**HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

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|---|---|
| (1) | REPORTABLE: ~~YES~~ / NO |
| (2) | OF INTEREST TO OTHER JUDGES: ~~YES~~/NO |
| (3) | REVISED. |

2014·06·20 .....
DATE

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SIGNATURE

**A771/2013**

20/6/2014

In the matter between:

**MACHEZI FRIEDMAN SHINGANGE** Appellant

and

**THE STATE** Respondent

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**J U D G M E N T**

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**MAKGOKA, J**

[1] The issue in this appeal is whether the appellant was the driver of his motor vehicle when it fatally collided with three people on 14 March 2010. The appellant was convicted of three counts of culpable homicide in the regional court, Tzaneen, arising from those deaths, and sentenced to 10 years imprisonment. He appeals against both the conviction and the sentence. The regional court granted him leave to appeal against the sentence only, but with leave of this court, the appeal is also against the conviction.

[2] The facts giving rise to the appellant's conviction are fairly simple. On 14 March 2010 at approximately 20h30 a motor vehicle belonging to the appellant, a Nissan Almera, rammed into a guard room of Bush Valley farm in the Tzaneen area. Three security guards were fatally injured during the collision.

[3] Approximately around the same time, Ms Eunice Ngobeni and her partner, identified only as Isaac, were driving towards the exit of the farm. She testified that she noticed three male people lying on the ground, and who appeared to be seriously injured. She further noticed a vehicle inside the farm, and observed that the vehicle was damaged. A male person alighted from the driver's seat of that vehicle. There were no other people inside that vehicle. She and Isaac also alighted from their vehicle. The person who alighted from the other vehicle approached them. They enquired from that person as to what had happened, and he replied that 'it was an accident'.

[4] Asked to explain how the accident occurred, he simply repeated that it was an accident. Isaac phoned and summoned help from the farm's employees. While Isaac was busy on the phone, the person who alighted from the damaged vehicle tried to exit the farm. Isaac told him not to leave the scene, and he obliged, but later disappeared into a nearby orange orchard. That was the last time she saw him. She was not able to identify the accused in court as the person she spoke to that night. People started gathering at the scene.

[5] Constable Patson Mkansi visited the scene of the accident after having received a report. Upon arrival he noticed the three deceased lying next to the gate, about three meters from an Almera vehicle, which from his observation, had been involved in the accident involving the three people lying there. There was no one inside the vehicle. He was informed by Ms Ngobeni that she had spoken to the driver of that vehicle, and that he later left the scene.

[6] He searched the vehicle and found a wallet on the floor of the driver's side. He also found a Z.88 firearm underneath the driver's seat. On the passenger's seat were three unopened beer cans. Inside the wallet he found a South African Police Service (SAPS) identity appointment certificate belonging to the appellant. While still interviewing people at the scene, he overheard people saying that the driver of the vehicle was back. It appeared to him that the driver had been taken into custody at that stage by his colleagues. He later encountered the appellant at the hospital, who introduced to himself to him.

[7] Mr Johannes Knox was head of security at Bush Valley farm during the relevant period. On the day of the incident at approximately 21h00 he heard a loud bang, and saw dust from the vicinity of the guard room. The area was well-lit. Shortly thereafter he received a report that there had been an accident at the entrance gate and that their colleagues had been killed. He rushed to the scene and on arrival he found Ms Ngobeni and Isaac. He observed a vehicle on the right side of the fence. It was badly damaged. On being told that the driver of the vehicle had run into the orange orchard, he requested one of the security guards, Mr Simon Mhlari, to search the area. After a while Mr Mhlari returned with the appellant. The police were already at the scene and they apprehended the appellant. He requested the police to test the appellant for alcohol as he had found beer cans inside his motor vehicle. The police drove away with the appellant.

[8] Mr Simon Mhlari is the security guard who found the appellant in the orange orchard. He testified that at first he searched the area and found nobody. He returned to the guard room. Whilst standing there, he heard a voice calling for his attention. Later he located the voice to a tuck-shop inside the orchard. Upon finding the appellant he asked him whether he was in the vehicle that had collided with the three security guards. The appellant answered in the

affirmative. He took the appellant to the police vehicle and handed him over to the police.

[9] Dr Mangolele tested the appellant for suspected driving under the influence of alcohol. His evidence related to the count of driving under the influence of alcohol, on which count the appellant was acquitted. Part of his evidence, however, has a bearing on the three counts which the appellant was convicted of. When he examined the appellant, he noticed that he had injuries to his jaw and knee. On enquiring from the appellant how he had sustained the injuries, the appellant told him that he had been hijacked and he later struggled for control of the vehicle with one of his hijackers, which resulted in the vehicle colliding with, and injuring people near the Bush Valley farm.

