THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 318/2013
Reportable

In the matter between

THUTHUKANI NDLANZI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ndlanzi v The State* (318/13) [2014] ZASCA 31 (28 March 2014)

Coram: Mhlantla, Bosielo and Petse JJA and Swain and Mathopo AJJA

Heard: 27 February 2014

Delivered: 28 March 2014

Summary: Criminal appeal – against conviction – whether the appellant had a fair trial – appellant's counsel adopting a trial strategy contrary to the appellant's warning statement – whether the evidence supported a conviction of murder by *dolus eventualis* or culpable homicide – appeal against sentence – whether a sentence of imprisonment for 15 years appropriate in the circumstances.

ORDER

On appeal from: The South Gauteng High Court, Johannesburg (Willis J and Bashall AJ sitting as a court of appeal):

1. The appeal against the conviction in count 1 (murder) is upheld.
2. The conviction of murder is set aside and replaced with a conviction of culpable homicide.
3. The sentence imposed by the court below in respect of the count of murder is set aside and replaced with the following:

'The accused is sentenced to imprisonment for five years, two years of which is suspended for five years on condition that the appellant is not convicted of culpable homicide arising from the driving of a motor vehicle during the period of suspension'.

4. The convictions and sentences in respect of counts 2, 3, 4 and 5 are confirmed. The sentences are and ordered to run concurrently with the sentence in respect of count 1.
5. The order cancelling the appellant's drivers' licence issued under licence number 200900013 CJN is confirmed.

JUDGMENT

Bosielo JA (Mhlantla and Petse JJA and Swain and Mathopo AJJA concurring):

[1] The appellant was charged in the regional court, Johannesburg on multiple charges including one count of murder, read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997; reckless or negligent driving of a motor vehicle; failure to stop his vehicle after an accident; failure to ascertain the nature of the injury sustained by any person(s) and failure to render such assistance to the injured person(s); as he was capable of rendering.

[2] The appellant was convicted on all the counts and sentenced as follows:

(a) Ad Count 1 (murder) – fifteen years' imprisonment;

(b) Ad Count 2 (negligent driving) – twelve months' imprisonment,

(c) Ad Count 3 (failure to stop the vehicle after a collision)

(d) Ad Count 4 (failure to ascertain the nature and extent of the injuries sustained by a person after the collision);

(e) Ad Count 5 (failure to render assistance to an injured person after the collision).

Counts 3, 4 and 5 were taken as one for purposes of sentence and the appellant was sentenced to imprisonment for three years. The sentences imposed on counts 2, 3, 4 and 5 were ordered to run concurrently with the fifteen years' imprisonment imposed for count 1. The effective sentence is therefore 15 years' imprisonment. Furthermore, an order was made

cancelling the appellant's driver's licence under licence number 200900013CJN.

[3] Aggrieved by the convictions and the sentences imposed on him by the regional magistrate, the appellant appealed to the South Gauteng High Court (Willis J and Bashal AJ). His appeal was dismissed and the convictions and sentences were confirmed. The court below having refused him leave to appeal, this appeal is with the special leave granted by *this court.*

[4] The background facts to this case are to a large extent common cause. The State called four witnesses. Three of these witnesses are the eye-witnesses whilst the fourth is a sergeant in the Johannesburg Metropolitan Police who took down the appellant's warning statement.

[5] The picture which emerges from the combined evidence of all these witnesses is as follows: On the afternoon of 18 April 2005, Ms Lulu Macala, complainant in count 2 (Lulu) accompanied by Ms Princess Ndlela, her friend (Princess) stood at the corner of Bree and Sauer streets, Johannesburg intending to cross Sauer Street en route to a nearby taxi rank. As the robot was green, she proceeded to cross. Princess was following her. Whilst in the middle of the street, a taxi came from around the corner and hit her. She fell to the ground. Princess helped her to stand up.

[6] After Princess had helped Lulu to her feet, they walked to a nearby police station to report the incident but found it closed. Princess told Lulu

that she had written down the registration number of the taxi that hit her, but she could not identify its driver.

[7] After some time, Lulu was alerted to an article which had appeared in the Daily Sun newspaper which carried a report about the accident and which apparently had the details of a police officer called Owen who could be contacted. Armed with this information, she, accompanied by Princess, went to Johannesburg Central Police Station where the matter was reported.

