

SOUTH AFRICA / JUDGMENT

Zulu v S (189/2011) [2012]

ZAKZPHC 26 (4 May 2012)

[2012] ZAKZPHC 26

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Koen, Mjoli

CASE / FILE NUMBER

189/2011

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IN THE KWAZULU-NATAL HIGH COURT: PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. 189/2011

In the matter between:

PRINCE SIFISO ZULUAPPELLANT

And

THE STATERESPONDENT

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] The appellant was charged in the Regional Court with the following counts:

1. Culpable Homicide, in respect of the death of Sidumisile Nonjabulo Mncube;
2. Culpable Homicide, in respect of the death of Hlengiwe Yvonne Dhlamini;
3. Contravening section 63(1) read with sections 1, 63(2), 63(3), 69, 73, 74 and 89 of the Road Traffic Act No 93 of 1996 ('the Act') - Reckless/negligent driving;

4. Contravening section 61(1) read with section 1, 61(4), 61(5), 69, 73, 74 and 89 of the Act – Failing to perform the duties of a driver after the accident, namely failing to immediately stop his vehicle, failing to ascertain the nature and extent of any injuries sustained by any person, failing to render such assistance to the injured person as he may be capable of rendering, and failing to ascertain the nature and extent of any damage sustained;
5. Contravening section 4(2) read with section 1, 69, 73, 74 and 89 of the Act – Operating an unlicensed /unregistered vehicle;
6. Contravening Regulation 35(6)(a) read with Regulation 1 of the National Road Traffic Regulations 2000 as promulgated by section 75 and further read with section 1, 69, 70, 74 and 89 of the Act – Displaying an incorrect license number not applicable to vehicle NUR 392629;
7. Contravening section 65 (2) read with sections 1, 65(3), 65(4), 69, 73, 74 and 89 of the Act – Driving a motor vehicle whilst the blood alcohol concentration exceeded 0,05 grams per 100 ml.

Counts 1 to 6 were all alleged to have been committed at or near NMR Avenue, Durban on 29 March 2008. Count 7 was alleged to have been committed on 8 July 2006 on the Western Freeway in the Regional Division of KwaZulu-Natal. Although counts 3 to 7 identify the motor vehicle involved, variously as having registration numbers NUR39629, NUR 39269 and NUR 392629, nothing turns on this discrepancy as there is no dispute that the alleged offences all pertain to the same vehicle, a BMW X5 (hereinafter simply referred to as ‘the X5’) owned by the appellant.

- [2] The Appellant pleaded guilty to count 5 and 6, that is that on 29 March 2008 he unlawfully operated the X5 on a public road, namely NMR Avenue within the Regional Division of KwaZulu-Natal whilst such vehicle was not registered and licensed and that he did on the same day and at the same place ‘drive’ the X5 while displaying a licensed number which was not applicable to that vehicle. His plea of guilty to these counts was dealt with in terms of section 112(1)(a) of the Criminal Procedure Act 51 of 1977. Although having admitted to ‘operate’ and ‘drive’ his vehicle on NMR Avenue on 29 May 2008, he pleaded not guilty to counts 1, 2, 3, and 4, and in his plea explanation, which was confirmed by him, advanced as his defence to those counts that he was not the driver of the X5 at the time of the accident? He pleaded that the name and details of the driver of his vehicle at the time of the accident had been disclosed to the investigating officer. The appellant also pleaded not guilty to count 7, his defence being that due to an alleged discrepancy in the seal numbers appended to the blood sample taken from the appellant and that analysed in the laboratory, the blood analysis resulting in a reading of 0,15 grams per 100 milliliters, in excess of that allowed by law, was not proved to be an analysis of blood taken from the appellant.
- [3] After hearing evidence, the court a quo convicted the appellant of all seven counts. The sentences imposed were as follows:

- (a) Counts 1, 2 and 3 were treated as one for the purpose of sentence and the appellant was sentenced to five (5) years' imprisonment, two (2) years' of which was suspended for three years' on condition that he was not convicted of reckless or negligent driving or culpable homicide committed during the period of suspension;
- (b) On count 4 he was sentenced to pay a fine of R3000,00 or in default to undergo one (1) years' imprisonment;
- (c) On counts 5 and 6 he was sentenced to pay a fine of R1 500,00 or three (3) months imprisonment on each count;
- (d) On count 7 he was sentenced to pay a fine of R3 000,00 or in default to undergo one (1) years' imprisonment.

