

SOUTH AFRICA / JUDGMENT

Mlanga v S (CA&R230/2018) [2020] ZAECGHC 9; 2020 (2) SACR 416 (ECG) (13 February 2020) [2020] ZAECGHC 9

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe, P.N. Mnqandi

CASE / FILE NUMBER

CA&R230/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: CA&R230/2018

Date

heard: 12 February 2020

Date

delivered: 13 February 2020

In

the matter between:

ALUTHA
SIYABONGA MLANGA
Appellant
and
THE
STATE
Respondent

JUDGMENT

LOWE, J

BACKGROUND

- [1] Appellant was charged with and convicted of culpable homicide by the Regional Court, Cradock and sentenced to 3 years' imprisonment. His driver's licence was suspended in terms of the National Road Traffic Act 93 of 1996 (the NRTA) for a 3 year period.
- [2] This is an appeal against sentence only with the leave of the Magistrate. Leave to Appeal against conviction was refused by the Magistrate and by the High Court (ECD).
- [3] The charge and conviction arose out of an incident that occurred on the N10 Road, Cradock on 13 November 2016 when a motor vehicle driven by Appellant collided with and killed Mr Mdoda. The accident

occurred during the afternoon at about 79.4km between Cookhouse and Cradock the deceased being on a pedestrian crossing at the time, this in the vicinity of Lingilihle Residential area.

- [4] The deceased was walking with Mr Rooi who saw a silver vehicle approaching warning the deceased that the vehicle was not going to stop at the crossing.
- [5] The deceased ignored the warning and proceeded then stopping in the road on the crossing. He had been pushing a wheelbarrow across the road when the vehicle veered from its path into the incorrect

lane striking the deceased who died from the injuries sustained. It would seem that the crossing was on a speed hump. There were what the Magistrate described as "numerous warning signs about the presence of a pedestrian crossing". Appellant said in evidence he was travelling at 50 – 55kph.

- [6] It would appear that just before the accident deceased let go of the wheelbarrow and ran to the side of the road away from Appellant's line of travel, back in the direction from which he had come and the

lane into which Appellant swerved. Appellant said that about 15 – 20 metres from the crossing he saw the deceased on the crossing and "could not apply brakes" – why is not explained – saying he swerved right.

- [7] Put otherwise Appellant was travelling at 50 – 55kph in a residential area on the N10 and failed to slow down or yield at a clearly marked pedestrian crossing, failing to brake, and seeing a pedestrian and wheelbarrow at 15 – 20 metres simply swerved into his incorrect lane striking the pedestrian who had retreated from approximately the middle of the road on the crossing.

- [8] This was in my view certainly no “momentary oversight or act of carelessness on the part of the accused”, as Appellant’s counsel submits. Far from it. Appellant drove at a speed of say 50kph, ignored the residential area which the road passed and without slowing in any way or having regard to the deceased at least in the vicinity of the crossing and being a potential person who may well, and then did, cross the pedestrian crossing.

APPELLANT’S PERSONAL CIRCUMSTANCES

[9] Appellant:

- (a) Was 29 years at the time;
- (b) Holds an educational qualification equal to Grade 12;
- (c) Is unmarried and has no children;
- (d) Holds a Code 10 driver’s licence and is employed in the transport business;
- (e) Attended to the deceased and arranged to have him taken to the hospital for treatment; he assisted in the transfer of the deceased to hospital in Port Elizabeth and contributed to the financial expenses of the funeral; and
- (f) Has no previous convictions.

SENTENCE ON APPEAL

- [10] Sentencing is within the discretion of the trial court, the court of appeal interfering only if there is a clear misdirection on the part of the trial court or the sentence is shockingly severe.

- [11] In *S v Kgosimore*[1] Scott JA said the following with respect to an appeal court’s powers to interfere with sentence:

“It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.”

APPELLANT’S CONTENTIONS

- [12] Appellant submitted that the Magistrate erred in failing to consider correctional supervision, or a fine with wholly suspended sentence, in terms of Section 276(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

- [13] This failure to so consider is said to be a failure to properly exercise his discretion judicially and reference is made to *S v Cunningham* [2].
- [14] Appellant further joins issues with the licence suspension, so it is argued in terms of Section 35(3) of the NRTA alternatively Section 34(1).