[8] Princess testified. To a large extent, she corroborated Lulu in all material aspects of her evidence. Crucially, she testified that after the accident, she went after this vehicle and recorded its registration number in her mobile phone. Princess testified further that she gave Owen the registration number of the vehicle that was involved in the collision, which is RVL 929 GP.

[9] The State then called sergeant Joseph David du Plessis, who is the officer from the Johannesburg Metropolitan Police who attended the scene of the accident on the same day. He handed into court the accident investigation report which contains some photographs of the scene and the taxi involved in the accident as well as a sketch-plan with some measurements as an exhibit. When the State sought to introduce the appellant's warning statement made to sergeant du Plessis, the appellant's counsel raised an objection on admissibility. As a result, a trial-within-a trial was held to determine if the statement was made by the appellant freely and voluntarily and without any undue influence. Suffice to state that the warning statement was admitted after the regional magistrate had

found that it was made by the appellant freely and voluntarily and without any undue influence. Aggrieved by this adverse finding, counsel for the appellant, Mr Bishop, indicated that he had instructions to take the decision to admit the warning statement into evidence on review. In order to afford Mr Bishop the opportunity to prepare his review application, the cross-examination of du Plessis was reserved whilst the trial continued.

[10] The next witness was Mr Harry Schoolboy Dlamini (Dlamini), a security officer employed at the main entrance of the Bree Street taxi rank. Whilst on duty on this ill-fated day controlling taxis at the entrance to the Bree Street taxi rank, he heard a loud noise. When he looked up he saw a white taxi colliding with a newspaper stall, then a dustbin and then a female pedestrian who was walking on the pavement next to the entrance to the taxi rank. This vehicle continued to move on until it hit a stop sign. It then reversed and drove over the female pedestrian who had fallen to the ground. As the vehicle did not stop, he wrote its registration number in his pocket book. These are RVL 929 GP. He then called his senior to whom he reported the incident. According to Dlamini he was virtually in front of this taxi. However, Dlamini conceded in cross-examination that he cannot say with certainty that the appellant was the driver of the taxi on the ill-fated day. He further conceded that it could have been another person as he never had a good look at him. This is notwithstanding the fact that in his statement to the police he had said that he would be able to identify the driver if he were to see him again. Crucially, Dlamini had pointed a wrong person out at an identification parade arranged by the police.

[11] I pause to observe that a very important incident occurred when the trial resumed. In the interim the appellant had terminated the mandate of his lawyers, namely Mr Nkwashu and Mr Bishop, and had appointed a new lawyer, Mr Krause, to represent him. Without enquiring from the appellant's attorney about the reasons why his mandate was terminated, the regional magistrate excused him from the trial and allowed Mr Krause to take over. It emerged from Mr Krause's address to the court that the main reason why the appellant terminated the mandate of his previous team of legal representatives was essentially that he was dissatisfied with the manner in which Mr Bishop conducted his defence. Essentially he averred that Mr Bishop had not conducted his trial in accordance with his instructions. In fact, the allegation is that instead of admitting that he was the driver of the taxi involved in the collision in issue in this case as he had disclosed in his warning statement, Mr Bishop cross-examined the State witnesses in a manner which suggested that the appellant had denied that he was the driver.

[12] With the appellant's consent, Mr Krause introduced into the record as exhibits, written admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the Act). In this statement, the appellant admitted all the essential allegations against him, his only defence being that he did not stop after the two accidents because of fear for his life as the people around the scene threatened to attack him.

[13] Without expressly requesting the regional magistrate to recuse himself, Mr Krause sought to persuade the regional magistrate to *mero motu* recuse himself as he feared that his continued presiding over the trial, given appellant's new version which was contradictory to what Mr

Bishop had conveyed to the court, would make it difficult for him to remain impartial as it was likely that his judgment could have been clouded by the conflicting versions adduced by the appellant. He contended that this was likely to infringe the appellant's right to a fair trial.

[14] The regional magistrate refused to recuse himself. Instead he acceded to the appellant's request to have the State witnesses who had already testified recalled so that Mr Krause could have the opportunity to cross-examine them further, presumably on the appellant's new version and to put the appellant's version to them. Suffice to state that, notwithstanding some valiant efforts by the investigating officer, these witnesses were never procured.

[15] Mr Krause applied for the discharge of the appellant in terms of s 174 of the Act. When this failed, he called the appellant to testify.

