IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITBURG

CASE NUMBER: AR 477/14

In the matter between:

KRIESEN MOODLEY **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

VAN ZÿL, J. (OLSEN, J concurring)

[1] This is an appeal from the Regional Court, Durban, with leave of the court *a quo*, against the appellant's convictions and sentences on three counts of culpable homicide (counts 1, 2 and 3), one count of driving under the influence of liquor (count 4) and one count of reckless or negligent driving (count 5). In respect of these offences the appellant was sentenced to 5 years' imprisonment on each of counts 1, 2 and 3, to 3 years' imprisonment on count 4 and to 2 years' imprisonment on count 5. The effective period totaled 20 years' imprisonment. In addition the appellant's drivers licence was cancelled

in terms of s34 of the National Road Traffic Act 93 of 1996 and a direction issued which disqualified him from obtaining a further licence within 5 years from 10 July 2017, being the date upon which sentence was passed.

[2] The charges against the appellant arose from a motor vehicle collision which occurred during the early hours of the morning of 28 March 2015 along Link Road between the M1 and the Ridgeview Shopping Centre adjacent to Chatsworth within the Durban Metropolitan area. It was common cause that at the time of the collision the appellant was the driver of a 2007 white BMW 335i 6 speed automatic convertible with the roof down (the BMW) and that his passenger was one Akshay Ramsaroop, then a 15 year old young man.

[3] The second vehicle involved was a 2007 Blue Toyota Yaris 5 seater manual sedan (the Yaris) driven by the late Mr Delon Gurriah (count 1) who died on the scene together with Mr Koveshan (Byron) Pillay (count 2) who had occupied the left front passenger seat and Mr Denalin (Preston) Naicker (count 3) who had been seated in the left rear passenger seat. The surviving passengers were Mr Denver Naidoo, the rear middle passenger and Mr Deon Bujram (Budram), the right rear passenger.

[4] At the time of the collision the BMW had been travelling in a southerly direction and the Yaris in a northerly direction along Link Road when they were involved in what may colloquially be referred to as a head-on collision. According to Mr Denver Naidoo, who was called as the second state witness he and the other occupants of the Yaris were all friends who attended "gym" together and were returning after supper in Durban. The witness, a police official, had been seriously injured in the collision and had been unconscious for 12 to 13 days in the intensive care unit at hospital, was only told about the collision after 14 days and was only told of the death of his friends 27 days after the event. He had no recollection of the collision but recalled meeting at the residence of Mr Deon Bujram at about 20h00 during the evening of March 27th, from where they travelled to Florida Road in Durban, but he had no

memory of where they actually had supper. Asked in cross examination whether they had consumed alcohol during the course of the evening the witness said that he never consumes alcohol and he had no recollection of whether any other members of the party may have taken alcohol. The other surviving passenger Mr Bujram was also called, but his loss of memory due to injuries sustained was even more marked and he was only aware from some photographs subsequently shown to him that their group of friends had shared supper. He had no recollection of the events of that evening.

[5] According to the appellant, who lived with his parents in their family residence, there was a social gathering at their home the evening of March 27th where an estimated 15 to 20 guests had gathered playing cards and consuming alcohol. These gatherings were a regular occurrence. Apart from himself, the appellant said that only one of his friends, one Troilin, was sober. The appellant said that he was observing his Saturday religious fast, as a result of which the consumption of alcohol and meat was not permissible. At about 01h30 some of the guests were hungry and he left to purchase hamburgers for them. The vehicle he used was the BMW which belonged to his friend Mr Thaveshan Moodley, one of the guests and which was parked in the driveway. He explained that because of their close relationship they drove each other's vehicles, so that there was no need first to request permission from the owner who was in the toilet when the appellant left.

[6] It is convenient at this stage to deal with the two driving counts (counts 4 and 5). With regard to the charge of reckless/negligent driving (count 5) counsel for the appellant contended and counsel for the respondent conceded that it amounted to an impermissible duplication of convictions and should be set aside, so that there is no need to give further consideration thereto.