It was directed that the sentences on counts 4, 5, 6 and 7 run concurrently with the sentence on counts 1, 2 and 3.

- [4] The appellant appeals with the leave of the trial court against his convictions on counts 1 to 4 and 7, and the sentences of these counts.

THE FACTS THAT ARE COMMON CAUSE OR NOT IN DISPUTE PROVING THE COMMISSION OF THE OFFENCES:

- [5] The learned Magistrate in the court a quo correctly recorded that the following facts are either common cause or not in dispute:
- (a) That a horrific accident occurred at the intersection of NMR Avenue and Somtsue Road in the evening of 29 March 2008 at approximately 21h00;
 - (b) That the X5 collided with a Colt Mitsubishi double cab bakkie;
 - (c) That the X5 vehicle belonged to the appellant;
 - (d) That the driver of the appellant's vehicle abandoned the vehicle and the scene and absconded from the scene of the accident;
 - (e) That two occupants of the colt Mitsubishi double cab were killed and several others injured as a result of the collision;
 - (f) That the X5 was travelling south upon NMR Avenue at a high speed, and had disregarded the red robot at the intersection and collided with the Colt Mitsubishi vehicle which was turning into Somtsue Road;
 - (g) That the two deceased died as a direct result of the injuries they sustained during the accident; and
 - (h) With regard to count 7 that the appellant was stopped at a road block on the western freeway whilst driving his vehicle, that blood was drawn from him and sent for an analysis of the alcohol content.

THE ISSUES BEFORE THE COURT A QUO:

[6] In the light of the appellant's plea explanation, the trial proceeded on the following issues:

- (a) Whether the appellant was the driver of the X5 on NMR Avenue on 29 March 2008 when it was involved in a collision;
- (b) Whether the blood sample analyzed was proved to be that taken from the the appellant.

WAS THE BLOOD SPECIMEN ANALYZED, THE BLOOD SPECIMEN TAKEN FROM THE APPELLANT?:

- [7] The evidence established that after having been stopped on the western freeway on 8 July 2006, a blood specimen was taken from the appellant by Sister Ogle within two hours of him being stopped. The regularity of obtaining the specimen was not impeached in any way. She opened a blood kit sealed and marked BA/A289602 from which she took a vacu-tainer which would contain the blood. Once she had taken the blood specimen she put it back in the kit and sealed it with seal number BA/A289603 which had come with the kit. The evidence established that a blood specimen sealed with number BA/A289603 was received by Ms Erna Hofmayer under cover of a letter with CAS no 144/07/06. It was analyzed by her and produced a finding that the concentration of alcohol in the specimen of blood, was 0.15 grams per hundred milliliters, thus exceeding the permissible legal limit of 0,05 grams per 100 milliliters.
- [8] The appellant's contention that the blood specimen analyzed was not that taken from him, was not pursued with great vigour by Mr Masuku on behalf of the appellant and, not surprisingly so. Something was sought to be made of a hypothetical situation should a specimen of blood be received reflecting a seal number BA/A289602/3. The uncontroverted evidence of Sister Ogle was that this would still refer to the same specimen. This evidence was not contradicted by the appellant.
- [9] In any event the specimen respectively taken by Sister Ogle and analyzed in the laboratory, were not only identified by the serial number, but also an Umbilo CAS number 144/07/06, which is also reflected on the results of the specimen analyzed.
- [10] The technical defence raised by the appellant regarding the identification of the blood specimen, was without any merit whatsoever. I am satisfied that the court a quo was correct in concluding that the State had proved beyond a reasonable doubt that the specimen analyzed was the blood specimen obtained from the appellant. The appeal against the conviction of the appellant on count 7 accordingly falls to be dismissed.

