

SOUTH AFRICA / JUDGMENT

Magwaxaza v S (A207/11, A398/11) [2011] ZAWCHC 541 (21 October 2011)

[2011] ZAWCHC 541

COURT

Western Cape High Court, Cape Town

BEFORE

Saldanha, Bozalek

CASE / FILE NUMBER

A207/11 & A398/11

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**IN THE HIGH COURT
OF SOUTH AFRICA
(WESTERN CAPE HIGH
COURT, CAPE TOWN)
CASE
NO: A207/11 &
A398/11**

DATE: 21 October 2011
In

the matter between: MICHAEL
MAGWAXAZA
Appellant
and
THE
STATE
Respondent

JUDGMENT

SALDANHA, J

The appellant, Mr Michael Magwaxaza, was convicted in the magistrate's court of Cape Town on the 25th of November 2010 on a charge of reckless driving in terms of Section 61(1) read with sections 1, 69(1), 89(1) and 93 of the National Road Traffic Act number 93 of 1996 (the Act). The appellant was sentenced on the 21st of April 2011 to a term of imprisonment of three years and his license was permanently revoked.

The appellant sought leave to appeal against the sentence but the application was refused by the magistrate. Leave to appeal was subsequently granted on petition to this division of the High Court. The charge arose out of an incident on the 7th May in which the appellant was alleged to have negligently or in a reckless manner to have driven a vehicle, a white Toyota Quantum with registration number CA655364 on a public road, being Lower Church Street, Woodstock, Cape Town. The appellant was legally represented throughout his trial. He initially pleaded not guilty to the charge and chose not to disclose the basis of his defence.

At the subsequent hearing the appellant made various admissions in terms of Section 220 of the Criminal Procedure Act (as amended) which obviated the need for the State to tender any evidence on the charge. The appellant submitted that on 7 May 2010 he was the driver of the Toyota Quantum with registration number CA655364, which he used as a taxi. He claimed that while on his way from Melkbosstrand to Cape Town he had taken the off ramp from the N1 freeway into Lower Church Street. While driving over a bridge he saw a stationary motorcycle in front of him at a yield sign. He admitted that he overtook the motorcycle on the right side and collided head on with the Toyota motor vehicle with registration number CFR12005. He admitted that when he did so he drove with wilful disregard for the safety of other road users. He admitted also that the driver of the Toyota vehicle had suffered injuries as well as the passenger in the vehicle, a Ms Lyndell Amon, the complainant, who was 31 weeks (approximately eight and a half months) pregnant at the time. He claimed that his speed at the time of the collision was between 60 and 80 kilometres an hour.

Thereafter both the State and the defence closed their case. The appellant was duly convicted of reckless driving by the magistrate.

The State proved no previous convictions against the appellant, and his legal representative requested that a report be obtained in terms of Section 276(A)(1)(A) of the Criminal Procedure Act (as amended) for the assessment and consideration of correctional supervision as an appropriate sentence.

In mitigation of sentence the appellant testified and set out his personal circumstances. At the time of the collision he was 39 years old, was married, had two sons aged 12 and 7, and a daughter of 11 months. His wife was unemployed and he was solely responsible as the bread winner for the payment of the two elder children's school fees. He earned R500 per week. His

own mother was a pensioner. The appellant had a valid driver's license and claimed that it was the first motor collision that he had been involved in. In respect of the incident itself and as to why he admitted his guilt, he explained that he felt "very bad about that day and I still have a picture of that and I am very sorry for that." He was not injured although his passenger, a friend, was also injured. He also explained that he felt "very bad about all of the other people" who had been injured in the accident. He claimed that in the event of him being sentenced to correctional supervision it would affect his ability to find another job, and although taxi driving was all that he knew how to do, he would have to find alternative employment. Although he had been driving since 1996 he claimed that he had only driven as a taxi driver since 2003.

