CASE NO: 243/96

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

G NAICKER APPELLANT

and

THE STATE

RESPONDENT

BEFORE: F H GROSSKOPF, MARAIS and SCHUTZ JJA

HEARD: 14 NOVEMBER 1996

DELIVERED: 27 NOVEMBER 1996

# JUDGMENT

## FH GROSSKOPF JA:

This appeal concerns sentence only. The appellant was convicted in the regional court of culpable homicide resulting from negligent driving and sentenced to two years' imprisonment. His appeal against conviction and sentence was dismissed by the Natal Provincial Division. Leave to appeal to this court against sentence was granted on petition to the Chief Justice.

During the early evening of 13 November 1992 the appellant was driving a Ford Sierra motor vehicle ("the Sierra") in an easterly direction along the M7 Freeway between Pinetown and Durban. The M7 Freeway was a dual carriageway and the east bound carriageway consisted of three traffic lanes. The appellant was travelling in the

centre lane behind a Mercedes Benz motor vehicle ("the Mercedes"). It was alleged by the state that the appellant and the driver of the Mercedes were racing with each other and driving at an excessive speed, but the magistrate did not think that the evidence could justify such a finding at the end of the state case when he discharged the alleged driver of the Mercedes, who was accused no 2 before the court, and the evidence given by the appellant thereafter took the matter no further.

The magistrate did however find that the appellant was driving at a high speed when he passed Mrs Cretten who was driving a BMW motor vehicle ("the BMW") at approximately 90 km/h in the same direction but in the left hand lane. Mr Cretten was a passenger in the BMW. The Crettens were independent witnesses who both testified at the appellant's trial. Despite certain discrepancies in their respective

versions the magistrate accepted their evidence. The magistrate was satisfied that the initial collision between the Sierra and the Mercedes occurred in the manner described by the Crettens.

The appellant's account of the collision differed in material respects from that of the Crettens. The appellant's version was found to be improbable and untruthful and need not be restated.

According to Mrs Cretten the Sierra was behind the Mercedes in the centre lane when they passed her. The Sierra then moved over to the right hand lane in order to pass the Mercedes, but was prevented from doing so by the driver of the Mercedes, who moved over to the right hand lane in front of the Sierra. When the Sierra moved back to the centre lane the Mercedes once again obstructed its passage by also moving over to that lane.

Having been prevented from passing the Mercedes in the two fast lanes the appellant moved over to the left hand lane in an attempt to overtake it on the left. The appellant must have been aware of the risk of slow moving traffic in that lane. As it happened there was a huge tanker vehicle ("the tanker") in the left hand lane moving downhill at a slow speed. Mrs Cretten's evidence is that she saw the driver of the Sierra applying his brakes "literally, as he moved into the [left hand] lane". She later said that "he had just entered the left hand lane" when she saw his brake lights coming on. Allowing for reaction time it would appear that the appellant first became aware of the tanker as he entered the left hand lane. One must assume that he would probably not have moved into that lane if he had seen the slow moving tanker at an earlier stage.

Mrs Cretten described how the driver of the Sierra applied his brakes and swerved to his right in order to avoid a collision with the tanker. She saw the Sierra going into a clockwise spin, skidding into the left hand side of the Mercedes which was still travelling in the centre lane and almost parallel to the Sierra. The Sierra then pushed the Mercedes over the south bound carriageway and onto the median strip separating the two carriageways.

Mr Cretten's evidence is that the driver of the Sierra "braked violently first …… then he started to lose control of the vehicle". He also saw the Sierra turning and going sideways into the Mercedes, forcing the Mercedes into the trees and bushes on the median. I should point out that the magistrate found that the road surface was dry immediately before and at the time of the collision. The fact that the

Sierra went into a spin and skidded can therefore not be attributed to a wet road surface, as was suggested by the appellant.

Other state witnesses described how the Mercedes came through the bushes over the median and collided with a Nissan Sentra ("the Sentra") travelling in the centre lane of the west bound carriageway. The deceased who was a passenger in the Sentra died as a result of injuries sustained in that collision, while her husband who was the driver of the Sentra was seriously injured. An Isuzu bakkie then collided with the Mercedes while the Sentra was pushed into a Toyota Corolla. Fortunately nobody else sustained serious bodily injuries.