WAS THE APPELLANT THE DRIVER OF THE X5 MOTOR VEHICLE AT ALL TIMES MATERIAL TO COUNTS 1, 2, 3 AND 4 ON 29 MARCH 2008 ON NMR AVENUE?:

- [11] Counts 1 to 4 all involve the driving of the X5 motor vehicle for the purposes of the common law offence of culpable homicide (counts 1 and 2), or for the purposes of the Act (counts 3 and 4).
- [12] The State bears the onus of proving beyond a reasonable doubt that the appellant was the driver of this vehicle.
- [13] In order to discharge this onus, the State relied on:
- (a) The presumption contained in section 73 of the Act;
 - (b) Circumstantial evidence.
- [14] The circumstantial evidence relevant to whether the appellant was the driver of the X5, was largely either not disputed or not contradicted. The defence sought to make much of what the appellant had allegedly reported to various witnesses called by the state regarding who the driver of his vehicle allegedly had been at the relevant time, as well as responses given by these witnesses when confronted in cross-examination with the version of the accused that the driver at the time was one Bongumusa Gumede.¹ In some instances these witnesses candidly admitted when confronted with the version of the appellant and when pressed on the issue, that they would not be in a position to dispute such version. Putting the version of an accused to state witnesses, is of course one of the fundamental requirements of cross-examination of state witnesses, namely that they should be confronted with the accused's version, so that they may comment thereon, either concede it, indicate that they cannot comment thereon, or dispute such version. In the absence of a concession or admission of the correctness of the version of an accused, thus making the version of the accused the evidence of a particular witness, propositions as to what the accused will say or advance as part of his case, is not evidence, unless proved by the testimony of the accused or witnesses he may call. What the accused reported to state witnesses, when testified to by them, generally remains inadmissible as hearsay evidence, or should he give evidence, as a previous consistent statement (which would only be admissible in exceptional circumstances), but it is not evidence per se.
- [15] The question more correctly in regard to the circumstantial evidence adduced, is whether the court a quo was justified in drawing the inferences it did. This aspect will be considered when considering the evidence in more detail below.

THE PRESUMPTION IN SECTION 73 OF THE ACT:

- [16] Section 73 (1) of the Act provides:

‘Where in any prosecution in terms of the common law relating to the driving of a motor vehicle on a public road or in terms of this Act, it is necessary to prove who was the driver of such vehicle, it shall be presumed, in the absence of evidence to the contrary, that such vehicle was driven by the owner thereof.’

- [17] The onus remained throughout on the state to prove the guilt of the appellant beyond a reasonable doubt. Accordingly, it would be sufficient for the appellant to rebut the presumption, if on the probabilities the appellant as the owner of the vehicle can show on a conspectus of the evidence that he was not the driver.² But that is a question to be answered on a conspectus of and an evaluation of all the admissible and credible evidence adduced before the court.
- [18] The appellant has adopted a novel approach to his obligations arising from the operation of the presumption. He argues that his denial of being the driver communicated extra curially to state witnesses on a number of occasions, as testified to by them, including the evidence that the appellant had initially advised them that Mr Dumisani Ngcobo and subsequently Mr Bongumusa Gumede was the driver at the relevant time, constitutes 'evidence' that the appellant as owner was not the driver, that such evidence was none the less ignored by the State, that it meant that the court was faced with two irreconcilable versions on 'the evidence', that the presumption accordingly could not apply, and that it remained for the state to prove its case against the appellant, without the assistance of the presumption, beyond a reasonable doubt, which it failed to do.
- [19] The fundamental flaw in the appellant's aforesaid submission lies in treating the evidence of state witnesses as to what was reported to them by the appellant or others, such as Mr Bongumusa Gumede and what the appellant said to his attorney, Mr Kafu, as admissible and credible evidence, which it is not.³
- [20] As indicated earlier, what the appellant reported to state witnesses as to who was the driver, or as to what Mr Bongumusa Gumede might have reported to the investigating officer, is inadmissible, or at the very least of insufficient probative value, in the absence of the appellant and/or Mr Bongumusa Gumede testifying, to even remotely rebut the presumption on a balance of probabilities.
- [21] The appellant never testified and what he was alleged to have reported to the state witnesses as to the true identity of the driver of his vehicle at the time, could never be tested in cross-examination. His identification of the driver, as reported to the state witnesses in any event varied from him initially having identified Mr Dumisani Ngcobo of Pietermaritzburg,⁴ to the appellant subsequently reporting to the investigating officer that the driver was in fact Mr Bongumusa Gumede. Mr Bongumusa Gumede never testified, and when confronted by the investigating officer was not prepared to admit in his warning statement that he was the driver of the vehicle. His warning statement simply recorded that he would 'speak in court.' Such an approach is understandable in the light of Mr Bongumusa Gumede's right not to incriminate himself, but it then made it all the more indispensable for the appellant to testify.
- [22] Apart from not being established by credible admissible evidence of sufficient probative value, these versions of the appellant as to the identity of the driver of the X5 are themselves inherently contradictory, mutually exclusive, the contradiction never explained by the

