

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: A106/2022

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

06 June 2023

DATE

SIGNATURE

In the matter between:

MNISI PHUMZILE CYNTHIA

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Mnisi Phumzile Cynthia v The State* (Case No: A106/2022)
[2023] ZAGPJHC 643 (05 June 2023)

J U D G M E N T

This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines.

Johnson AJ:

[1] The appellant, an adult female, and the driver of a motor vehicle on 20 July 2015, is charged in the main count with culpable homicide in that she on Pongola Drive and Strydom Street, public roads in the district of Ekurhuleni, wrongfully and negligently caused or contributed to a collision which caused the death of Inganatheni Sobokwa. In the first alternative she is charged with a contravention of section 63 (1) (reckless or negligent driving) and in the second alternative of a contravention of section 64 (inconsiderate driving) of the National Road Traffic Act 93 of 1996 on the same date, time and place mentioned in the main count. She was initially represented by Ms Khanye and before the closure of the State's Case, by Mr Ngobeni, and she pleaded not guilty.

[2] The appellant was nevertheless found guilty of culpable homicide and sentenced to 30 months' imprisonment, and is appealing against both the conviction and sentence with leave of the court *a quo*.

[3] It was admitted in terms of section 220 of the Criminal Procedure Act 51/1977 (CPA) that the appellant drove the vehicle in the charge sheet on 20 July 2015 on Pongola Drive and Strydom Road, that the identity of the deceased was Nganathi Sobokwa, and that the post mortem report was not disputed. After Mr Malontane came on record, it was also admitted that the deceased died of subdural haemorrhage.

[4] Mpho Mathibela testified that he is a crash scene investigator in the service of the Johannesburg Accident Unit of the South African Police Services. He attends serious accident and culpable homicide cases.

[5] After receiving a report he went to the scene of the accident where he arrived at approximately 8:30. Constable Mugimeta was already on the scene. He took photographs and measurements of the scene.

[6] The driver, who was taken to hospital, drove on Strydom Road. It has a slight curve, down a decline towards the stop street. The tar road was in a very good condition and the weather clear.

[7] He approached the vehicle which could carry 10 to 16 passengers. It was not roadworthy. The steering component was tied with insulation tape, the ignition wiring was exposed so that it could only start by hotwiring, a passenger seat at the back of the driver was not mounted or bolted, the brake and clutch pedals were smooth, the steel exposed and had no rubber housing, and the window winder was homemade. The operator's disc had also expired on 30 June 2015, but a grace period of 21 days is given to operators.

[8] He noticed a yaw mark which indicated that the vehicle veered off the road from left to the right across oncoming traffic into a ditch. A yaw mark is caused by oversteering and using the accelerator instead of the brakes. It ended where the vehicle in question came to a stop. The prosecutor and the magistrate struggled to comprehend what a yaw mark is. It represents

such a common description for a mark, (which is made by a tire that is rotating and sliding sideways parallel to that wheel's axle) in contrast to a brake mark, that we take judicial notice of what a yaw mark is.

[9] It was put to the witness that the appellant was avoiding an oncoming car in her lane that was speeding and that she moved the steering wheel to the side to go onto the gravel on the left side of the road. After the car had passed, she moved to the right to find that her vehicle was unsteady on the road and moved from one side to the other. She then let go of the accelerator and brake for the vehicle to move on its own. He replied that he found no brake or skid marks, only the yaw mark that pointed to her applying the accelerator and veering off the road.

[10] The cones that he placed to indicate the yaw mark on the road on Exhibit A photo 11, shows that the vehicle of the appellant moved from the left lane over the lane of oncoming traffic into the ditch.

[11] Warrant Officer Dreyer is a mechanical investigator from the Tswane Accident Response Unit with 29 years' experience. As a result of a call from the Johannesburg Response Unit, he went to the scene where he found the vehicle in question, a Mitsubishi Star Wagon minibus, which had been pulled out of a river. He was requested to do a mechanical inspection.