The magistrate found that this evidence quite clearly showed that

> "it was the gross negligence of the accused, if not the recklessness which caused the initial collision between his vehicle and the Mercedes and which caused the Mercedes to end up on the west bound carriageway".

In passing sentence this magistrate acknowledged that he had to look at the degree of negligence in order to determine the appellant's moral culpability, and then concluded:

> "I think I can safely say that without endeavouring to categorise your negligence as gross negligence or recklessness your negligence was of a high degree."

I agree with the magistrate's further observation that the appellant's conduct cannot be described as mere inadvertence or slight negligence, but I cannot with respect agree with the magistrate and the court a quo that the appellant's conduct amounted to either gross negligence or recklessness, or negligence bordering on recklessness. (Cf S v Zyl 1969(1) SA 553 (A) where this court considered the meaning of recklessness and gross negligence.) A finding of gross negligence would perhaps have been justified if the magistrate had found

that the respective drivers of the Sierra and the Mercedes had been driving at an excessive speed while racing with each other. I have already mentioned that the magistrate declined to make such a finding. However serious the consequences of the appellant's conduct they arose out of a momentary lapse, probably caused by the grossly inconsiderate behaviour of the driver of the Mercedes.

Although the magistrate did not regard the appellant's high speed as negligence by itself, speed does have some bearing on the matter. While the presence of slow moving traffic in the left hand lane was to be expected the appellant moved into that lane at a speed which proved to be too high to take evasive action in time.

Overtaking on the left is not negligence per se. Where for instance the roadway of a road is restricted to vehicles moving in one

direction, and is divided into traffic lanes as in the present case, the passing on the left of any other vehicle proceeding in the same direction is permissible in terms of s 91 of the Road Traffic Act 29 of 1989, provided the person driving the passing vehicle can do so with safety to himself and other traffic or property which is or may be on such road. In the present case the appellant could not of course do so with safety to himself and others.

In my judgment the appellant was clearly negligent in failing to keep a proper lookout before moving into the left hand lane. In the result he entered that lane at a time when it was unsafe to do so. There was no motor vehicle on the road other than perhaps the Mercedes which could have obscured the appellant's view, and if it did the appellant should not have entered the left hand lane. Had he kept a

proper lookout before he entered that lane he would have seen the slow moving tanker nearby. It appears from the evidence referred to above that he probably first saw the tanker when he entered the left hand lane. That proved to be too late to take evasive action. He reacted immediately by applying his brakes, but then apparently lost control of the Sierra.

The magistrate was fully justified in considering the tragic consequences of the appellant's negligence and to take it into account for purposes of sentence. See J v Ngcobo 1962(2) SA 333 (N) at 337 A -B. Miller J however pointed out in that case at 336 H that the magnitude of the tragedy resulting from negligence should never be allowed to obscure the true nature of an accused's crime or culpability. The learned judge then concluded at 336 H to 337 A:

> "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."

(See further S v Hougaard 1972(3) SA 748 (A) at 758 F - G; S v Greyling 1990(1) SACR 49 (A) at 56 c - f.)

In my judgment the evidence does not justify the trial court's finding of gross negligence or recklessness on the part of the appellant. Without attaching any label to it I am satisfied that the appellant's negligence as set out above was not of such a high degree as to warrant a sentence of direct imprisonment. Bearing in mind that the degree of the appellant's culpability ought to be the basic measure for determining a fit punishment, and that it was wrongly assessed as being more serious

than it in fact was, I am of the view that this is a proper case for reassessing afresh the sentence imposed by the magistrate.

