

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: YES ☒ NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

CASE NO: A576/16

Blaise 2016
DATE

[Signature]
SIGNATURE

In the matter between:

MEMANI VUSI PHILLIP

and

THE STATE

JUDGMENT

MTATI AJ:

Introduction

- [1] The Appellant was arraigned with five charges in the district Court of Highveld Ridge held at Evander. The first count against Appellant was culpable homicide, alternatively, reckless and/or negligent driving. The second count was driving under the influence of liquor or drugs in contravention of section 65(1)(a) of the National Road Traffic Act 93 of 1996 (Act 93 of 1996). The third count was corruption in contravention of section 4(1)(b) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. The fourth count was driving without a licence in contravention of section 12 of Act 93 of 1996. The fifth count was driving an unlicensed or unregistered vehicle in contravention of section 42(2) of Act 93 of 1996. Appellant was found not guilty on count 5 and accordingly, this count is of no relevance for purposes of this appeal except for surrounding circumstances in relation to counts 1 to 4.
- [2] All the offences took place on the 30th January 2015 in Kinross within the district of Highveld Ridge.
- [3] Appellant was found guilty on charges 1 to 4 and was sentenced as follows: Count 1, 18 months' imprisonment; count 2 R8000 or two years imprisonment of which R5000 or 18 months was suspended for a period of five years on condition that he is not convicted of an offence of driving under the influence of liquor or drugs during the period of suspension; count 3, two years imprisonment; count 4, R1000 or three months

imprisonment wholly suspended for the period of five years on condition that he is not convicted of driving a motor vehicle without a valid driver's licence during the period of suspension. Appellant was further disqualified from obtaining a driver's licence for a period of six months.

[4] The Appellant approaches this Court with the leave of the trial Court against conviction and sentence on all counts.

Background

[5] The facts leading to the conviction of Appellant can be summarised as follows. On 30th January 2015, Appellant was driving a motor vehicle in the company of Mr. B.N. Makganya together with Mr. W.C. Shabalala hereinafter referred to as the deceased. They were attending a family function at Afghanistan within the district of Highveld Ridge. On arrival at Afghanistan they were with other people predominantly family members who had also attended the function. After some time the three decided to drive to Kinross in order to buy liquor.

[6] It is on their way back that an accident took place with the resultant death of the deceased. The members of the South African Police Service (Police) arrived together with paramedics and the deceased was certified dead on the scene. Mr. Makganya suffered injuries and was ferried to hospital whilst Appellant remained behind. Appellant apparently bribed the police and he was under the influence of alcohol. It was admitted on behalf of the Appellant that the deceased died as a result of injuries sustained during the accident.

[6] The State led the evidence of Mr. Makganya who testified that he was a passenger in the vehicle driven by Appellant.

6.1. According to Mr. Makganya they bought liquor from Kinross and were on their way to Afghanistan (an informal residential area in the district of Kinross).

6.2. He was seated behind the Appellant. He could not see the speedometer from where he was sitting. He could however feel that the vehicle was driven at high speed.

6.3. Appellant was requested three times by the deceased to allow Mr. Makganya to drive the vehicle. The reason for this was because Appellant was drunk. Appellant refused to permit Mr. Makganya to drive the vehicle.

6.4. On being asked how he saw that the Appellant was drunk, Mr. Makganya testified that he saw him with one bottle of liquor on his hand which was opened.

6.5. On their way from Kinross he testified that the Appellant attempted to overtake another vehicle but could not do so. In an attempt by Appellant to return back to his lane, he then lost control of the vehicle and their vehicle veered to the left and overturned.

6.6. He suffered injuries and the deceased died on the scene.

6.7. In cross examination the witness denied that he drank alcohol on that day. He denied further the version of the Appellant that there was a technical fault with the vehicle that led the Appellant to lose control.

