REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA & R 34/2011

LUYOLO YABO Appellant

And

THE STATE Respondent

Coram: **Chetty and Majiki JJ**

Heard: **13 February 2013**

Delivered: **25 February 2013**

Summary: Sentence – Culpable homicide – Appellant disobeying red traffic light and colliding with vehicle entering intersection – Both occupants killed on impact – Appellant travelling at excessive speed and highly inebriated – Appellant showing no remorse – Maintaining deceased driver at fault – Appellant 26 years old and first offender – No basis warranting interference with sentence imposed – Appeal dismissed

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JUDGMENT

Chetty, J

[1] This is an appeal against a sentence of four (4) years imprisonment imposed on the appellant following his conviction on two (2) counts of culpable homicide. Notwithstanding the inelegant formulation of the charges in the charge sheet the gravamen of the aforementioned offences concerned a collision between two (2) motor vehicles, a maroon Subaru, DZZ 543 EC and an Opel Corsa bakkie, occupied by the two (2) deceased who were seated in the cab and Mr *Victor Bonniface,* seated in the rear of the bakkie. The appellant, who was legally represented at the trial, pleaded not guilty to the charges[1], (eight (8) in all) and, in a terse plea explanation, attributed the collision solely to the negligence of the driver of the Corsa bakkie.

[2] During his testimony, he castigated the evidence of the state witnesses who had alleged that his negligence was the sole cause of the collision, denounced them as untruthful and steadfastly maintained his innocence. The truth of the matter however, as the trial court correctly found, is that the entire body of his evidence was contrived. The proven facts may conveniently be summarised as follows – At approximately 06:30 a.m. the two (2) deceased, Ms *Susan Oelefse (Susan)* and her boyfriend, Mr *Colin Bonniface* (*Colin*) and the latter's brother, Mr *Victor Bonniface* (*Victor*), all postal employees, were en route to their place of employment and travelling along Kimberly Road, in an Opel Corsa bakkie. Colin was the driver of the bakkie, *Susan*, his front passenger, whilst *Victor* was seated in the canopied rear. As the Corsa approached the robot controlled intersection with Oxford Street, it slowed and stopped at the red light.

[1] The other counts are irrelevant for the purposes of this judgment.

When it turned green the Corsa proceeded into Oxford Street and as it executed the turn, the maroon Subaru, travelling at high speed, disobeyed the red light and careered into the Opel Corsa with such force that not only the rear canopy, but *Victor* himself, were flung from the vehicle. The cab occupants, *Susan* and *Colin*, were not as fortunate – they died on impact.

[3] Mr *Brandon Gerald Botha* (*Botha*) had himself being travelling along Oxford Street immediately prior to the collision, and, in obesience to the colour change from orange to red at the robot controlled intersection, stopped in the lane adjacent to the pavement. He witnessed the Corsa turning into Oxford Street and as it executed the turn, the Subaru flashed past him on his right, and collided with the Corsa. *Botha* immediately alighted from his vehicle and noticed that the driver of the Subaru, whom, it is common cause was the appellant, was trapped behind the steering wheel airbag. He assisted him out of the vehicle and thereafter the rear seated passengers, who immediately upon alighting, removed four bottles of alcohol from the vehicle and disposed of it by throwing it over a nearby wall.

[4] Mr *Herman Olivier*, a tow truck driver employed by Three Way Towing and fortuitously travelling along Oxford, was telephonically appraised of the collision by a colleague. When he arrived at the intersection, he observed the Subaru juxtaposed against a building wall and the Corsa, against a pole. When he alighted from his vehicle, he immediately approached a colleague and enquired

as to the identity of the driver. The appellant, who was standing close by, acknowledged being the driver and requested *Botha* to ferry him away from the scene. When *Botha* refused, the appellant surreptitiously walked away and, when observed and admonished by *Botha* to return, took flight. *Botha* pursued and caught up with the appellant in Turnbull Park, escorted him to the scene and handed him over to the police on their arrival.

