Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number A284/11

In the matter of:

JAN VOGELS Appellant

versus

THE STATE Respondent

JUDGMENT DELIVERED ON 22 SEPTEMBER 2011

ZONDI, J

Introduction

[1] The appellant, who was legally represented, appeared in the Strand Magistrates Court on 4 November 2009 facing two charges; one of culpable homicide with two alternative charges and driving under the influence of liquor or drugs in contravention of the National Road Traffic Act. The charges arose out of a motor vehicle collision which occurred

on 11 August 2008 on N2, Sir Lowry's Pass, Gordons Bay between a truck with registration number DMX 016 EC driven by the appellant and a bakkie driven by the deceased. The appellant pleaded not guilty to all the charges. He was found guilty of culpable homicide and sentenced to three years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 ("the Act"). He was acquitted on the charge of driving the truck whilst under the influence of liquor or drugs.

[2] The appeal before this Court is against conviction and sentence with the leave of the Court *a quo.*

[3] It is common cause that on the day in question the appellant was driving a truck from South to North on N2, Sir Lowry's Pass, Gordons Bay and whilst driving as aforesaid he lost control over the truck. The truck left its normal path of travel, got onto a lane for oncoming traffic and collided with a bakkie driven by the deceased. The deceased died instantly in the collision. At the time of the collision the appellant was a well experienced truck driver; he had 18 years experience as a truck driver and was familiar with the traffic conditions of the area at which the accident occurred. He had driven on this road on a number of occasions before the incident giving rise to the proceedings.

[4] The question was whether the appellant drove the truck negligently and whether his negligent driving caused the collision and the resultant death of the deceased. The appellant denied that he was negligent. He blamed the collision on the failure of the truck braking mechanism which caused him to lose control over the truck with the consequence that the truck left its normal path of travel and landed on an incorrect side of the road.

[5] Regarding the functioning of the truck braking mechanism and its condition at the time of the collision the State presented the expert evidence of Inspector Marais who examined the truck immediately after the occurrence of the collision at the request of D/Inspector Geldenhuys. He examined the braking system for the truck, first trailer and the second trailer and thereafter compiled a report which was handed in as Exhibit "E" at the Court *a quo*.

[6] His examination of the truck revealed that the foundation brake components (brake shoe linings and brake drums) on the front and first/leading rear axles had evidence of excessive overheating at the time immediately before the occurrence of the accident. His report goes on to state:

> *"9.1.2 The brake shoes, at the left wheel brake assembly, on the second*

rear axle, were rusted and probably had no contact with the brake drum, with brake application, for an extended period of time prior to this incident. This was probably the result of "over-camming" of the s-cam, at this wheel brake assembly, resulting from failed routine brake clack adjustment.

9.1.3 Foundation brake components (brake shoe linings and brake drums) at the right wheel brake assembly, on the second rear axle, presented with minor levels of overheating."

[7] Inspector Marais further testified that when he examined the first/leading trailer he found:

"9.2.1 Foundation brake components (brake shoe linings and brake drums) on the first/leading rear axle (left & right) and at the left on the second rear axle presented with visual evidence suggesting an episode of excessive overheating at the time immediately prior to this incident.

9.2.2 Foundation brake components (brake shoe linings and brake drums) at the right on the second rear axle presented with no visual evidence to suggest overheating. The brake shoes, at this wheel brake assembly, touched the brake drum with full service brake application, however, this wheel could still be rotated by hand. This "condition" was the result of the inadequate brake shoe to –drum clearance adjustment at this wheel brake assembly."

[8] His examination of the second trailer revealed that:

"9.3.1 Foundation brake components (brake shoe linings and brake drums) on the front axle (left & right) and at the left on the rear axle presented with

visual evidence suggesting an episode of excessive overheating at the time immediately prior to this incident.

9.3.2 Foundation brake components (brake shoe linings and brake drums) at the right in the second rear axle presented with no visual evidence to suggest overheating. The brake shoes, at this wheel brake assembly was only partially exposed to the drum, with full service brake application. This "condition" was the result of misalignment of the s-cam on the brake shoe rollers, resulting in more force being applied to the inboard side of the shoes with brake application.