6.8. On the contrary, he blames the Appellant for driving at high speed and that this caused the accident.

6.9. He does not remember talking to the police on the scene. His testimony is that he spoke to either the police or the paramedics. This point becomes crucial in examining the evidence later.

[7] The police later arrived at the scene of the accident and found the Appellant, Mr. Makganya and the deceased. They summoned the paramedics who certified the deceased dead and took Mr. Makganya to hospital to attend to his injuries.

[8] The State then led the evidence of Constable Mbombela and warrant officer Banda. I will summarise both their evidence and only point out to differences where necessary.

8.1. Their evidence was that on the day in question they were on patrol and received a report that there was a motor vehicle accident at R29 between Kinross and Lesley.

8.2. On arrival at the scene they found Appellant, Mr. Makganya and the deceased whereafter they called the paramedics. The paramedics certified the deceased dead and took Mr. Makganya to the hospital.

8.3. The Appellant was asked who was driving the vehicle and he pointed to the deceased.

8.4. The Appellant also introduced himself as Vusi Mnguni. He refused to be taken to hospital although he appeared to be injured.

8.5. The Appellant also smelled of alcohol. Constable Mbombela also testified further that whilst he was opening a culpable homicide case inside the police station, warrant officer Banda approached him and

intimated that the Appellant wanted to be accompanied to Afghanistan to report the accident and the death of the deceased.

8.6. Warrant officer Banda testified that on arrival at Afghanistan he noticed that Appellant was not walking straight as he was approaching the premises where the report was to be made.

8.7. He also smelled alcohol from the Appellant. On their way back from Afghanistan to the police station, Appellant reported to warrant officer Banda that in fact, he is the person that was driving the vehicle and not the deceased.

8.8. The Appellant also offered some money to warrant officer Banda to the tune of R2000.00 if he would keep quiet about the information.

8.9. On arrival at the police station warrant officer Banda related the information to constable Mbombela who promised to arrest the Appellant.

8.10. Both constable Mbombela and warrant officer Banda took the Appellant to his house at Embalenhle.

8.11. According to constable Mbombela, the reason for the trip in his examination in chief, was to secure the drivers licence of the Appellant.

[9] During cross examination, on being confronted about the bribery incident, constable Mbombela stated that the trip to Embalenhle was also to complete the offence of corruption. In other words, he wanted to see if the Appellant would indeed offer them money. He could not provide a sound reason why it was not mentioned in his statement that

the primary reason to go to the Appellant's house was to fetch his driver's licence.

[10] This to me is important to demonstrate the motive of visiting the Appellant's house. Further, on being asked why they had to fetch the drivers licence since the offence of culpable homicide and bribery had already been committed, he responded by saying that they thought it important to also secure the drivers licence. Interestingly, it also came to the fore during cross examination that neither of the police officers mentioned that the primary reason to visit the Appellant's house was to fetch his driver's licence.

[11] On arrival at the Appellant's house he gave the two police officers an amount of R800.00 whereafter he was arrested.

[12] The Appellant also testified in his defence.

12.1. He testified that he was requested by the deceased, who was his son-in-law, to accompany him and Mr. Makganya to Kinross to buy liquor.

12.2. On their way back he felt a sound on the left front side of the vehicle and the vehicle was pulling towards the left hand side.

12.3. In an attempt to pull the vehicle he lost control and the vehicle overturned. He also suffered injuries from the accident and the police refused him medical assistance alleging that he was drunk.

12.4. He denied that he was drunk and testified that the deceased and Mr. Makganya were the people who were drunk. He further denied that he attempted to bribe the police officers. Instead he testified that he was

informed that if he had an amount of R1000.00 he could be released on bail and that is the reason why he went to his house to fetch the money.

12.5. He also testified that after giving the money to warrant officer Banda, he was taken to the back of the police van where he saw the two police officers going back to his house.

12.6. On his return to his house the following day from the Police Station, he realised that he lost an amount of R2500.00 that remained after taking the "bail" money.

