Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Saakno / Case number:	**CA&R 100/2016**
Datum aangehoor / Date Heard:	**12 / 12 / 2016**
Datum gelewer/Date delivered:	**03 / 02 / 2017**

In the appeal of:

REFILOE KALAMORE Appellant

and

THE STATE

Coram: Pakati, J *et* Erasmus, AJ

JUDGMENT ON APPEAL

ERASMUS, AJ

[1] The appellant was convicted in the Galeshewe Magistrate's Court on two charges, to wit a contravention of section 63(1) of the National Road Traffic Act, No 93 of 1996 (negligent driving) and a contravention of section

61(1)(c) of the same Act in that he had failed to offer assistance after having been involved in a motor vehicle accident.

[2] In respect of count 1, he was sentenced to 3 years imprisonment and on count 2 to a fine of R1,000.00 or 60 (SIXTY) days imprisonment.

[3] With leave of the Court *a quo* he now appeals against the conviction and sentence on count 1 and the conviction on count 2. He was released on bail pending the finalisation of his appeal.

[4] The facts which are common cause between the parties are the following:

4.1 On 31 May 2013, at approximately 20:00, a light delivery van with registration no. [F...] ('the vehicle'), was involved in a collision with two pedestrians who had been walking on the pavement in Hulana Street, Galeshewe, Kimberley after the driver thereof had lost control of the vehicle.

4.2 The pedestrians had sustained serious injuries.

4.3 The first pedestrian suffered severe injuries to her spinal cord, liver and hip leaving her paralysed and wheelchair-bound as a result.

4.4 The second victim sustained a broken left foot and a few injuries to her forehead.

[5] The only issue pertaining to the convictions was whether the appellant had been the driver of the motor vehicle.

[6] The victims of the motor vehicle collision were called to testify but neither of them could identify the driver of the vehicle concerned.

[7] The State relied on the evidence of Mr Joachem Mabula and Mr Thabo Malgas. Both these witnesses alleged that they had been passengers in the vehicle driven by the appellant. The appellant is known to both these witnesses. On the day of the incident they had assisted him in moving his belongings and furniture to the premises of Mr Thabo Malgas, where he was to reside. The two witnesses and the appellant had been drinking together at a place referred to as "*the premises of Bogati*". At approximately 20:00, they left the premises of Bogati in the vehicle. Mr Mabula was seated on the left

passenger seat, Mr Malgas in the middle and the appellant in the driver's seat.

[8] Mr Mabula had felt the vehicle swerve and the appellant informed him that he had collided with people on the sidewalk. He did not observe the accident, but had noticed damage to the left window, left mirror and the bonnet of the vehicle. Mabula did not report the accident at the police station and instead went to sleep. The reason for not reporting was that the appellant had bribed them not to.

[9] The morning after the collision the employer of the appellant came to the premises where Mr Mabula resided and where the vehicle had been parked. Mabula woke the appellant and then requested the keys of the vehicle, whereafter the appellant took the keys from his trouser pocket and handed it over to him.

[10] During cross-examination, it was put to him that the appellant had not been the driver but that he (Mabula) had in fact been the driver. He denied this, saying he was unable to drive a vehicle and that he was not in possession of a driver's licence.

[11] Mr Malgas corroborated the evidence of Mr Mabula regarding the manner in which the collision had taken place and the events of the following morning. He further testified that the appellant had requested Mr Mabula to inform his employer that he was available he had gone to Bloemfontein. He also confirmed Mr Mabula's evidence that the appellant had instructed them to keep quiet about the accident and that he had bribed them in order to do so.

[12] During cross-examination Mr Malgas also denied that Mr Mabula had been the driver of the vehicle and persisted with his version that the appellant had in fact been the driver.

[13] Mr Mabula only reported the events of 31 May 2013 several months later, initially to his mother and later to the police. The reason proffered for the eventual reporting of the actual events of that evening was that he had felt an overwhelming sense of guilt when he would see the wheelchair bound victim. He too confirmed that the appellant had earlier bribed them to secure their silence.

[14] The appellant testified in his own defence. According to him he had spent the day drinking whilst moving his

belongings, with the assistance of Mr Malgas, to his new place of residence. Having finished the move, they went to the premises of Bogati where they left the vehicle and continued to consume alcohol. Mr Mabula joined them later. According to the appellant he later sent Mr Malgas to draw money and on his return they continued drinking. At some stage he decided to go home to bathe and met up with a certain Owen along the way. He gave Owen some money to buy more beer and the two of them stood together at the corner, drinking. He eventually passed out at his new place of residence. He indicated to Court that Owen would be called as a defence witness.

