REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A563/2011
A341/14

(1) REPORTABLE: **YES**

(2) OF INTEREST TO OTHER JUDGES: **YES**

16/10/2014

In the matter between:

THABANG DREMUS **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Date of Hearing: 13 OCTOBER 2014

Date of Judgment: 16 OCTOBER 2014

KUBUSHI, J

[1] On 14 April 2011, the appellant was convicted in the magistrate's court Soshanguve on a count of culpable homicide. He was sentenced to two years imprisonment in terms of s 276 (1) *(i)* of the Criminal Procedure Act 51 of 1977 (the Act). He was granted leave by the trial court to appeal the sentence. At the hearing of the appeal, on 2 November 2012, the matter was referred back to the trial court with an order that the record be reconstructed and the appellant invited to explain the circumstances leading to him losing control of the motor vehicle, was issued. The appeal was set down again for hearing on 3 December 2013 whereat an order setting the sentence aside and referring the matter back to the trial court for a reconsideration of the imposition of a sentence in terms of s 276 (1) *(h)* of the Act, was issued. When reconsidering sentence, the trial court imposed the sentence of two years imprisonment, in terms of s 276 (1) *(i)* of the Act again. The appellant is before us leave to appeal the sentence having been granted by the trial court. The appellant was legally represented throughout the trial.

[2] According to the appellant, who was at the time of the commission of the offence employed as a police officer by the South African Police Services, he was driving his father's taxi after work. He was in the company of his cousin who was sitting in the back passenger seat. As he was conversing with his cousin, he looked back and as a result, lost concentration and drove out of his lane of travel thereby colliding with one of the two pedestrians who were walking in the yellow lane along the road. The said pedestrian died as a result of the injuries sustained in the collision. The appellant pleaded guilty at the outset of the trial but the trial court noted a plea of not guilty in terms of section 113 of the Act because his plea did not include an element of negligence or recklessness. The appellant later supplemented his plea with formal admissions made in terms of s 220 of the Act and was as a result found guilty as charged.

[3] This court in its judgment of 5 December 2013 was of the opinion that on the basis of the appellant's personal circumstances the trial court should have considered other sentencing options, in particular the correctional supervision sentence in terms of s 276 (1) *(h)* of the Act. It became evident, at the hearing of that appeal that the trial court could not have considered a correctional supervision sentence since it was not provided with a presentencing report or a correctional officer's report.[1] Hence, the matter was referred back to the trial court for reconsideration of sentence, specifically correctional supervision sentence.

[4] A report of the correctional officer was placed before the trial court. According to the correctional officer's report, the appellant is a suitable candidate for correctional supervision sentence. However, the record does not reflect whether or not when reconsidering sentence, the trial court took this report into account. There is also no indication that the trial court, as directed by this court, considered the correctional supervision sentence or any other sentence as an option. If it did, it failed to justify why the correctional supervision sentence or any other sentence, other than direct imprisonment, was not suitable.

[5] The appellant's contention in this appeal is that he should have been sentenced in terms of s 276 (1) *(h)* of the Act. The appellant further submits that the trial court did not exercise its sentencing discretion judicially and properly. According to the appellant, the trial court misdirected itself in not properly considering the facts in the cases which it relied on when passing

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1 In terms of s 276A of the Criminal Procedure Act punishment shall only be imposed under s 276 (1) *(h)* after a report of a probation officer or a correctional official has to been placed before a court.

sentence. And when arguing the matter before us, the appellant's counsel submitted that the trial court over-emphasised the fact that a person died and failed to measure the culpability or blameworthiness of the appellant in the commission of the offence.

[6] The issue for determination in this appeal is whether, in the circumstances of this case, the trial court was correct to impose the sentence of direct imprisonment in terms of s 276 (1)*(i)* instead of a sentence of correctional supervision in terms of s 276 (1) *(h)*, as the appropriate sentence.

[7] In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal – *(a)* should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial court'; and *(b)* should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'. The test under *(b)* is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. [2]

[8] I seem to be in agreement with the submission by counsel for the respondent that the trial court failed to measure the appellant's moral blameworthiness as against the offence committed and in that sense it erred. As is trite persons should be punished in accordance with their moral blameworthiness and a person with less morally blameworthy conduct should benefit through a more lenient sentence upon conviction.

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2 See *S v Rabie* 1975 (4) SA 855 (A).

[9] The trial court relied on a number of judgments in its reasoning for meting out sentence of direct imprisonment. In particular it relied on what it referred to as recent 'ground breaking' judgments where the accused, as irresponsible motorists, were charged with murder and attempted murder for causing the death of and/or serious injuries to innocent persons. The two cases he referred to are the *Humphreys* case in Western Cape and the *Maarohanye* case in Protea North, Soweto. These, in my view, are not model cases on which the trial court should have relied on at the time because there was a possibility of the cases going on appeal. It is common knowledge that both these cases have since been on appeal. In both these cases the accused were initially convicted of murder and attempted murder in the court below but the convictions were on appeal overturned and converted to culpable homicide. [3]

[10] The *Humphreys-and-Maarohanye*-cases also differ from the current case because the degree of moral blameworthiness of the accused persons in those cases far exceeds that of the appellant in this instance. In the *Humphreys*-case, the accused was found to have been the primary cause of a collision between a minibus (of which he was a driver) carrying 14 school children and a train. It was established that he overtook a number of stationery motor vehicles at a railway crossing, ignored various warning signs in his illegal attempt to navigate the minibus through the crossing and that he was at that time aware that a train was approaching the crossing. As a result of this conduct ten children were killed and four were seriously injured. He was on appeal sentenced to eight years imprisonment. The two accused in the *Maarohanye*-case, caused a serious collision when they were drag racing

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3 See Humphreys v The State (424/12) [2013] ZASCA 20 (22 March 2013)

under the influence of hard drugs on a public road near a school. Four children were killed and another two survived with brain damage. The accused were on appeal sentenced to 10 years imprisonment of which two were suspended.

