence to wrongfully and negligently cause the death of another

person. I am sorry for what I have done and ask the court to see my plea as a sign of remorse."

- [4] The record reveals that the appellant is a 28 year old self employed traditional healer. He is married with dependants, and is the sole bread winner.
- [5] In aggravation of sentence the State called Mr Harper, the father of the deceased, who testified that at the time of the accident the deceased had been returning from Rhodes University where she was studying towards a doctorate degree in pharmacy. He testified that the family had to undergo counselling in order to deal with the loss. Resulting from the incident, the deceased's brother has gone off the rails and is deep in the use of drugs. According to Mr Harper the incident received publicity in newspapers circulating in and around Paterson.
- [6] In the main, this court is called upon to decide whether the magistrate erred in finding that the imposition of correctional

supervision (in any form) would not exhibit his and the community's strong disapproval of the appellant's conduct.

- [7] It is trite law that sentencing is a matter within the discretion of a trial court. A court of appeal will only interfere if there is a clear misdirection on the part of the trial court or the sentence imposed is disturbingly inappropriate, or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably. This view was confirmed by the Appellate Division

in *S v Pillay*[1] where the court stated that "mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the court's decision on sentence".

- [8] Prior to imposing the sentence a report in terms of section 276A (i) of the Criminal Procedure Act[2] was handed to the court. According to the report the appellant was found to be a suitable candidate for correctional supervision.

The magistrate rejected both correctional supervision and imprisonment subject to correctional supervision as sentencing options on the basis that such sentences would not properly embody the deterrent and retributive aspect of the sentence. I am of the view that he failed to properly consider these options and other sentencing options, thus committing a misdirection, opening the matter up for interference by this court and to consider sentence afresh.

- [9] In sentencing the appellant the court a quo relied on *State v Sikhakhane*[3] which case was decided before the introduction of the new sentencing options provided in section 41(a) of Correctional Services and Supervision Matters Amendment Act[4] came into operation. This constituted a material misdirection by the trial court, warranting interference by this court.

[10] For the proper determination of an appropriate sentence in matters like the present I have had regard to the approach adopted by our courts in dealing with cases of culpable homicide arising out of driving of a motor vehicle and I found a useful comparative

analysis

of the types of sentences imposed in similar matters in *S v Nyathi*.^[5] The common feature in all the matters referred to in the judgment is that in passing sentence, the court should have regard to the degree of blameworthiness of the accused in the commission of the unlawful act.

[11] barrier line and caused the death of six passengers in a minibus taxi. A sentence of five years' direct imprisonment was imposed, two of which were conditionally suspended, and confirmed on appeal.

[12] Nyathi is clearly distinguishable from the instant case and is only referred to because it provides a general guide in translating degrees of negligence into years in custody. What is clear from a reading of the record in the instant matter is the highest degree

of moral blameworthiness on the part of the appellant. I am satisfied that the court a quo correctly found that the appellant recklessly disregarded the safety of other road users, which resulted in the death of the deceased.

[12] In *State v Scholtz*^[6] it was held that sentences of correctional supervision in section 276(1)(i) of the CPA are not foreign to the offence of culpable

homicide arising out of the driving of a motor vehicle, even in the worst-case scenarios. This section is also an alternative sentencing

option that has to be properly considered in cases like the present one.

[13] The issue of the suspension of the driver's licence of the appellant was not fully canvassed by the trial court because of the nature of the sentence imposed. Nothing, therefore, precludes this court from dealing with that issue in this judgment. In the absence of evidence justifying that the suspension of the driving licence should not take effect, it is necessary for the court to deal with the issue and pronounce thereon as provided for in section 34 of the National Road Traffic Act^[7]. There will be no point in referring the matter back to the trial court for such determination.

[14] I am of the view that the appellant's driving licence should be suspended for a period of 2 years. I am mindful of the provisions of the Traffic Act and the fact that appellant is a first offender, but his degree of blameworthiness at the time of the collision and his conduct after the incident warrant the imposition of a longer period than what is prescribed in the Traffic Act.

[15] I am satisfied that the provisions of section 276(1)(i) of the CPA, as opposed to direct imprisonment, will be an appropriate sentencing option.

[16] In the result the following order is made:

1. The appeal against sentence succeeds.
2. The sentence imposed by the magistrate is set aside and substituted with the following:
 - (a) The accused is sentenced to undergo 3 years' imprisonment in accordance with section 276 (1)(i) read with section 276A(2)(b) of the Criminal Procedure Act, in terms of which he may be placed under correctional supervision in the discretion of the Commissioner of the Parole Board.
 - (b) The accused's driving licence is suspended for 24 months effective from today.
 - (c) Both sentences shall run concurrently.

S TILANA – MABECE

ACTING JUDGE OF THE HGH COURT

I agree

S M MBENENGE

JUDGE OF THE HGH COURT

For the appellant: P Daubermann

(of Peter Daubermann Attorneys

PORT ELIZABETH)

For the respondent: D Els

Instructed by: The Director of Public Prosecutions

Grahamstown

Heard on: 22 March 2017

Delivered on: 23 May 2017

[1]

1977 (4) SA 534 (A).

[2]

51 of 1977 (CPA).

[3]

1992 (1) SACR 783 (N).

[4]

22 of 1991 (Amendment Act).

[5]

2005 (2) SACR 273 (SCA).

[6]

2006 (1) SACR 442 (EC)

[7]

93 of 1996 (Traffic Act).

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