REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A23/2019

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

17/11/2019 .....

Date **DJF DU PLESSIS AJ**

In the matter between:

KOAPE THSEPO RAMOSHAI **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

DU PLESSIS AJ

[1] The following are the crisp issues in this appeal:

(a) Whether or not the Appellant's convictions in the Regional Court, Kempton Park on culpable homicide resulting from a motor vehicle collision (count 1) and contravening section 65(1)(a) of the National Road Traffic Act, 93 of 1996, driving under the influence of intoxicating liquor (count 2), resulting from pleas of guilty to both counts, were justified; and

(b) Whether or not the sentences imposed in respect of counts 1 and 2 were shockingly inappropriate and should be interfered with. The sentences imposed were six year's imprisonment in respect of count 1 and R20 000.00 or one year's imprisonment in respect of count 2.

The Convictions

[2] The Appellant was legally represented by Mr Matshabele who submitted a written plea explanation in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977 (the CPA). On 18 October 2017 the learned Regional Court Magistrate, Mr Mhlari, found that the plea explanation in respect of both counts indicates the Appellant intends to plead guilty. He was furthermore satisfied that the Appellant in respect of both counts made all the necessary admissions to justify his convictions. The Appellant was thereupon convicted and sentenced.

[3] Mr Mhlari in the interim has resigned. Another magistrate adjudicated the Appellant's application for leave to appeal his convictions and sentences. The Appellant was granted leave as prayed for.

[4] It is now submitted on behalf of the Appellant that the plea explanation was nothing more than regurgitation of the charge sheet. As a result, the learned magistrate could not have been satisfied that the Appellant is guilty as charged and that he does not have a possible defence. In the circumstances the learned magistrate ought to have applied section 113 of

the CPA and noted a plea of not guilty to each count. Furthermore, as far as count 1 is concerned, the trial court ought not to have been satisfied that the ignoring of the red traffic light was the cause of the collision with the deceased and his consequent demise.

[5] It is apposite at this stage to indicate that before sentence and at the time the matter was postponed in order for the Appellant to obtain a pre-sentence report, the Appellant was represented by new counsel, Mr Makhubela, who is also counsel appearing in this appeal on behalf of the Appellant.

[6] This court enquired from Mr Makhubela why he did not before sentence apply to the trial court for the plea of guilty on the two counts to be changed to pleas of not guilty in terms of section 113 of the CPA. In terms of section 113 a plea of guilty in terms of section 112(2) of the CPA may be altered to not guilty at any stage up to before sentence is imposed. Mr Makhubela informed the court that it was a strategic decision not to apply there for and that it should rather be addressed on appeal.

[7] The Respondent submitted that that the Appellant had tendered sufficient facts in his plea explanation to convict him of culpable homicide and driving under the influence of intoxicating liquor. The Appellant admitted that he recklessly crossed the red light and caused a collision which led to the deceased sustaining his fatal injuries. He also admitted that he drove under the influence of intoxicating liquor.

[8] The Appellant's plea explanation, Exhibit "A" reads as follows:

"I admit that I am the accused in this matter facing two counts, one (1) of culpable homicide and driving under the influence of alcohol.

1.

My legal representative of record has informed me of my constitutional rights and my right to remain silent.

2.

The consequences of this plea have further been explained to me. I therefore made this statement freely and voluntarily, without being unduly influenced by anyone.

3.

I understand the charge against me and I plead guilty as charged.

4.

I admit the following:

COUNT ONE

4.1 in (sic) that upon or about the 27th of May 2017 and on Van Riebeck (sic) Park, a public road in the regional division of Gauteng, I, the accused being the driver of a vehicle, wrongfully and negligently caused or contributed to a collision in which Ntsizwa Johan Marisela in his lifetime a 30 year old male, received certain injuries, as a result of which he died at the scene and at De Wikus Road, and thus I, the accused did wrongfully and negligently cause the death of the said Ntsizwa Johan Marisela.

I further admit that on above mentioned date while driving at De Wikus Road in Van Riebeck (sic) Park around 18:30 I approached traffic lights which at the time I did not have right of way due to the fact that it was red prohibiting me to pass, however I drove past the red traffic light and I realised that there was a car parked on the left hand side, which was stationary at the time. I then

passed it on the adjacent lane to which (sic) I collided with the above mentioned person and thus there and there (sic) causing him injuries as a result to (sic) which he died.