[13] It is correct that the trial court did not properly interpret the other earlier cases on which it relied. In the *Mapipa*-judgment, [4] for example, firstly, the trial court's reasoning that because Mr Mapipa, who was a magistrate, was sentenced to imprisonment for four years and therefore the appellant as a police officer should also be sent to prison was ill conceived; secondly, the trial court failed to realise that the two cases are distinguishable in that in the *Mapipa*-judgment alcohol played a serious role whereas in this instance no alcohol was used. If the trial court could have realised this distinction, it would have concluded that Mr Mapipa's moral blameworthiness was of a greater degree than that of the appellant in this instance and was thus entitled to the four year imprisonment term. *S v Barnardo* [5] is also distinguishable in that the court in that case found the appellant to have been grossly negligent which is not the position in this instance.

[14] The evidence, in this instance, indicates that the appellant lost control of the motor vehicle whilst conversing with his cousin who was sitting in the back passenger seat. He turned his head or looked at the back, lost concentration and collided with the deceased. Surely his moral blame cannot be equated with that of the accused in the cases the trial court relied on. His conduct being less morally blameworthy, he should have benefited through a more lenient sentence upon conviction. It is, therefore, my view that, in these

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4 *S v Mapipa 2010 (1) SACR 151 (ECD)*

5 *1960 (3) SA 552 (AD)*

circumstances, the trial court ought to have imposed a sentence of correctional supervision in terms of s 276 (1) *(h)* of the Act.

[15] Correctional supervision is a form of punishment an offender serves in the community, and during which the offender is not incarcerated in a prison at any time, subject to such conditions as the court may prescribe. It is executed through a wide range of measures which include house arrest, monitoring, community service, employment and rehabilitation programmes. Such measures are aimed at the offender's training, rehabilitation and improvement. [6]

[16] My view is that the personal circumstances of the appellant are such that he is a perfect candidate for correctional supervision. When the trial court first sentenced him to imprisonment in terms of s 276 (1) *(i)* he was what can be referred to as a stand-up member of the society. He was employed as a police officer in the South African Police Services. He was a family person with a wife and child. He was a first offender and had pleaded guilty at the outset of the trial. Even though the trial court entered a plea of not guilty he still persisted in his plea of guilt. However, at the time of the reconsideration of sentence his personal circumstances had somewhat changed. He had lost his job because of the long time it took to finalise this matter. He had another child. These changed circumstances have not altered my view that he is a candidate for correctional supervision.

[17] In terms of s 276A (1) of the Act punishment shall be imposed under s 276 (1) *(h)* of the Act, where conviction is not for an offence under the

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6 See *S v R* 1993 (1) SACR 209 (A).

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, for a fixed period not exceeding three years. An appropriate period which should be imposed in the circumstances of this case should therefore be two years.

[18] The correctional officer assessed the appellant and also found him suitable for correctional supervision sentence. He recommended, which recommendation is acceptable to me, that he be placed under house arrest from 16:00 to 07:00 on work days and from 14:00 to 08:00 on days when he is not working provided the house arrest will not be applicable during the following times: when doing community service or when attending rehabilitation programs or when attending church service between 12:00 and 14:00 (the appellant is a member of the Islam Church). In addition to the house arrest, the appellant shall perform 16 hours community service for every month of the sentence which will consist of cleaning at Themba Clinic and the Commissioner of Correctional Services (the Commissioner) may also give him one hour additional community service for every hour that he failed to do community service. The appellant shall also subject himself to treatment programs as determined by the Commissioner which are applicable to his specific needs with the aim of rehabilitating him and to better prepare him for acceptance in the community.

[19] In the circumstances, I would suggest the following order:

19.1 The conviction is confirmed.

19.2 The appeal on sentence succeeds.

19.3 The sentence imposed by the trial court is set aside and substituted by the following sentence:

"1. The accused is placed under correctional supervision in terms of section 276(1)*(h)* of the Criminal Procedure Act 51 of 1977 for two years, which correctional supervision must include the following:

i) that he is placed under house arrest from 16:00 to 07:00 on work days and from 14:00 to 08:00 on days when he is not working;

ii) that the house arrest will not be applicable during the following times:

a. when doing community service; or

b. when attending rehabilitation programs; or

c. when attending church service between 12:00 and 14:00.

iii) that he shall perform service to the benefit of the community for 16 hours every month for two years. The form of such service will consist of cleaning at Themba Clinic and the mode of supervision to be determined by the Commissioner of Correctional Services who may also give him one hour additional community service for every hour that he failed to do community service.

iv) that he shall also subject himself to treatment programs as determined by the Commissioner of Correctional Services which are applicable to his specific needs with the aim of

rehabilitating him and to better prepare him for acceptance in the community.

v) he may not change his residential or work address without prior notification of the Commissioner of Correctional Services.

vi) he shall for the full duration of the sentence, refrain from the use of alcohol or the use of drugs other than on prescription by a medical practitioner

vii) he shall subject himself to monitoring by the Commissioner of Correctional Services regarding the administration of this sentence."

E. M. KUBUSHI,

JUDGE OF THE HIGH COURT

I concur and it is so ordered

A. M. L. PHATUDI

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:	Adv. L. Augustyn Instructed by: **PRETORIA JUSTICE CENTRE** 2nd Floor FNB Building 206 Church Street PRETORIA 0001
On behalf of the respondent:	Adv R. Molokoane Instructed by: **DIRECTOR OF PUBLIC PROSECUTIONS** Presidential Building 28 Church Square PRETORIA 0001