CASE NO: 663/94
NvH

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PRAN ANDHEE

and

THE STATE

SMALBERGER, JA

Case No: 663/94 N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PRAN ANDHEE Appellant

and

THE STATE Respondent

CORAM: SMALBERGER, MARAIS,JJA

et SCOTT, AJA HEARD: 14

NOVEMBER 1995 DELIVERED: 23

NOVEMBER 1995

J U D G M E N T

SMALBERGER, JA:

On the evening of 6 December 1991 Mrs Faldielah Nair and

her thirteen year old daughter Tasneen ("the deceased") were crossing Monntbatten Drive in

Reservoir Hills, a suburb of Durban,

on their way home from a supermarket. They stood on the traffic island in the centre of the road waiting for vehicles from their left to pass before completing their crossing. One of the vehicles, travelling at speed, mounted or encroached upon the island. It collided with the deceased, injuring her fatally. The vehicle stopped, the driver alighted from it, went to the front of his vehicle, returned to the driver's door and glanced at the deceased who was lying on the road behind the vehicle. He then re-entered his vehicle and drove away, ignoring the deceased's mother's pleas for help.

As a sequel to these events the appellant, a medical practitioner, was charged in the Magistrate's Court, Pinetown with (1) culpable homicide; (2) a contravention of sec 118(1)(b) of the Road Traffic Act 29 of 1989 ("the Act") (failing, as the driver of a vehicle involved in an accident, to ascertain the nature and extent of any injury sustained by any person injured in the accident); (3)

a contravention of sec 118(l)(d) of the Act (failing to ascertain the nature and extent of any damage sustained to any property); and (4) a contravention of sec 118(l)(c) of the Act (failing to render assistance to any injured person). He was also charged (count 5) with defeating or obstructing the course of justice, arising from allegedly false information which he later gave to the police that his vehicle had been stolen before the collision.

A protracted trial followed. The appellant persisted in his claim that his vehicle had been stolen and that he had not been driving it when the collision occurred. He testified that he had been at a party at the time. He called a number of witnesses to support him. The trial magistrate disbelieved the appellant and his witnesses, and convicted him on all five counts. The appellant continued to protest his innocence. He did not give evidence in mitigation of sentence, and left it to his attorney to address the court on his behalf. In respect of count 1 the appellant was sentenced to

a fine of R6 000-00 or twelve months imprisonment. On counts 2, 3 and 4 (taken together for the purposes of sentence) he was sentenced to nine months imprisonment. A similar sentence was imposed on count 5. The magistrate ordered the sentences in respect of counts 2 to 5 to run concurrently. The effective period of imprisonment was accordingly nine months.

The appellant appealed to the Natal Provincial Division against his convictions and sentences on all counts. Shortly before the hearing of the appeal, and after receiving advice from senior counsel, the appellant changed his stance. He conceded that he had been responsible for the collision. He abandoned his appeal against his conviction and sentence on count 1, as well as his conviction on count 2. He proceeded with his appeal against his convictions in respect of counts 3, 4 and 5 (the latter to the extent that he claimed that he should only have been convicted of an attempt) as well as his sentences on those counts. His appeal was partially successful.

His convictions on counts 2 and 3 were set aside; that on count 5 was altered to an attempt to defeat or obstruct the course of justice. The sentence of nine months imprisonment on counts 2, 3 and 4 (previously taken together) was ordered to stand as the sentence on count 2; the sentence on count 5 was confirmed. However, the court a quo, which before the hearing of the appeal had given notice of its intention possibly to increase sentence, ordered the sentences to run consecutively instead of concurrently, thereby increasing the effective sentence from nine to eighteen months imprisonment. The present appeal, with leave of the court a quo, lies against the sentences on counts 2 and 5 only.

