

SOUTH AFRICA / JUDGMENT

# McGeer v S (A151/2018) [2019] ZAGPJHC 34 (21 February 2019)

[2019] ZAGPJHC 34

## COURT

South Gauteng High Court, Johannesburg

## BEFORE

S Budlender, I Opperman

## CASE / FILE NUMBER

A151/2018

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REPUBLIC  
OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG  
LOCAL DIVISION, JOHANNESBURG  
APPEAL  
CASE NO: A151/2018  
In

the matter between: CAMERON  
MICHAEL  
MCGEER Appellant  
and  
THE  
STATE Respondent

**JUDGMENT**

S BUDLENDER AJ (OPPERMAN J concurring):

**Introduction**

- [1] The appellant was convicted of culpable homicide by the Roodepoort Regional Magistrates' Court. On 14 August 2017, the trial court sentenced him to five years direct imprisonment, directed that his driver's licence be suspended for a period of five years[1] and declared him unfit to possess a firearm.[2]

- [2] On petition, the appellant initially sought and obtained leave to appeal in relation to both conviction and sentence. However, he subsequently abandoned his appeal against conviction and the appeal before us dealt only with the issue of sentence.

The proceedings before the trial court

- [3] The appellant was charged with culpable homicide. However, the trial took a somewhat unusual course.

[3.1] Initially, the appellant pleaded guilty to the charge of culpable homicide. This plea was accepted by the trial court and the appellant was pronounced guilty.

[3.2] Sentencing proceedings then began. However, following evidence and argument in the sentencing proceedings, the trial court concluded that it was no longer satisfied as to the appellant's guilt and instead entered a plea of not guilty in terms of section 113 of the Criminal Procedure Act.[3]

[3.3] Without further ado, and without any discussion of the status of the evidence that had already been led for sentencing purposes, the trial proceeded on the merits. The trial court ultimately convicted the appellant of culpable homicide.

[3.4] The matter then proceeded to sentence and the trial court imposed the sentence of five years' direct imprisonment, together with the related orders mentioned above.

- [4] The evidence revealed that the circumstances in which the deceased, Mrs Mashimbye, was killed were as follows:

[4.1] Mrs Mashimbye was driving home in the early hours of 1 June 2014.

[4.2] At approximately 1h30am, she was stationary at the traffic lights at the intersection of Hendrik Potgieter Street and Van der Kloof Street, waiting for the lights to turn green in her favour.

[4.3] The appellant drove down Hendrik Potgieter Street and drove into the back of Mrs Mashimbye's vehicle.

[4.4] The collision caused Mrs Mashimbye's vehicle to burst into flames and she was pronounced dead on the scene.

[4.5] An autopsy and post mortem confirmed that the cause of the death was the burns suffered by Ms Mashimbye as a consequence of the fire.

The misdirection of the trial court regarding sentence

- [5] Before us, the appellant sought to challenge three findings relied on by the trial court for purposes of sentence.

[5.1] First, the trial court concluded that the appellant had been drag-racing at the time of the accident;

[5.2] Second, the trial court concluded that the appellant was driving at an excessive speed at the time of the accident; and

[5.3] Third, the trial court concluded that the appellant had consumed alcohol before driving the vehicle. The judgment on conviction makes clear that the trial court concluded from this that the appellant was drunk when the accident occurred.

[6] The appellant submitted that the trial court misdirected itself in all three respects. I deal with each of these issues in turn.

#### Drag-racing

[7] The trial court took the view that it was able to conclude as a matter of fact that the appellant had been drag-racing at the time of the accident. It did so solely on the basis of the evidence of the deceased's husband, Mr Mashimbye, regarding what the appellant had told him.

[8] The full extent of Mr Mashimbye's evidence on this score was as follows:

*"My first Google for him to find who Cameron is, came up with him and the very same car racing on a drag race. To me a law abiding citizen does not do that. I had a conversation with him guided from that. He therefore confessed to similar scenarios which were on the day of the accident he went and fitted a new chip on his car. Him and his friends took the car out for a spin from..."*

[an objection was noted by the appellant's legal representative, whereafter the evidence continued]

So on that day he fitted a new chip on the car which allow the car to be faster. Him and his friends went to.... a bar."