[12] He found that the vehicle was not roadworthy in accordance with the National Road Traffic Act and SANS code 10047. He found loose electrical

wires in the dashboard. The ignition had not been fixed, the brake master cylinder was leaking and there was a lot of excessive free play on the steering system which indicated an excessive wear on the steering links and ball joints. Ordinarily a free play of 10 degrees is allowed, but on this vehicle the free play was 45 degrees. That meant that the steering wheel would have to be turned 45 degrees before it turned the wheels. The vehicle should have been fitted with commercial tires, but it was not. The vehicle was not in compliance with the National Road Traffic Act. He compiled a report which was handed in as Exhibit C. As a result of the leaking master cylinder, the brakes were not in a good condition.

[13] To a question by the court he testified that, if you drive with excessive play on the steering wheel, you must constantly correct the vehicle to keep it on the road. Where you would normally make a slight turn to swerve out in the case of an emergency, you would have to turn much further if there is excessive play on the steering wheel. One would not be able to keep proper control of a vehicle with 45 degrees play on the steering wheel.

[14] Sgt Mugimeti is a member of the SAPS stationed at Norkem Park. On 20 July 2015 while on patrol, he noticed a group of people on the corner of Pongola and Strydom. There was a vehicle in a ditch and many injured children. There was a policeman Monoto on the scene who came from or was on his way to work. He made a list of the children on the scene on Exhibit E. From a viewing of the list, the deceased's name is mentioned as no 2 on the list. There were 20 injured bleeding children sitting on the ground whose names appear on the list. He contacted the ambulance

services and two responded. Later more arrived. He asked who the driver of the vehicle in the ditch was, and the appellant replied that she was. She was also injured.

[15] Sisokuhle Mdletshe testified that the appellant picked her up at her house on 20 July 2015 between 06:30 to 07:00 on her way to school. They drove on Strydom Road where there is a sharp curve. She sat behind the appellant facing the other way, and do not know what the appellant was doing. She lost control of the vehicle and it drove into a ditch on the curve. She barely remembers what happened thereafter, but she was rescued. She sustained injuries to her knees.

[16] Robert Matlo Mabula is a detective constable in the SAPS stationed at Norkem Park. He was called to the Tembisa Hospital on the day in question where he was told that the deceased had died.

[17] Ben Monoto testified that he is a police officer stationed at Olifantsfontein. On the day in question, he was on his way to pick up colleagues on his way to work. On his way he was stopped and told of a vehicle that drove into a ditch. He went there and found the vehicle with children inside. He removed the windscreen and removed the child who sat on the front seat. The driver was pressed by the steering wheel and the other children piled on top of each other. He then assisted the children out of the vehicle.

[18] That was the State's case.

[19] The appellant testified that she is the owner of the vehicle mentioned in the charge sheet. It can transport 14 passengers plus the driver, which is the number that was in the vehicle during the accident. She uses it to transport school children. She picked up the children and on the way to school approaching Pongola, a black Dodge sped towards her in her lane. She tried to avoid the vehicle, but lost control and drove onto the gravel on the left side of the road.

[20] After it passed her, she tried to get back on the road, but again lost control of her vehicle. She drove into a ditch on the right-hand side of the road. The children were helped out of the vehicle. She was trapped, but eventually helped out.

[21] She disagreed with the expert witnesses with regards to the roadworthiness of her vehicle. It was road worthy.

[22] In evaluating the evidence in her judgement, the learned magistrate was mindful of the fact that the State had to prove its case beyond reasonable doubt, and that no onus rests upon an accused person.

[23] The only dispute was whether the appellant was negligent when she lost control of her vehicle and thereby causing the death of the deceased.

[24] The evidence of Mr. Mathebula and Mr. Dreyer are crucial to solve the issue in dispute. They had no connection to each other and were two

independent witnesses. They were cross-examined at length over the faults they discovered during the inspection of the appellant's vehicle, and disagreed that the accident could have caused it. All the faults were existing faults, and they gave reasons for this finding. Both concluded that the vehicle was not road worthy and not fit to transport passengers.

