REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

(4) 14/4/2022

DATE SIGNATURE

Case No. A181/21

In the matter between:

DAVID TSHEPO HOSHA

And

THE STATE

JUDGMENT

Mogotsi AJ

Introduction

[1]This is an appeal against a sentence imposed by a Regional Court sitting in Vanderbijlpark on the 26th January 2021.The appellant tendered a plea of guilty on four counts of culpable homicide involving a motor vehicle. He received a sentence of six (6) years direct imprisonment on each of the four counts. The sentences were ordered to run concurrently in terms of sec. 280(2) of the Criminal Procedure Act 51 of 1977 (CPA).

[2]He got aggrieved by the sentence and applied for leave to appeal. The court *aquo* upheld his application and released him on warning.

Facts

[3]On the 3rd August 2018 at 00h00 the appellant in his capacity as a member of SAPS was instructed to transport members of the CPF to their home in Orange farm. He had four members in the cabin and three in the back of a Nissan double cab van. He travelled on N1 highway in the direction Parys. That was the way he used to travel whenever he was transporting CPF members back to Orange Farm. On reaching the first cross over the bridge, he drove onto the island in order to cross over to the other side of the N1 highway and take the direction he came from. It was the shortest but the wrong way of using that route. As he was about to join the other side of N1 so as to travel back in the direction he came from, a vehicle approached with its head lights on. The appellant under estimated that vehicle's proximity. He also could not ascertain the lane the vehicle was travelling in. He got into the fast lane. The oncoming motor vehicle flickered its head lights. He switched on the left indicator and as he got into the left lane, that oncoming motor vehicle hit the police van he was driving from behind. Four members of the CPF lost their lives in that accident.

Grounds of Appeal

[4] The court erred and misdirected itself in the following aspects;

4.1 In finding that he is not bound by judgements from the high court.

4.2 By ruling that the appellant stopped on the highway and made a U-turn on the highway.

4.3 By finding that R59 is a treacherous road which is also busy as it runs through Vandebijlpark, Vereeniging, Sharpeville and Meyerton while the accident took place along N1 highway.

4.4 The appellant collided with the motor vehicle he did not expect while a guilty plea says that 'he stopped in the island between the 4 lanes, saw the oncoming vehicle, (only one on the road), thought that it was still far away and that it is safe for him to enter the highway, turning to the same direction that the oncoming vehicle was travelling in. He joined the road in the fast lane, (right hand lane); the oncoming vehicle flickered its lights. He thought that vehicle was in the fast lane; he then switched on his indicator and moved to the left lane, when he entered the left lane, the oncoming vehicle hit the rear of his vehicle.

4.5 The Regional Magistrate also erred in ruling that the negligence of the other driver was not taken into account; the degree of the negligence by the other driver must have an impact on the moral blameworthiness of the appellant.

4.6 The court erred in finding that the appellant was grossly negligent as this was only a miscalculation of the oncoming car's speed and the lane it was travelling in. The appellant did not stop or make "u" turn on the highway as the court found.

4.7 The court erred by not considering a sentence in terms of section 276(1)(i) of the CPA.

4.8 The court erred by not adequately considering the theories of punishment, i.e. deterrence, retribution, prevention and rehabilitation.

Primary caregiver

[5]The court did not do follow the decision of *S v M 2008 (3) SA (CC)* as the appellant is a primary care giver.

Law

[6]It is trite law that a court of appeal may only interfere with the sentence imposed where it induces a sense of shock or is tainted by misdirection. In *S v Salzwedel & others*[1] it was held that:

'An appeal court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is "disturbingly inappropriate" or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection's of a nature which shows that the trial court did not exercise its direction reasonably.'

See also, *S v Francis*[2] *1991(1) SACR 198 (A) at 204 c-e*

"An appeal court will not lightly interfere with the findings of the trial court especially as the latter was steeped in the atmosphere of the trial and had the benefit of observing witnesses. The trial court is in the best position to make findings as to such matters as credibility, demeanour and reliability. "

Evaluation

[7]The trial court was aware of both the triad as in *S v Zinn*[3]and the main purpose of punishment. The appellant is 36 years old. He is a first offender. He is the youngest of five. His father passed on while he was still young. He is still a member of the SAPS after joining in 2016. Prior to that, he worked for a company which built FNB stadium. At some stage, he worked as a car washer. The appellant was brought up by his mother who was a single parent. He lost his farther when he was three years old. He is as a widower and a primary care giver of his 9 years old son. He informed the probation officer that the passing on of his girlfriend affected his daily functioning. He further contends that he does not have a propensity to commit crime.