I further admit that I was reckless in my driving and that (sic) by me crossing through a red traffic light. I further admit at the time I so acted, I knew that my actions were wrongful and unlawful and further punishable by law. Thus I plead guilty to count number one, being that of culpable homicide.

COUNT TWO

Driving under the influence of liquor

That I am guilty of the offence of contravening the provisions of Section 65(1) (a and b).

In that upon or about the 27th of May 2017 at South Spartansburg (sic) a public road in the regional division of Gauteng, I did wrongfully drive a motor vehicle to wit Toyota Corolla with registration number: SYX 970 GP or sit in the driver's seat of the vehicle..... with the engine of which was running whilst I was under the influence of liquor or drug having a narcotic effect.

On the above mentioned date I was in a pub where I was consuming liquor and around 18:30 I got into my vehicle, drove the said vehicle while under the influence of liquor and I knew that driving a vehicle under the influence of Liqour is unlawful and punishable by law, however I persisted in driving the vehicle under the influence.

5.

I further confirm that I made this statement freely and voluntarily, without any undue influence and in my sound and sober senses."

On a question by the trial court the Appellant indicated that the alcohol he consumed consisted of a few Hansa dumpies. He was unable to recall the exact quantity. The trial court also enquired from the Appellant's legal representative what the Appellant's level of "drunkenness" was. He

informed the court that the state will provide evidence to that effect, but admitted that the Appellant was "drunk".

[9] During the pre-sentencing proceedings, after conviction, the trial court indicated that it wanted to know the level of "drunkenness" of the Appellant. The state then adduced the evidence of Mr Makhokha, a metro police officer. He testified that he attended the crime scene. He has 2 years and 11 months experience as such. According to him, the deceased was decapitated as a result of the collision. The deceased's head was found approximately 50 meters from his body. According to his undisputed evidence the Appellant was under the influence of liquor to the extent that he could not speak properly, having difficulty with certain words, and that he also could not stand on his own as he had to lean against a motor vehicle. The breathalyser test done on the Appellant indicated that his alcohol level was beyond the prescribed minimum.

[10] It further transpired that the deceased's vehicle's driver's door was ripped off during the collision. It would appear that the deceased must have been at this door when he was hit. The state thereafter submitted the post mortem report as Exhibit "C". This was done under cover of an affidavit in terms of section 212(4) and (8) of the CPA by the pathologist that did the post mortem examination.

[11] The sketch plan and photo album, Exhibit "1", was also handed in after conviction with the consent of the Appellant. It depicts that the road where the collision occurred consists of two lanes in the one direction and two lanes in the opposite direction. Photo's 3 and 5 depict the vehicle of the deceased being stationary on the left side of the left lane in the direction from which the Appellant travelled. It is clear from this

photo that even if the deceased's vehicle's driver's side door was fully opened it could not have encroached into the adjacent lane.

[12] Photo 14 depicts the damage to the Appellant's vehicle. The front hood in the middle has a dent and the primary damage is at the left front light, left mudguard and the left side of the windscreen.

[13] The matter was postponed to the following day for purposes of argument on sentence. The matter was then further postponed to 25 October 2017. On that day Mr Matshabele for the accused withdrew. Mr Makhubela then appeared for the Appellant. The matter was postponed to 1 December 2017 at the request of Mr Makhubela in order to obtain a pre-sentence report. On that day the matter was further postponed to 14 December 2017 as the pre-sentence report was not yet ready. On 14 December 2017 the social worker, Ms Thompson, testified about her pre-sentence report. The state called witnesses in aggravation of sentence regarding the impact of the deceased's demise.

[14] The Appellant's plea explanation in terms of section 112(2) of the CPA has to comply with two requirements. The first is that it must indicate that he intended to plead guilty. Secondly, the trial court must satisfy itself that enough factual information is presented to ensure that he is indeed guilty and to safeguard against the possibility that he has a valid defence.

[15] The plea explanation pertaining to the count of culpable homicide falls short of satisfying the second requirement in that the facts averred does not completely satisfy it. The reckless ignoring of the red traffic light as indicated in the plea explanation is on its own not necessarily indicative of the cause of the deceased's death. The plea explanation in respect of count 2 also does not aver that the Appellant's driving ability was

affected by him allegedly being under the influence of liquor. It is, however, arguable that his indication that he consumed alcohol; was under the influence of liquor; and indeed "drunk" when driving his vehicle may be regarded as enough assurance that he is indeed guilty of this offence. Be that as it may, I will deal with both these issues as if they are lacunae in the plea explanations.