Before proceeding further something needs to be said about what the proper approach to the matter of sentence should have been in the court a quo. Having set aside the convictions on counts 3 and 4, and altered that on count 5 to what was, technically at any rate, a lesser offence, the court a quo was obliged to

reconsider the sentence. However, it did not enjoy an unfettered discretion, unrestricted in any way by what the trial magistrate had done, to impose a sentence, or an effective sentence, which had a more stringent effect than that imposed by the magistrate. Even if all the convictions had been sustained on appeal the court a quo would not have been at liberty to increase mero motu the sentences imposed by the trial magistrate unless he had imposed a sentence so glaringly inadequate or disturbingly inappropriate that it justified the inference that he acted unreasonably and therefore improperly (S v Anderson 1964(3) SA 494(A) at 495E-H). A fortiori it is not at liberty to do so where some of the convictions have been set aside on appeal. The need to revisit the question of sentence in this case does not mean that the parameters set by the trial magistrate become entirely irrelevant and may be disregarded. On the contrary, they must still be taken to represent the outer limits of what may be done unless exceeding those limits would have been justified even if

there had been no success on appeal against the convictions. Any other conclusion would be illogical, legally untenable and fundamentally unfair to an appellant who has been partially successful in his appeal against his conviction or convictions.

In the present instance the court a quo in essence doubled the appellant's sentence in respect of fewer and less serious crimes than he was convicted of originally. This it could not do merely in the exercise of an untrammeled sentencing discretion. It was only entitled in the present case to increase the sentences if it was satisfied that the sentences determined were, or the effective period to be served was, glaringly inadequate, even for the offences found by the magistrate to have been committed. (This would not, in my view, have precluded the court a quo in the exercise of its discretion from imposing, as it did, on count 2 the same sentence as had been imposed on counts 2, 3 and 4 taken together. That they were taken together does not detract from the fact that each individually could

have qualified for a sentence of nine months. The sentence imposed on count 2 can therefore not be viewed as an increase in sentence per se).

It is not apparent from the court a quo's judgment that it was aware of this limitation on the exercise of its discretion. It merely observed that "the magistrate's sentence erred on the side of leniency, not on the side of severity". That in itself provided no acceptable basis for increasing it. At no time did it express the view that the effective sentence imposed by the magistrate was glaringly inadequate. That was the test to be satisfied in the present matter before the effective sentence could be increased.

Mr Wallis, for the appellant, contended that having set aside two, and lessened one, of the appellant's convictions, the court a quo should have remitted the matter to the trial magistrate to sentence the appellant afresh. He submitted that there were two factors which justified the adoption of such a course. The first was

that the evidence of the deceased's mother raised the possibility that the driver of the vehicle (the appellant) had been shocked after the accident, and had acted as he did through panic. The second was that the appellant had previously adopted a defence that precluded him from putting evidence before the trial court explaining his conduct. As he had, prior to the appeal in the court a quo, had what Mr Wallis referred to as a "change of heart" and now conceded that he was the driver of the vehicle involved in the collision, he should be afforded an opportunity of explaining why he had behaved as he did. This would cure the lacuna in the record concerning his state of mind at the time. A further consideration alluded to during argument was that the appellant was clearly an appropriate candidate for correctional supervision, and that the trial magistrate would be able to reconsider that sentencing option in the light of the altered circumstances.

Mrs Nair's evidence is a weak peg on which to hang an

argument that the appellant acted as he did on account of shock.

We were referred to three passages in her evidence. Dealing in

chief with the appellant's movements after alighting from his vehicle

she said:

> "And he had his hand like this. He had his hands like this, like he was looking for something, or I don't know whether he was shocked or what but ...."

Reverting to this stage of the events she stated under cross-examination:

> "To me, at first I thought he was shocked or he was looking for something."

And finally:

> "When that person got into his car and he drove off, I just knew that must have been the driver that got frightened or shocked or whatever and drove off, Your Worship."

Mrs Nair's evidence goes no further than to postulate shock as a possible cause for the

appellant's behaviour. Such possibility

is purely speculative and not based on any objective facts. It is largely negated by the appellant's subsequent conduct which points to his having left the scene for no other reason than a desire to escape detection.