9.3.3 The brake air circuits on this vehicle, were incorrectly configured, as discussed on page 24 of this report, and did not meet the requirements of SANS 1051 – Part 3: braking energy sources and reservoirs. The air line configuration on this vehicle was incorrect i.t.o this standard as it did not provide for any reserve air pressure to allow service brake operation should the air supply source ("emergency line") be disconnected from the vehicle."

[9] He concluded that the foundation brake components suggested that they had overheated excessively at the time immediately prior to the collision. He stated that the level of overheating which he observed at these components, was indicative of an episode of prolonged foundation brake application immediately prior to the collision.

[10] He explained that excessive overheating of these components adversely affects the braking efficiency within the affected wheel brake

assembly, as it results in a significant reduction of the efficiency of friction between the frictional braking components. He was of the opinion that the affected foundation brake components overheated due to prolonged brake application, as the vehicle was descending down Sir Lowry's Pass and these brake components probably over heated to such an extent that they resulted in "*brake fade*" which is not brake failure.

[11] During cross-examination Marais rejected the suggestion that the brake failure was the cause of the collision as the evidence of overheating indicated that the brake components were in a proper working order before the collision. He pointed out that if the foot brake failed the appellant could have used other braking components such as retarder or exhaust brake of the truck. He should also have engaged the truck in the lowest gear when he descended down the Pass. But he conceded that the 3rd gear would have been appropriate to apply in the situation depending on a type of gear box of the truck.

[12] The following question was put to Marais by the defence following his evidence after his-recall by the Court:

> *"Kyk, so as die beskuldigde sou sê hy het teen 40, 50 kilometer die pas afgegaan in derde rat dan het hy die regte rat gekies."*

Marais response was:

> *"Ek twyfel of 'n voertuig, hetsy hy 12 of 16 ratte het, sou 40 of 50 kilometer 'n uur haal in derde rat. In my opinion sal dit meer in die omgewing van tussen 15 en 20 kilometer 'n uur wees, die top spoed in die spesifieke rat"*

But he conceded that he had never driven a Scania truck.

[13] Marais pointed out that the retarder, exhaust brake and service brake work independently of each other and the failure of one does not lead to the malfunction of the other. He was adamant that *"daar is geen rede hoekom jou voetrem hom nie sal stop nie, maar die voetrem is ook onafhanklik van beide die twee stelsels".*

[14] He stated that the overheating of the service brake was as a result of the appellant having used it repeatedly to control the speed of the truck which he should have done by using the exhaust brake. This was poor driving. He formed the view that the appellant had been travelling at a high speed explaining his overuse of the service brake.

[15] The appellant testified that when he reached the Pass he engaged the truck into a third gear and travelled at a speed between 35 and 40 km per hour seeing that the truck had 30 ton load. As he drove down the pass he first used the retarder *"om die vrag wat ek daarmee afkom vas*

te hou laat die trok nie kan vinnig hardloop daar af nie". The retarder has 5 levels and he changed the levels as he drove down in order to reduce the speed of the truck. When he reached the 5th level he felt that the retarder was losing power and he began using the exhaust-brake. The exhaust-brake could not reduce the speed of the truck. The load on the trailer pushed the truck causing it to accelerate. He pumped the service brake but he felt it was too weak. He used the handbrake together with service brake but it did not work. The truck accelerated. At this point in time he could not engage the truck in a lower gear as the rev-counter was too high. While this happened a bakkie and another vehicle approached from the opposite direction. He tried to warn them that he was in danger by flashing lights at them. The truck left its normal path of travel and landed on the wrong side of the road and collided head-on with a bakkie.

[16] He denied that he was drunk on the day in question. He stated that the last time he had taken alcohol was late in the day before the collision. He had two quarts of beer and Old Brown Sherry.