[15] The appellant further testified that he had merely assumed the keys would still be in the vehicle at the premises of Bogati where he had left it. He elaborated on this reasoning by saying that Thabo and Bogati had arrived with the vehicle and had left the keys in the ignition and that they had used the vehicle to go and draw money. He testified further that he usually gave the vehicle to Mr Malgas. He was under the impression that Mr Malgas had left the keys in the ignition because he had not given the keys back to him on his return. According to the appellant someone had told him that he had seen Messrs Mabula and Malgas in the vehicle. When asked during cross-examination by whom the vehicle had been driven when the two state witnesses went to draw

money, the appellant merely said that he had given the keys to Bogati. When this question was repeated, he said Bogati had driven the vehicle as he had given him the keys because he had not been drinking.

[16] Although the evidence of Mr Mabula that he could not drive a vehicle was not contested, the appellant testified during cross-examination that Mr Mabula usually drove his car and his parents' taxi.

[17] Although it was put to the state witnesses that someone had seen Mr Mabula driving the vehicle, no witnesses were called to attest thereto. The appellant did not call any other witnesses as it had emerged that one of them could not be traced and the other was not available to testify on the day the appellant had testified.

[18] Adv Nel, on behalf of the appellant, submitted that the Court *a quo* erred in not finding that the appellant's version was reasonably possibly true. Although he conceded that there were unsatisfactory aspects in the evidence of the appellant, he submitted that these were not so serious as to lead to a finding that his version is not reasonably possibly true.

[19] Mr Nel referred to the contradictions between Messrs Mabula and Malgas, specifically the contradictions between the testimony of Mr Mabula and the contents of a statement that he had made in a case of theft of the motor vehicle. Mr Nel pointed out that Mr Malgas had testified that the appellant had requested Mr Mabula to inform his employer that he was in Bloemfontein whilst Mr Mabula never testified to that.

[20] Adv Mxabo, on behalf of the respondent, submitted that the contradictions between the evidence of Mr Mabula and Malgas are not material and do not cast doubt on the crucial issue, namely who the driver of the vehicle was at the time of the collision. He further submitted that the learned Magistrate was correct in rejecting the appellant's version.

[21] It is trite that a court of appeal will not lightly interfere with the factual findings of the trial court and that it will only interfere if it is convinced that the findings were wrong.[1] Put differently, it is presumed that a trial court's findings of fact are correct. If there is no misdirection,

[1] *R v Dhlumayo and Another* 1948(2) SA 677 (A) op 705 -706; *Alfred Mnisi v S* (531/12) [2012] ZASCA 41 (28 March 2013)

the Court of appeal will interfere only if it is convinced that such evaluation is wrong.[2]

[22] Contradictions will not *per se* lead to the rejection of the evidence of a witness. Such contradictions could merely be as a result of a mistake on the part of the witness.[3] The evidence in totality should be considered and the court must be satisfied that the truth of what had happened had been told.[4] On the other hand, it is not a prerequisite for an acquittal that the Court should believe the innocent account of the accused: it is sufficient that it might be substantially true.[5]

[23] The learned Magistrate found that the two witnesses, Mr Mabula and Mr Malgas, had corroborated one another in that the appellant had been the driver of the vehicle. It appears from the judgment that he had considered the contradictions between the state witnesses and the evidence as a whole. He considered the contradictions in the version of the appellant and emphasised the fact that the appellant had stated in his plea explanation that he had left the key in the ignition, but later testified that Bogati had been the last person to drive the vehicle.

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[2] *S v Mlumbi en 'n Ander* 1991 (1) SACR 235 (A); *S v Hadebe and Others* 1998 (1) SACR 422 (SCA); *S v Kekana* 2013 (1) SACR 101 (SCA)
[3] *S v Mkohle* 1990(1) SACR 95 (A) op 98f-g;
[4] See also *S v Hlongwa* 1991 (1) SACR 583 (A) at 587

[5] Rex v Difford 1937 AD 370 at 272; See also *S v V* 2000 (1) SACR 453 (SCA)

[24] The Court *a quo* also referred to the improbabilities in the version of the appellant, more specifically that he would leave his employer's vehicle outside the premises of Bogati to go and bath whilst they were all still drinking and then not return to the vehicle having left the keys in the ignition. The learned Magistrate also considered the improbability of the appellant allegedly passing out but remembering finer details such as how long he had been talking to Owen.