[9] I have some doubts about the admissibility of this evidence against the appellant. Quite apart from the question of whether the evidence amounts to impermissible hearsay, the evidence was led before the trial court as part of the abortive first sentencing proceedings. It is therefore not clear to me whether it was, without more, properly before the trial court when the trial proceeded after the court entered the plea of guilty in terms of section 113 of the Criminal Procedure Act.

[10] However, it is not necessary to decide these issues. Even if the evidence is assumed to be admissible and to have been properly before the trial court, it simply does not go far enough to establish even a *prima facie* case that the appellant was drag-racing at the time of the accident. At the very most it establishes that the appellant had previously been involved in the activity of drag-racing and that he remained involved in the activity of drag-racing. But this does not remotely establish beyond a reasonable doubt that he was drag-racing at the time of the accident.

[11] Indeed, counsel for the state quite properly and correctly conceded that:

[11.1] There was no evidentiary basis for a conclusion that the appellant was drag-racing at the time of the accident; and

[11.2] On this basis alone, the trial court misdirected itself, which entitles us to reconsider the sentence imposed.

#### Excessive speed

[12] The speed limit on the road in question was 90 km per hour. The trial court concluded that the appellant was driving at an excessive speed.

[13] However, it appears to me that there was no proper basis for this conclusion.

[13.1] None of the lay witnesses who testified and who were present at the accident scene could offer meaningful evidence of the speed at which the vehicle was going.

[13.2] Mr Malinga, a road crash investigator from the Johannesburg Metropolitan Police Department, testified for the State. However, he testified that he and his colleague were unable to determine the speed that the appellant's car was likely driving at.

[13.3] Mr Govendor, an expert mechanic, also testified for the State. He testified convincingly that it was the collision that had caused Mrs Mashimbye's petrol tank and car to ignite. However, the most he could say regarding the likely speed of the appellant's car is that it would have been in excess of 40 km per hour.

[13.4] The defence then called Mr Bezuidenhout as an expert witness on the speed issue. There was a significant dispute about the extent of his expertise on this score. However, his evidence was in any event inconclusive. His evidence in chief was that the appellant was likely travelling between 90 km per hour and 100 km per hour – though under cross-examination it became clear that even this assessment depended to a substantial extent on significant assumptions that had been made.

[14] Notably, the trial court did not refer to any of this evidence in concluding that the appellant was travelling at an excessive speed. It appears that the sole basis for its conclusion was:

[14.1] The extent of the damage that was done to Mrs Mashimbye's car by the appellant's car; and

[14.2] The fact that, even though Mrs Mashimbye's car was stationary at the time, the collision did not stop the appellant's car from progressing through and beyond the intersection.

[15] In my view, neither of these facts is sufficient to lead to a conclusion beyond reasonable doubt that the appellant's car was travelling at an excessive speed. This is especially the case given that:

[15.1] The speed limit for the road in question was 90 km per hour; and

[15.2] None of the three expert witnesses were able to use the facts concerned to reach a firm conclusion that the appellant was driving at more than 90 km per hour.

- [16] In the circumstances, I do not consider that there was any basis for the appellant to be sentenced on the basis that it was proven that he was driving at an excessive speed.

#### Drunk when the accident occurred

- [17] The trial court concluded that the appellant was drunk when the accident occurred. She held that the evidence “revealed that the accused had consumed alcohol, which means that he was drunk when the accident occurred”.

- [18] However, it is clear from the record that the blood alcohol level of the appellant was not measured. Moreover, while a number of eye-witnesses were questioned regarding whether the appellant was drunk at the time of the accident, counsel for the State quite properly and correctly conceded there was no admissible evidence that the appellant was drunk at the time of the accident.

- [19] Instead, the high-water mark of the evidence on the alcohol issue was the report of the probation officer, which stated:

*“The accused mentioned that on the day of the accident he had beers but too many. He informed that he was not drunk and he was tipsy...”*

*“The accused confirmed drinking alcohol and he mentioned that on the day of the accident he had quiet [quite] a few drinks of Castle lite beer. He mentioned that he was just tipsy....”*

- [20] The evidence of Mr Mashimbye was to the same effect. It was that the appellant told him that he consumed alcohol on the night of the accident.
- [21] It is again not necessary to decide whether this evidence – which was placed before the trial court as part of the abortive first sentencing proceedings – was properly before the trial court after it entered the plea of guilty in terms of section
113. Even assuming that it was, the most that it demonstrates are statements by the appellant that he had consumed some alcohol during the course of 31 May 2014 and that, in his view, he was not drunk but was “tipsy”. There was no more precise evidence led as to how much alcohol had been consumed and what the proximity of this consumption was to the time of the accident at 01h30am the next morning.
- [22] In the circumstances, there was simply no evidential basis for the trial court to conclude that the appellant was drunk at the time of the accident. The conclusion by the trial court to the contrary was a misdirection.

#### The appropriate sentence

- [23] In light of the three misdirections just highlighted, we are entitled to interfere with the sentence imposed by the trial court and sentence the appellant afresh. Counsel for the State correctly conceded that this was so even as a result of the misdirection regarding drag-racing alone.

[24] A critical consideration in determining the appropriate sentence is the tragic loss of life that has occurred as a result of the appellant's negligent driving.

[24.1] Mrs Mashimbye was 27 years old at the time of her death and was the mother of two young twins, who were three years old at the time. Her death robbed her twins of a mother and her husband of a wife.

[24.2] The death of Mrs Mashimbye evidently caused immense pain for her family. The accident occurred close to the house where they lived and Mr Mashimbye testified that they ultimately had to leave the house because it brought back terrible memories of the accident and Mrs Mashimbye's death.

[25] It is also necessary to take into account the fact that the appellant is a first-time offender, with no previous convictions. He had also expressed remorse for what had occurred.

[26] In determining the appropriate sentence, it seems to me that a helpful starting point is the decision of the SCA in *Nyathi v the State*.<sup>[4]</sup>

[26.1] There, the court dealt with the appropriate sentence for culpable homicide in respect of a driver who had overtaken on a double-barrier line whilst unable to observe approaching traffic. He crashed into a mini-bus, causing it to overturn and killing six people.

[26.2] The Court quoted the earlier approach of Corbett JA in *S v Nxumalo* as follows:

*"It seems to me that in determining an appropriate sentence in such cases the basic criterion to which the Court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the accused's deviation from the norm of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's*

*negligence cannot be disregarded. If they have been serious and particularly if the accused's negligence has resulted in*

*serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed."*<sup>[5]</sup>

[26.3] The court went on to explain that "in translating degrees of negligence into years in custody, it is useful to have regard in a general sort of way to sentences imposed by this and other courts".<sup>[6]</sup>

[26.4] Having engaged in this exercise, the court concluded that in none of the cases it found, had the appellant's negligence been as gross and the consequences as grave as the case before it. It emphasised that "the appellant's culpability is seriously aggravated by his conscious assumption of the risk of a devastating collision".

[26.5] The court also remarked that, given that the National Road Traffic Act had increased the terms for maximum imprisonment for negligent driving and reckless driving, “no one if there is an upward pressure on the custodial penalties imposed for road accident related culpable homicide offences”.

[26.6] The court then proceeded to confirm the sentence of five years imprisonment (with two years suspended) for the six convictions for culpable homicide.

[27] The present case is obviously quite different from Nyathi.

[27.1] Here there is no evidence that the present appellant engaged in the “conscious assumption of the risk of a devastating collision”. Moreover, the present appellant has been convicted on one charge of culpable homicide – not six, as was the case in Nyathi.

[27.2] Yet, despite this, the sentence imposed by the trial court was more severe than that in Nyathi. While the appellant in that case received a sentence of five years’ imprisonment with two years suspended, in the present case the sentence was simply five years’ imprisonment.

[28] The inappropriateness of the sentence imposed by the trial court is confirmed by having regard to other sentencing decisions regarding culpable homicide.

[29] In *S v Greyling*,<sup>[7]</sup> a nineteen year old who took a corner too fast collided with a concrete wall, killing four young women who were being conveyed on the back of his pick-up. On appeal, he was sentence to one year’s imprisonment.

[30] In *S v Birkenfield*,<sup>[8]</sup> the appellant rode his motor cycle very fast and without stopping at an intersection controlled by a stop sign, killing a pedestrian and his passenger. The Appellate Division confirmed a sentence of three years’ imprisonment, subject to the Commissioner’s discretion to place the appellant under correctional supervision.

[31] More recently, in *Ndlanzi v the State*,<sup>[9]</sup> the SCA set aside a conviction for murder and replaced it with a conviction of culpable homicide.

[31.1] The appellant there had killed a woman by driving on to a pavement in peak hour traffic, when there many pedestrians.

[31.2] In determining the sentence for culpable homicide, the Court took into account the fact that the appellant in that case was a taxi driver (which it held required more care and caution from him than the average driver) and the fact that the appellant had a previous relevant conviction.

[31.3] The Court ultimately sentenced the appellant to five years’ imprisonment, of which two years were suspended, and which was to run concurrently with the sentence of imprisonment imposed for the other crimes in respect of which the appellant had been convicted. In doing so, the Court emphasised:

*“That the appellant has been convicted of a very serious offence admits of no doubt. Although the sentence to be imposed must reflect the seriousness of the appellant’s conduct, it must not be such that it has the effect of destroying him on the alter of general deterrence or retribution. This court must guard against pandering to the whims of the public at the expense of the appellant....”[10]*

[32] Similarly, in *Van Vuuren v the State*, [11] two judges of this Court recently dealt with an appeal against sentence regarding a conviction for two counts of culpable homicide.

[32.1] In that matter, the appellant had negligently driven into the back of another vehicle, causing the death of two people. The court concluded, in part on the basis of expert evidence, that the accident had been caused by the appellant driving at an excessive speed.

[32.2] The court sentenced the appellant to three years’ imprisonment, one year of which was suspended.

[33] While every case must obviously be decided on its own facts, the decisions just set out appear to indicate that the appropriate sentence for a single case of culpable homicide, without any special aggravating sentences, will often involve imprisonment – but then only for a reasonably limited period.

[34] Of course, there are certainly decisions where the Courts have imposed more severe sentences for culpable homicide. However, they are plainly distinguishable on the facts from the present case.

[34.1] For example, in *Humphreys v the State*, [12] the SCA imposed a term of eight years’ imprisonment for culpable homicide – after setting aside a convictions for murder and attempted murder. But there the appellant had been the driver of a school taxi, who had overtaken a queue of vehicles at a railway crossing, ignoring warning lights and a boom in the process, and who killed ten children and seriously injured four others.

[34.2] Similarly, in *Maaronanye v the State*, [13] a Full Court imposed a sentence of ten years’ imprisonment (with two of those years suspended) after setting aside convictions

for murder. But there the appellants had been responsible for killing four pedestrians and injuring two others. They had

consciously taken drugs and then proceeded to engage in racing on a public road, that is engaging in “driving conduct of extremely reckless proportions”.

[35] In my view, this analysis of the approach of our courts to sentences for culpable homicide demonstrates that neither the approach of the appellant nor that of the State are sustainable.

[35.1] The appellant appeared to contend before us that correctional supervision was a serious option. I cannot agree. While it is true that the evidence revealed mere negligence on his part rather than the additional factors relied on by the trial court, the fact remains that the negligence has shattered a family and given rise to trauma on their part that will take many years to recover from. The suggestion that, in those circumstances, the trial court should not have sentenced the appellant to any imprisonment is in my view unsustainable.

[35.2] On the other hand, the contention by the state that a sentence of five years' imprisonment should be left in place is equally untenable. Such a sentence would be completely out of step with the approach of courts to similar cases.