[17] Thereafter Mr Burger was called to give expert evidence for the appellant. He stated that the truck in question had 12 gears. It had a dip-tronic system. He had driven his Scania truck on Sir Lowry's Pass on a

number of occasions in the past and he normally used the third gear and had been able to restrain the speed of the trailer by using the retarder. In his opinion the appellant had followed safe driving procedures when he drove down the Pass.

[18] During cross-examination he conceded that he never drove the truck in question. Neither did he examine it after the collision. He never visited the scene of the collision but had driven past it before and his knowledge of the road and the traffic conditions in that vicinity was reasonably well. He conceded that his evidence was based on the assumptions.

[19] The Court *a quo* called Mr Visser to testify regarding the technical aspect of the Scania truck. He is a driving instructor at Scania.

[20] He said based on his knowledge of the gear box of that particular truck if the appellant was travelling down the Pass at a speed of between 35 and 40 km per hour he must have been on the seventh or eighth gear and not on 3rd gear as testified to by the appellant because the maximum speed one can reach driving on the 3rd gear is 20km per hour. Travelling at that speed would have blown up the truck's engine because at that speed the rev-counter is already on red. According to

Visser it is highly unlikely that all the braking systems of the truck could fail simultaneously in the light of the fact that according to the appellant's version he had been travelling on a third gear at a speed of 30 to 40 km per hour. In his opinion the fact that the drums were rusted does not mean that they could not stop the truck even if it was travelling at 40 to 60 km per hour.

[21] The Court *a quo* rejected the suggestion that the appellant might have been mistaken about the gear and a speed at which he was travelling as he negotiated the descent.

[22] It went on to find as follows at page 270 line 14-22 of the record:

> *"Dit is egter vir die hof duidelik, uit die getuienis, dat indien beskuldigde die regte rat gekies het, dat daar geen redelike moontlikheid bestaan dat hierdie voertug, ten spyte van die vrag, bloot net aan die loop sou gaan en al die sisteme sou oppak nie. Weereens moet die hof opmerk dat indien die retarder begin lol het, soos beskuldigde beweer, hy steeds kon stilhou en die trok in 'n gepaste laer rat kon sit, selfs in die ry, indien hy as gevolg van die regte rat-keuse stadig genoeg gery het."*

[23] The Court *a quo* rejected the appellant's version as being not reasonably possibly true. It reasoned that it was clear from Visser's evidence that the appellant was not truthful regarding the gear and the

speed at which he was travelling immediately before the accident. It noted that had the appellant properly handled the truck he could have avoided the collision. It found the appellant to have been negligent in his handling of the truck and accordingly convicted him of culpable homicide.

[24] There are two grounds upon which the conviction is attacked. Firstly, it is submitted on behalf of the appellant that the Court *a quo* committed gross irregularity in calling Mr Visser to testify in circumstances where the necessity for his evidence was not explained and in relying on his evidence which resulted in the appellant not receiving a fair trial. Secondly, it is submitted that the Court *a quo* erred in rejecting the appellant's version as being not reasonably possibly true.

[25] It is correct that the *onus* was on the State to prove its case beyond reasonable doubt and that if the appellant's version was reasonably possibly true he should have been entitled to his acquittal.

[26] The State case regarding the negligence of the appellant was based on the expert evidence of Marais. Marais inspected the truck and the condition of its braking mechanism immediately after the collision. He found that there was excessive overheating of its braking

components due to the appellant's overuse of the footbrake. He explained that the appellant should have used the retarder and exhaust brake instead of service brake to control the speed of the trailer. He was negligent in the choice of the braking system which was not suitable for the traffic conditions. He formed the view that the appellant must have been travelling at a speed prior to the accident which justified the need for his over-use of the footbrake.

[27] The question is whether the Court *a quo's* finding that the appellant was negligent is correct. The test for negligence is the objective standard of the reasonable person. Would the reasonable person foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would the reasonable person take reasonable steps to guard against such occurrence and whether the appellant failed to take such steps?

