IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal No: AR 362/18

Magistrate's Case No: RC 33/15

In the matter between

MBONGENI SITHOLE **THE APPELLANT**

and

THE STATE **THE RESPONDENT**

Dealt with in term of s 19(*a*) of the Superior Courts Act 10 of 2013 without a hearing. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10:00 am on _____

ORDER

On appeal from Pietermaritzburg Magistrate Court.

(a) The appeal against sentence is upheld.

(b) The sentence of the court a quo is set aside and substituted with the following sentence:

"(i) Count 1: the accused is sentenced to twelve (12) months imprisonment.

(ii) Count 2: the accused is sentence to three (3) years imprisonment.

(iii) Count 3: the accused is sentenced to three (3) years imprisonment.

(iv) Count 4: the accused is sentenced to three (3) years imprisonment.

(v) In terms of the provisions of section 280 of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence in count 1 will run concurrently with the sentence in count 2.

(vi) The sentence is antedated to 29 October 2016.

JUDGMENT

Mogwera AJ

[1] The appellant was convicted in the Pietermaritzburg Regional Court on a charge of using a motor vehicle without the owner's consent in contravention of the provisions of

section 66(2) of the National Traffic Act,[1] and three (3) counts of culpable homicide resulting from negligent driving of a motor vehicle. He was sentenced to twelve (12) months imprisonment in respect of the first conviction and five (5) years imprisonment in respect of each of the other three counts. The trial court made an order that the sentence in count one should run concurrently with the sentences in counts 2, 3 and 4. The appellant impugns the sentences imposed.

[2] A brief background of the evidence which was adduced in the trial which resulted in the conviction and theses sentences will suffice. The appellant was employed as a gardener and a general worker by Mr Neelan Chetty for a period of approximately one year. On 22 December 2012 Mr Chetty and his family left for Johannesburg on holiday. The appellant was paid his salary and his yearly bonus and he was given the gate remote so he could gain access to the premises in order for him to feed the pets. The house was locked and secured before the family's departure. Mr Chetty gave the appellant a lift to his home in Cedara, as the appellant was carrying a box with a gift which Mr Chetty had bought for his birthday which was on the following day.

[3] On the following day at around 10H00 Mrs Chetty received a phone call from the police at Hilton Police Station and she was informed that her motor vehicle, a Peugeot with registration letters and numbers NYZ 141 GP (the vehicle), had been involved in a collision. After receiving this information Mr Chetty travelled back to Pietermaritzburg, leaving his family behind in Johannesburg. Upon his arrival at Hilton Police Station he was shown photographs and he identified the wreck depicted therein as being that of the vehicle which belonged to his wife. There he was informed that the appellant had been driving the vehicle at the time of the collision. He later learned from his domestic worker that the appellant had taken the spare keys for the vehicle, when he had to wash it, at

[1] National Road Traffic Act 93 of 1996.

some stage prior to the family leaving for Johannesburg. He did not give the keys to him, neither did he authorise him to use the vehicle.

[4] Mr Bongani Derrick Zuma (Mr Zuma) was one of the passengers in the vehicle which was driven by the appellant at the time when it was involved in a collision. His evidence shed light on what happened on that fateful day. On the morning of the 23 December 2012 he was with Sandile Shoba and Nhlanhla Zuma, at the latter's home drinking beer when the appellant arrived. He requested them to accompany him to Howick-West to see one Sizwe. They were later joined by one Khiti Mohlakwane and they all proceeded to Howick-West in the vehicle which was being driven by the appellant. When they did not find Sizwe at his work place they proceeded to a nearby bottle store and purchased alcohol. They consumed some of it there, and the appellant suggested that they should proceed to Mathandubisi area.

[5] Upon their arrival there they proceeded to a tavern where they continued to consume alcohol which they had brought with them. When they had finished that alcohol they bought some more, and they proceeded to consume it. At some stage the appellant left them there and went away in the vehicle. The appellant later returned with a certain gentlemen and they joined his friends and continued to drink alcohol. The appellant again left with that man and returned after a short while. It was then decided by the appellant that they should go back to Howick-West to look for Sizwe. They again did not find him. They bought some more beer, and they decided to drive back to Cedara.

[6] It was while they were travelling along the N3, en route to Cedara that the collision occurred. Mr Zuma testified that the appellant was driving at an excessive speed, following a certain motor vehicle on the left lane. As the appellant got very close to that vehicle, instead of slowing down he decided to change lanes and in the process of doing so he lost control of the vehicle. It then hit the silver barrier on the extreme right side of

the road and it capsized. The damages to the vehicle were quite extensive, it was a complete wreck. The other three friends who were passengers in the vehicle lost their lives as a result of the collision. Only the appellant and Mr Zuma survived to tell the story.

[7] The evidence of the other two witnesses, the police officers who attended the scene of the collision is undisputed, and it is therefore not necessary to refer to it for the purposes of this judgment.