[36] In determining the appropriate sentence, I have had regard to the fact that the appellant was incarcerated from 14 August 2017 until 20 April 2018, at which stage he was released pending this appeal. He has thus served eight months' imprisonment.

[37] In all the circumstances, it seems to me that the appropriate sentence is for the appellant to be sentenced to two years and eight months' imprisonment, with two years suspended for a period of five years on condition that the appellant is not found guilty of the crimes of culpable homicide involving reckless and/or negligent driving, or reckless and/or negligent driving.

[38] In my view, that sentence strikes an appropriate balance between the competing considerations that must be borne in mind in determining sentence. It recognises that a sentence of imprisonment is appropriate given the devastating consequences of the appellant's conduct, but allows the appellant to take steps to rehabilitate himself and rebuild his life. At the same time, the operation of the suspended sentence for a period of five years – until August 2022 – should operate as a significant inducement to ensure that the appellant acts with greater care and respect for the lives of others into the future.

Remaining

## orders

[39] The trial court directed that the appellant's driver's licence be suspended for a period of five years, in terms of section 35(1)(a) of the Road Traffic Act.

[39.1] That section permits a court convicting a person of various offences, to suspend the licence of the person concerned.

[39.2] The appellant contended that the trial court's order was not permissible because there had been no compliance with section 35(4) of the Act. It provides:

*“A court convicting any person of an offence referred to in subsection*

- (1) shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and of subsection (3) to the notice of such person.”

[39.3] However, this is not borne out by the record. The trial court specifically drew to the attention of the appellant's attorney that it was considering suspending his driver's licence and the attorney made submissions, albeit brief, on this issue.

[39.4] There is accordingly no merit in the appeal on this score.

[40] By contrast, there is merit in the appeal regarding the trial court's order declaring the appellant unfit to possess a firearm, in terms of section 103(1) of Firearms Control Act.[14]

[40.1] Section 103(2)(a) of the Firearms Control Act provides that a court which convicts a person of a crime such as that presently at issue must enquire and determine whether that person is unfit to possess a firearm.

[40.2] There was no such enquiry in this case and so the appeal against the order made must be upheld.

## Conclusion

[41] For these reasons, I make the following order:

[41.1] The appeal on sentence is upheld and the sentence imposed by the trial court is set aside;

[41.2] The appellant is sentenced to two years and eight months' imprisonment, with two years suspended for a period of five years on condition that the appellant is not found guilty of the crimes of culpable homicide involving reckless and/or negligent driving, or reckless and/or negligent driving;

[41.3] The sentence is antedated to 14 August 2017;

[41.4] The appeal against the order of the trial court declaring the appellant unfit to possess a firearm is upheld and the order is set aside; and

[41.5] The appeal against the order of the trial court directing that the appellant's driver's licence be suspended for a period of five years is dismissed.

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S BUDLENDER

ACTING JUDGE OF THE HIGH COURT

I agree

I OPPERMAN

JUDGE OF THE HIGH COURT

Date of hearing

26 November 2018

Date of judgment

21 February 2019

Appearances:

For appellant: L. Fick instructed by Swartz Weil Van Der Merwe Greenberg

For respondent: N. Kowlas

[1] In terms of section 35(1)(a) of the National Road traffic Act 93 of 1996

[2] In terms of section 103(2) of the Firearms Control Act 60 of 2000

[3] Act 51 of 1977

[4] 2005 (2) SACR 273 (SCA)

[5] At para 14, quoting S v Nxumalo 1982 (3) SA 856 (AD)

[6] At para 15

[7] 1990 (1) SACR 49 (A)

[8] 2000 (1) SACR 325 (SCA)

[9] 2014 (2) SACR 256 (SCA)

[10] At para 47

[11] Case A234/2017, judgment delivered 5 December 2017

[12] 2015 (1) SA 491 (SCA)

[13] 2015 (1) SACR 337 (GJ)

[14] Act 60 of 2000

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