appellant, and accordingly patently insufficient to constitute a rebuttal of the operation of the presumption. Mr Bongumusa Gumede's statement to Mr Quinton Herbst, the insurance assessor, even if taken as extra curial admission⁵ to which Mr Herbst testified, is not conclusive. At the end of the day its probative value must be assessed on a conspectus of all the evidence. Mr Herbst stated that he did not believe Mr Bongumusa Gumede, and weighed against all the evidence neither do I. Similar considerations apply to his alleged visit to the police station accompanied by his attorney Mr Kafu. Mr Kafu simply acts on his client's instructions and cannot vouch for the truthfulness or otherwise of his client's version. It might seem improbable that Mr Bongumusa Gumede would admit or would want to admit to being the driver of the vehicle which killed two persons, even extra curially, if it was not in fact the case. But none of his statements constitute admissible incriminating evidence against him. However, in the light of all the evidence and specifically the failure of the appellant and Mr Bongumusa Gumede to testify and the extremely poor, if not pathetic evidence of Mr Xulu, the discrepancies in the version of the appellant, as it has varied from time to time, and the cogent circumstantial evidence of the state witnesses, which I will deal with further below, I have absolutely no hesitation in rejecting the appellant's version, such as it may be sought to be advanced through the testimony of other witnesses, as false beyond a reasonable doubt.

[23] The appellant's ultimate version that Mr Bongumusa Gumede was the driver, was a poorly and ill-conceived strategy to mislead the court and defeat the administration of justice. It is probably deserving of him and his cohorts possibly being charged with defeating the ends of justice and possibly perjury. It was a strategy designed to mislead, but devised in an extremely amateurish manner. That it could ever have been thought to have any prospect of success was to insult the intelligence of the learned magistrate, who, to his credit, was not fooled by this deceit.

[24] In the light of my conclusions on the operation of the presumption, the guilt of the appellant is established on counts 1 to

4. It is strictly not necessary to undertake any further analysis of the evidence.

[25] I however intend referring briefly to some aspects of the evidence as, even in the absence of the presumption, the evidence adduced by the state on the identification of the appellant as the driver, which evidence was largely unchallenged, irresistibly point as the only logical and reasonable inference to the appellant being the driver of his vehicle at the relevant time.

THE EVIDENCE:

[26] Captain Spilsbury, a metro policeman was at the intersection where the accident occurred. He immediately stopped and proceeded to contact his control room on his radio. Whilst talking (no estimation as to how long after the impact occurred this was) he saw two men run past his vehicle coming from the side of the accident scene. One was dressed in a white shirt and had dreadlocks. The other was wearing khaki clothes. When he later discovered that the driver of the X5 had fled the scene, he informed the other police officers about the

two males he had seen running from the scene.

