

IN THE COURT OF APPEAL - SWAZILAND

CRIMINAL APPEAL NO.39/96

In the matter between:

LUCKY PHERSON MNISI APPELLANT

vs

REX RESPONDENT

CORAM

: STEYN JA

: SCHREINER JA

: LEON JA

FOR APPELLANT : MR. KUBHEKA

FOR CROWN : MR. WACHIRA

JUDGMENT

Steyn JA:

This appeal involves the propriety of the sentence imposed upon the appellant in respect of the crime of culpable homicide and two offences under the ROAD TRAFFIC ACT. The Appellant pleaded guilty to all three charges. He was represented by Mr. Kubheka both in the High Court and in this Court. A document was handed in by agreement between the prosecution and the defence. It is headed "Agreed Facts". It is common cause that it is principally upon these facts that the sentence was determined in the Court below and its propriety is to be adjudicated upon by us. It reads as follows:

"1. Accused Lucky Mnisi was employed as a driver of "Hamba Mfana" bus registration No. SD 212 VM. (Hereinafter referred to as "Hamba Mfana Bus.")

2. On 17th February 1995 he had just returned from his off-duty and upon arrival at Mbabane Bus rank, he found that Hamba Mfana the bus registration No. SD 212 VM he was meant to drive to Manzini at 4.30pm,

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had departed being driven by a colleague named Patrick Shodi Mavuso employed by Hamba Mfana Bus services as a driver. He secured a motor vehicle, a Nissan laurel and drove after the bus. He finally caught up with the said bus at Mahlanya near the King's fieds. He stopped the said bus and took over the driving reigns from Mavuso. The passengers complained that they were being delayed by the exchange of drivers. The bus was fully loaded with standing passengers .

3. As he passed Mahlanya market, accused was driving the bus at such a high speed that passengers started complaining. He caused the bus to collide with motor vehicle registration No. SD 235 YM which was being driven by Zibuse Dlamini who had already indicated his intention of turning towards Malkerns direction by indicating with the indicator light of his motor vehicle which was then stationery waiting for motor vehicles driving from Manzini direction to pass.

4. As consequence of the collision motor vehicle SD 235 YM was damaged at the left rear corner of the bumper and indicator light.

5. There were police officers nearby namely; 3216 Constable Ernest Thwala and 2574 Constable Christmas Dlamini who witnessed the accident. The said officers attended to the scene of the accident and controlled traffic. Constable Dlamini drew a sketch plan of the scene - ex. A.

6. The accused after the collision proceeded turning towards Manzini. 2856 Constable Mfana Magagula also was a passenger in the said bus went personally to plead with the accused to stop the bus for passengers to alight because of his manner of driving but accused refused to listen. Accused overtook every vehicle along the way. As he approached Nokwane Market junction there were two vehicles overtaking each other heading towards Manzini. Accused attempted to overtake the said vehicles whilst one was still in the process of overtaking the other.

7. There was (sic) on-coming vehicles from Manzini direction driving on their

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correct side of the road. Due to the speed he was driving at, as accused was on their lane, he swerved the bus to the left which caused the bus to go off the road. Accused swerved the bus to the right, the bus lost control and it went off the road to the right hand side as one goes towards Manzini across the road where it overturned.

8. Police officer 3216 Constable Thwala and 2574 Constable Dlamini received a report of the accident and proceeded to the scene. They started assisting the victims together with other members of the public.

9. 14 passengers died on the spot and one died on the way to hospital. 42 passengers were seriously injured and rushed to Mbabane Government Hospital and Manzini R.F.M. Hospital where they were admitted, treated and discharged on different dates. Constable Dlamini prepared a sketch plan - Ex. B.

10. Constable Thwala immediately took accused to R.F.M. Hospital where his blood specimen was removed for examination as to the level of alcohol content.

11. Leonard Themba Dlamini, a chemist in the forensic laboratory, analysed the blood specimen and found the concentration of alcohol to be 0.20 gram per 100 millimetre of blood. He prepared a report - Ex. C.