[8]On reaching that place where the accident took place, the appellant was used to going against traffic rules, a practice which ultimately led to the loss of lives. He states as follows in his plea;

"I drove from River road joined Barrage road and travelled to the N1 highway. After I have joined the N1 highway, I travelled in the direction of Parys. At the first cross-over bridge I moved into the island to cross over to the other side of the N1 highway, in order to allow me

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[1] *S v Salzwedel & others* 1999 (2) SACR 586 (SCA) at 591F-G.
[2] *S v Francis 1991(1) SACR 198 (A) at 204 c-e.*

[3] *S v Zinn 1969 (2) SA 537*

to travel backwards Orange Farms. The link that I used to join the N1 highway direction of Orange Farms was not an official link, but it was a link that was frequently used to take members back to Orange Farms as it was the shortest route."

[9]Against this background, the defense argues that the court erred by finding that the appellant made a "u" turn. The probation officer's report at page 184 also says;

"*He mentioned further that he was on the N1 road when he decided to make a U turn under a bridge."*

[10]This whole maneuver does in the end amount to making a "u" turn on a high way because he achieved his aim of taking a direction he came from while travelling on a high way. Secondly, the appellant is saying that move was used not only by him but by others as it was the shortest. As a police officer he consciously put his life as well as that of the deceased and those who survived at risk because there are other people who are conducting themselves in that wrongful way. It can only mean that a sentence should not only be meant to deter him alone, it should also be aimed at deterring others from acting wrongfully and negligently like he did and think the court did correctly address that.

[11] The clinical psychologist's observation is *inter alia* that the appellant presents the following symptoms of clinical concern, page 189 par;

11.1 Sleep disturbance,

11.2 Poor appetite

11.3 Nightmares regarding the accident

11.4 Repetitive thoughts and ruminating about the accident.

11.5 Feeling hyper vigilant at times especially at work when he is in a vehicle.

11.6 Feeling of distress

11.7 Poor concentration, due to the ruminating thoughts.

11.8 Severe feelings of guilt.

11.9 He experiences flashbacks to an extent that he feels the need to park the car at the side of the road to just cry and pray.

[12]The conclusion reached is that "the appellant is displaying symptoms that warrant a diagnosis of Major Depression and Post Traumatic Stress Disorder, which has an impact on his functioning to such an extent that he struggles to cope with all that has to do with life and its challenges."

[13]The court *aquo* did not attach weight to his prospects of rehabilitation. While rehabilitation is an important purpose of punishment, it should not be given undue weight against the other purposes of punishment, being prevention, deterrence and retribution.

[14]The trial court did mention the fact that the appellant is a primary care giver as stated in the psychologist report. The argument of the defence is that the court will never satisfy the wishes of the family members of the deceased people, who will always want the most severe sentence. No sentence that this court will impose will satisfy the victims.

[15] The family of the deceased in EXHIBIT "BB" requested a direct imprisonment. The probation officer recommended *inter alia*, a suspended sentence in terms of section 297(1) of the CPA on condition that he also attends the Road Offences Panel Program at NICRO. A report by correctional services in terms of section 276A (1) (a) of the CPA, EXHIBIT "AA" recommends a correctional supervision sentence. The officer did not consult the families of the deceased as well as the investigating officer before making such a recommendation.

[16] The victims of crime expect proportionate sentences to be imposed and that justice be done. It is so that this was just a once off incident. It was not a recurring incident as the defense correctly argues. The magistrates lamented the abuse of the Constitutional rights as well as how "Everybody just do as they please and specially to get on the road". "All these principles, laws, and regulations were totally ignored. We are slaughtering each other on the roads" [sic]. The court made a finding that the appellant was negligent and also that he was grossly negligent. I think that for the purpose of formulating a proportionate sentence, it is important to distinguish between the two.

[17]At page 126 par.10, the trial court did take into consideration that "... not all people can be satisfied ..."

[18]It is so that the object of sentencing is not to satisfy public opinion but to serve public interest. A sentencing policy that caters predominantly or exclusively for the public is inherently flawed: page 126 par.10 ed. It remains the court's duty to impose fearlessly appropriate and fair sentence even if the sentence does not satisfy the public, *S v Mhlakaza*[4]; Harms JA. Indeed, the level of total disregard for rules of the road and the recklessness of drivers coupled with the carnage experienced daily on our roads calls for proper sentencing. It clearly seems that some emphasis should be on retribution and deterrence.

[19]Having said that, sentencing is a matter for the discretion of the trial court. The evidence before court remains important in determining a question of proportionality. Therefore, the inferences drawn or a conclusion arrived at must be supported by evidence or facts. It is not clear how the following conclusion, found its way into the record and it cannot be ignored as it may have had influence in the calculation or determination of the sentence imposed. On page 120, par .20, the court said as "at least 25 to 30 thousand people, if not more, get killed on South African roads and where road rage also plays a role. However, nobody is concerned about that. "At page 121, at par 20", it is stated: "This R59 road is a treacherous road". I grew up when they started building this road and after many years, it is still the same, just much busier". The honorable magistrate further acknowledged that this accident could have been avoided. At page 122 par.10, he went on to say "I know the road and drove on it myself. I feel bad if I kill an animal, a cat, or a bird or whatever crossing on the road". "I am also and luckily in my life, I never killed a human being on a motor vehicle road," Four people lost a bread winner. This unfortunate part of judgment obviously played a role in the determination of sentence even though it appears to be based on the general conduct and or experience of the presiding officer who was not a witness. Factors of which the court takes judicial notice should be clearly distinguished from one's personal encounter. It will assist if they are so stipulated as factors of which the court took judicial notice of.

