REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**

27/11/2018

DATE SIGNATURE

Case Number: **A92/2018**

In the matter between:

KOMANE MICHAEL MADIKWE Appellant

And

THE STATE Respondent

JUDGMENT

FISHER J, (MATSEMELA AJ CONCURRING):

INTRODUCTION

[1] This is an appeal against sentence, with the leave of this court. The appellant pleaded guilty to 3 counts of culpable homicide and to 1 count of driving a motor vehicle while the concentration of alcohol in his blood was not less than 0,05 grams per 100ml (section 65(2)(a) of the National Road Traffic Act of 1996).

[2] The appellant received a sentence of 11 years effective imprisonment calculated as follows: the 3 three counts of culpable homicide were taken as one for the purpose of sentence and the appellant was sentenced to 8 years in respect of these counts; in respect of count 4 he was sentenced to 6 years imprisonment of which 3 were ordered to run concurrently with the sentence imposed in respect of counts 1 to 3.

FACTS LEADING TO CONVICTION

[3] The facts of the matter as they emerge from the plea explanation which the appellant made in terms of section 112(2) of the Criminal Procedure Act are the following; the appellant had attended a funeral where he consumed a significant amount of alcohol. He gave a lift home to 4 people who had also attended the funeral. On the way home the appellant drove at an excessive speed on a dangerous road. As a result of him driving in this dangerous manner, his vehicle overturned. The tragic result was that three of the four passengers in the vehicle were killed. They were Thembi Martha Mpongoze, Ben Johannes Banda, and Skumbuzo Eugene Nkosi. They were apparently unsuspecting as to whether his ability to drive competently had been impaired by his consumption of alcohol.

FACTS RELEVANT TO SENTENCE

[4] The appellant served 9 months of his sentence before obtaining bail pending appeal. He has no previous convictions.

[5] By the account set out in the report dealing with his suitability for correctional supervision he was 45 years old at the time of sentencing. He is married and resides in Vosloorus with his wife and the two children born of their marriage who were 18 and

8 at the time of sentence. He was employed as a supervisor and earned R16 000 per month. He started out as a warehouse packer and it seems that he was able to work his way up in the ranks of his employer. His wife was employed as a domestic worker. He had been employed by the same company for some years. He has a code 10 driving licence which he has had for a period of nine years.

[6] He is the firstborn of a family of 10 children. He has a good relationship with all his siblings. He is in good physical and psychological health. He stated that he consumed alcohol but that he did not use other drugs.

[7] The official compiling the report was of the view that the appellant would benefit from participating in therapeutic programmes presented by the Department of correctional services. He was of the view that a sentence of correctional supervision was appropriate. He stated that it would enable the appellant to be more responsible and also to enable him to be employed and maintain a healthy relationship with his family and community. He found that the accused did indeed qualify as a candidate for correctional supervision in terms of section 276 (1)(h) of the Criminal Procedure Act. It was recommended that the appellant be so sentenced.

[8] The appellant testified in mitigation of sentence. He stated that he was very remorseful. He said that he was unable to sleep properly as a result he stated also that the incidents had affected his eating habits and appetite.

[9] He stated that, if he were sentenced to imprisonment, his family would suffer financially as he is their main provider.

THE MAGISTRATE'S APPROACH TO SENTENCE

[10] The magistrate made the finding that the appellant was "totally drunk". The magistrate found his blameworthiness to exist in the fact "...that he was driving whilst he was under the influence of intoxicating liquor, and as a result collided with these human beings and killed three people ".

[11] The magistrate placed the emphasis on the effects of the negligent conduct of the appellant. The fact that 3 deaths resulted from the negligent driving led him to the

conclusion that the only sentence which would be appropriate was a period of lengthy imprisonment. For the conviction on count 4, it appears that the consequence again weighed heavily in his determination.

[12] The facts found were however not the facts of this case. Apart from the finding by the magistrates that the deceased were killed while walking on the side of the road and having been collided with by the appellant which was not the manner in which the accident occurred, the magistrates finding that the appellant was totally drunk is not borne out by any evidence save the level of alcohol in his blood. It is thus not known the extent to which his drunkenness impacted on the accident.

LEGAL PRINCIPLES

[13] The conventional approach adopted by our courts in relation to culpability for road accident deaths was succinctly stated in *S v Nxumalo* 1982 (3) SA 856 (AD) by Corbett JA, who said the following at 861A-G:

> *"Now, there is no doubt that the Court, when assessing the punishment to be meted out to a person convicted of an offence arising from the negligent driving of a motor vehicle on a public highway cannot, and should not, ignore the consequences of such negligent driving, especially where one of the consequences is the death of another person and the conviction is of culpable homicide."*

[14] The basic assessment that the Court must undertake is the degree of culpability of the accused person. 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 must be considered in this context. At the same time the actual consequences of the accused's negligence cannot be disregarded (see *S v Hougaard* 1972 (3) 748 (A) at 758F).