- [27] Later that same evening Captain Spilsbury was called to Durban Central Police Station. As he walked towards the charge office he saw the appellant sitting outside the charge office and recognized him as one of the men who ran past his vehicle at the scene. The appellant was wearing khaki clothes resembling the clothes worn by one of the men he had seen fleeing. He enquired from the appellant whether he was the driver of the X5. The appellant denied he had been the driver.
- [28] Captain Spilsbury returned from inside the police station with Inspector Pillay, who asked him if the appellant was one of the persons he had seen fleeing the scene. Captain Spilsbury was not 100 per cent certain but said that the clothing was the same. Captain Spilsbury testified that while they were talking to the appellant, the appellant kept on rubbing his chest and arms.
- [29] Mr Tristan Manning, a paramedic was at a filling station about 20 meters away from the scene of the accident, when the collision occurred. He immediately rushed to the scene. Upon arriving he saw a person standing outside the X5 next to the front passenger door. This person, who was talking on his cell phone, was wearing a white shirt and had dreadlocks. He observed the driver of the X5 still sitting on the driver's seat behind the steering wheel. He turned his immediate attention to the injured persons scattered all over the road. Whilst attending to the injured he noticed the male with dreadlocks running away from the scene.
- [30] Inspector Subramoney Pillay attended the scene and confirmed that the driver of the X5 was not at the scene. While opening a criminal docket at the Durban Central Police Station, Captain Naicker informed him that he had brought the appellant to the police station. Upon questioning, the appellant confirmed that the X5 belonged to him, but denied being the driver at the time. When asked for particulars of the driver, the appellant replied that it was Mr Dumisani Ngcobo, who lives somewhere in Pietermaritzburg. When asked for Mr Ngcobo's contact number, the appellant said he could not recall the number. The appellant tried to phone Mr Ngcobo on his cell phone but was unsuccessful. The appellant further explained that he had been at Musgrave having a party and was too drunk to drive and then took a taxi to his home in the Point area. The appellant could not provide the name of the taxi

company that transported him. He observed that the appellant had scratch marks on his hands and kept his hands across his chest

clenching it, as if he was in pain. When he inquired whether the appellant was feeling okay, the appellant replied that he had had a wild party. He noticed that the appellant was wearing a pair of long khaki pants and a short sleeved khaki shirt. Captain Spilsbury later confirmed to him that he was not 100 per cent sure that the appellant was the person that he had seen fleeing the scene of the accident, but that the appellant's clothing matched those worn by the person fleeing the scene.

[31] Captain Casey Naicker of the Durban Metro Police attended the scene. Having been given the description of the two males who fled the scene by Captain Spilsbury, he circulated that information to the dog unit to search for the suspects. The then MEC for Transport and Security, Mr Cele, then arrived at the scene. At some stage Mr Cele left the scene to return later with the appellant, who he handed over to Captain Naicker to take to the Durban Police Station. The appellant told them that he had been at his home sleeping when the Minister called him. He further stated that the person who was driving his vehicle was a friend who was employed by the Provincial Government working in Pietermaritzburg. He told Captain Naicker that he had tried to phone this friend but the friend did not answer. The appellant did not give the name of the driver to him. He took the appellant to the police station where he handed him over to Inspector Pillay who then asked him to call Captain Spilsbury to come to the police station which he did. He did not discuss the matter with Captain Spilsbury but only asked him when he came to the police station, to ask for Inspector Pillay.

[32] The investigating officer, Inspector Ndlovu testified that on 8 April 2008 he and senior superintendent Ntshinga, who previously also investigated the matter but who has since passed away, met with the appellant. After having been warned of his rights, the appellant informed them that Mr Dumisani Ngcobo to whom he had given his motor vehicle keys was not the one who was driving at the time of the accident, but that it was Mr Bongomusa Gumede. He explained his movement on the day and said that he had returned home and was playing music at his home, when he received a call from Mr Cele informing him that his X5 had been involved in an accident. Mr Cele collected him and took him to the scene of the accident. He could not give details of the taxi he took, except that it was white in colour. During the meeting the appellant excused himself for a short while and thereafter returned with Mr

Bongomusa Gumede in the company of his attorney. Mr Gumede was asked by the police whether he wanted to say anything as it was alleged that he was the driver of the vehicle. Mr Gumede said that there was nothing and that he would talk in court. Mr Gumede then left. As they did not believe the appellant and did not have any evidence against Mr Gumede they requested the appellant to show them Mr Ngcobo's residence. He failed to do so.