[7] Count 4, the charge of driving under the influence of intoxicating liquor, however remained in dispute. The evidence relating to this charge comprised the two police witnesses, constables Phiri and Mbozana, who were on patrol

and happened to come upon the scene of the collision shortly after it occurred. Their evidence was to the effect that the appellant was still in the driver's seat of the BMW, they spoke to him and suspected that he might be under the influence of alcohol. As a result he was dispatched by ambulance to hospital accompanied by constable Mbozana who said that she was present when the doctor took a blood sample from the appellant, duly sealed the container, replaced it in the evidence kit which was also sealed and of which she then took possession. She left the appellant at the hospital for treatment, returned to the police station and subsequently entered the sealed evidence kit containing the blood sample into the SAP13 register, a copy of which was received as exhibit "D".

[8] Warrant Officer S. Govender gave evidence that he was the charge office commander and received the evidence kit from Constable Mbozana, checked that it was properly sealed and placed it in the safe. It appears that the sample was subsequently collected by one Carol Hlope, who was a clerk at the police station and conveyed to the State Forensic Laboratory where it was received and examined by Mr T Mtshali, a forensic analyst in the employ of the National Department of Health. According to his evidence, when he opened the sealed kit, it contained no blood sample at all. He was unable to account for how this could have come about. In the result there was no blood sample to analyse and no proof that there had been any alcohol in the system of the appellant at the relevant time.

[9] The state called as a witness Mr Thaveshan Moodley, the owner of the BMW. It was alleged that he had made a statement to Warrant Officer Snodgrass, the police accident investigating specialist who had earlier given evidence. The apparent object of calling this witness was to lead evidence to the effect that he had not given the appellant permission to take the BMW while he, the witness, was in the toilet and to establish that the witness had observed the appellant consuming alcoholic liquor before he had departed in the BMW. However, the witness deviated from his statement and was declared a hostile

witness upon the application of the prosecutor. In evidence he claimed still to have been under the influence of intoxicating liquor when he made his police statement and that the person he intended referring to therein was in fact the appellant's brother "*Krishan*" and not the appellant himself. Although he had attended at the scene of the collision before the appellant was removed to hospital and spoke to him, he said that the appellant did not appear to him to have been under the influence of alcohol at that time and that he had not noticed whether the appellant consumed alcohol during the course of the preceding evening. Warrant Officer Snodgrass was not recalled to deal with the evidence thus given by Mr Moodley.

[10] The only other evidence relevant to intoxication was that of constables Phiri and Mbozana. Under cross examination they both admitted that they were unable to say that the symptoms they observed relevant to the appellant at the scene of the collision, namely slurred speech, bloodshot eyes and an unsteady gait, could not have resulted from the appellant's involvement in the collision, nor could they dispute that the appellant had in the process suffered a cracked pelvis for which he was subsequently hospitalized. It was conceded that such injury could have affected his gait. Both were however adamant that they smelled alcohol on the person of the appellant.

[11] On behalf of the appellant it was submitted, with reference to *S v Mzimba* 2012 (2) SACR 233 (KZN) at 235, that the state was required to establish beyond a reasonable doubt that the driving ability of the appellant had been impaired by his consumption of alcohol and that there had been no evidence before the Magistrate to that effect. In *S v Edley* 1970 (2) SA 223 (N) Miller J (as he then was) at 226B held that

> '*.. the question which is before us now is whether, on the evidence I have briefly summarised, the State succeeded in discharging the onus which rested upon it to prove, not only that the appellant had taken alcohol and was under the influence of alcohol, but that, as a result of the consumption*

of alcohol, his judgment or skill in the sense explained in Rex v Spicer, 1945 AD 433, was affected by the alcohol consumed by him." The court concluded that "*it seems to me to be a matter of impossibility to infer with the necessary degree of certitude that the alcohol which he undoubtedly consumed, to judge by the smell of alcohol on his breath, had affected him to the requisite degree*' (at 226H -227A).