After his conviction it was open to the appellant to explain why he had left the scene of the accident without attempting to ascertain the nature and extent of the deceased's injuries. He did not avail himself of the opportunity to do so. Instead he persisted in his false denial that he was the driver. Having made his bed he must now lie on it. This does not mean that he is to be punished for his untruthfulness. But the mere fact that he decided at a late stage and on the advice of counsel to "come clean" does not entitle him to any special indulgence from this Court. He has no right to require of the Court that he be allowed to do now what he declined to do previously. He would have been entitled to apply for the matter to be remitted for hearing further evidence if he was able to

satisfy the requirements for doing so. There is no such application before us. We simply have no inkling of what explanation the appellant might proffer for his conduct. We have no means of ascertaining whether an acceptable explanation exists for his not giving such evidence at his trial; whether the evidence he might wish to give is likely to be believed; or, if it was, whether it would be likely to mitigate his conduct and favourably influence his sentence - all necessary prerequisites that need to be established where an appellant seeks to lead further evidence. The arguments advanced provide no proper basis for remitting the matter to the trial magistrate. The position would be different if the sentences were vitiated by misdirection or other accepted grounds for interference and this Court considered correctional supervision to be the proper sentencing option which, for reasons that follow, I do not believe to be the case.

I propose to deal first with the sentence on count 5. The

offence of attempting to defeat or obstruct the ends of justice is rightly regarded as a serious one which may, and frequently does, warrant severe punishment (S v Mene and Another 1988(3) SA 641(A) at 665J-666A; S v W 1995(1) SACR 606(A) at 608I). In the present matter, when confronted with the fact that the front number-plate of his vehicle had been found at the scene of the collision, the appellant falsely claimed that his car had been stolen. He then preceded to spin an intricate web of deception in order to escape detection and avoid the consequences of his unlawful conduct. He went further. In an attempt to prevent his conviction he suborned others to commit perjury. His conduct was calculated and contrived. It even extended to attacking the bona fides of Mrs Naif in identifying him as the driver. He failed to show any remorse for what he had done. In the words of the trial magistrate when sentencing the appellant "the nature and circumstances of this particular count .... are so aggravating that the deterrent aspects in

the interests of society must be paramount. In the circumstances correctional supervision was not in any view an appropriate sentencing option." I agree. Even making full allowance for the appellant's personal circumstances, and the likely effects of incarceration upon him, there is no basis for interfering with the sentence of nine months imprisonment imposed on this count.

Once it has been determined that imprisonment is appropriate on count 5, correctional supervision is no longer a viable option on count 2. It is true that the evidence does not establish that the deceased's life might have been saved had the appellant endeavoured to establish the nature of her injuries. But that does not detract from his moral blameworthiness. He merely glanced in her direction. He never went up to her. He made no attempt to establish her condition. For whatever reason, he appears to have displayed complete indifference. The fact that he was a medical doctor who could not have been sure that by dint of his training and

experience he would not have been able to assist her in one way or another, compounds his blameworthiness. In my view no justification exists for interfering with the sentence imposed.

There remains the question whether the court a quo was entitled to order that the sentences on counts 2 and 5 should run consecutively. In ordering them to run concurrently, the trial magistrate took into account the cumulative effect of the sentences. For a highly educated professional person such as the appellant incarceration for even a short period, with all its negative implications, is in itself a severe form of punishment. In addition, one must not lose sight of the fact that the appellant was sentenced separately on the culpable homicide count. Even if the court a quo was correct in labelling the sentences under consideration as lenient, the effective sentence was in my view not so glaringly inadequate or shockingly inappropriate that it entitled the court a quo to increase it. It should not therefore have interfered with the order

that the sentences run concurrently.

The appeal is allowed to the extent that the court a quo's order that the sentences on counts 2 and 5 should run consecutively is set aside, and the order of the trial magistrate that they are to run concurrently, is restored.

J W SMALBERGER
JUDGE OF APPEAL

MARAIS, JA) Concur
SCOTT, AJA)