[33] Mr Quinton Herbst, the insurance assessor, testified that the appellant came to meet him with Mr Bongomusa Gumede. Mr Gumede told him that after they had drinks at Musgrave, he then went to Florida road in the appellant's X5, the keys to which had been handed to him, to see a friend. The appellant had left Musgrave with a Mr Ntshinga. After being involved in the accident he got out and simply walked away. The appellant confirmed this explanation by Mr Gumede to Mr Herbst. The appellant never mentioned the name of Mr Dumisani Ngcobo to Mr Herbst.

- [34] The State adduced evidence of certain cell phone records relating to the cell number used by the appellant. Much criticism was leveled at the cell phone records. The cell phone records clearly are not conclusive on their own. Although open to criticism they do place the handset which contained the sim-card allocated to the cell phone number of the appellant, in the general area of the accident in Durban.
- [35] Neither the appellant, Mr Bongomusa Gumede nor Mr Dumisani Ngcobo (if such a person in fact exists) testified. The accused called a Mr Xulu who testified that he, the appellant, Mr Bongomusa Gumede and another person called Sifiso met at Musgrave at a venue called Vestage at about 18h30 to 19h00 on 29 March 2008. They had planned to meet some other friends in Umhlanga Rocks. The appellant declined to go with them but lent his car to some of them to travel to Umhlanga. He stated that if he recalls well, the appellant gave the keys to Mr Gumede, although he did not actually see the appellant give the keys to Mr Gumede.
- [36] The defence also called a Mr Gazu, who sought to impeach the evidence of Captain Spilsbury that he had never seen the appellant prior to that day, and a Mr John Ullyett in respect of the cell phone records.

DISCUSSION OF THE MERITS:

- [37] The learned Magistrate conducted a careful evaluation of the evidence. He concluded that the state witnesses were impressive and corroborated each other on every material respect, that they were forthright with answers under cross-examination and did not contradict each other in any material respects or aspects. The learned Magistrate concluded that the evidence of Captain Spilsbury and Inspector Pillay and that of Mr Manning, when considered together with the other evidence in the matter pointed to the appellant as being the driver of his vehicle on the evening in question. I do not repeat the learned Magistrate's reasons in this judgment in detail. I have considered them carefully and find his reasoning convincing.
- [38] The only possible criticism that could be leveled at the evidence of the state relates to timing. Captain Spilsbury had testified that when the accident occurred he communicated on the radio in his vehicle for assistance, when he saw the two persons fleeing the scene. The evidence of Mr Manning was that upon the accident occurring he immediately proceeded to the scene 20 meters away, noticed the one person with a white shirt and dreadlocks standing outside the passenger door and the driver still behind the wheel of the vehicle. The former was talking on his cell phone. He later noticed the person with the white shirt fleeing the scene. The criticism was leveled at the fact that Captain Spilsbury could not have seen the two persons, with the descriptions he gave of them, fleeing the scene immediately after the accident, as, according to the evidence of Mr Manning the one with the white shirt was still busy on his cell phone and the driver was still seated behind the wheel immediately after the accident. It was argued

that this amounts to a contradiction in their evidence, tainting the reliability of particularly the evidence of Captain Spilsbury.

[39] No questions were posed on the time that elapsed from the time that the collision occurred until Captain Spilsbury had raised his control room on his radio, looked up and saw the two persons fleeing the scene, on the one hand, or Mr Manning moving immediately to the scene 20 meters away from where he was and noticing the passenger having disembarked from the X5 and standing next to the passenger door talking on his cell phone while the driver was still behind the wheel. It being a moving scene, the two versions are not irreconcilable, that testified to by Mr Manning probably being from a different aspect or view, probably relating to what occurred the earlier in time while Captain Spilsbury was busy on his radio establishing radio contact with his control room. It is also significant that Mr Manning's concentration would, as a paramedic, be focused on assisting the injured scattered all over the road. His attention would not have been focused on the people he saw at the X5, whom he probably only noticed as a snap shot and in passing. He could only testify to seeing the person with the white shirt and dreadlocks fleeing the scene, his attention by then clearly having moved from whoever was at the vehicle to the injured. The arguments advanced by the defence in

this regard do not detract from the overall credibility of the state witnesses, particularly that of Captain Spilsbury.