In cross-examination he acknowledged that there was a lot of carnage on the road as a result of the reckless driving of taxi drivers. He reiterated his remorse for the complainant who had lost her baby and the trauma that he had caused to her.

A report in terms of Section 276 (A)(1)(A) was formally tendered into evidence by the defence. The report had also set out in detail the personal circumstances of the appellant and recorded that he had verbalised remorse and had taken responsibility for his actions. The report also indicated that the appellant had used alcohol socially but did not use drugs. The correctional officer was of the view that the appellant was a suitable candidate for correctional supervision, and recommended a sentence in terms of Section 276(1)(h) of the

Criminal Procedure Act. The appellant had an address at which he could be monitored. It was also recommended that besides house detention the appellant should also be ordered to do community service.

In aggravation of sentence the State tendered the evidence of the complainant, Ms Amon. She confirmed that her pregnancy had been at an advanced stage and as a result of the accident the umbilical cord to the baby was severed. The birth had to be induced and the baby was stillborn. She also suffered whiplash and still had marks impressed upon her chest as a result of the seatbelt. She had been hospitalised for approximately five days. She explained to the Court the trauma that she suffered as a result of the loss of her baby, and it appeared that she was still very emotional while testifying. She, however, had reconciled herself to forgiving the appellant for his conduct and in what appeared to have been an emotive plea addressed him directly in court to remember the pain and trauma that he had caused to her and to her family.

In considering an appropriate sentence the magistrate took into account the need to balance the personal circumstances of the appellant, the interest of the community and the nature and severity of the offence. The magistrate noted that the sentence was also to be tempered with an element of mercy. The magistrate repeatedly stated through his handing down the sentence that she did not wish to make an example of the appellant but that the sentence had to fit the crime and was to act as a deterrent. She emphasized that the sentence was to send a strong message about the conduct of the appellant, and in particular taxi drivers in general. She made reference to the appellant's acknowledgement of the problem of reckless driving by taxi drivers and those who drove without licenses and under the influence of alcohol. She made reference to other

cases of reckless driving and the public outcry to a particular incident where a number of children had died because a taxi driver had disregarded the warning signs at a level crossing. She remarked that the appellant had smirked during his testimony in response to a question from the prosecutor as to what "he should do about changing his ways". The magistrate noted however that the appellant appeared to be remorseful. She found that the only mitigating factor was that the appellant had played open cards with the Court and that he was a first offender. She considered that a suspended sentence would be wholly inappropriate and although she regarded correctional supervision as a hard sentence it would not be appropriate given the seriousness of the offence.

Both counsel for the appellant and the State correctly submitted that a court of appeal will not lightly interfere with the sentence of a lower court unless there was a serious misdirection on the part of the magistrate. In this regard the remarks of Smalberger, JA in paragraph 8 of *Moosajee v S* 1999(2) All SA 353 (A) remains instructive:

"It is trite law that sentencing is pre-eminently a matter for the discretion of the trial court. Interference with the sentence on appeal is not justified in the absence of a material misdirection or irregularity or the sentence imposed is so startlingly inappropriate as to create a sense of shock."

It would appear from the magistrate's consideration of the sentence that she regarded the conduct of the appellant as aggravated by the fact that he was a taxi driver, and took into account the general perception of reckless driving by taxi drivers. This was compounded by the unfortunate fact that the complainant had lost her baby as a result of the collision.

The appellant for his part had admitted his guilt and appropriately acknowledged the role of reckless driving by taxi drivers and the carnage on the road. He remorsefully expressed his sympathy for those injured in the collision and in particular the loss to the complainant. The complainant, for her part, magnanimously expressed her forgiveness for the appellant.