[16] The appellant confirmed what he had disclosed in his s 220 admissions. Regarding why he never stopped after the two collisions, he explained that this was due to the fear for his life induced by a mob which threatened to attack him at the scene. His evidence was further that the same fear persisted at the second set of robots because whilst stopping there for the robots to turn green for him, he heard the noise of that murderous mob coming from behind. He then drove his vehicle over the pavement in an attempt to flee from this mob. He maintained that at no stage did he see the deceased. He only saw the concrete block and the newspaper stall on the pavement but thought that he could manoeuvre

himself around them. Unfortunately, in his confused state he collided into them.

[17] He then reversed to extricate himself and drove away to the Johannesburg Central Police Station where he had intended to report the incident. As he alighted there he saw a vehicle which looked similar to the one he had seen earlier at the scene. Suspecting that it might be part of the mob that threatened to kill him at the scene, he abandoned his vehicle and fled on foot. He later contacted his employer telephonically and reported what had happened. Arrangements were then made for him to hand himself over to the police the next day which he did. With the help of Mr Nkwashu, his attorney, he made a warning statement which was admitted as exhibit H. I interpose to state that this evidence is the same as his warning statement.

[18] The appellant was cross-examined at length on what appeared to be a *volte face*. He explained that he never instructed his counsel to deny that he was the driver of the taxi which caused the accident as he had admitted this in his warning statement. Although he agreed that he understood the evidence in court, he explained that he was taken aback when Mr Bishop told him to plead not guilty. This is the main reason why he later terminated his mandate. On being asked why he had waited until after all the State witnesses had testified, he explained that it was because he had trust in his counsel. He thought that it was perhaps because his counsel knew the law, suggesting that he must have known what he was doing.

[19] Before us, counsel for the appellant launched a two-pronged attack against his conviction. The main attack was based on the allegation that

the appellant did not receive a fair trial as envisaged by s 35(3)(*g*) of the Constitution because of the manner in which his defence was conducted. The second attack was against the finding of murder based on *dolus eventualis.*

[20] The main thrust of the appellant's argument is that his counsel adopted a trial strategy inconsistent with his instructions. It was contended that based on his warning statement which he made on 19 April 2005, ie one day after the collision, the appellant would never and had never instructed his lawyers to deny that he was the driver of the offending vehicle. Crucially, the appellant contended that this trial strategy was never discussed with him, the suggestion being that he would not have approved it as it conflicted with his warning statement.

[21] It is clear from the cross-examination of all the State witnesses that primarily because of the trial strategy adopted, counsel was not able to cross-examine the witnesses effectively on what actually occurred. Furthermore, counsel failed to put the appellant's defence of necessity or emergency to the State witnesses. As a result of this failure the court never had an opportunity to hear and see how the State witnesses reacted to the appellant's version of the events and to assess its cogency. At face value and absent any explanation, this might lead to the conclusion that the appellant's right to a fair trial was subverted. (*S v P* 1974 (1) SA 581 (RA) at 582E; *S v Mafu & others* 2008 (2) SACR 653 (W) para 24.)

[22] The right to a fair trial for every accused is constitutionally protected by s 35(3) of the Constitution. Integral to this right, amongst

others, is the right to legal representation. The importance of the right to legal representation is underscored by s 35(3)(*g*) which demands that, in the event that substantial injustice might redound to an accused who cannot afford private legal representative, the State is obliged to assign a legal representation to such an accused at State expense. This is the *raison d' être* for the existence of the Legal Aid Board, the primary mandate of which is to ensure that people who are indigent and can therefore not afford legal representation are not compelled to defend themselves in our courts. This is particularly important in our criminal justice system which is adversorial. A failure to accord an accused legal representation without any good reason might, in appropriate circumstances render his or her trial unfair. *S v Halgryn* 2002 (2) SACR 211 (SCA) para 14.

[23] However, the appellant's position is different as he had private legal representation by counsel and an instructing attorney. His complaint is not that he did not have legal representation but that his lawyers deviated from his instructions without his consent. This resulted in his true version being withheld from the court.

[24] Undoubtedly, the appellant's allegations, albeit unsupported by evidence, are very serious and warrant serious consideration because, if proved to be true, they might justify the conclusion that the appellant did not receive a fair trial, bearing in mind the manner in which the state witnesses were cross-examined, in particular, the failure by his counsel to put the appellant's version to the State witnesses. (*S v Majola* 1982 (1) SA 125 (AD) at 133D-G.)