[28] The appellant was an experienced truck driver. He was familiar with Sir Lowry's Pass road conditions and the driving technique to employ in driving through the Pass. According to him he engaged the truck on the third gear and drove at a speed of about 30 to 40 km per hour. He stated that at some point he used the retarder to reduce the speed of the trailer. It did not work. He then used the exhaust brake

which also did not work. He eventually applied the service brake to stop the truck but it also could not stop the truck. He denied that he used the service brake repeatedly whilst driving between George and Sir Lowry's Pass. He stated that he used service brake as and when it was necessary to do so depending on the condition of the road.

[29] The appellant's denial that he used repeatedly the service brake is inconsistent with the expert evidence of Marais who inspected the brakes of the truck and trailers immediately after the collision. He found them to have been excessively overheated and which in his view was caused by the prolonged brake application. Marais' evidence on the cause of the excessive overheating of the brakes was not disputed. His evidence that it was not possible to reach a speed of 30 – 40 km per hour on the 3rd gear at the Pass was corroborated by Visser. Marais' opinion was that if the truck was on third gear the maximum speed it could reach while descending would have been about 15 – 20 km per hour. In my view in the absence of a challenge to Marais' evidence the Court *a quo* was correct in accepting and relying on his evidence and rejecting the appellant's denial.

[30] Furthermore it was Visser's evidence that the appellant could not have driven at 30 to 40 km per hour on the third gear. He stated that

travelling at that speed on the third gear would have blown up the engine of the truck. In his opinion for the appellant to have been travelling at that speed he must have been on a sixth or seventh gear. It is clear in my view that the driving technique which the appellant employed as he drove through the Pass was inappropriate for the traffic conditions. He over applied the service brake resulting in its overheating. He knew that he should have used the retarder or exhaust brake to control the speed of the trailer. He did not engage the truck in an appropriate gear to avoid the speeding of the trailer. The appellant acted negligently by employing driving techniques which were not suitable for the road conditions on which he was travelling. He was traveling at a very steep decline with very sharp bends. A reasonable person in his position who was an experienced truck driver and familiar with road conditions would foresee the reasonable possibility of his conduct injuring other road users in the event of the truck getting out of control and would have taken reasonable steps to guard against such occurrence. In my view the appellant was correctly convicted of culpable homicide and the appeal against conviction should fail.

[31] Mr **Louwrens'** criticism of the Court *a quo's* decision to call Mr Visser to testify and its reliance on his evidence is in our view misplaced. It is correct that the record does not indicate or explain the

circumstances in which Mr Visser was called. But it can be deduced from the record that all the parties involved including the Court *a quo* had considered the necessity of further evidence. The appellant was represented by Mr Van Coller who did not seem to have an objection to the Court *a quo* calling Mr Visser. That there was a prior discussion before the Court *a quo* used its discretion under section 186 of the Criminal Procedure Act 51 of 1977 to call Mr Visser is borne out by the following extract from the record:

> *"Die saak was dan uitgestel vir betoë en uitspraak. Die hof het dan betoogshoofde ontvang van Mnr Van Coller. Van die staat het die hof nog niks ontvang nie, maar die hof het dan ondertussen die partye meegedeel dat die hof 'n getuie wil roep ten einde duidelikheid te kry oor sekere tegniese aspekte van hierdie voertuig. Die hof het dan inderdaad 'n getuie geroep..."*

[32] The defence and the State were afforded an opportunity to cross-examine Mr Visser. Mr Visser's cross-examination by the defence was very extensive. It is not suggested by Mr **Louwrens** that the Court a quo called Mr Visser in order to supplement the State's case. (*S v Khumalo* 1972 (4) SA 500 (O). The aspects on which Visser testified – such as an achievable maximum speed when driving on a particular gear – were aspects which were already covered by Marais in his evidence. In my view the Court *a quo* did not exercise its discretion under section 186 of the Act improperly when it called Visser.

[33] I turn now to consider the appellant's attack on the sentence. In this regard it was submitted on appellant's behalf that the Court *a quo* erred in finding that the appellant was grossly negligent and in sentencing him to 3 years' imprisonment.