[40] The learned Magistrate had the opportunity of observing the demeanor of the witnesses. He explained his preference for accepting the evidence of the state witnesses and rejecting that of the defence where in conflict, in a well reasoned judgment. The appellant has not demonstrated that the learned Magistrate misdirected himself in any respect. Indeed, if regard is had to the overwhelming probabilities arising from the evidence taken alone, and even more so when read with presumption, the case against the appellant is overwhelming. The version of the appellant was riddled by contradictions. I agree with the learned Magistrate's conclusion that the explanation tendered by the appellant to the police was simply untrue. The first defence witness, Mr Xulu was a poor witness whose evidence was riddled with contradictions and improbabilities, his evidence at times also being in conflict with the appellant's version. These were highlighted in the judgment of the learned magistrate and do not require repeating herein.

[41] No basis has been advanced to interfere with the judgment of the learned Magistrate.

[42] Accordingly, it follows that the appeal against conviction should be dismissed.

SENTENCE:

[43] As regards the sentence, no basis has been advanced to suggest that the learned Magistrate misdirected himself in any way. The sentences imposed also do not induce a sense of shock and are entirely appropriate, if not lenient. The learned Magistrate had regard to all the relevant considerations. An aggravating factor is that the appellant has shown no remorse.

He has persistently refused to accept that he was the driver of his motor vehicle on the night in question, has presented false evidence before the court a quo, and, as is apparent from the pre-sentence reports that were obtained, persisted in denying responsibility.

Accordingly, there is no basis on which this court may interfere with the sentences that were imposed. In reaching that conclusion, I am very alive to the fact that the sentence imposed in respect of counts 1 to 3, entails a period of incarceration. This was also considered by the learned Magistrate and reflected upon very carefully. Prior to being involved in the collision, the appellant had consumed alcohol. Although not a previous conviction, the appellant's conviction on count 7 shows that he has no hesitation in consuming alcohol and then taking to the road thereafter. This is a needless and reckless attitude to the safety of other road users. It requires censure in strong terms. The learned Magistrate correctly considered that a period of incarceration was called for and more than suitably modified the harshness of any such sentence by providing that two (2) years of the five (5) year period of imprisonment would be suspended for three (3) years, to act as a deterrent to the appellant.

[44] In the result, the appeal against sentence also falls to be dismissed.

ORDER:

[45] The appeal against conviction and sentence is dismissed. The appellant's conviction on counts 1 to 7 and the sentences imposed by the court a quo are confirmed.

KOEN J

MJOLI AJ

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RESPONDENT'S ATTORNEYS: STATE ATTORNEY?

1During the trial the appellant's version was that the driver of the X5 had been Bongumusa Gumede. Shortly after the accident he had reported that the driver was Dumisani Ngcobo of Pietermaritzburg, who he purportedly tried to contact on his cell phone on the evening of the accident. Subsequent to the initial report and before the trial commenced, he changed his version and told the investigating officer that the driver in fact had been Bongumusa Gumede. Neither the appellant nor Mr Bongumusa Gumede testified during the trial.

2.' see S v Meaker 1998 (2) SACR 73 (W) referred to by the Constitutional Court in S v Manamela and Another (Director General of Justice intervening) 2000 (3) SA 1 (CC) where the presumption was described as '... an eminently reasonable device, which accords with practical common sense and in its application produces equitable results'

3Even if it was possibly admissible on some exceptional basis (such as the exceptions created in the Law of Evidence Amendment Act 45 of 1988 which was not advanced by the appellant) the appellant's reports to state witnesses would not be of sufficient probative

value as to constitute proof on a balance of probabilities that he was not the driver.

4The appellant's initial version had been that Mr Dumisani Ngcobo had taken his vehicle from where they had been drinking at Musgrave Road to travel to Umhlanga Rocks. The drinking at Musgrave Road had also on the appellant's version been attended by Mr Xulu who testified on behalf of the appellant. Significantly Mr Xulu testified that he did not even know a Mr Dumisani Ngcobo.

5which it really cannot be as it is exculpatory in nature and substance.

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