[25] I interpose to state that no evidence was put before the regional magistrate in support of these allegations, other than the say-so of the appellant through his counsel. Of even greater significance is the fact that neither Mr Bishop nor Mr Nkwashu were given an opportunity to respond to these allegations. The appellant offered no explanation for this default. Predictably the appellant was cross-examined pertinently on why, if he did not agree to this trial strategy, he permitted his counsel to pursue it up to the close of the State's case without demur. The appellant was not able to proffer any explanation. However, I regard the following exchange which took place between the prosecutor and the appellant to be revealing:

'Now when you decided to allow Mr Bishop and the instructing attorney to conduct the defence on your behalf was it your expectation that there was a possibility that you would be found not guilty, acquitted? – The motive for me or behind everything is that I explained the counsel or Mr Bishop that I was the driver of the taxi so I was now taken aback when I was told that I must tender a plea of not guilty. That is why I had to terminate their mandate and go to (intervenes).

To seek other legal assistance? –Yes. Now there were many witnesses called. Mr Bishop at length cross-examined them and specifically about the point whether you were the driver or not. The proceedings went further that at the stage when you handed yourself over admitting the fact that you were the driver we had to go into more deeper proceedings, trial-within-a trial where this aspect was fought for days. Do you recall that? – Ja I still recall.

Why do you wait so long to then seek alternative counsel or advice, legal advice? Why go through all of that? Why not in court stand up and, or stop Mr Bishop and say whoa, this is not what I wanted?

I did explain to Mr Bishop, counsel that I admit that I had knocked a person down but now he, I had trust in him but now I do not know, maybe he knows the law. Maybe he might have seen a loophole, I do not know.

When it was ruled that the fact that you admitted you were the driver, it was ruled now admissible, it could be considered as evidence did you realise you were now in trouble, that you could be convicted of not necessarily what was murder or whatever

but that you could be convicted of something now, that you faced this possibility? – Yes I had foreseen that. Another thing that I was very bitter of myself that I had knocked somebody down. I would not beat about the bush, I would not lie again.'

To my mind this has exposed the fallacy in the appellant's belated complaint.

[26] A fact which exacerbates the position further is that du Plessis, the police officer who took down the statement, was cross-examined at length in the presence of the appellant. After he had testified and the warning statement was admitted, the matter was postponed for some time. In a rather lengthy exchange with the regional magistrate, Mr Bishop indicated that he had instructions to take the ruling on review. In the interim, the State led the evidence of Dlamini. It was only when the case resumed that all of a sudden the appellant expressed some unhappiness with his counsel's trial strategy. It is clear that the appellant had more than enough time during the trial to raise any objection to the manner in which his trial was conducted if he had any. Quite inexplicably he failed to do that.

[27] It is easy to understand the trial strategy. Having studied the docket, the appellant's counsel must have become aware that none of the State's eye-witnesses could identify the appellant as the driver. The reasoning must have been that, if his warning statement was not admitted as evidence, the State would not have been able to identify him as the driver. The trial strategy therefore was to not admit that he was the driver and see if the State could prove it. The probabilities are overwhelming that the appellant was made aware of these defects in the State's case which, incidentally became apparent when the witnesses testified. It was

then agreed with his lawyers that rather than for him to admit that he was the driver and take a risk with his defence, disclosed only when he testified which might not succeed, he would rather exercise his constitutional right to remain silent. It is not surprising that when the warning statement was admitted, against his expectation, that the appellant then realized that he had met his Waterloo and the only escape route was to put the blame on his counsel. Hence this belated *volte face*.

[28] An important fact which weighs heavily against accepting appellant's belated *volte face* is that, given the strict ethics governing the lawyers' profession, a presumption of regularity operates in favour of accepting that the lawyers acted in terms of their mandate from the appellant. There has to be some cogent evidence to displace this presumption. A court cannot afford to accept any criticism by a litigant against his or her lawyer. Such an approach has the potential to open floodgates of spurious complaints by disgruntled litigants. (*Strikland v Washington* 466 U.S. 688 (1984).) It is trite that ordinarily counsel acts on a brief from an attorney who in turn acts on instructions from the client. Absent any instructions from the appellant, both Mr Bishop and Mr Nkwashu would be guilty of very serious professional misconduct which could have led to disciplinary proceedings by their professional bodies concomitant with serious consequences for them. One cannot, on the mere say-so of the appellant and without more conclude that both Mr Bishop and Mr Nkwashu could have taken such a serious risk. Based on the above-stated facts, I am constrained to conclude that the appellant had consented to the trial strategy, alternatively that he acquiesced in it. (*S v Louw* 1990 (3) SA 116 (A) at 125E-J.) It follows that there is no merit in this ground of appeal.