[34] It is correct that the Court *a quo* characterised the appellant's conduct as amounting to gross negligence. The basis for the characterisation is, however, not explained.

[35] The question is whether the Court *a quo* was correct in sentencing the appellant to 3 years' direct imprisonment for culpable homicide.

[36] It is true that the degree of an accused's culpability is a most important factor in the determination of an appropriate sentence for culpable homicide. And it has been held in a number of cases that generally 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. (*S v Mkwanazi* 1967 (2) SA 593 (N); *S v Grandin* 1970 (2) SA 621 (T).

[37] Although no greater moral blameworthiness arises from the fact

that the negligent act caused death, it is proper for the Court, regard being had to the deterrent and retributive purposes of punishment, to emphasise the sanctity of human life and impose a more severe sentence than if the accused's negligence had not resulted in the loss of life. But this should not lose sight of the fact that road accidents with calamitous consequences are frequently caused by inadvertence, often momentary (*S v Nyathi* 2005 (2) SACR 273 (SCA) paragraph 14).

[38] As Miller J observed in *S v Ngcobo* 1962 (2) SA 333 (N) at 336 H – 337B:-

> *"the magnitude of the tragedy resulting from negligence should never be allowed to obscure the true nature of the accused's crime or culpability. Whatever the result of the negligent act or omission, the fact remains that what the accused person in such a case 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... the basic measure for determining punishment for a negligent motorist must be the degree of his culpability or blameworthiness."*

[39] Applying these principles to the facts of the instant matter, I am of the view that the Court *a quo* misdirected itself in imposing a direct imprisonment sentence on the appellant on the basis of its finding that

he had been grossly negligent. There is no factual support for that finding. While it is correct that the appellant seemed to have chosen a wrong driving technique in approaching and driving through the Pass, which amounted to negligence, such a conduct may not in law constitute a basis for the finding of gross negligence.

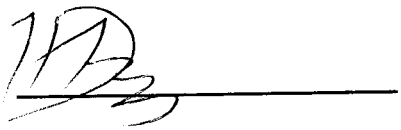
[40] Mr **Theron** who appeared for the State conceded, correctly so in my view, that there was no factual basis for the finding that the appellant was grossly negligent to justify the imposition of a custodial sentence.

[41] There is no doubt in my mind that the offence of which the appellant was convicted is a serious one and that appreciation must be reflected in the sentence to be imposed. His negligent driving led to a loss of life which can never be replaced. The appellant was a first offender and had been a truck driver for over 18 years at the time of the incident. Road accidents resulting from the negligent driving are common on South African roads these days and these can only be stopped by imposing severe sentence in cases where the conduct had resulted in the loss of life. But as I have already stated the choice of the sentence for the appellant must be made on the basis of the extent of the appellant's culpability which in my view did not amount to gross negligence.

[42] In light of what I have stated a sentence of 3 years' imprisonment in terms of section 276(1)(i) of the Act should not have been imposed in this matter having regard to the fact that the appellant was a first offender and was not grossly negligent.

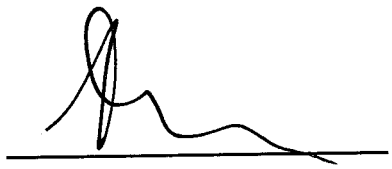
[43] In the result the sentence imposed by the Court *a quo* should be set aside and the matter remitted to the Court *a quo* to impose a sentence in terms of section 276(1)(h) of the Act (*S v Omar* 1993(2) SACR (C) 5).

[44] To sum up, the appeal against conviction is dismissed and the conviction is confirmed. The appeal against sentence succeeds and the sentence of 3 years' imprisonment in terms of section 276(1)(i) of the Act is set aside. The matter is remitted to the Court *a quo* for it to impose a sentence in terms of section 276(1)(h) of the Act.



DH ZONDI
Judge of the High Court

I agree.



N BAWA
Acting Judge of the High Court