[10] In his evidence, the appellant did not deny that he was the owner of the motor vehicle which was involved in the accident, and that he was inside the vehicle during the accident. However, he denied that he was the driver. His explanation is that he was hijacked by three male persons at gun point. One of whom drove the vehicle, and he was seated in the front passenger seat. Along the way they forced him to drink an intoxicating concoction, which made him dizzy and drunk. As they drove past the Bush Valley entrance he grabbed the steering wheel and forced the vehicle off the road, with the intention that it would hit a fence and draw people's attention to his ordeal. He knew the place to always have lots of people. The vehicle went through the gate and collided with the walls. After the accident, the three hijackers fled from the vehicle. He alighted from the vehicle, using the driver's door, as the passenger door of the vehicle could not open.

[11] In his judgment, the learned regional magistrate rejected the appellant's version as not reasonably possibly true, on essentially two grounds. First, his version of being hijacked was not disclosed at the scene, neither to the Ms

Ngobeni and her partner, nor to the police officers who arrived at the scene shortly after the accident. Second, the court accepted the evidence of Ms Ngobeni that she heard the appellant convey to her partner that he was the driver, and that what had happened, was 'an accident'.

[12] On behalf of the appellant, it is contended that the state had failed to prove its case beyond a reasonable doubt. In particular, it is argued that the trial court erred in finding that the appellant was the driver of the vehicle when it collided with the deceased. The trial court is said to have not taken into account the so-called rules of logic when it evaluated the circumstantial evidence against the appellant. Lastly, the trial court is criticized for relying on the evidence of Ms Ngobeni, the contention being that she was not able to tell whether it was the appellant who emerged from the driver's door after the accident. The state supports the conviction.

[13] Before I consider the arguments on behalf of the parties, it is useful to remind ourselves of the proper approach in matters such as the present. The approach to be adopted by a court of appeal when it deals with the factual findings of a trial court is found in the collective principles laid down in *R v Dhlumayo* 1948 (2) SA 677 (A). A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it. See also *DPP v S* 2000 (2) SA 711 (T); *S v Leve* 2011 (1) SACR 87 (ECG); and *Minister of Safety and Security and Others v Graig and Another NNO* 2011 (1) SACR 469 (SCA).

[14] The appellant was convicted on circumstantial evidence. The 'cardinal rules' when it comes to inference to be drawn from circumstantial evidence, are trite, and were laid down in the well-known case of *R v Blom* 1939 AD (1) 188 at page 202-203, namely:

(i) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn;

(ii) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[15] In the present case the proved or admitted facts are:

(a) the appellant is the owner of the vehicle which caused the accident;
(b) the appellant was inside the vehicle during the accident;
(c) the appellant was intoxicated (although there is a dispute as to the source of the intoxication and whether it was voluntary or not);
(d) after the accident the appellant emerged from the driver's side of the vehicle;
(e) the appellant went into the orchards immediately after the accident.

[16] In the present case, I find no fault with the reasoning and conclusion of the learned regional magistrate as summarized in para [11] above. His version is improbable, and inconsistent with normal conduct of a person who had been a victim of hijacking. It should be borne in mind that the appellant is a police officer himself, and it is inconceivable that he would not have immediately told the people in the vicinity that he had been hijacked and that the hijackers had fled into the orchards. The version of being hijacked was clearly an after-thought, and in my view correctly rejected by the trial court.

[17] Even if this conclusion is wrong, and it be that the version of being hijacked is reasonably possibly true, on his own version, the appellant was negligent in grabbing the steering wheel of the vehicle in circumstances where it was foreseen that the loss of control of the vehicle was likely to result in injury or damage to property. I therefore have no hesitation in confirming the conviction. Our law does not require proof beyond a shadow of doubt, but only proof beyond a reasonable doubt. When a court deals with circumstantial evidence, as in the present matter, the court is not required to consider every fragment of the evidence individually to determine how much weight it had to be afforded. It was the cumulative impression, which all the fragments made collectively, that had to be considered to determine whether the accused's guilt had been established beyond reasonable doubt (*S v Ntsele* 1998 (2) SACR 178 (SCA) at 180d-f). See also *S v Phallo and Others* 1999 (2) SACR 558 (SCA); *S v Trainor* 2003 (1) SACR 35 (SCA).