[16] What remains to be considered is whether this court as a court of appeal has the power to take into consideration the evidence of Mr Makhokha and Exhibit "1" that were produced after the Appellant's conviction, before sentence.

[17] The following remarks in *S v Carter* 2007 (2) SACR 415 (SCA) have a direct bearing on the issues to be decided in this matter:

At par [28] the court held that:

> "The short comings in compliance with the terms of ...section 112(2) are, however, not, as counsel supposed, decisive of this appeal. Section 322(1) of the CPA confers wide powers on a court on appeal, but they are qualified:
>
> > '....
> >
> > Provided that, notwithstanding that the Court of Appeal is of opinion that the point raised might be in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the Court of Appeal that a failure of justice has in fact resulted from such irregularity or defect.'

The court at par [32] refers, among others, to *S v Jaipal* 2005 (1) SACR 215 (CC) where the Constitutional Court placed the matter as follows in a constitutional context:

"In terms of section 322(1) (of the CPA) the Court of appeal may allow the appeal if it thinks that the judgement of the trial Court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a 'failure of justice'. Therefore a failure of justice must indeed have resulted from the irregularity for the conviction and sentence to be set aside. In construing when an irregularity has led to a failure of justice, regard must be had to the constitutional right of an accused person to a fair trial. If the irregularity has resulted in an unfair trial, that will constitute a failure of justice as contemplated by the section and any conviction will have to be set aside. Whether a new trial may be commenced against the accused will also require a constitutional assessment of whether that would be a breach of the right to a fair trial or not. The meaning of the concept of a failure of justice in section 322(1) must therefore now be understood to raise the question of whether the irregularity has led to an unfair trial."

And at [34] the following is held:

"Is there any reason why the fair-trial test should require the conviction and sentencing proceedings to be compartmentalised? There may be situations where such a separation is inherent in the notion of a fair trial, e g when the plea is one of not guilty and an element of the offence is proved for the first time during the course of sentencing. There is, however, a difference in principal once an accused pleads guilty. He thereby indicates that he no longer takes issue with the prosecution and does not require proof by it by any of the elements of the offence. Sections...112(2) are not concerned with *proof*; there is no question of discharge of an *onus*. In order to protect an accused the judicial officer must satisfy himself, by questioning the accused if necessary, that the accused in fact admits the elements of the charge and is therefore guilty of the offence. Fairness in the judicial process is a matter of substance, not technicality or procedure (though both may bear on substance). I do not see why any evidence fairly adduced after conviction but still within the confines of the same trial should not be used to provide or strengthen the assurance which section...112(2) are designed to provide. As section 113 demonstrates, the Legislature has expressly provided that if it appears to the

> court at any time before sentence is imposed following on a plea of guilty that there is doubt as to whether the accused is guilty, the court must enter a plea of not guilty. That provision is in itself an example of how fairness of the conviction is not circumscribed by the proceedings before conviction."

The court then at par [35] explains that to determine whether a failure of justice has occurred, each case must be determined according to its own circumstances and in its own context. In the present instance it is clear from the Appellant's plea explanation that he intended to plead guilty. He was legally represented at the time and although the formulation of the plea explanation by counsel left much to be desired, the Appellant understood the consequences of his pleas of guilty. Nothing that was said in the plea explanation was in material contradiction to what was intended. Certain areas were, however, superficially dealt with.

[18] I am of the view that the lacunae in the plea explanation were closed by the evidence led after conviction and before sentence. The evidence of Mr Makhokha and the contents of the photo album, Exhibit "1" is indicative thereof that the Appellant's vehicle must have passed the deceased's vehicle partly inside the left lane in which the deceased's vehicle was stationary. From the objective evidence the only reasonable inference to be drawn is that the Appellant must have either noticed the deceased's vehicle too late to take proper evading action or that his reactions were too slow to avoid the collision. It is further clear from all the available evidence and the Appellant's plea explanation that he drove his vehicle recklessly in ignoring the red traffic light, culminating in his inability to take proper evading action. If one takes this into consideration together with the undisputed evidence of Mr Makhokha about the Appellant's level of intoxication, inter alia, that he was unable to stand on his own and had difficulty in expressing himself properly, the only reasonable

inference is that his driving ability was affected to the extent that he, as a result, caused the collision and the deceased's death. This conclusion is to some extent strengthened by the following which appears in Ms Thompson's pre-sentence report, Exhibit "D" at paragraph 6.4(b) on page 11:

> "During the interview with the accused, he acknowledged the following:
>
> ..... He realised that if you have been drinking and get into your car, you put others' lives at risk the moment you turn the ignition."