In R v Swanepoel 1945 AD 444 Davis AJA held as follows at 448:

> "In the case of Rex v Mahametsa (1941, A.D., at p 86), CENTLIVRES, J.A., laid down the law as follows:-
>
> 'We do not disagree with the view that imprisonment is an appropriate punishment in cases of recklessness, if by 'recklessness' is meant gross negligence or a wilful disregard of the rights of other road users, as for example in the case of numbers of accidents which are caused by the dangerous practice of 'cutting in' or driving round a blind corner on the wrong side of the road, or passing another car on the crest of a hill'.
>
> Inferentially, the case shows that, in the absence of recklessness or some other high degree of negligence, an unsuspended sentence of imprisonment, without the option of a fine, should not be imposed on a first offender."

The learned judge further remarked at 449:

> "It seems to me to be quite evident that, before a Court can find

> that it has been proved that an accused person has acted with such reckless disregard of the rights of others, or even with such gross negligence, as to merit imprisonment, it must first very carefully analyse the evidence and arrive at some precise and accurate conclusion as to what has been proved to have occurred."

In R v Bredell 1960(3) SA 558 (A) at 560 G - H (and see also R v Barnardo 1960(3) SA 552 (A) at 557 D - E) this court warned that it may be that the time has come when it is the duty of judicial officers to exercise greater severity in passing sentence in cases of the negligent use of motor vehicles. It should however be pointed out that in both those cases the court found that the conduct of the particular accused amounted to gross negligence or wilful disregard of the rights of other road users, and it was on the strength of those findings that the court in both instances sanctioned a sentence of unsuspended imprisonment.

Correctional supervision did not exist as a sentencing option in 1960 and

what was done in cases decided in the pre-correctional supervision era should be treated with caution when looking to them for guidance in regard to sentence.

In reaching the conclusion that the appellant's conduct did not warrant a sentence of imprisonment I have not overlooked the fact that a death and serious injury resulted from the appellant's negligence.

The appellant is a first offender who was 30 years of age and in regular employment at the time of the commission of the offence. He is not married but his parents are dependent on him for support.

Having considered the various sentencing options I am of the view that a fine coupled with a suspended term of imprisonment would not reflect the seriousness of the offence. Appellant's counsel informed us . that the appellant would in any event not be able to pay a substantial

fine.

The magistrate considered the option of correctional supervision but concluded that such a sentence would not be in the interest of society, would not have the same deterrent effect as a sentence of imprisonment and would not reflect the gravity of the offence. The question whether the appellant would be a suitable candidate for correctional supervision was therefore not investigated.

The advantages of correctional supervision over imprisonment have been referred to in S v K 1993(1) SA 476 (A) at 488 G -I; S v Kruger 1995(1) SACR 27 (A) at 31 b - f, and again in S v Volkwyn 1995(1) SACR 286 (A) at 288 i - 289 d. On the other hand a note of caution has been sounded in S v Schutte 1995(1) SACR 344 (C) at 350 c - e against the indiscriminate use of correctional supervision as a form

of sentence, and it has been repeated by this court in S v Sinden 1995(2) SACR 704 (A) at 708 g - i. However, as was pointed out Ingram 1995(1) SACR 1 (A) at 9 e - f, correctional supervision can be coupled with appropriate conditions to make it a suitably severe sentence even for serious offenders.

I have reached the conclusion that the relevant facts of this case and the favourable personal circumstances of the appellant would make a sentence of rigorous correctional supervision in terms of s 276(1) (h) of the Criminal Procedure Act 51 of 1977 appropriate, if the appellant is found to be a suitable candidate after assessment in terms of s 276 A (1)(a).

A similar approach was adopted in the case of S v Keulder 1994(1) SACR 91 (A) where this court set aside a sentence of three years' imprisonment and decided that a sentence of correctional

supervision would be appropriate where the appellant had been convicted of culpable homicide and of driving a motor vehicle under the influence of alcohol.

This case will have to be remitted to the trial court for consideration of correctional supervision as an appropriate sentence after considering a report of a probation officer or a correctional official.

The appeal succeeds and the sentence is set aside. The matter is remitted to the trial court to sentence the appellant afresh in the light of the views expressed in this judgment, after due compliance with the provisions of s 276 A(l)(a) of the Criminal Procedure Act and after considering such further evidence as may be received.

F H GROSSKOPF
JUDGE OF APPEAL

MARAIS JA )
)CONCUR
SCHUTZ JA )