[29] However, this is not the end of the matter. A more vexing legal question is whether or not the proven evidence establishes *dolus eventualis*. The appellant testified that when he drove onto the pavement he never saw the deceased. He only saw a newspaper stall and a concrete pole. He was not even aware that he had collided with the deceased. This was never disputed.

[30] The legal question to be answered is whether, given these circumstances, it can be found that the appellant subjectively foresaw the possibility of colliding with the deceased and causing her death, and further, whether notwithstanding that realization, he proceeded to drive in the manner he did.

[31] The correct legal approach to this vexed legal question was enunciated as follows in *S v Sigwahla* 1967 (4) SA 566 (A) at 570B-E:

'That, however, does not conclude the enquiry because the following propositions are well settled in this country.

(1) The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis* as distinct from *dolus directus*.

(2) The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide.

(3) Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably by drawn.'

Recently this approach was refined by *this court* in *S v Humphreys* 2013 (2) SACR 1 (SCA) by Brand JA at 8a-b as follows:

'In accordance with trite principles, the test for *dolus eventualis* is twofold:

(a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and

(b) did he reconcile himself with that possibility (see eg *S v De Oliveira* 1993 (2) SACR 59 (A) at 65i-j)?

Sometimes the element in (b) is described as "recklessness" as to whether or not the subjectively foreseen possibility ensues (see eg *S v Sigwahla* 1967 (4) SA 566 (A) at 570B-E'.

[32] It is clear that the requisite subjective foresight may be proved by inferential reasoning based on the premise that '… in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence', see *Humphreys* at 8e.

[33] Thereafter, 'the next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.' See *Humphreys* at 8f.

[34] The appellant conceded that it was peak hour traffic and there were many pedestrians. They were rushing to catch taxis and were on the pavement and in the road. The appellant maintained, however, that the

pedestrians on the pavement were at a distance moving away from him. When he drove onto the pavement he saw the newspaper stand and the other objects in his vehicles path but be believed he would 'overcome' them but collided with them. He maintained that he never saw the deceased because he 'was looking back and sideways'.

[35] Any person with a modicum of intelligence would have appreciated that driving a motor vehicle onto the pavement in the prevailing circumstances of this case, raised the possibility that a collision with a pedestrian would occur with fatal consequences. Any right-minded person would have foreseen the possibility of the death of a pedestrian.

[36] On the evidence there is no basis for concluding that the appellant did not possess the requisite subjective intent in accordance with this standard.

[37] The second element of *dolus eventualis* requires proof that the appellant reconciled himself with the foreseen possibility of the death of a pedestrian. As pointed out by Brand JA in *Humphreys* at 9i-j:

'The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his action. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.'

[38] In this regard, the appellant stated that when he drove onto the pavement his vehicle was in first gear travelling at between 10 to 15

kilometres per hour. Dlamini confirmed that the vehicle was not travelling at a high speed. The appellant maintained that the pedestrians he saw were on the other side of the objects his vehicle collided with near the taxi rank. The appellant stated that he therefor turned back onto the road to avoid colliding with them. He said he could not swerve to the left to avoid colliding with these objects, because he would then have collided with the pedestrians.

[39] On this evidence, the appellant believed he would be able to avoid colliding with the pedestrians on the pavement by turning to the right back onto the road. Consequently it cannot be inferred that it was immaterial to the appellant whether he collided with a pedestrian on the pavement. It can also reasonably be inferred that he may have thought that a collision with a pedestrian, which he subjectively foresaw, would not actually occur. In other words, the appellant 'took a risk which he thought would not materialise', see Humphreys at 10D. The second element of *dolus eventualis* was accordingly not established on the evidence.

[40] However, it is clear from the conduct of the appellant that he did not act like a reasonable driver. Notwithstanding the fact that he was frightened, his driving of his vehicle into the pavement which is reserved for pedestrians at peak hour, near a taxi rank and at a time when the place was teeming with pedestrians, was clearly negligent. As this negligence led to the death of the deceased in count 1, it follows that the appellant is guilty of culpable homicide.