In *Naicker v S* 1997(1) All SA 5 (A) Grosskopf, JA in dealing with the negligent driving of an appellant and the fatal consequences thereof remarked:

"The magistrate was fully justified in considering the tragic consequences of the appellant's negligence and to take it into account for the purposes of sentence. See *S v Nqobobo* 1962(2) SA 333 (N) at 337A-B. Miller, J however pointed out at 336H that the magnitude of the tragedy resulting from negligence should never be allowed to obscure the true nature of the accused's crime or culpability. The learned judge concluded, at 336H to 337A:

"Whatever the result of the negligent act or omission the fact remains that what the accused person in such a case is guilty of is negligence - failure to take reasonable and proper care in given circumstances. His negligence may be slight, and yet may have the most calamitous consequences, or it may be gross and yet be almost providentially harmless in result. I venture to suggest that the basic measure for determining fit punishment for a negligent motorist must be the degree of culpability or blameworthiness."

The recklessness of the appellant's driving (which he admitted) was apparent. In consequence thereof three people were injured, one of whom lost a baby.

Grosskopf, JA in Naicker (above) remarked further:

"In *R v Bredell* 1960(3) SA 558 (A) at 560 G-H (and see also *R v Bernardo* 1960(3) SA 552 (A) at 557 D-E) this court warned that it may be that the time has come when it is the duty of judicial officers to exercise greatest severity in passing sentences in cases of the negligent use of motor vehicles. It should however be pointed out that in both those cases the court found that the conduct of a particular accused amounted to gross negligence or wilful disregard

of the rights of other road users and it was on the strength of those findings that the Court in both instances sanctioned a sentence of unsuspended imprisonment. Correctional supervision did not exist as a sentencing option in 1960 and what was done in cases decided in the pre correctional supervision era should be treated with caution when looking to them for guidance in regard to sentence.

In reaching the conclusion that the appellant's conduct did not warrant a sentence of imprisonment I have not overlooked the fact that a death and serious injury resulted in the appellant's negligence. The appellant is a first offender who was 30 years of age and in regular employment at the time of the commission of the offence, he is not married but his parents are dependant on him for support."

The advantages of correctional supervision over imprisonment has been considered in a number of decisions, see in this regard *S v R* 1993(1) SA 476 (A) at 488G-I, *S v Kruqer* 1995(1) SACR 27 (A) at 31 b-f and again in *S v Volkwyn* 1995(1) SACR 286 (A) at 288i-289d. On the other hand a note of caution was sounded in *S v Schutte* 1995(1) SACR 344 (C) at 350c-e against the indiscriminate use of correctional supervision.

In consideration of all the factors and without derogating from the seriousness of the offence and the trauma suffered by the complainant and other passengers I am of the view that the magistrate erred in finding that direct imprisonment was the only option as an appropriate sentence. In this regard the appellant was assessed and considered to be an appropriate candidate for correctional supervision. Mindful that the appellant has already served six months of his sentence I am of the view that an appropriate sentence should be that of correctional supervision in terms of Section 276(1)(h) of the Criminal Procedure Act. I am also of the view that the cancellation of the appellant's driver's license is unduly harsh and that it would have been more appropriate to suspend it for a period of five years in terms of Section 34 of the National Road Traffic Act.

In the result I propose to set aside the sentence imposed by the magistrate and to impose a sentence of correctional supervision in terms of sections 276(1)(h) of the CPA. Further I am also of the view that it would be more appropriate for the matter to be remitted to the magistrate to consider and to provide the details of the components of the correctional supervision such as community service and/or attendance at courses (but excluding compensation).

In the result I propose the following order:

- i) A sentence of three years imprisonment and the order of the permanent revocation of the appellant's license is set aside;
- ii) The appellant is sentenced to 36 months community service in terms of Section 276(1)(h) of the Criminal Procedure Act;
- iii) The matter is remitted to the magistrate to consider and to impose the terms of the community service and any other conditions appropriate to the sentence;
- iv) The appellant's driver's license is suspended for a period of five years in terms of Section 34 of the National Road Traffic Act.

SALDANHA, J

I agree, and it is so ordered.

BOZALEK, J

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