[25] Mr. Mathebula described the direction of the yaw mark which started on the left side of the road, and then ran over the path of oncoming traffic until it ended where the vehicle came to a standstill. The yaw mark indicated that the brakes were not applied, but the accelerator.

[26] Mr. Dreyer described the major fault of the defective steering wheel. Normally a free play of 10 degrees is allowed, but on this vehicle the free play was 45 degrees. That meant that the steering wheel would have to be turned 45 degrees before it turned the wheels. It would also cause the driver to continue overcorrecting the steering.

[27] The two witnesses corroborated each other on material aspects regarding the fact that the vehicle was not roadworthy.

[28] By the appellant's own admission, she lost control of the vehicle before it crashed into the ditch. She could not satisfactorily explain what caused her to lose control. It was not caused by the oncoming vehicle, because if it was, she would have said so in response to the question what caused her to lose control. The only reasonable inference that can be

drawn from the facts is that the faulty steering mechanism and braking system caused her to lose control.

[29] The learned magistrate rejected her evidence where it conflicted with that of the State.

[30] The test for negligence was stated as follows in *Kruger v Coetzee* 1966 (2) SA 428 A 430E-G

“For the purposes of liability culpa arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.”

[31] The learned magistrate correctly concluded that a reasonable person would have foreseen the reasonable possibility that, by driving an overloaded, defective vehicle to transport children, could cause them harm, would have taken reasonable steps to guard against such an occurrence, and that the appellant failed to take such steps.

[32] The appellant was correctly found guilty of culpable homicide.

[33] As far as the sentence is concerned, it was considered that the appellant is 50 years of age and has 4 dependants. She is the sole breadwinner, earns R1 800 presumably per month, and is a first offender.

[34] The seriousness of the offence and the circumstances, under which it was committed, was also considered. The court alluded to the fact that the actions on the appellant caused a child to lose his life, and that she has shown no remorse.

[35] A fine and a suspended sentence were considered, but the learned magistrate found it not to be appropriate sentences. The court concluded that, in view of the recklessness of the appellant's actions and her disregard for the lives of children, the only appropriate sentence would be one of imprisonment.

[36] The general approach to matters of this nature was set out in *S v Nxumalo* 1982 (3) SA 856 (A) at 861G – H where the Court of Appeal held that:

"It seems to me that in determining an appropriate sentence in such cases (being matters of culpable homicide arising from traffic accidents) the basic criterion to which the Court must have regard is the degree of culpability or blameworthiness exhibited by the appellant in committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the appellant's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the appellant's negligence. At the

same time the actual consequences of the appellant's negligence cannot be disregarded...."

[37] The discretion to impose a sentence is that of the trial court. A court of appeal does not have an unfettered discretion to interfere with the sentence imposed by the trial court (*S v Anderson* 1964 (3) SA 494 (A) 495.

[38] A court of appeal will only interfere where it is apparent that the discretion of the trial court was not exercised judicially or reasonably.

[39] We are not convinced that the learned magistrate committed any misdirection which warrants us to interfere with the sentence.

[40] We make the following order:

The appeal against conviction and sentence is dismissed.

JOHNSON A.J.
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION (JOHANNESBURG)

I agree and it is so ordered

ISMAIL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION (JOHANNESBURG)

APPEARANCES:

Heard on : 22 May 2023

For the Appellant : Adv. Hlazo
Johannesburg local Office
3rd floor
56 Main street
Marshalltown
Johannesburg

For the State : Adv. Kau
Office of the Director of Public Prosecutions
Innes Chambers
Cnr Pritchard & Kruis Street
Johannesburg, 2000
Tel: (011) 220 4071
Cell: 082 845 4747

Date of Judgment : 06 June 2023