[18] I turn now to the appeal against the sentence. It is contended that the sentence imposed by the trial court induces a sense of shock and that the trial court failed to take into account the appellant's 'mitigating factors' and his personal circumstances. It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where is vitiated by an irregularity, misdirection or where there is striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See generally: *S v Petkar* 1988 (3) SA 571 (A), *S v Snyder* 1982 (2) 694 (A) and *S v Sadler* 2000 (1) SACR 331 (SCA) and *Director of Public Prosecutions, KZN v P* 2006 (1) SACR 243 (SCA) para 10.

[19] With regard to the appellant's personal circumstances, the following are relevant. He was 49 years old when he was sentenced. He is married, and has three children, two of whom are doing tertiary education. The youngest was

doing grade 10. He is the breadwinner in his family, as his wife is unemployed. The appellant is not a first offender, having been convicted of reckless and negligent driving in January 2010, which is obviously very relevant to the sentencing. It is instructive to note that the present offence was committed two months after the first one.

[20] In his judgment on sentence, the learned magistrate took into consideration the seriousness of the offence, the appellant's previous conviction and the appellant's perceived lack of remorse, as aggravating factors. The court also emphasized the interests of the community. In the process it neglected to balance these with the personal circumstances of the appellant. The result is a sentence, which, as demonstrated below, is shockingly and disturbingly disproportionate. This constitutes a misdirection of the nature contemplated and described in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F as follows:

'Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such nature, degree, or seriousness that is shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.'

[21] In the light of the material misdirection by the trial court, as demonstrated above, this court is at large to set aside the sentence imposed by the trial court and substitute it with one we deem appropriate in the circumstances. It is useful to consider the sentencing patterns of our courts in matters such as the present.

[22] In *S v Nxumalo* 1982 SA 856 (SCA) the Supreme Court of Appeal cited with approval a passage from *R v Barnado* 1960 (3) SA 552 (A) at 557D-E, where it was stated that although no greater moral blameworthiness arises from the fact that a negligent act caused death, the punishment should acknowledge

the sanctity of human life. It affirmed the dicta in *S v Ngcobo* 1962 (2) SA 333 (N) at 336H-337B, in which the proper approach to road death cases was set out. The court (in *Nxumalo*, above) said the following at 861H:

'[I]n 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 so 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 imposed.'

[23] In *S v Nyathi* 2005 (2) SCRA 273 (SCA) Conradie JA undertook a useful review of recent cases in which death arose from motor vehicle accidents, and the sentences imposed by the courts in recent years. In that case (*Nyathi*) the appellant had been convicted in a regional court on six counts of culpable homicide arising from overtaking on double barrier lane and colliding with an approaching vehicle, causing it to overturn, killing six of its occupants. He was sentenced to five years' imprisonment, of which two years were suspended. The sentence was confirmed, both by the High Court and the Supreme Court of Appeal (SCA), as his negligence was found to be gross and its consequences serious.

[24] One of the cases considered by the SCA in Nyathi (above), is *S v Sikhakhane* 1992 (1) SACR 783 (N), where a head-on collision was caused by an appellant's negligent overtaking. 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.

[25] In the present case, the appellant's negligence was gross, and its consequences serious in that human life was lost. Having said that, a point

should be made that the sentence of 10 years direct imprisonment induces a sense of shock, given the pattern of the sentences reflected in the decisions of the Supreme Court of Appeal. Although sentencing is pre-eminently a matter for the trial court, and in the discretion of the presiding officer, it remains a judicial discretion bound by judicial precedent and judicial authority (*S v Juta* 1988 (4) SA 926 (TkS) at 927E.

[26] Taking into account the personal circumstances of the appellant, the seriousness of the offence, the need to reflect the sanctity of life, a sentence of 5 years' imprisonment, would, in my view, serve the aims of punishment, be fair to society and to the appellant.

[27] In the result the following order is made:

1. The appeal against the conviction is dismissed;
2. The appeal against the sentence is upheld. The sentence of 10 years' imposed by the regional court is set aside and a sentence of 5 years' imprisonment is substituted for it.

**TM MAKGOKA**
**JUDGE OF THE HIGH COURT**

I agree

**A.L.C.M LEPHOKO**
**ACTING JUDGE OF THE HIGH COURT**

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| **DATE HEARD** | **: 24 APRIL 2014** |
| **JUDGMENT DELIVERED** | **: 20 JUNE 2014** |
| **FOR THE APPELLANT** | **: ADV K.P. TLOUANE** |
| **INSTRUCTED BY** | **: PRETORIA JUSTICE CENTRE** |
| **FOR THE STATE** | **: ADV T.V. CHETTY** |
| **INSTRUCTED BY** | **: DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA** |