THE MAGISTRATE ON SENTENCE

- [15] It is certainly so that the Magistrate dealt with sentence shortly. He did however make mention of the fundamental trilogy relevant to sentencing and dealt with this. He concluded that Appellant acted with gross negligence bordering on recklessness and thus that the only appropriate sentence was one of direct imprisonment.
- [16] There was certainly no mention of other sentencing options such as correctional supervision, and there was no report obtained from a Correctional Supervision Officer or expert, and no pre-sentencing report of any kind.
- [17] In argument Appellant's attorney, as to sentence, made no mention at all of correctional supervision concentrating solely on a fine with wholly suspended sentence.
- [18] The defence agreed apparently with the Magistrate that there was no need to lead evidence on suspension of sentence.
- [19] The prosecution extraordinarily did not demure apparently supporting a sentence of a fine with wholly suspended sentence and no licence suspension. Clearly as appears below such a sentence in a matter such as this would have been wholly inappropriate[3].
- [20] The Magistrate's reasons for sentence must be considered in the light hereof.
- [21] In the result it seems to me that notwithstanding the absence of any evidence or reports relevant to correctional supervision (and no mention thereof by the defence) the Magistrate ought nevertheless to have raised and considered all possible and appropriate sentence alternatives, including correctional supervision, and if appropriate called for reports from a correctional supervision officer and sentencing report. He should have considered a possible sentence in terms of Section 276(1)(i) of the CPA.
- [22] Section 276(1)(h) and (i) of the CPA were introduced as sentencing options by Act 122 of 1991 as either immediate correctional supervision or a sentence of imprisonment from which the Commissioner of Correctional Services can place the prisoner under correctional supervision.

The introduction brought into effect useful sentencing options between a set term of imprisonment and non-custodial sentences.

A sentence under section 276(1)(i) can be appropriate for traffic offences with reckless conduct or conduct with a high degree of blameworthiness. *S v Kibido* [4]. This enables the court to impose a term of direct imprisonment but still create the possibility of early release under supervision.

[23] As pointed out above, sentencing is within the discretion of the trial court, the court of appeal will only interfere if there is a clear misdirection on the part of the trial court or the sentence is shockingly severe[5].

[24] In *S v Pillay*

[6] the nature and the extent of misdirection was explained as follows:

“...a 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 a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.”

[25] I accept that the need to reflect the concerns of the community about the rate of fatal collisions on the roads includes avoiding undue leniency in punishing drivers who are negligent or reckless. For many years however, it has been accepted, though not as an inflexible rule, that in the absence of recklessness or some other high degree of negligence an unsuspended sentence of imprisonment, without the option of a fine, should not be imposed on a first offender.

[26] Of considerable importance is the judgment in *S v Nyathi* [7] in which it is emphasised that, before a court can find an accused has been guilty of such a high degree of negligence as to merit

imprisonment, it must first carefully assess the evidence and arrive at an accurate conclusion as to what occurred. The Supreme

Court of Appeal, after careful discussion of the case law, emphasised the gravity of the problem of death arising out of serious misconduct on the roads, and provided a useful indication of the pertinent sentencing factors which apply to the situation. I also accept that the court must emphasise the sanctity of human life, though the magnitude of the tragedy resulting from negligence should never be allowed to obscure the rue nature of the accused's crime or culpability[8].

[27] It is relevant to refer to the examples set out in *Nyathi* [9] as providing a general guide in “translating degrees of negligence into years in custody”.

“[16] The best starting point is sentences for culpable homicide in serious road accident cases confirmed or imposed by this Court in the last ten years. In S v Greyling 1990

(1) SACR 49 (A) a 19-year-old who took a corner too fast collided with a concrete wall, killing four of five young women who were being conveyed on the back of his pick-up. His sentence of five years' imprisonment of which one year was suspended was on appeal changed to one of 12 months' imprisonment. The Court reaffirmed the approach that in cases of gross negligence imprisonment even for a first offender may be indicated. The accused in *S v Keulder* 1994

- (1) SACR 91 (A) was an alcoholic who was convicted of culpable homicide committed while driving in a heavily intoxicated condition. His sentence of two years' imprisonment was set aside and the matter remitted to the trial court to consider the imposition of a sentence of correctional supervision. Having regard to the fact the appellant had two previous convictions for road related alcohol offences his personal circumstances obviously weighed heavily with the Appeal Court.