12.7. He inferred that the money was taken by the two police officers as they saw where the money was hidden. He reported the alleged theft to one Nthombeni, who was apparently the charge office commander. He followed up but upon not receiving satisfactory response he left the matter there. The defence then closed its case.

Issues to be determined

[13] In my view the issues for determination by the Court are whether:

- a. The Appellant negligently caused the death of the deceased;
- b. The Appellant drove the vehicle whilst under the influence of alcohol;
- c. The Appellant gave a benefit to the police for them not to arrest him;

d. The Appellant drove a motor vehicle without the requisite valid driver's licence.

Analysis of evidence

[14] The trial court convicted the Appellant on the first count based primarily on the fact that the evidence of Mr. Makganya was found to be satisfactory. The trial court could not find any reason why Mr. Makganya would falsely implicate the Appellant. The court also made reference to a photo album which depicted the vehicle after the accident and concluded that the Appellant could not have been travelling at a speed of between 70 and 80 km per hour¹.

[15] These reasons alone cannot, in my view be sufficient to find the Appellant guilty on a charge of culpable homicide. It is indeed so that there is only the evidence of Mr. Makganya on this count. This evidence must be satisfactory in all material respects. Section 208 of the Criminal Procedure Act provides:

"An accused may be convicted of any offence on the single evidence of any competent witness."

[16] It is indeed so that the trial court was best placed to determine the credibility of the evidence by witnesses including that of the Appellant. However, in my view, it is not sufficient to merely cite the application or relevance of section 208 of CPA without actually evaluating the

¹ See page 179 of the transcribed record

evidence of a single witness and satisfying oneself that it meets the minimum required threshold.

[17] In the matter of **S v Sauls & Others**² it was noted that the absence of the word "credible" (in section 208) is of no significance; the single witness must still be credible. In **S v Chabalala**³ it was pointed out that the *"...correct approach in determining the guilt of an accused is, to weigh up all the elements which points towards the guilt of the accused against all that are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."*

[18] I now turn to the evidence of Mr. Makganya. He testified that he was seated behind the Appellant and could not see the speed at which the vehicle was driven. That he felt the vehicle was driven at high speed cannot be conclusive proof of the allegation. There are no experts that were called by the State that could corroborate this allegation. The vehicle itself was not inspected to check if there were any technical faults. The presiding officer himself concluded by merely looking at the photos that the vehicle could not have been driven between 70 and 80 km per hour. There was also no evidence tendered on the speed limit at the route where the accident took place. The fact that the witness did not hear of any sound of a technical fault from the vehicle does not necessary mean it was not existent as testified by the Appellant.

²1981 (3) SA 172 (A) 180H

³ 2003(1) SACR 134 (SCA) 139I-j to 140a

[19] The evidence of the State must prove the guilt of the Appellant beyond reasonable doubt. If on the other hand the explanation of the Appellant is reasonably possibly true, then he is entitled to an acquittal. This follows the burden resting on the State to prove the guilt of the accused beyond reasonable doubt. See **S v M⁴**; **S v Kubheka⁵**; and, **S v Makobe⁶**. The Appellant testified that he heard a sound of a technical fault and this led to him losing control of the vehicle. He remained with this version throughout his testimony.

[20] I now turn to the charge of driving the vehicle under the influence of alcohol. Mr. Makganya testified that he saw the Appellant with one bottle of beer that was opened although there was other alcohol in front of him. Upon being confronted in cross examination that he is the person that was drunk he then reneged and said he was busy inside the house. He never in his testimony testified that he saw the Appellant drinking except to mention that he was drunk. The State struggled to elicit information from him on what led him to conclude that the Appellant was drunk. He ultimately testified that he knows the Appellant when he is drunk.