[12] So too in the present matter is it impossible to infer upon the available evidence and even if it were accepted that the appellant was found with alcohol on his breath after the collision, that his driving ability had been impaired by the consumption of alcohol prior to the collision. In my view the state had failed to discharge the onus of proof which rested upon it and the appellant's appeal against his conviction on count 4 must succeed.

[13] The primary issue regarding the conviction of the appellant on the culpable homicide counts is whether the state managed to prove beyond reasonable doubt the negligent killing of the three deceased. To answer that question requires a determination of how the collision occurred. This in turn involved the determination in particular of where in relation to Link Road the point of impact occurred. The state relied on circumstantial evidence and its main witness in this regard was warrant officer F Snodgrass.

[14] In the first instance the expertise of the witness was attacked by the defence. It was submitted that he lacked the necessary expertise and qualifications to arrive at any authoritative conclusions as to the cause of the collision and more particularly as to the point or area of impact between the two vehicles involved. In his report (Exh B) the witness set out on oath an abbreviated *curriculum vitae* in which he indicated that he had been a member of the South African Police since 1991 and joined its Accident Combatting Unit during October 1994. During his service he successfully completed various training courses relevant to vehicle accident attendance and investigation

which he listed. In the process he stated that he had attended more than 2000 minor and more than 500 serious (involving fatalities) motor vehicle collision scenes. As such his duties involved the investigation and reconstruction of "*accident crash scenes*". It is evident that at the time of the present investigation the witness had more than 20 years' experience in the investigation of motor vehicle collisions.

[15] Mr Van Heerden who appeared for the respondent submitted on the strength of *A A Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (AD) that even if Mr Snodgrass were held not to qualify as an expert witness, then and in any event the opinion of an experienced policeman as to the point of collision was usually allowed as *prima facie* proof, which becomes conclusive if not challenged.

[16] During the course of a long and at times somewhat acrimonious cross examination of Mr Snodgrass, there was no concerted attack made upon his qualifications and experience in collision matters. Cross examination amounted more to disagreeing with his statements or conclusions, often based upon speculative possibilities. A great portion of the evidence of the witness was taken up with irrelevant matter, for instance flowing from his references in his report to alleged insobriety on the part of the appellant. It was, however, quite clear that the witness had no personal knowledge on the subject and had responded to hearsay information imparted to him by the police witnesses and the owner of the BMW Mr T Moodley, whose police statement the witness had taken. These irrelevancies may be safely disregarded whilst giving attention to the nub of his evidence, namely what he found and recorded at the scene of the collision upon his arrival some 2 hours after the event.

[17] The correct approach to the assessment of the value of expert evidence requires that questions of reasonableness and negligence are for the court to determine on the basis of the expert's opinions as presented. This generally requires consideration, not of credibility but rather of the opinions and an

analysis of their essential reasoning, to enable the court to reach its own conclusion on the issues involved (*Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) at para 34).

[18] The circumstances of the collision were briefly as follows. The route of the BMW brought it through a curve where the southbound lane changed to a double lane, while northbound was a single lane approaching the curve and was relatively straight, as demonstrated in image 3 of exhibit B. After the collision the two vehicles came to rest in positions as reflected in the sketch plan and key thereto forming the last three pages of exhibit B. Two photographs in particular demonstrating the positioning of the vehicles are photos 37 and 38. The witness said that the point of impact was at or near the point which he marked "X" (on photo 38). Cross examined as to the "point" the witness said that it was merely intended to indicate the immediate vicinity of the area of impact. As has become common, reference to the point of impact is used for convenience to describe the immediate area or locality of the impact and not to denote a particular point with absolute accuracy. It is also used herein on that basis.