[8] The appellant's version of the events of that day is that he was given permission to use the vehicle by Mr Chetty, who had given him the vehicle keys and the remote for the gate to the premises. He was driving the vehicle when he met his friends who were carrying alcohol with them. They boarded the vehicle and he travelled with them to buy some groceries. It was when he was driving back to Cedara to drop off the groceries and deliver his friends when the collision occurred. He disputed that he had consumed alcohol on that day. He also denied that he was driving at an excessive speed. He testified that he was driving behind a truck with a trailer carrying horses and there was another vehicle driving on the fast lane. That vehicle then moved to his side and drove in front of his vehicle. It was at that stage that Nhlanhla, who was seated next to him, grabbed the steering wheel, which caused the vehicle to swerve and hit the barrier. This version was rejected by the trial court as being not reasonably possibly true, and rightly so.

[9] The sentence imposed by the trial court is said to be so severe that it induces a sense of shock. It has also been submitted that the learned magistrate ought to have requested pre-sentence reports given the personal circumstances of the appellant, in particular the fact that he is a young first offender and he stated in mitigation of sentence that he is receiving a disability grant as he had sustained an injury to the head and two broken legs at the time of the collision.

[10] It is necessary to briefly restate the well-known approach to be adopted by the court of appeal when dealing with the question of sentence. Punishment is pre-eminently the prerogative of the trial court. The court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, simply substitute the sentence imposed with the one it believes would have been more appropriate, and in that way usurp the sentencing discretion of the trial court. Interference with a sentence would only be justified where such discretion has not been properly exercised, the sentence is vitiated by irregularity or material misdirection, where the sentence is shocking and disproportionate,[2] or where there is a startling or disturbing disparity between the trial court's sentence and that which the appellate court would have imposed.[3]

[11] It is trite that, in determining an appropriate sentence, the trial court has to further be guided by the principles which constitute the triad — the crime, the offender and the interests of society.[4] These are to be considered in conjunction with the main purposes being deterrence, prevention, rehabilitation and retribution. The role of mercy in sentencing is widely recognised in our criminal justice system and it has been said that one way of showing mercy to the accused was through ordering that sentences imposed should run concurrently[5], as was done in this case.

[12] The appellant's personal circumstances which were alluded to in mitigation of sentence were that he is young and that he is a first offender. He was also injured during the incident and he was getting a disability grant at the time of his incarceration. It was also indicated that the fact that he was intoxicated at the time and that the persons whose deaths he caused were his friends should be viewed as mitigating factors. It has been

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[2] *S v Rabie* 1975 (4) SA 855 (A) at 857*; S v Petkar* 1998 (3) SA 571 (A) at 574*; S v Malgas* 2001 (1) SACR 469 (SCA), *Director of Public Prosecutions, KwaZulu-Natal v P* 2006(1) SACR 243 (SCA).
[3] *S v Birkenfield* 2000(1) SACR 325 (SCA) para 8; *S v Hewitt* 2017 (1) SACR 309 (SCA) para 8
[4] *S v Zinn* 1969 (2) SA 537 (A) at 540 G.
[5] *S v Senatsi* 2006 (2) SACR 291 SCA para 6.

submitted before this court that due to these circumstances the trial court ought to have requested for pre-sentence reports, regardless of his attorney's failure to do so.

[13] Where the offender is an adult, as in this case, there is no obligation on the court to obtain pre-sentence reports, unless there are some exceptional circumstances which necessitates that the reports be obtained. In this case, the appellant was represented by a competent attorney throughout his trial, and the issue of a pre-sentence report was never raised. I do not agree with the submission that there are circumstances which "cried out for pre-sentence reports to be obtained in this case." There was sufficient evidence placed before the trial court to enable it to properly exercise its sentencing discretion. The trial court was aware of, and took into consideration the fact that he was injured in the incident which resulted in him having some disability.

[14] The serious consequences which resulted from this incident cannot be overstressed. The evidence which was adduced in this trial reveals that the appellant was in a position of trust, which he abused when he used the vehicle of his employer without his knowledge and permission. He then drove the said vehicle while he was under the influence of alcohol on a public road which is notoriously busy. He drove at an excessive speed while having passengers in the vehicle, which resulted in him having to swerve into the fast lane in order to avoid colliding with a vehicle in front of his. In engaging in that manoeuvre he lost control of the vehicle which was speeding at the time and hit the barrier which caused the vehicle to capsize, causing the death of three people and the vehicle to be written off. His culpability is seriously aggravated by these factors.

[15] In line with giving due regard to the needs of society or public interest, it is also imperative that rights of victims need to be taken into account.[6] It is generally accepted that as much as the interests of the offender have to be taken into account, recognition

[6] *S v Nxumalo* [2018] ZAKZD 48 (22 October 2018).

must also be given to the rights of victims and they need to 'be treated with respect by the criminal justice system', in accordance with the principles of restorative justice.[7] It is because of this that our law makes provision for victims of crime to make representations when a decision regarding release of the offender on parole has to be made.[8] There are many victims who were adversely affected by the consequences of this crime. Mrs Chetty lost her prized possession, but the most significant loss was that of three lives. These were all young men who still had many years ahead of them. Undoubtedly their families must have been devastated by this incident.