[15] In *S v Ngcobo* 1962 (2) SA 333 (N) Miller J, at 336H - 337A, made the following useful pronouncement as to the assessment to be undertaken:

> *"Whatever the result of the negligent act or omission, the fact remains that what the accused person in such a case is guilty of is negligence - the failure to take*

reasonable and proper care in given circumstances. His negligence may be slight and yet may have the most calamitous consequences, or it may be gross and yet be almost providentially harmless in the result. I venture to suggest that the basic measure for determining fit punishment for a negligent motorist must be the degree of his culpability or blameworthiness. In terms of the judgment to which I have referred, the fact that a death or deaths resulted from such negligence is a factor which may and should be taken into account by the court for purposes of sentence, not so much for its purely punitive effect on the culprit, who may not deserve severe punishment, but for its deterrent effect in emphasising 'the sanctity of human life' and in warning motorists that negligence on the highways may well result in the death of innocent persons and in severe penalties being imposed upon those responsible therefor".

[16] In *S v Nyathi* 2005 (2) SACR 273 at [13] Conradie JA, after having examined the facts and sentences passed in a number of similar cases stated as follows with reference to the facts in that case:

> "*Road accidents with calamitous consequences are frequently caused by inadvertence, often momentary. 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.*"

DISCUSSION AND CONCLUSION

[17] That the magistrate passed sentence on a completely different set of facts to those which actually occurred is of grave concern. This is a misdirection which goes to the very heart of the consideration undertaken and vitiates the entire process.

[18] The appellant gave scant details of how the accident occurred. I would urge judicial officers adjudicating on cases such as this to insist on detailed evidence being given with regard to the manner in which the accident occurred. This is, after all, central to considering the blameworthiness of the accused. It strikes me that to plead guilty on the basis that one merely acknowledges guilt without dealing with the level of culpability may even be regarded as a ploy to avoid a proper consideration of matter.

[19] I had considered sending the matter back to the magistrate with a direction to obtain evidence of the details of the accident. However, I ultimately determined that there was enough evidence on which properly to consider the matter.

[20] The appellant drove at a speed which was higher than the limit of 100 km per hour. He did this after having consumed a substantial amount of alcohol. He was driving on a road which was single carriage in opposite directions. The chance that he would endanger his passengers was high in the circumstances. As it was, he lost control of the vehicle and it overturned. This suggests a very high degree of culpability. The excessive consumption of alcohol is indeed an aggravating factor. The fact that 3 people were killed as a result of his reckless driving cannot be under- estimated.

[21] To my mind however the magistrate over-emphasized the fact that the negligence had resulted in the deaths of 3 people.

[22] I have taken into account that 9 months were spent in jail. I have also considered the recommendations of the correctional supervision report and the evidence given in mitigation. To my mind these aspects suggest an ability to be rehabilitated, to learn from the experience and to be deterred.

[23] The 3 counts of culpable homicide are taken as one for the purposes of sentence.

[24] I may make mention that, were it not for the time served in prison, I would have been more inclined to impose a custodial sentence, albeit for a significantly shorter period than that imposed.

ORDER

[25] I thus make the following order:

a. The appeal succeeds.

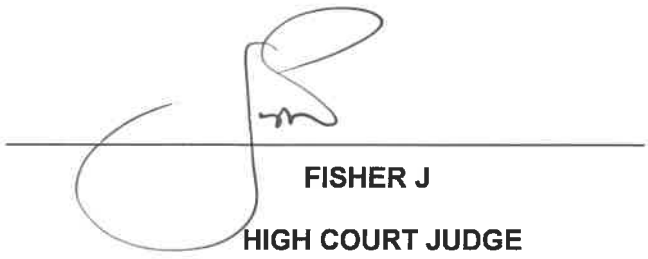
b. The sentence handed down by the magistrate is set aside and replaced with the following:

"In respect of counts 1- 3 (which are taken together): The accused is sentenced to 3 years' correctional supervision in terms of s 276(1) *(h)* of the Criminal Procedure Act 51 of 1977 and, in addition, to 2 years' imprisonment which is suspended, on condition that he is not convicted of an offence of negligent or reckless driving.

The following conditions are imposed in terms of section 52 of the Correctional Services Act 111of 1998:

1. **The accused must be placed under house detention for the full duration of the correctional supervision;**
2. **He must have a fixed residential address;**
3. **He must be physically monitored at his place of residence by way of an electronic monitoring device ;**
4. **He must perform such community service as shall be determined by Boksburg Community Corrections for a minimum of 16 hours per month;**
5. **He must take part in the Life Skills Programme conducted by the Boksburg Community Corrections or any similar programme as may be recommended by Boksburg Community Corrections;**
6. **He must refrain from using alcohol or illegal substances including Marijuana;**
7. **He must not commit any criminal offence;**
8. **He must report to Boksburg Community Corrections once per week on a Saturday.**

In respect of count 4: The accused is sentenced to 18 months' imprisonment which is suspended on condition that he is not found guilty of any offence under section 65 of Act 93 0f 1996."



FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur,

MATSEMELA AJ

ACTING JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 06 November 2018.

Judgment Delivered: 27 November 2018.

APPEARANCES:

For the Appellant	: Mr I Van As (Attorney).
Instructed by	: Botha-Booyens & Van Attorneys.
For the Respondent	: Adv D Zinn.
Instructed by	: NPA.