[19] Mr Snodgrass indicated in both his report and in his evidence that the point marked "X" (photo 38) and reflected as point "C" in the sketch plan to exhibit B represented, in his opinion, the point of impact as being well within the northbound lane of travel of the Yaris. It was essentially this conclusion which was at the target of the attack by the appellant upon the evidence of the witness. Mr Samuels, who appeared in the appeal for the appellant but who did not conduct the trial, fairly conceded that if the point of impact was correctly determined by the witness, then the appeal against the convictions for culpable homicide cannot succeed.

[20] Mr Snodgrass during the course of his evidence explained that on the northbound single lane he found fresh gouge and scrape marks on the road surface which extended in a line diagonally across to the double southbound

lanes, past the position of the BMW and up to the position of the Yaris. The distance from where the makings commenced up to the BMW was measured at 14,6 meters and to the Yaris at 32.4 meters. From his evidence it appeared that when two vehicles impact with each other the bodywork and mechanisms deform and the force of the impact can drive portions of the bodywork or mechanisms onto the road surface causing indentations. Where a vehicle in its deformed state is propelled for any distance across the road surface by its momentum, or the force of the impact, scrapes and gouge marks result along its course. In this instance the scrape and gouge markings clearly marked the lines of movement of the two vehicles from where the markings commenced up to where the wreck of each vehicle came to rest. He was therefore confident that the point or area of impact was where the markings commenced, as indicated in photos 37 and 38.

[21] The witness pointed out that the angle of impact upon the Yaris centered at its left frontal area and that the vehicle had rolled or overturned after impact. This conclusion was consistent with the state of the wreck after the collision. The side panel damage is apparent from photos 44 and 45 and the crush damage from photos 63 and 64. According to the report the standard length of the Yaris was 3,75 meters and post collision it measured in at 3,18 meters on the right side and 2,56 meters on the left. By contrast the standard length of the BMW was 4,58 meters and post collision it measured in at 3,79 meters.

[22] The witness postulated that the point of impact was in the lane of travel of the Yaris and that the BMW coming out of the curve had drifted outwards into the lane reserved for oncoming traffic before colliding with the Yaris. According to him statistically drivers of right hand steering vehicles, faced with imminent collision, instinctively take avoiding action by swerving to the right and those of left hand steering vehicles to the left. That, according to the witness would account for the more extensive crush damage to the left front of the Yaris. He also suggested that the post collision position of the BMW

towards the middle of the road was due to its driver trying to steer towards his left at the time of impact.

[23] Mr Snodgrass was of the opinion that the BMW had upon impact propelled the Yaris backwards with sufficient force not only to instantly reverse its line of travel, but to carry it 32,4 meters before coming to a halt. The BMW continued moving forwards despite the impact for a further 14,6 meters. Even allowing for the fact that the BMW was the heavier vehicle of the two, the witness suggested that the greater impact on the Yaris resulted from excessive speed on the part of the BMW. Certainly upon their respective specifications the BMW was by far the more powerful vehicle. It was fitted with a 3000cc turbo charged engine and a 6 speed automatic gearbox whilst the Yaris had a 5 speed manual gearbox with a 998cc capacity engine. Based also upon the catastrophic damage, particularly to the Yaris, the witness was of the opinion that at the time of impact the BMW must have been traveling at a speed well in excess of 120 kph.

[24] The defence version was to the effect that the appellant, coming out of the curve and driving at 60 to 70 kph in the middle lane, observed the lights of the approaching Yaris as well as sparks coming from its left frontal area. The Yaris then changed course and veered across the roadway in the direction of the BMW. As a result the appellant took evasive action by swinging towards his left and estimated that about one half of the BMW had crossed over to the far left lane while the other half was still in the middle lane when impact occurred. Based upon his observations it was submitted that the probable explanation for the sparks was that the Yaris had hit the curbside on its left, lost control as a result and veered over into the lane of travel of the BMW where the impact then occurred.

[25] In this regard the defence drew attention to the defective condition of the Yaris as identified in the report of Mr Snodgrass. These related to the rear brake linings that were worn and the exposed steel beading on the left front tire

(the second photo 68). The witness said that, as indicated in his report, the brakes of the Yaris would have functioned normally and the remaining tread face on the left front tire was sufficient so that the defects as identified could have had no causal connection with the collision. He speculated that the damage to the left front tire may have resulted during the course of the recovery of the wreck and its removal to storage, where he subsequently examined it.

[26] The witness scoffed at the manner in which the defence suggested the collision had occurred. He pointed out that the defence version as put to him was entirely inconsistent with the gouge and scrape markings he found at the scene. According to the witness the scrape markings on the road surface clearly indicated not only the immediate vicinity where impact occurred, but also the lines of travel of each vehicle after the impact and until each vehicle came to rest. In addition he said that had the left front wheel of the Yaris come into contact with the concrete curbside of the road as suggested to him, then he would inevitably have expected to find scrape and scouring markings on the edge of the metal rim of the left front wheel and there were none. A post collision image of this wheel appears in (the first) photo 68.

[27] The appellant himself in evidence was not a convincing witness as to the point or area of impact. In his evidence in chief he claimed that between about 01h30 to 02h00 he was driving at between 60 and 70 kph in the right hand or middle lane as depicted in photo 10. When he observed the Yaris veering in his direction he swerved towards his left and about one half of the BMW had crossed into the left lane at the moment of impact. Under cross examination he was asked how it was possible for the point of impact to be where the witness Mr Snodgrass had indicated in the light of the version offered by the appellant. His reply was that he was not sure. He then insisted that the impact was on the right hand side of the BMW, a claim not supported by the subsequent damage to the vehicle.

[28] Pressed on why the point of impact was not on the southbound (double) lanes, being the appellant's correct direction of travel, the prosecutor put to him "*It happened on the oncoming traffic*", to which the appellant replied "*I am not too sure if it happened on the oncoming traffic.*"

[29] Under re-examination by his own defence attorney the appellant was asked "*Now, in photograph 38 the prosecution asked you the question regarding the point of impact, in other words, what he is putting to you is that both cars met on the Yaris's path of travel so as to cause those marks, your response?*", to which the appellant replied that "*I can't remember hitting the Yaris on his lane so I don't know how the marks came …[indistinct]*".

[30] In the end the Magistrate was left to deal with the factual evidence of Mr Snodgrass, coupled with his reasoned interpretation of the road markings, position of and damage to the vehicles and his conclusion that the point of impact was as indicated, namely within the lane of travel of the Yaris. Against that was the unsubstantiated explanation of the appellant, initially claiming that the impact point was on the southbound lanes, being his correct lane of travel, but then becoming unsure and under cross examination conceding that "*I am not too sure if it happened on the oncoming traffic.*"

[31] Objectively any claim that the point of impact was situated on the southbound lanes is irreconcilable with the facts placed before the Magistrate. The only position for the point of impact which accords with the facts is in the immediate area as indicated by Mr Snodgrass, namely in the correct lane of travel for the Yaris. The probabilities strongly, even compellingly, suggest that the BMW must have been travelling at an excessive speed in order to drift over into the lane of travel of the Yaris and not being able to steer clear of it when the danger of a collision became apparent. To believe, as the appellant claimed in evidence, that he was travelling at between 60 and 70 kph is, in all the circumstances, farfetched.

[32] In my view the Magistrate cannot be faulted in rejecting the evidence of the appellant and in finding that the state had established the guilt of the appellant beyond a reasonable doubt. The appeal against the convictions on counts 1, 2 and 3 should therefore be dismissed.

[33] The appeal is also against the sentences imposed by the Magistrate and more particularly the cumulative effect of those sentences. Even discounting the sentences passed in respect of counts 4 and 5 where the appeal against the convictions have succeeded, the effective sentence remaining is still one of 15 years' imprisonment.

[34] In *S v Naidoo* 2003 (1)SACR 347 (SCA), Marais JA remarked that the sentences imposed by the trial court were "*.. so far removed from what I consider to be an appropriate sentence that they fall to be characterised as strikingly inappropriate and therefore to require amelioration by this Court. It is therefore unnecessary to deal with the alleged misdirections of which the Court a quo was submitted to have been guilty by counsel for the appellant. It suffices to say that the submissions were not without some substance.*" In the present matter I propose to adopt a similar approach.

[35] The general approach to matters of this nature was set out in *S v Nxumalo* 1982 (3) SA 856 (A) at 861G – H where the Court of Appeal held that:

> '*It seems to me that in determining an appropriate sentence in such cases (being matters of culpable homicide arising from traffic accidents) 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 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. ..*'

[36] That approach was followed in *S v Humphreys* 2013 (2) SACR 1 (SCA) in para 22. I respectfully propose to do the same in the present matter. In *Humphreys* a school bus driver entered a railway crossing at a time when it was absolutely inopportune to do so, collided with a train as a result of which ten passengers lost their lives. The court remarked that his behaviour represented a most reprehensible degree of negligence, amounted to a blatant deviation from what could be expected from the reasonable driver and a flagrant disregard for the safety of others. Much the same can be said of the conduct of the appellant in the present matter.

[37] The appellant is a young man born on 18 April 1993 and presently 26 yrs of age. He is matriculated, married with a young child and employed as an administration clerk. They live with his family where he contributes to the household. He is a first offender. But, as Nugent, JA remarked in *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 58:-

> '*In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be ..*'

[38] The deceased were also all men in the prime of their lives. Their deaths inevitably caused heartbreak, financial distress, a sense of loss and left a vacuum in the lives of their families. The two surviving passengers in the Toyota Yaris were seriously injured and by all accounts permanently scarred, both physically and psychologically. Given the state of the wreck they appear to have been fortunate to have survived at all.

[39] In *Naidoo* the effective sentence on 13 counts of culpable homicide was reduced upon appeal to an effective 9 years and 9 months' imprisonment, taking account of the fact that the appellant had been in custody for 8 months prior to conviction. In *Humphreys* the appellant's effective sentence was reduced upon appeal on 10 counts of culpable homicide to 8 years' imprisonment.

[40] In the present matter likewise the offences are by far too serious not to attract a substantial custodial sentence. It follows that a sentence of correctional supervision as contended for on behalf of the appellant is unsuitable in the circumstances of the matter.

[41] The appellant has shown no serious remorse and offered a vigorous and specious defence during the trial. At the conclusion of his evidence in chief he purported to offer an apology to the families of the deceased whilst, in the same breath, protesting his innocence.

[42] Having given serious consideration to all the multiple factors affecting the determination of an appropriate sentence and endeavoring to balance them, I have come to the conclusion that the sentence reflected in the order below will best meet the needs to the matter. The 3 counts of culpable homicide all flow from the same sequence of actions and I therefore regard it as appropriate that they should be taken together for purpose of sentencing.

[43] In the circumstances I propose an order upon appeal, as follows:-

a. The appeal against the convictions on Counts 1, 2 and 3 fails and is dismissed.
b. The appeal against the convictions on Counts 4 and 5 succeeds, the convictions and sentences are set aside and a verdict of "*Not guilty and discharged.*" is substituted on each of these counts.
c. The appeal against the sentences imposed in respect of counts 1, 2 and 3 succeeds and the sentences imposed by the Magistrate are

set aside and the following sentence is substituted in their place, namely;

> "*Counts 1, 2 and 3 are taken together for purposes of sentence and the accused is sentenced to serve six(6) years' imprisonment.*"

VAN ZÿL, J.

OLSEN, J.

JUDGMENT RESERVED:	26 APRIL 2019
JUDGMENT HANDED DOWN:	3 May 2019
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