[16] Ordinarily it is desirable in a case where an offender is convicted of offences that are inextricably linked in terms of time and location that the cumulative effect of the sentences imposed be considered.[9] However, the sentencing court must also pay due regard to the offender`s blameworthiness in determining the effective sentence to be imposed so as to ensure that such effective sentence is not inappropriate. It needs to be borne in mind that although no greater moral blameworthiness arises from the fact that a negligent act caused death, punishment for such act should still factor in the sanctity of human life. [10]To do otherwise could lead to an undue 'focus on the well-being of the accused at the expense of the other aims of sentencing and the interests of the community [which tends] to distort the process and to produce, in all likelihood, a warped sentence'.[11]

[17] In his contention that the sentence imposed in this matter is severe, counsel for the appellant has referred us to *S v Nyathi*,[12] where the Supreme Court of Appeal (SCA) confirmed the effective sentence of three years imprisonment imposed by the trial court where the appellant had overtaken another vehicle on a blind rise and thereby caused a

[7] *S v Matyityi* 2011 (1) SACR 40 (A) para16
[8] Section 299A Criminal Procedure Act 51 of 1977.
[9] *S v Schrich* 2004 (1) SACR 360 (C) at 370 b-c; *S v Mokela* 2012 (1) SACR 431(SCA) par 11.
[10] *R v Barnado* 1960 (3) 1960 (3) 552 (A) at 557 D-E; *S v Nxumalo*1982 (3) SA 856 (SCA).
[11] *S v Lister* 1993 (2) SACR 228 (A) at 232h – i.
[12] *S v Nyathi* 2005 (2) SACR 273 (SCA).

collision which resulted in the death of six people. Reference was also made to *S v Humphreys*[13] were the SCA sentenced the appellant to eight years imprisonment where he had decided to overtake a number of stationery vehicles at a railway crossing, ignoring various warning signs in his attempt to steer the minibus through the crossing while he was fully aware that a train was approaching. His conduct led to the death of ten children and left four with serious injuries.

[18] While reference to prior decided cases on sentence can be a useful and to assist a court in determining an appropriate sentence, it should be borne in mind, in the final analysis, that each case must be decided on its own merit since no two cases are the same. In my view, the facts of this case are rather similar to those in *S v Maarohanye*[14] and the degree of moral blameworthiness of the offenders in the two matters is also comparable. In *Maarohanye* the two accused who were drag racing on a public road near a school while under the influence of hard drugs caused a serious collision in which four school children were killed and two were left with brain injuries. The effective sentence of eight years' imprisonment was imposed. The appellant in this case was also speeding on a busy freeway whilst under the influence of intoxicating liquor when the collision which claimed the lives of three of his friends occurred. Furthermore, in *S v Mapipa,*[15] the fact that the appellant was under the influence of alcohol when the vehicle he was driving collided with and killed a motor cyclist was an aggravating factor. He was sentenced to four years' imprisonment which was confirmed on appeal.

[19] The fact that the appellant was injured during the incident is unfortunate. He is, however, the author of his own misfortune. His decision to drive at an excessive speed was a conscious assumption of risk on his part. In *S v Samuels* the SCA stated that it is imperative for sentencing courts to differentiate between offenders who ought to be

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[13] *S v Humphreys* 2013 (2) SACR 1 (SCA).
[14] *S v Maarohanye* 2015 (2) SA 73 (GJ).
[15] *S v Mapipa* 2010 (1) SACR 151 (ECG)

removed from society and those who, although deserving of punishment, should not be so removed.[16]

[20] Given all the aggravating factors in this matter as well as the comparable cases I have referred to, it is undoubtedly evident that the finding of the trial court that a sentence of imprisonment is warranted, is justified. However, it is the cumulative effect of the sentences which were imposed by the trial court which make them grossly inappropriate, especially given that they are inextricably linked in terms of time and location, and they resulted from a single act or conduct. This warrants interference by this court.

[21] I therefore make the following order:

(a) The appeal against sentence is upheld.

(b) The sentence of the court a quo is set aside and substituted with the following sentence:

"(i) Count 1: the accused is sentenced to twelve (12) months imprisonment.

(ii) Count 2: the accused is sentence to three (3) years imprisonment.

(iii) Count 3: the accused is sentenced to three (3) years imprisonment.

(iv) Count 4: the accused is sentenced to three (3) years imprisonment.

(v) In terms of the provisions of section 280 of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence in count 1 will run concurrently with the sentence in count 2.

(vi) The sentence is antedated to 29 October 2016."

[16] *S v Samuels* 2011 (1) SACR 9 (SCA) para 10.

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MOGWERA AJ

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K PILLAY J

Appearances

Counsel for Appellant	: L Barnard
Instructed by	: Sipho Ngubane Attorneys, Pietermaritzburg
Counsel for Respondent	: I P Cooke
Instructed by	: Deputy- Director of Public Prosecutions, Pietermaritzburg