[25] We are not convinced that the findings of the Court *a quo* were wrong or that the learned Magistrate had misdirected itself. We are satisfied that the finding that the appellant had been driving the vehicle is correct. The appeal against the convictions on both counts therefor stands to be dismissed.

[26] In respect of the appeal against the sentence imposed on count 1, Mr Nel submitted that the Court *a quo* over-emphasized the apparent lack of remorse on the side of the appellant and under-emphasized his favourable personal circumstances. Given the fact that the appellant had been convicted of negligent driving and no finding of gross negligence, the sentence of 3 years imprisonment is therefore excessive and induces a sense of shock. Mr Nel

referred to several judgments and pointed out that even in cases where an accused had been convicted of culpable homicide, the imposition of direct imprisonment is exceptional.[6]

[28] Mr Mxabo correctly pointed out that there were several aggravating factors present, all of which had been taken into account before the appellant was sentenced to direct imprisonment. He submitted that the appeal against the sentence should be dismissed.

[29] The correct approach which this court must follow when deciding whether to interfere with the sentence imposed by the Court *a quo* was set out by Rumpff JA in *S v Anderson*[7]:

> *'A court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that. The court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with.'*

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[6] *S v Botha* (A141/06) [2006] ZANCHC 77 para [13]-[14] and [20]-[34] and the cases referred to

[7] 1964 (3) SA 494 (A) at 495G-H; See also *S v L* 1998 (1) SACR 463 (SCA) 468*f-h; S v Romer* 2011 (2) SACR 153 (SCA) at [22]-[23]

[30] The consequences brought about by the negligent conduct of the appellant are severe and cannot be rectified. A 26-year old woman was paralysed for life as a result of his negligence. It should be kept in mind though that, as pointed out by Miller J in **S v Ngcobo**[8], '*the magnitude of the tragedy resulting from negligence should never be allowed to obscure the true nature of an accused's crime or culpability*.'

[31] The appellant was 31 years old at the time of sentencing and a first offender. He had passed grade 12 and was gainfully employed at the time of the collision. He was convicted of a crime involving negligence and not intent.

[32] A correctional supervision report, as envisaged in section 276A of the Criminal Procedure Act, No. 51 of 1977 ('the CPA'), had been obtained before the imposition of sentence. From the report it appears that the appellant was considered to be a suitable candidate for rehabilitation within the community context and it was recommended that he be sentenced to correctional supervision in terms of section 276(1)(h) of the CPA. Although not specifically stated, it appears from the judgment of the learned Magistrate that he had considered correctional supervision

[8] 1962(2) SA 333 (N) at 336H-337A; *S v Naicker* 1996(2) SACR 557 (A) at 560F-H

to not be appropriate because of the seriousness of the offence and the interest of the community.

[33] Having considered the personal circumstances of the appellant, the seriousness of this specific offence and the circumstance under which the crime had been committed, the interests of the community and objectives of punishment, we are satisfied that the learned Magistrate had erred in not considering correctional supervision in terms of section 276(1)(h) or (i) of the CPA as a suitable sentence option. Furthermore, the sentence of 3 years imprisonment induces a sense of shock and the difference between it and the sentence we consider appropriate is such that it can be inferred that the trial court had acted unreasonably. We are therefore at liberty to consider sentence afresh.

[34] As emphasized by Majiedt J (as he then was) in **S v Botha**[9], correctional supervision is not a 'light' sentence. We are satisfied that in this instance the objectives of punishment, being prevention and deterrence, rehabilitation and retribution, will be served by imposing a sentence under section 276(1)(i) of the CPA. The appeal against the sentence on count 1 therefore stands to succeed.

[9] *Supra* par [36]; *S v E* 1992(2) SACR 625 (A) at 633a

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. **THE APPEAL AGAINST THE CONVICTIONS ON COUNTS 1 AND 2 IS DISMISSED.**

2. **THE APPEAL AGAINST THE SENTENCE ON COUNT 1 SUCCEEDS AND THE SENTENCE IMPOSED BY THE MAGISTRATE GALESHEWE UNDER CASE NUMBER GAL 1962/2015 IS SET ASIDE AND REPLACED WITH THE FOLLOWING SENTENCE:**

   "3 YEARS IMPRISONMENT IN TERMS OF SECTION 276(1)(i) OF THE CRIMINAL PROCEDURE ACT, NO. 51 OF 1977"

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SL ERASMUS
ACTING JUDGE

I concur.

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B PAKATI
JUDGE

On behalf of the Appellant:	Adv. I.J. Nel (oio Towell and Groenewaldt Attorneys)
On behalf of Respondent:	Adv. N.X. Mxabo (oio the NDPP)