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[4] *S v Mhlakaza 1997(1) SCAR 515 (SCA).*

[20]The court on page 131, having considered that the appellant is a care giver directed the probation officer to appoint a foster parent or an appropriate center that will take care of the child. The appellant and his minor son have been staying with the appellant's mother and the son may continue to do so.

[21]The trial was concluded over a period of about two years. The court *a quo* ordered that the sentences should run concurrently in terms of section 280(2) of the CPA.

[22] Referring to the cases of *Maarohanye and Another*[5] *and Humphreys*[6], the Responder's contention is that "In comparison, the deviation from the norms of reasonable conduct and the moral blameworthiness of the accused in both these cases was so much more substantial than that of the accused in *casu*, that the six years direct imprisonment in *casu* indeed appears disproportionate."

[23] The presentence report does not discuss a correctional supervision sentence. It recommends a wholly suspended sentence coupled with a condition that the appellant should attend an appropriate NICRO program. Direct imprisonment is also not recommended as the probation officer is of the opinion that it will "cause harm" to the minor child and would not serve any purpose towards rehabilitation. The trial court made a finding that the reports were well prepared but "without providing clear reasons. It held that neither a correctional supervision, a community service nor a sentence of imprisonment coupled with correctional supervision would suffice. The court came to a conclusion that direct imprisonment would be appropriate. The Respondent further referred to *S v Naicker* [7]

[24]Indeed, there are pre-sentence reports filed. As was the case in *S v Greyling*[8] which involved a youthful first offender aged 19, the court said: "where an accused was guilty...of gross negligence, direct imprisonment even in for a youthful first offender, was not in itself inappropriate..."As the Respondent pointed out, factors such as that the accused's conduct was not a sudden lapse of judgment, but a conscious assumption of risk, and that the accused ought to have considered that he was transporting live passengers whom he was in the process endangering. That

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[5] *Maarohanye and Another 2015 (1) SACR 337 (GJ).*
[6] *Humphreys 2013 (2) SACR 1 (SCA.*
[7] *S v Naicker 1996 (2) SACR 557(A) at 562 A-F.*
[8] *S v Greyling 1990 (1) SACR 49 (A) at 55G-56H.*

factor; coupled with the fact that loss of life resulted, were found to be relevant considerations which justify the imposition of a custodial sentence.

[25]The Respondent is of a view that a sentence of 3 years' correctional supervision in terms of section 276(1) (h) of the CPA would disregard the appellant's negligence.

[26]The trial court also bemoaned the general conduct of drivers leading to carnage on our roads. The degree of blameworthiness, the number of the people who passed on are but some of the aggravating factors the court took into consideration.

[27]The court is faced with a situation where the Appellant's conduct had nothing to do with a lapse of mind but everything to do with how the Appellant and other road-users usually conduct themselves, which conduct is contrary to the rules of the road. The appellant took a conscious assumption of risk. In so doing his four passengers lost their lives.

[28]*S v Qamata*[9], an appropriate sentence actually means a sentence in accordance with the blameworthiness of every individual offender.

[29](The punitive sanction should be proportionate in severity to the degree of blameworthiness, (seriousness), of the conduct).

Conclusion

[30]Having reflected on the triad, the purpose of sentencing, the reasons for handing down the sentence, I come to a conclusion that the sentence is disparate and that it must be altered.

[31] The appellant was released on bail on the date of sentence and therefore it is not necessary to have the sentence antedated.

I accordingly make the following order.

Order.

[9] *S v Qamata 1997 (1) SACR 479 (E) 483 a.*

[31.1.] The appeal against sentence succeeds.

[31.2.] The sentence imposed by the trial court is set aside in its entirety, and is substituted with the following;

Sentence.

[31.3.]. The appellant is sentenced to six years' imprisonment, three years of which is suspended for a period of five years on condition that the appellant is not convicted of the offence of culpable homicide which is committed during the period of suspension.

D.D.Mogotsi AJ

Acting judge of the High Court of South Africa

North Gauteng Division, Pretoria.

I agree and it is so ordered.

Maumela J

Judge of the High Court of South Africa

North Gauteng Division, Pretoria

APPEARANCE:

For the Appellant: Adv. Roelof van Wyk

Instructed by:

For the State:

Instructed by:

Date of hearing: 18th February 2022

Date of delivery: April 2022