[19] I am in the circumstances far from being persuaded that the irregularities which resulted in non-compliance with the terms of section 112(2) of the CPA resulted in a failure of justice.

The Sentences

[20] It is trite that sentencing is pre-eminently the domain of the trial Court. The Court of appeal may only interfere with the sentence imposed by the trial court if it is of the view that the trial Court did not exercise its discretion judiciously or that the exercise of such discretion was patently wrong. Put differently, if the Appeal Court is of the view that the sentence imposed is disturbingly inappropriate.

[21] In *S v Hewitt* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) the Supreme Court of Appeal stated the following:

> "It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial

court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised."

[22] I am of the view that the sentence imposed in respect of count 1 cannot be regarded as shockingly inappropriate. The trial court considered the relevant principles pertaining to the imposition of sentence on count 1 in a balanced manner. He considered the mitigating and aggravating circumstances. He also quite correctly considered the degree of culpability or blameworthiness of the Appellant. The following from *S v Humphries* 2013 (2) SACR 1 (SCA) where that court confirmed the approach to sentencing in culpable homicide cases arising from traffic accidents is apposite:

> "The general approach to sentence in matters of this kind was formulated with admirable clarity by Corbett JA in S v Nxumalo 1982 (3) SA 856 (A) at 861G when he said:
>
> > 'It seems to me that in determining an appropriate sentence in such cases, ... the basic criterion to which the Court must have regard is the degree of culpability or blameworthiness exhibited by the accused committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foresee ability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded ...'"

[23] I am of the view that the Appellant, as far as count 1 is concerned, got his just deserts, nothing more or nothing less. What does, however, appear to

be misdirection in the learned magistrate's consideration, is that he did not give proper, or enough, consideration to the cumulative effect of both the sentences. The fine of R20 000 or one year's imprisonment on count 2 has the effect that the Appellant has to serve an effective term of 7 year's imprisonment, as the Appellant did not pay the fine. Although the offence in terms of count 2 is a substantive offence, the Appellant's driving under the influence of intoxicating liquor undoubtedly contributed to the offence in terms of count 1.

[24] I am of the view that the sentence on count 2 should have been ordered to run concurrently with the sentence imposed on count 1. It cannot be ordered that a sentence of a fine is to run concurrently with a term of imprisonment.

[25] In the circumstances, I make the following order:

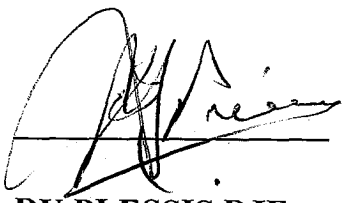
1. The appeal against the convictions is dismissed.

2. The appeal against the sentence on count 1 is dismissed.

3. The appeal against the sentence on count 2 is upheld.

4. The sentence of R20 000.00 or one year's imprisonment on count 2 is set aside and replaced with the following:
   A. The appellant is sentenced to 1 year's imprisonment.
   B. The sentence of 1 year's imprisonment is ordered to run concurrently with the sentence on count 1.

C. The period of imprisonment the Appellant has served before his release on bail pending appeal must be discounted from the period of 6 year's imprisonment.

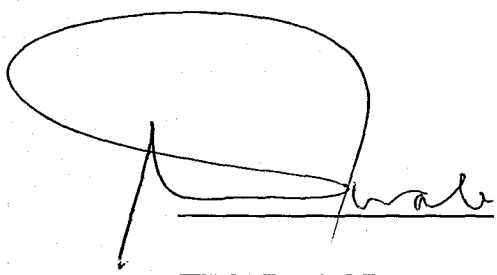


DU PLESSIS DJF

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree



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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: **28th October 2019**

Date of Judgment: **15th November 2019**

For the Appellant: **Adv N Makhubela**

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