[41] Having altered the conviction in count 1 from murder to culpable homicide, it follows that a sentence of imprisonment for 15 years cannot stand as it is undoubtedly shocking. *This court* is at large to reconsider it afresh. Counsel for the appellant submitted that, given the reports by the various experts on sentence, a sentence in terms of s 276(1)(*i*) of the Act would be appropriate. On the other hand, counsel for the respondent contended that the overall behaviour of the appellant was seriously reprehensible, more so that a person lost her most precious possession, life. She suggested a custodial sentence of between seven and ten years.

[42] In determining an appropriate sentence, it is important for the court to maintain the delicate balance between the triad, difficult as the task might be. Friedman J expounds the approach as follows in *S v Banda & others* 1991 (2) SA 352 (BGD) at 355A-B:

'The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the courts is sound and is incompatible with anything less.'

[43] I find the following facts to be aggravating: The appellant is not an ordinary driver. He is a taxi driver and therefore a professional driver. In order to qualify as a taxi driver, he is required to have a public drivers' permit which implies that he is well trained and qualified to drive public vehicles. He is involved in the conveyance of people on a daily basis on

our public roads. This calls for more care and caution from him. He failed to apply the care and skills required of a reasonable driver. Undoubtedly, the fact that a person died from the appellant's negligent conduct aggravates the appellant's conduct. Such conduct warrants serious condemnation and a severe sentence. See *S v Nxumalo* 1982 (3) SA 856 (A) at 861H.

[44] I am of the view that, given the senseless carnage which occurs on our roads daily, the appellant deserves a sentence which will address the legitimate concerns and the natural indignation of members of the public. The failure by the court to impose appropriate sentences for such offences might lead to loss of confidence in the criminal justice system by the public, who might take the law into their hands. Ironically, this is best illustrated by the instantaneous behaviour of members of the public, who according to the appellant were baying for his blood after the collision.

[45] However, a sentencing court should never allow the public interest to eclipse the other considerations relevant to sentencing, in particular the appellant's personal circumstances. The circumstances surrounding these offences, show that the appellant acted under some kind of emergency. It will be unrealistic if not cynical to say that it was self-created. This would, to my mind, be akin to resuscitating the *versari in re illicita* doctrine which was buried many years ago. The reality is, however, that the appellant's negligent conduct led to the death of the deceased.

[46] The appellant was 35 years old; married with three children; and he is now a taxi-owner with seven taxis. In addition to his family which he maintains, he has seven drivers who drive his taxis, who are his

responsibility. He is personally responsible for the management of his fleet of taxis. He has one relevant previous conviction which happened in the year 2000. The appellant handed himself over voluntarily to the police a day after the incident. He expressed his remorse at the turn of events.

[47] 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. It is clear from the expert's report that over time the appellant has improved himself from an ordinary driver to a taxi owner with a fleet of seven taxis which creates employment for at least seven people. This is proof that the appellant is a productive and useful member of society. It cannot be said that he is not amenable to rehabilitation. I am of the view that the sentence which should be imposed should be such that it does not destroy him, but gives him hope and opportunity to be rehabilitated within a reasonable time so that he can return to society a rehabilitated and better person, to play a useful role.

[48] As I indicated earlier, the appellant was convicted on five counts. However, all these counts emanate from one event. Although the appellant deserves to be sentenced for each count, I am of the view that the cumulative effect of the separate sentences would result in a sentence which might be shockingly disproportionate to his blameworthiness. It is for this reason that I will confirm the order by the regional magistrate that the sentences in respect of counts 2, 3, 4 and 5 should run concurrently with the sentence in respect of count 1.

[49] In the result I make the following order:

1. The appeal against the conviction in count 1 (murder) is upheld.
2. The conviction of murder is set aside and replaced with a conviction of culpable homicide.
3. The sentence imposed by the court below in respect of the count of murder is set aside and replaced with the following:

'The accused is sentenced to imprisonment for five years, two years of which is suspended for five years on condition that the appellant is not convicted of culpable homicide arising from the driving of a motor vehicle during the period of suspension.'

4. The sentence in respect of counts 2, 3, 4 and 5 as imposed by the regional magistrate are confirmed. The sentences are ordered to run concurrently with the sentence imposed in respect of count 1.
5. The order cancelling the appellant's drivers' licence issued under licence number 200900013 CJN is confirmed.

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L.O. BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant	:	PJ du Plessis Instructed by: David H Botha, Du Plessis & Kruger Inc. Johannesburg Symington & De Kok, Bloemfontein
For Respondent	:	GE Market Instructed by: Director Public Prosecutions; Johannesburg Director Public Prosecutions, Bloemfontein