[5] As adumbrated hereinafter, not content with persisting with his false version, the appellant however moreover disputed that he had been assisted out of his vehicle, that he had attempted to flee the scene and branded the state witnesses liars. He maintained that he was sober saying, ***"Now, about the allegations of being drunk and you going to do some work, what can you say about that? - - - as the sole person here in South Africa who was in charge at the moment for all the volunteers that are in South Africa, I could receive an emergency call at any time during the day or night, whether a volunteer has been attacked or robbed, or they have been in an accident, so the state of sobriety had to be held at all times because I was the first point of contact with the volunteer, they called me. So the point of my sobriety is non-negotiable, I had to be sober at all times during that particular month"***. The trial court however rejected the appellant's evidence that he was sober and correctly found that he was highly inebriated. It is common cause that on forensic analysis, his blood alcohol concentration was found to be 0.23g/100 ml.

[6] During the sentencing stage of the proceedings the appellant's attorney sought leave to hand in two (2) documents, exhibits "F" and "G", a probation officer's report compiled by a Ms *P Loggenberg* and a pro forma document titled **"Correctional Supervision: Section 276 (1) (h). The State versus Luyolo Yabo"**. Although neither the appellant nor Ms *Loggenberg* testified, the latter's report, a brief resume of the appellant's personal circumstances, was merely handed in as evidence. Ms *Loggenberg* consulted and interviewed the appellant, his mother and *Susan's* sister, a Mrs *Nel*. The sum total of this interview reveals that the latter informed her that *Susan* was the mother of two (2) adult daughters who were adversely affected by the untimely death of their mother as were the deceased's parents, who were themselves devastated by her death. Apropos the appellant himself, although the report mentions a somewhat fractured relationship between the appellant and his late father in his formative years, the appellant, his sibling and mother nonetheless shared a close relationship.

[7] The appellant matriculated in 2000 and enrolled at the University of Durban Westville to pursue a course of study in engineering but apparently left in 2004 due to financial constraints. He was employed by an entity styled, Go Getter Solutions, initially as a volunteer from 2005 – 2006 and permanently during 2007. In November 2007 he commenced employment at Volunteer Services Abroad until his dismissal in June 2009 whereafter he appears to have become self employed assisting in the preparation and submission of tender documents.

[8] In her deliberation of various sentencing regimes Ms *Loggenberg* discounted a fine, direct imprisonment, a suspended sentence and what she termed an **"alternative sentence"** (whatever that might mean) before concluding that a sentence of correctional supervision was **"appropriate"**. Her conclusion is rather perplexing. Whilst she states that **"the accused has not been assessed for this option"** she nonetheless considered that the appellant **"could be successfully rehabilitated if he is subjected to this sentence"**. The report however provides no rational basis for either her conclusion or her recommendation. Although Ms *Loggenberg* stated that the appellant was **"remorseful about his actions"** this comment is in contradistinction to the appellant's own testimony. He had steadfastly maintained that the collision was occasioned by the recklessness of the driver of the Corsa not heeding the red light at the robot controlled intersection. By definition, true remorse, which evinces a gnawing distress arising from a sense of guilt for past wrongs, is incompatible with the appellant's contrived disavowal of any wrongdoing on his part. Whilst genuine remorse may properly be considered a mitigating factor, the appellant's pseudo remorse appears to be no more than an expression of regret. As such, it can be entirely discounted as a mitigating feature.

[9] The trial court delivered a well reasoned judgment on sentence. It considered all the relevant factors, had regard to the *Loggenberg* report and referred to a plethora of case law on point before imposing the sentence it did. It has repeatedly been emphasized that sentence is pre-eminently a matter within

the discretion of the sentencing court. Appellate interference is not unlimited and is warranted only on limited grounds viz, a material misdirection, improper or unreasonable exercise of discretion, and a shocking disparity between the sentence imposed and that which an Appellate Court, sitting as a court of first instance, would have imposed.