[21] The two police officers testified that they smelled alcohol from the Appellant. Warrant officer Banda also stated that the Appellant was not walking straight. The Appellant testified that he did not drink. The only explanation on not walking straight was as a result of it being dark at the place where he was going to report the accident. The reason why the Appellant was not taken for blood samples was because he

⁴ 1946 AD 1023

⁵ 1982 (1) SA 534 (W)

⁶ 1991 (2) SACR 456 (W)

said that he was not driving the vehicle according to the police. The Court asked Counsel for the State if there was any reason why the Appellant was not taken for blood tests after he apparently confessed to be the driver. The response to this question was that it was way beyond two hours which is the time limit within which the tests could be done. If that is indeed the case and warrant officer Banda also saw the Appellant not walking straight only when he was reporting the accident at Afghanistan, then the charge of driving under the influence of alcohol cannot stand. I say this because at the time when the accident was reported, it was way beyond two hours.

[22] Further, the Court asked Counsel for the State if, notwithstanding the period of two hours being exceeded after the accident, was it not necessary to still take blood samples from the Appellant to corroborate the version of the police officers. To this Counsel for the State conceded that it may have been necessary. In my view the State failed to prove the guilt of Appellant beyond reasonable doubt on this charge.

[23] Sequentially what follows is the charge of corruption. The evidence of the two police officers is that they proceeded to the Appellant's house in order to fetch his driver's licence. In cross examination of constable Mbombela he stated upon being confronted with his written statement that he also wanted to witness the bribe and arrest the Appellant. Warrant officer Banda, with 23 years of experience in the police, he found it important to travel to Embalenhle to fetch a driver's licence in place of charging the Appellant for driving without a valid driver's licence.

[24] After the bribe money was handed over to warrant officer Banda, he testified that he then arrested the Appellant. On the question whether he explained the rights of the Appellant before this arrest he said *"No, I did not, I do not want to lie. I did not warn him, my intention was to come before court so that I can prove before court that the accused person actually did try to bribe me..."*⁷ On the other hand, constable Mbombela who was always in the company of warrant officer Banda stated in his written statement that warrant officer Banda *"...then informed him that he was under arrest and informed him of the charges he faces and informed him [of] his constitutional rights"*⁸.

[25] The Appellant's testimony has been consistently that he went to his house to fetch bail money. In my view, the State failed to prove its case beyond reasonable doubt on this charge.

[26] In relation to driving without a valid driver's licence, it does not appear through the testimony of the Appellant that he, at any stage produced a valid driver's licence. Even if the Court were to accept that it had expired as per his testimony, the very least he could have done would be to produce same even during the trial proceedings. In my view, the State succeeded in proving the guilt of the Appellant on this charge beyond reasonable doubt.

[27] Having considered all the evidence it is my considered view that the appeal partially succeeds and I propose the following order:

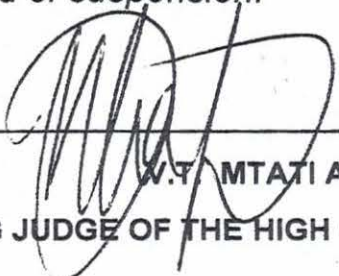
⁷ See page 82 line 25 of the transcribed record

⁸ See page 307 of the paginated record

Order

The appeal partially succeeds. The decision of the magistrate is set aside and substituted with the following order:


- 1. On the count of culpable homicide the accused is found not guilty and discharged.*
- 2. On the count of driving under the influence of alcohol the accused is found not guilty and discharged.*
- 3. On the count of corruption the accused is found not guilty and discharged.*
- 4. On the count of driving without a valid driver's licence the accused is found guilty. He is sentenced to a fine of R1000,00 (one thousand rand) or three months imprisonment wholly suspended for 5 years on condition that the accused is not found guilty of driving a motor vehicle without a driver's licence during the period of suspension.*



W.T. MTATI AJ
ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.



T. MAUMELA J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON 1 FEBRUARY 2018

JUDGMENT DATE

FOR THE APPELLANT: ADV M BOTHA

INSTRUCTED BY: LEGAL AID SOUTH AFRICA

FOR THE RESPONDENT: ADV MOLATUDI

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS