REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

CASE NO: CC10/2011

In the matter between:

THE STATE

And

JACOB HUMPHREYS Accused

Coram: HENNEY, J

Heard: 7 November – 9 December 2011

Delivered: 12 December 2011
Judgment on Sentence: 28 February 2012

Summary:

MURDER

Based on *dolus eventualis* arising out reckless and wilful act of the driving of a motor vehicle, where it crossed a level-crossing in the face of an oncoming train. That action was wilful conduct based on *dolus eventualis*.

SENTENCE

Direct imprisonment to serve as a deterrent for drivers, transporting commuters in a minibus in a wilful and reckless manner. Where the wilful non-compliance of the rules of the road resulted in serious injury and death, direct imprisonment is the only appropriate sentence.

The age of the accused together with other factors, may serve as a substantial and compelling in a particular case especially in the case of an older person. It would be appropriate to then not to impose a sentence of imprisonment the minimum sentence given his age, longer than necessary.

Republic of South Africa

[Reportable]

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

CASE No: CC10/11

In the matter between:

THE STATE

v

JACOB HUMPHREYS **Accused**

JUDGMENT ON SENTENCE: 28 FEBRUARY 2012

HENNEY, J:

INTRODUCTION

[1] We live in a country where the majority of our people are poor and cannot provide for their own transport. They, therefore out of necessity have to rely on public transport in the form of trains, busses and what are commonly referred to as minibus taxis.

[2] On a daily basis hundreds of thousands of commuters are transported to and from their place of work, school and other places. More often than not they make use of minibus taxis for which they have to pay a transport fare. They place their safety in the

hands of the drivers who are in control of these vehicles.

[3] Against this background and reality the court has to impose an appropriate sentence against the accused. In considering an appropriate sentence the court has to look at the aims of punishment, which are: deterrence, rehabilitation, prevention and retribution. Further aspects the court has to consider are:
the personal circumstances of the accused, the offence which he had committed and the interest of society.

PERSONAL CIRCUMSTANCES

[4] The accused is a 56 year old married person. He is the father of 5 children, 4 of which are adults. The fifth child, a grandchild, he adopted. He is also a first offender with no previous convictions. The accused has a stable and disciplined background. He managed to pass Grade 10 at school.

[5] He had been in stable employment at Transnet from 1976 – 2001 where he worked as a general worker, a Shunter and later a Shunter Foreman. After his resignation in 2001, he became self-employed by conducting his own business as a small shopkeeper which he ran from his house. Later in 2001, at the request of some of the members of the community, he started to transport children to school, until this incident occurred.

[6] Before his arrest, he and his wife had a monthly income of R38 150,00 which they generated through his businesses, namely, as a transport operator and small shopkeeper. It seems that he is a responsible member of society, who is hardworking and was able to provide well for his family.

THE OFFENCE

[7] The accused was convicted of 10 counts of murder and four counts of attempted murder arising out of one single act of the driving of his minibus. The circumstances under which these offences were committed are indeed unusual. These offences which were committed arose out of a callous and blatant disregard for the rules of the road and traffic laws. Contraventions of traffic laws and rules of the road are generally regarded as minor transgressions and in most instances are not viewed by members of society as amounting to a serious disregard of the rules of society, nor as criminal offences in the proper sense.

[8] The offences when committed are usually undetected and victimless unlike ordinary offences like theft, robbery, housebreaking or possession of an unlicenced firearm, etc. The amount of detection and investigation expended in these type of cases is not the same as in more serious cases, for example drunken driving, reckless and negligent driving. However, it even seems that the latter examples of behaviour are not regarded as serious offences by some members of the community, the excuse being that almost everybody does it and it is seldom, if ever, that perpetrators are caught. This perception would be based on the premise that such an offender would be regarded "as one of us" and not "one of them" and does not deserve a prison sentence as a common criminal, even if the consequences of his/her actions resulted in devastation. This is a perception that has to change.

This notwithstanding the immense resources made available to authorities, and their great effort, to curb road traffic violations.

[9] It is only when these transgressions or violations result in serious damage to property, injury and death that we as society begin to take note thereof. Then do we only

seriously start to consider the effect or potential effect of these transgressions. This is when we start to bay for the blood of the offender, as has happened in this particular case, only as a result of a continuous and intentional disregard for the rules of the road that had as a consequence the death of 10 school children and near death of another 4 school children. This culture and attitude by drivers on our roads has to change. It is because of this very attitude that there is a high prevalence of accidents and fatalities.

[10] According to the evidence presented by the State there is a high incidence of passenger fatalities where minibus taxis are involved. This incidence increased in this province, and, also nationally, between the years 2009 – 2011.

[11] In the period 2003 – 2011 the total number of road deaths that were reported in the Western Cape was 9350, as reflected in the Crime Statistics of the SAPF. In the same period the total number of road deaths in the Republic of South Africa was 98378.[1] During this period of reporting the lowest yearly recorded figure nationally was in 2003/4 and the highest figure was 13184 in the year 2007/8. There was a decrease from 12571 in 2008/9 to 11974 in 2010/11.

Whilst it is encouraging to see a decline in the total number of road deaths, these are still shocking figures.

[12] What is further shocking is the number of incidents where level-crossing boomgates were damaged during the period 2007 – 2012 according to figures supplied by Metrorail in the Western Cape. What is of grave concern is the fact that at the particular level-crossing where this incident had occurred, in the same year of the incident, namely 2010, there

were 43 incidents where people crashed into this boom. In the following year, there were a further 64 crashes into the boom. Whilst one may blame these figures on ineffective policing or a lack of will on the part of the authorities to curb any further such incidents, one would have expected that this incident where 10 children lost their lives would have deterred people from acting in the same manner. Once again, this shows a total lack of respect by some members of society for traffic laws. It is therefore clear that something drastic has to be done to stop this type of behaviour.

[13] Although our courts in the past have viewed violations of traffic laws which also constitute reckless acts of driving in a serious light, and as having to be visited with the strictest form of punishment, even direct imprisonment, this has not acted as a sufficient deterrent, and a culture of responsible road behaviour. This may be because of the fact that the strictest form of punishment would only be imposed in the most exceptional circumstances.

[14] A further consideration would have been, when dealing with this type of offence, the offender would not be regarded as the worst type of offender as in any other matter, where sentences of direct imprisonment would ordinarily have been imposed.

[15] The courts have, however, always endorsed the view that in appropriate circumstances in cases where there is a reckless or willful disregard to the rules of the road, a sentence of direct imprisonment would not be inappropriate.

In **R v MAHAMETSA 1941 AD 83** at **86,** the following was stated:

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1 www.saps.org.za (crime statistics)

"We do not disagree with the view that imprisonment is an appropriate punishment in case of recklessness; if by recklessness is meant gross negligence or a willful disregard of the rights of other road users, as for example in the case of numbers of accidents which are caused by the dangerous practice of 'cutting in', or driving round a blind corner on the wrong side of the road, or passing another car on the crest of a hill."

See also **S v KIBIDO 1998 (2) SACR 213 SCA** at 216 e – g and 217 b – d.

[16] If regard is had to the circumstances of this particular case, the actions of the accused constitute a wilful and wanton disregard for the rules of the road and the safety of his passengers. He fully accepted the responsibility as a transport operator to transport these children in a safe and secure manner. Through his actions, he violated the position of trust that he was placed in by the parents of these children.

[17] One must have regard to circumstances that existed at the time of the commission of the offence, which are the following:

i) The accused started driving this vehicle in a reckless manner down Frederick Street. In doing this he veered onto the wrong side of the road crossing a barrier line to overtake the stationery vehicles standing at the stop street of Frederick Street and Buttskop Road;

ii) Whereafter, once again, in a wilful and reckless manner, he failed to stop at the stop street of Frederick and Buttskop Road;

iii) Whereafter, seeing and knowing that the boomgates had closed for traffic, but wanting to cross the level crossing for traffic in Buttskop Road, he once again, in a

reckless manner, after making a U-turn veered onto the wrong side of the road by once again crossing a barrier line and proceeded for 70 metres (measured) towards the level crossing;

iv) Thereafter, once again, where he had foreseen the possibility that death and/or injuries could result, maneuvered his vehicle in between the booms in the face of an oncoming train, this with a total disregard for the consequences of actions.

[18] I am in agreement with Mrs Galloway,for the State's argument that having regard to the particular circumstances of this offence, there was more than sufficient time for the accused to consider what he was doing prior to reaching the level crossing. This was not a situation where there was a singular, thoughtless act which could not have been prevented.

[19] The accused's actions, in my view, constitute a high degree of blameworthiness or culpability and is to be distinguished from the ordinary case of recklessness resulting in death or injury and a case of negligence which results in death or injury. This case exceeded the ordinary degree of recklessness and escalated to a degree of wilful conduct. As said in my judgment earlier, there can be no better example of *dolus eventualis* than this case, where a person wilfully and knowingly, with a vehicle full of passengers, drove into the face of an oncoming train.

[20] The degree of culpability of the accused was commensurate with the devastating consequences of his actions. This is not a case where a minimal degree of culpability resulted in tragic consequences, for example, where a person by means of a momentary and slight lapse or lack of concentration, caused the death or injury of another.

In **S v NXUMALO 1982 (3) SA 856 (A) at 861 H – 862 A**, Corbett JA 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 in committing the negligent act. Relevant to such of culpability or blameworthiness would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded. If they have been serious and particularly if the accused's negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed. It is here that the deterrent purpose in sentencing comes to the fore."

[21] Therefore, in deciding the type of sentence to be imposed, a court should have regard to the degree of culpability or blameworthiness of the accused. It is a weighty factor the court must consider before deciding on an appropriate sentence. It is also a determining factor to consider when a court decides whether to impose direct imprisonment, even for a first offender like the accused.

In **S v GREYLING 1990 (1) SACR 49 (A)** at **54** the following was said:

"Waar 'n beskuldigde, in 'n geval soos die onderhawige, aan roekeloosheid of growwe nalatigheid skuldig is, is direkte gevangenisstraf, selfs in die geval van 'n jeugdige eerste oortreder, nie op sigself onvanpas nie. Sien S v Viljoen 1971 (3) SA 483 (A). Voordat gevangenisstraf egter opgelê word, is dit noodsaaklik dat daar 'n deeglike analise van die getuienis gemaak word ten einde vas te stel presies hoe die ongeluk gebeur het, aangesien die beskuldigde se verwytbaarheid en die graad van sy nalatigheid daarvan afhang. In R v Swanepoel 1945 AD 444 het Davis Wn AR dit soos volg gestel

op 449:

> ***'It seems to me quite evident that, before a Court can find that it has been proved that an accused person has acted with such reckless disregard of the rights of others, or even with such gross negligence, as to merit imprisonment, it must first very carefully analyse the evidence and arrive at some precise and accurate conclusion as to what has been proved to have occurred.'***

[22] Mrs Wolff, the criminologist who testified in mitigation of sentence for the accused, suggested that the court should impose a non-custodial sentence in the form of a suspended sentence. Apart from the normal conditions of suspension, she further proposed that an element of compensation to the victims, as well correctional supervision, form part of this sentencing option. She describes this as a restorative justice sentence.

[23] Apart from the lack of detail provided as to how the compensation component would be implemented, it is my view that a restorative justice sentence would ordinarily, without deciding on this issue, follow upon a plea of guilty. A further concern regarding the feasibility of such a sentence is the fact that most of the families of the deceased, it seems, were not consulted about the desirability of such a sentence. This was according to the argument raised by Mrs Galloway, who had consulted with them, which was not disputed.

[24] Mr Engelbrecht who appeared on behalf of the accused, requested the court to impose a non-custodial sentence. In argument, he did not fully pursue and further elaborate on the sentencing option as proposed by the criminologist. And rightly so in my opinion, because such a sentence, given the particular circumstances of this case, would send out a wrong message. In summary, therefore, a sentence of direct imprisonment would not be inappropriate.

[25] The next question which would have an impact on the sentence the court must impose and which strongly came to the fore in this matter, as it was raised by the accused himself, the Criminologist, Miss Claire Wolff and his Counsel in argument is the 'question of moral blameworthiness'. It was argued that the accused had shown remorse for his actions and had empathized with the families of the deceased and the victims after the devastation which resulted from his actions. An understanding of what this precisely means and whether the accused had indeed exhibited such remorse had been conveyed to this court by his Counsel and the Criminologist, Miss Claire Wolff.

[26] In **S v MATYITYI 2011 (1) SACR 40 SCA** at **47a – d** PONNAN JA after having referred to all the authorities on this point expressed the following:

> ***"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the***

consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."

In **S v MARTIN 1996 (2) SACR 378 (W)** at **382 j – 383 a – c**

"To determine sentence, particularly for a more serious crime, there is not a more important question than, 'Why did you do it'? It is hardly excusable to ask an accused how many children he has and to omit the crucial 'Why did you do it'? Only in an exceptional case will the answer to that question not be dominant in getting to understand the influences on the accused and generally to discover the true degree of moral reprehensibility. With no known answer to that question, the accused is at risk of appearing to have acted without reason and to deserve the harshness which accompanies wanton criminality which is executed without anything with reduces moral reprehensibility. An accused assumes some risk by failing to testify in that there is then often a preclusion of opportunity to give an answer to that crucial question. Counsel's speculation without factual basis is not an equivalent."

[27] If one is to have regard to the above *dicta*, one should review and consider whether any of the actions the accused claims to have performed or caused to have been performed constituted genuine remorse. In this regard, he claimed the following: that he is sorry for what had happened; that he never intended to harm the children; and that flowers were sent to the families of the deceased. Mr Engelbrecht contended that these actions show that he empathized with the grief and suffering of the families. Mr Engelbrecht further claimed that the accused could not as a result of his bail conditions meet with the parents to sympathize with them.

[28] Mrs Galloway disputes this and contends that the accused had ample opportunity to express his remorse even if he could not sympathize beforehand. This he could do when he testified in court and during the sentencing proceedings. It is clear that the accused regrets his actions but steadfastly refuses to acknowledge and take full responsibility for his actions. He persists with his version that he cannot remember what happened even after the court rejected his version.

[29] I still do not know why the accused acted in the manner he did, what motivated him in doing so, and if he fully appreciates the horrendous consequences of his actions. He does not want to take the court into his confidence, by refusing to take responsibility. There is no clearer indication than this of a lack of remorse and I am sure this is what most if not all the parents of the deceased and others expected him to do.

SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

[30] The accused, having been convicted of an offence of murder falling under Part II of Schedule 2 and being a first offender, shall be sentenced by the court in terms of Section 51(2)(a) of the Criminal Law (Sentencing) Amendment Act 105 of 1997 (or what is also commonly known as the Minimum Sentencing Act), to a minimum sentence of fifteen (15) years. The court however, may deviate from this sentence if it is satisfied that there are substantial and compelling circumstances which justify the imposition of a lesser sentence.

[31] In the case of **S v MALGAS 2001 (1) SACR 469 (SCA)** laid down certain guidelines that the court should consider when deciding whether substantial and compelling circumstances are present which justify the imposition of a lesser sentence.

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"B. Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons."

"D. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the legislature has provided."

[32] This court, after having regard to the totality of the evidence, is of the view that there are substantial and compelling circumstances which justify the imposition of a lesser sentence. In terms of Section 53(3) of the Minimum Sentencing Act, the following are recorded to be substantial and compelling circumstances.

(a) The age of the accused. He is 56 years of age. Mrs Galloway argued that this is a neutral factor and does not carry sufficient weight for this court to deviate from the minimum sentence. I disagree. Ordinarily, this might not be a factor that carries sufficient weight to constitute substantial and compelling circumstances. In this particular case, however, for the reasons that follow, I am of the view it will carry

sufficient weight. Whilst this might not be a factor that will preclude the court from imposing a sentence of direct imprisonment it would surely be a factor that would preclude me from imposing a longer term of imprisonment than absolutely necessary.