[17] The appellant in *S v Cunningham* 1996

- (1) SACR 631 (A) who collided on his wrong side of the road with two cyclists in an intersection abandoned his appeal against his sentence of three years' correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 and two years' imprisonment suspended for four years. The Court remarked that he was correct in doing so (at 633c). The same year saw the decision in *S v Naicker* 1996
- (2) SACR 557 (A), an appeal against sentence only. The regional magistrate's sentence of two years' imprisonment, confirmed by the Provincial Division, was set aside on appeal and the matter remitted to the trial court for it to consider the imposition of correctional supervision. This Appeal Court disagreed with the stigmatisation as gross negligence of the appellant's conduct in moving at high speed (he had been racing another vehicle) into the slow lane obstructed by a tanker although, the Court observed, he was clearly negligent in failing to keep a proper look-out before moving into the left- hand lane.

[18] In *S v Birkenfield* 2000

- (1) SACR 325 (SCA) the appellant rode his motor cycle very fast and without stopping at an intersection controlled by a stop sign, thereby killing a pedestrian as well as his pillion passenger. In confirming the sentence of five years' imprisonment subject to s 276(1)(i) of the Criminal Procedure Act 55 of 1977 the Court remarked that it was 'well within reasonable limits' (at 329g).

[19] The only decision brought to my attention concerning a head-on collision caused by an appellant's negligent overtaking is *S v Sikhakhane* 1992

- (1) SACR 783 (N). The appellant was found to have been reckless to a high degree. Two passengers in an approaching vehicle were killed and its driver and a motor cyclist seriously injured. A sentence of two years' imprisonment was confirmed on appeal.

[20] *S v Omar* 1993

- (2) SACR 5 (C) was a case where a driver strayed onto the wrong side of the road. Three passengers in the offending vehicle were killed. A sentence of two years' correctional supervision was confirmed on appeal. It appears to have been one of those cases where the driver lost concentration or fell asleep at the wheel. Another case of negligent driving that cost the lives of three people is *S v De Bruin* 1991

- (2) SACR 158 (W). There the appellant was sentenced to four years' imprisonment by the trial court for having recklessly entered an intersection controlled by a traffic light when the light was red against him. He had consumed alcohol before driving and had three previous convictions for driving under the influence of liquor or for driving with a higher than permitted blood alcohol level. Apart from *S v Birkenfield* (where the sentence was subject to s 276(1)(i) of the Criminal Procedure Act) the sentence imposed on De Bruin was the most severe custodial sentence (even after it was reduced by the appeal Court to three years' imprisonment) that I know of for culpable homicide in a road accident context. It must be accepted that his previous convictions counted heavily against him.
- [21] Not much less severe was the sentence imposed on Mr Ngcobo in *S v Ngcobo* 1962 (2) SA 333 (N) for having run into a crowd in a well-lit street, killing four and injuring 24 of them: on appeal one year of the three years' imprisonment was suspended. The gross negligence attributed to him consisted in having driven too fast while not keeping a proper look-out.
- [22] In none of the cases mentioned above has the negligence been as gross and the consequences at the same time as grave as the one we are considering. The appellant's culpability is seriously aggravated by his conscious assumption of the risk of a devastating collision. For that reason, and despite the appellant's favourable personal circumstances, I am not dismayed by the fact that the regional magistrate's sentence is arguably higher than that imposed in any of the above cases. Now that the National Road Traffic Act 93 of 1996 has increased the maximum imprisonment for negligent driving from one year to three and for reckless driving from three years to six it should surprise no one if there is an upward pressure on the custodial penalties imposed for road accident related culpable homicide offences.” [10]
- [28] In *Nyathi* [11] the convicted driver overtook another vehicle on a blind rise against a double barrier line and caused death of six passengers in a minibus taxi. A sentence of five years' imprisonment, of which two were conditionally suspended, was confirmed on appeal.
- [29] As was stated in *S v R*
- [12] it is now possible for a trial court, by way of imposing correctional supervision as a substantive sentence, to impose severe punishment upon even very serious offences without making use of imprisonment (and without thereby sometimes, if not most of the time, destroying whatever good characteristics remain as far as the offender or prisoner is concerned). It is now possible to impose a severe punishment and to serve the interests of the community by imposing a deterrent and strict sentence, other than imprisonment[13].
- [30] *Coopers Motor Law: Hocter Juta*[14] states that for an accused to be under the influence of intoxicating liquor at the time of the collision is regarded by the courts as an aggravating circumstance, but there must be proof of impairment before intoxication is regarded as a factor causing death[15]. *Hocter* [16] also states as follows:

“Wherever appropriate, correctional supervision should be used as a sentencing option. This approach accords with both the severity of this form of punishment, as well as the context of the problem of serious overcrowding in South African prisons. Other cases where the court has deemed correctional supervision to be an appropriate sentence in cases of vehicular culpable homicide include S v Naicker 1996 (2) SACR 557 (A); S v Keulder 1994 (1) SACR 91 (A); and S v Omar 1993 (2) SACR 5 (C). The judgment in Omar provides a helpful example of the approach to be adopted in imposing a sentence of correctional supervision in the circumstances.”

Hocter also emphasises that in determining an appropriate sentence for culpable homicide the court should take into account the punitive effect of a cancellation or suspension of the driver’s licence of the accused[17].

[31] As to degrees of culpability in driving related cases see Nyathi [18]. In Nxumalo[19] Corbett JA said:

“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 norms 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.”

[32] I bear in mind all Appellant’s personal circumstances as set out above and the fact that he is without question a useful member of society, gainfully employed.

ANALYSIS

[33] In my view there can be no doubt that in a matter such as this the Magistrate was duty bound to consider all available and relevant options including Section 276(1)(h) and (i) of the CPA. In failing to do so he misdirected himself entitling us to intervene.

[34] It most certainly appears from the analysis above that there is no doubt that the Magistrate was correct in categorizing Appellant’s conduct as, at least, grossly negligent. To drive as he did in the vicinity of a residential area and seeing two pedestrians about to, and then one entering the road at a clearly marked crossing without making every effort to apply emergency brakes and clearly having failed to keep a proper lookout, was indeed grossly negligent.

[35] On the other hand Appellant was unaffected by the intake of alcohol and is clearly a first offender and useful member of society. He is also clearly truly remorseful.

[36] Of course that the deceased died as a result of Appellant’s negligent conduct is a very serious and notable aggravating fact.

[37] *S v Birkenfield* (supra) is not very different from this matter and a sentence of 5 years' imprisonment in terms of Section 276(1)(i) was confirmed on appeal.

[38] It is also clear that correctional supervision as a substantive sentence is correctly to be regarded as severe punishment even for a serious offence without making use of imprisonment[20].

[39] As set out in *Naicker* [21], *Omar* (supra) and *S v Scholtz* [22] sentences of correctional supervision in terms of Section 276(1)(h) of the CPA are not foreign to the offence of culpable homicide committed whilst driving a motor vehicle, even in the worst-case

scenario. Section 276(1)(i) of the Criminal Procedure Act is also an alternative sentencing option which must be weighed[23].

[40] I am not persuaded that correctional supervision in terms of Section 276(1)(h) of the CPA is necessarily not an appropriate sentence, having regard to all the circumstances of this matter, even in the light of the fact that this is a serious example of culpable homicide arising out of the driving a motor vehicle, in circumstances of

extreme culpability/blameworthiness on the part of Appellant, taking into account, also, the devastating loss of life caused thereby.

[41] I am also however of the view that the provisions of Section 276(1)(i) of the Criminal Procedure Act, as opposed to ordinary direct imprisonment, is potentially an appropriate sentencing option in a matter such as this, which can certainly be described as being an example of the most serious kind of cases of culpable homicide in a driving scenario. I take into account particularly Appellant's personal circumstances and remorse which point to a good chance of rehabilitation and accept that thus rehabilitated he will be a useful member of society. A sentence in terms of Section 276(1)(h) or (i) of the CPA will, whilst demonstrating that culpable homicide of such a degree of culpability deserves a serious and appropriate sentence, take into account the remaining important elements of sentencing and afford Appellant a full opportunity of rehabilitation coupled with a licence suspension as appears hereafter.

