REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case Number : 448 / 04

In the matter between

S NYATHI **APPELLANT**

and

THE STATE **RESPONDENT**

Coram : **ZULMAN, CONRADIE and JAFTA JJA**

Date of hearing : **11 MAY 2005**

Date of delivery : **23 MAY 2005**

SUMMARY

Six charges of culpable homicide arising from negligent driving of a motor vehicle – driver attempting to overtake in defiance of double barrier line prohibiting overtaking in either direction – negligence found to have been gross – sentence of five years' imprisonment of which two years suspended upheld on appeal.

J U D G M E N T

CONRADIE JA

[1] On 7 December 1994 on the national road between Cathcart and Stutterheim a collision occurred between a sedan driven by the appellant towards Cathcart and a minibus taxi driven towards Stutterheim. The impact caused the minibus to overturn, killing six of its occupants. Other passengers were injured. The incident led to the appellant's facing six charges of culpable homicide in the regional court, alternatively a charge of reckless or negligent driving or, as a further alternative, driving under the influence of intoxicating liquor. He was convicted of culpable homicide and sentenced to five years' imprisonment, two of which were suspended for five years. His driver's licence was suspended for four years.

[2] An appeal to the Eastern Cape division of the high court was dismissed. The appellant was nevertheless granted leave by that court to appeal against the conviction and sentence.

[3] The crucial issue in the appeal is the correctness of the regional magistrate's finding that the collision occurred on the appellant's incorrect side of the road. Former police sergeant Holloway was the draughtsman sent out to record evidence on the accident scene. The salient feature recorded by him was a yellow chalked cross enclosed in a circle marked on the road surface. It was located 2.2 metres from the centre white line within the lane in which the

minibus travelled from Cathcart to Stutterheim. This was where he was told the impact between the two vehicles had occurred. For better visibility constable Kuhn was asked to stand on the yellow cross and a photograph in the record depicts him there.

[4] Holloway said that he was taught not to accept unquestioningly the correctness of a point of collision but to judge by his own observations whether the point appeared to be correct. He did so on this occasion and came to the conclusion that the yellow cross accurately identified the point of impact. He observed that the right front tyre of the appellant's sedan had been detached by the collision. Left exposed by the removal of the tyre, the wheel rim made a mark on the tarred road surface from the indicated point of collision to where the sedan left the road to come to rest on the grass verge. The presence of bits of road gravel lying on the surface showed that the marks had been freshly made. On the other side of the yellow cross were marks that appeared to Holloway to have been made by the minibus taxi. All marks on the road surface emanated from the spot pointed out to him and all the collision debris near the collision site lay on the side of the road where the yellow cross was.

[5] Constable Kuhn was the one who told Holloway that the yellow cross represented the point of impact. It had been marked by captain, then sergeant, Zondeka who testified that the spot had been pointed out to him by the appellant the only driver who could do so, the driver of the minibus having been killed.

[6] The appellant admitted that he had indicated a point of collision but maintained that it was on his correct side of the road and that he had shown it to another policeman who had marked the spot in the same way as the Zondeka spot had been marked. The appellant's version found no support from anyone. Holloway was firm that the cross on which Kuhn stood, was the only 'crayon' marking on the road and Zondeka maintained throughout that the spot that he had marked was the one pointed out to him by the appellant.

[7] The conspiracy theory put up by the appellant, that Zondeka was falsely implicating him and had gone so far as to persuade eye witnesses to perjure themselves was not accepted by the trial court. Zondeka showed the appellant nothing but kindness on the day in question, going to extraordinary lengths to help him secure money to pay the bail that had been set for him.

[8] The State does not rely on the physical evidence alone. It called three eye witnesses, all of them passengers in the minibus taxi. There were the usual discrepancies in their evidence, but they were clear on one thing: the sedan that collided with the minibus, in attempting an overtaking manoeuvre, suddenly appeared from behind another vehicle and drove into the bus on the latter's correct side of the road.

[9] There is no reason to doubt the evidence of these three witnesses. The regional magistrate believed them and trusted their recollection and

observations ; no reason appears from the record suggesting that he should not have done so. The eye witnesses powerfully corroborate Holloway's evidence and his evidence in turn renders theirs entirely convincing. The appeal against the conviction cannot succeed.

[10] The appeal against the sentence imposed by the magistrate was dismissed by the court *a quo*. Its conclusion was that there had been no material misdirection vitiating the sentence. I agree that no misdirection has been shown. I also agree that the sentence was not so severe that no reasonable court would have imposed it.

[11] The collision occurred on a blind rise where a double barrier line prohibits overtaking by vehicles proceeding either to or from Cathcart. It was common cause at the trial that forward visibility was restricted. The appellant's case was that he would not have thought of overtaking because he could not see ahead well enough. The fact that the appellant did overtake proclaims grave negligence on his part. Overtaking on a barrier line, and especially on a double barrier line where a motorist should realise that his inability to observe approaching traffic is compounded by the inability of traffic in the opposite direction to see him is probably the most inexcusably dangerous thing a road user can do.

[12] It is hard to conceive of an instance of road-related conduct that could be considered more dangerous. A driver under the influence of intoxicating liquor who ventures onto the wrong side of the road in similar circumstances might, I suppose, be considered more blameworthy: his condition would prevent him from seizing what little change there might be of avoiding a vehicle coming towards him. Other than that, I am at a loss. Deliberately ignoring a red traffic light is of course very dangerous but unless the intersection is obscured, a vehicle or a pedestrian lawfully crossing the intersection at least has an opportunity of observing the offending vehicle approach and of judging whether it is likely to obey the red traffic signal or not.

[13] Road accidents with calamitous consequences are frequently caused by inadvertence, often momentary.[1] Overtaking on a double barrier line is not inadvertence. It is a conscious decision to execute a manoeuvre that involves taking a fearfully high risk.

[14] In *S v Nxumalo* 1982 (3) SA 856 (SCA) the court approved a passage from *R v Barnardo* 1960 (3) SA 552 (A) (at 557D-E) where the court held that although no greater moral blameworthiness arises from the fact that a negligent act caused death, the punishment should acknowledge the sanctity of human

[1] *Dube v S* [2002] JOL (Judgments on Line) 9645 (T), a case mentioned by the regional magistrate, is an example. The appellant was the driver of a bus involved in an accident on a mountain pass which killed twenty eight passengers. On appeal a suspended sentence of two years' imprisonment was substituted for one of six years' imprisonment imposed by the trial court on the footing that the appellant's negligence had been slight.

life. It affirmed the *dicta* of Miller J who twenty years earlier in *S v Ngcobo* 1962 (2) SA 333 (N) at 336H-337B had set out the approach to road death cases. At 861H 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 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.'

[15] More severe yes, but how much more severe? 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.

[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 nineteen 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 twelve

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 633*c*). 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 176(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 176(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 twenty-four 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[2] has increased the maximum imprisonment for negligent driving from one year to three and for reckless driving from three years to six[3], it should surprise no one if there is an upward pressure on the custodial penalties imposed for road accident related culpable homicide offences.

The appeal against the conviction and sentence is dismissed.

J H CONRADIE
JUDGE OF APPEAL

CONCURRING:

ZULMAN JA
JAFTA JA

[2] Sections 63 read with 89.
[3] The earlier penalties were imposed by s 120 read with 149 of the Road Traffic Act 29 of 1989.