(b) Furthermore, for a younger person who committed a similar offence, the number of years imprisonment would not have the same impact as it would for an older person. A younger person, upon release would still be able to pick up his or her life and move on. For an older person like the accused, it would be much more difficult in my opinion.

(c) Coupled with this, is the fact that for most of his adult life the accused had been a hardworking and exemplary citizen who cared well for his family. He held a steady job for most of his life and upon resigning from Transnet, he managed to build a successful small business to provide for himself and his family.

For these reasons, I would deviate from the prescribed sentence of fifteen (15) years on each of the murder charges.

INTEREST OF SOCIETY

[33] This particular case attracted a high degree of public interest. If regard is to be had to the particular circumstances of this case and the manner in which this offence was committed, society demands that the court impose a very strict sentence.

[34] The court should also be mindful about the difference between public opinion and public interest.

In **S v MHLAKAZA AND ANOTHER 1997 (1) SACR 515 (SCA) AT 518 E – G** it was held:

> ***"The object of sentencing is not to satisfy public opinion but to serve the public interest. (Compare Ashworth & Hough 'Sentencing and the Climate of Opinion' [1996] Crim LR at 776; S v Mafu 1992 (2) SACR 494 (A) at 496g-j.) A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public. In this context the approach expressed in S v Makwanyane and Another 1995 (2) SACR 1 (CC) at 38-9, paras 87-9 (per Chaskalson P) applies mutatis mutandis: public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public."***

[35] Furthermore, the court should exercise caution, to not be swept away by the emotion and sentiment, and enormous media attention that surrounds this trial. This should not sway the court in objectively determining what is in the public interest.

[36] This sentence must serve as a deterrent for those members of the public who make themselves guilty of this type of behaviour. Not only should people be made to understand that driving in a manner which causes serious damage to property, serious injury and death will be visited with severe sentences, but also that these devastating consequences are caused by a reckless and wanton disregard for the rules of the road.

[37] Where the lives of 10 young teenagers, who could have been productive members of society, are taken away in such a horrendous manner by the continuous recklessness

and murderous act of a person like the accused, who refuses to take responsibility for his actions, society demands no less than a sentence of long term direct imprisonment. This will clearly send out a message to all of society and, in particular, people who transport those hundreds and thousands of members of society on a daily basis on our roads in busses and taxis to take care and respect the sanctity of their passengers and fellow road users who, in the case of users of taxis, are mostly the poor and vulnerable who have no choice but to make use of this means of transport.

[38] Mr Humphreys, after much thought, consideration and agonizing you are sentenced as follows:

On counts 1 – 10 – Of murder, you are sentenced to twelve (12) years imprisonment on each of these charges.

The court will however take into account the cumulative effect of these sentences and will order the sentences to run concurrently. Thus, an effective twelve (12) years imprisonment will be served.

On counts 11 - 14

Six (6) years imprisonment on each of these charges.

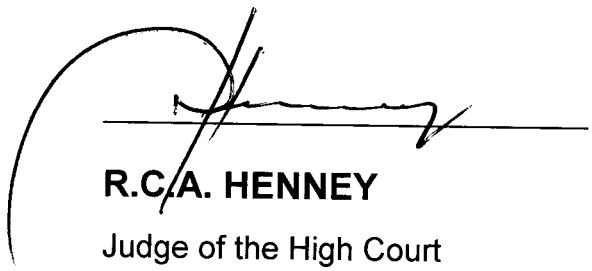
The court orders that four (4) year imprisonment on each of these charges be served concurrently with the effective sentence on counts 1 – 10.

On these 4 charges, therefore the accused has to serve a sentence of a further eight (8) years cumulatively.

Effectively, on all 14 charges, the accused is to serve a total sentence of Twenty (20) years direct imprisonment.

In terms of Section 34(1) of the National Road Traffic Act 93 of 1996 the licence and public driver's permit of the accused is cancelled with immediate effect.

In terms of Section 103 of Act 60 of 2003, the Firearms Control Act, the accused is declared unfit to possess a firearm.



R.C.A. HENNEY

Judge of the High Court