[42] I deliberately refrain from expressing a final view on the above, having regard to the order herein, as the Magistrate should have a discretion as to sentence, whether this be Section 276(1)(h) and (i) – though it would seem to me that direct imprisonment outside Section 276(1)(i) would not be appropriate.

[43] In my view, a final decision as to sentence should be taken, by the Magistrate, after consideration of a Correctional Supervision Report, and as to whether this should be in terms of Section 276(1)(h) or (i), and on what terms and conditions, and for what period.

THE LICENCE SUSPENSION ISSUE

- [44] Despite reference to Section 35(1) of the NRTA the Magistrate, as he says in his supplementary reasons, clearly applied Section 34(1)(a). That this is so is borne out by a proper reading of the record.
- [45] Section 34(1) is a discretionary decision to be made in respect of, in this case licence suspension.
- [46] Having regard however to all the facts and circumstances set out above, it seems to me that a suspension is to be considered against all relevant facts and circumstances and be seen as part of an overall sentence when a final decision is taken by the Magistrate thereon.

ORDER

[47] In the result, the following order is made:

A The appeal succeeds as to sentence to the extent set out below:

B

1. The conviction is confirmed.
2. The sentence imposed by the Magistrate and suspension of licence is set aside.
3. The matter is referred back to the Magistrate for reconsideration of sentence in terms of Section 276(1)(h) and (i) of the Criminal Procedure Act 51 of 1977, and of licence suspension in terms of Section 34 of the National Road Traffic Act 93 of 1996.
4. A Correctional Supervision Report is to be obtained urgently and placed before the Magistrate referring to all factors relevant to Section 276(1)(h) and (i) of the Criminal Procedure Act 51 of 1977.
5. The Magistrate is then to re-consider and impose an appropriate sentence, and to consider simultaneously an appropriate decision in terms of Section 34 of the National Road Traffic Act 93 of 1996 seen as part of an overall just and equitable sentence.

M.J. LOWE

JUDGE OF THE HIGH COURT

MNQANDI, AJ:

I agree.

P.N. MNQANDI

JUDGE OF THE HIGH COURT (ACTING)

Obo Appellant: Adv J.R. Koekemoer

Instructed by: McCallum Attorneys, Grahamstown

Obo Respondent: Adv L.W. Sinclair

Instructed by: Director of Public Prosecutions, Grahamstown

[1] 1999 (2) SACR 238 (SCA) at para [10].

[2] 1996 (1) SACR 631 (A).

[3] The Magistrate quite correctly rejected this contention.

[4] 1998 (2) SACR 13 (SCA).

[5] *S v Pieters* 1987 (3) SA 717 (A).

[6] 1977 (4) SA 534 (A) at 535F-G.

[7] 2005 (2) SACR 273 (SCA) at paragraphs [14] – [22].

[8] *S v Ngcobo* 1962

(2) SA 333 (N) at 336-7, *S v Nxumalo* 1982

(3) SA 856 (SCA).

[9] *Supra* at paragraph [15] et seq

[10] *S v Crossberg* [2008] ZASCA 13; 2008

(2) SACR 317 [95] – [100].

[11] *supra*

[12] 1993 (1) SACR 209 (A)

[13] *Nikelo v S* (Hartle J, unreported judgment, Case No.: CA&R214/11 ECD) and *Gouws v S* (Lowe & Bloem JJ, unreported judgment, Case No.: CA10/2015, 26 June 2015, ECD); *S v Mosikili* 2019

(1) SACR 705 (GP); *S v Mapipa* 2010

(1) SACR 151 (ECG).

[14] At C1-12.

[15] *S v Chretien* 1979

(4) SA 871 (D) at 878D.

[16] At C1-12.

[17] *Ngcobo* (*supra*); *Chretien* (*supra*).

[18] At paragraph [12].

[19] (supra) at 861 H

[20] Cf however *S v McGeer* (2019) ZAGPJHC 34.

[21]

[1997] 1 All SA 5 (A).

[22] 2006 (1) SACR 442 (EC).

[23] See particularly *Birkenfield* (supra), *S v Mapipa* 2010

(1) SACR 151 (EGG), *S v Langeveldt* 2008 JDR 0564 (SCA).

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