[10] Central to the argument advanced on behalf of the appellant for the setting aside of the custodial sentence and its substitution by a sentence of correctional supervision in terms of s 276 (1) (h) of the **Criminal Procedure Act**[2] is the grouse that the trial court had scant regard to the appellant's personal circumstances and over-emphasized the seriousness of the offences. The submissions made hereanent are entirely fatuous. There is not a tittle of evidence that the appellant **"was injured in the accident and that he lost his vehicle since he could not claim it back from his insurance company"**. On the contrary, the appellant gave no evidence of having been injured in the collision and averred that the vehicle he drove was a **"company vehicle"**. The appellant was not, as contended by his counsel, dismissed because he drove his employer's vehicle. By his own admission, he was only dismissed, several months after the collision, when the results of the blood analysis was disclosed. There is furthermore no evidence that he maintained his **"elderly mother and younger brother"**. All that the *Loggenberg* report states is **"he is currently taking care of every aspect of the household"**. The fact of the matter is that the appellant's mother is employed and, one can safely assume, capable of

[2] Act No, 51 of 1977

maintaining herself. Neither in the oral evidence adduced at the trial nor in the *Loggenberg* report is there any suggestion that the appellant's younger brother is dependent upon him for support. The further submission that the appellant **"appears to have progressed relatively far in his engineering course"** is speculative in the extreme. The aforegoing submissions are at variance with the evidence adduced and without any foundation.

[11] In his oral submissions, Mr *Price*, relying on certain dicta by van Deventer J in **S v Standaard**[3] and an article published in Advocate by Adv Carryl Verrier submitted that, given the conditions prevalent in South African prisons, ***"jailing a person in the circumstances the South African prisons find themselves in at the moment, would be to act unconstitutionally"***. The aforegoing submission has, in recent years, become all the more prevalent and the notion that imprisonment should be considered only as a last resort and in the most serious cases, debunked. It is admittedly so that conditions in our prisons are less than ideal. The fact of the matter is that imprisonment, as a sentencing option, is legislatively sanctioned. As was pointed out by Nienaber J.A in **S v Lister** *1993 (2) SACR 228 (A.D)*[4], at *232g-h*:-

> "Prison, one knows, is not a congenial place and the conditions may well be less than ideal for psychotherapy. But then, a prison is primarily an institution of punishment, not cure. As the Court *a quo* was at pains to point out, the approach of a

[3] 1997 (2) SACR 668 at 670a
[4] Albeit in a case concerning psychiatric evidence

> sentencing officer is not the same as that of a psychiatrist. The sentencing officer takes account of all the recognised aims of sentencing including retribution; well-being of the accused at the expense of other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence."

[12] The trial court was alive to the fact that the appellant was relatively young and a first offender and, notwithstanding the unwarranted criticism directed at the magistrate hereanent, no doubt carefully considered. There is, in my view, no justifiable basis for interference in the sentence imposed. In **S v Mapipa**[5], I considered the appropriateness of a sentence of four (4) years imprisonment in a motor collision death related case. After an extensive analysis of relevant case law, I dismissed the appeal and confirmed the sentence. To repeat what I said therein will unnecessarily burden this judgment. What must be emphasized however is that the aggravating features in this case are legion – a highly inebriated appellant, with scant regard for the well being of other road users, drove his vehicle at high speed in a city centre, through a red robot and, by his conduct, killed two (2) innocent persons en route to their work place. Thereafter, he attempted to flee the scene and subsequently sought to apportion blame to the deceased driver. He has taken no responsibility for his actions, has shown no genuine remorse and is the author of his own misfortune. In my judgment the sentence imposed is entirely appropriate.

[5] 2010 (1) SACR 151

[13] The following order will issue: -

The appeal is dismissed.

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D. CHETTY
JUDGE OF THE HIGH COURT

Majiki, J

I agree.

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B. MAJIKI
JUDGE OF THE HIGH COURT

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