12. Post-mortem examination were carried out by Dr. S.D. Berson Government Pathologist on deceased persons. He compiled reports that are collectively marked Ex. D.

13. The bus was examined by George Tsela, Vehicle Inspector on the same day. He compiled his report - Ex. E.

14. On 20th February 1995 at Malkerns Police Station accused was cautioned by 1246 Inspector Nkambule. Accused then freely and voluntarily recorded a statement under oath which was reduced into writing - Ex. F.

15. Accused was then charged."

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Two other documents that are relevant were a plan of the scene of the accident and a statement - Ex. F. referred to above. It was made by the Appellant three days after the accident. This statement reads as follows:

STATEMENT OF LUCKY PHERSON MNISI: MALKERNS RTA 24/95 (Statement taken on Monday the 20th February, 1995 at Malkerns Police Station at about 0930 hours)

I am the son of Jeremiah Mnisi of Herefords area brother to Petros Mnisi the owner of Masibekela Bus Service residing at Piggs Peak Mangwaneni location. I reside at Manzini at the homestead of Mlungisi Zikalala the owner of Hamba Bus Service and I am employed by him as a driver of the bus SD 212 VM which is operating between Manzini and Mbabane as a non stop bus service.

I do recall very well on the 17th February, 1995 at about 0750 hrs when I arrived in Mbabane from Manzini in the same bus Mr. Patrick Mavuso who is employed by Hamba Mfana Bus Service as a driver asked me to drive his car and proceed to Hawane area next to Nkhamba to collect his child. He told me that he is going to take the driving of the bus as a request I agreed to do that and told him that I shall assume my duty of driving the bus at 1630 hrs when the bus go down to Manzini. As we have finalised our agreement I proceeded to Hawane area to collect the child. I returned back at about 1640 hrs and I found that the bus has recently left Mbabane to Manzini. I then followed it in the same car with the intention of going to take the bus from Patrick Mavuso. Fortunately I found it at Mahlanya next to the Kings field. I stopped it and took the driving reins. I left Mavuso in his car which I am sure he returned back to Mbabane. When I took over the bus the passengers complained that we are delaying them they are in a hurry because of their complaints I drove the bus in a high speed trying to cover the time we spent during the exchange. I was driving from 100 km/hr to 120 km/hr. When I was at Mahlanya I accidentally knocked a car which was on the road indicating to be going to Malkerns. I tried to stop the bus but the passengers scolded me complaining that they were in a hurry. I drove the bus and continue with my way hoping that I will talk to the owner of the car Mbuli. Still driving continuing with my way in the same speed at Hamsa next to the turn off which is going to Namboard Agricultural market a yellow van came to my front and slow down the speed because I was driving in a speed I tried to apply my brakes to avoid the collision on the back of the car but the bus slipped because the road was wet. I then tried again to overtake the car on the right hand side still trying to avoid the collision but because the bus was in a high speed it overturned on the right hand side of the road and it had already stopped the engine running. I do not know what happened after that until I was pulled out of the bus by people who were around the scene. I do not know at the moment how many people died and or were injured but I am sure that they were some who died and some injured.

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Read over and admitted to be correctly recorded.

Signed by: Lucky P. Mnisi

Recorded by: 1246 Inspector Nkambule.

The sentence imposed upon the Appellant by the Acting Chief Justice was seven years' imprisonment of which 3 years was suspended for three years, on certain conditions. Whilst both Counsel argued the matter on the basis that Appellant's licence was cancelled, the note on the original file records that, "Appellant's drivers licence was suspended for 5 years."

Mr, Kubheka in the course of a well presented argument launched a two-pronged attack upon the sentence. His first contention was that the court a quo had misdirected itself and that this Court was consequently at large to determine an appropriate sentence itself. In this regard Mr. Kubheka relied upon two statements made by the Judge a quo, one in the course of the presentation of argument by counsel and one in his judgment when passing sentence, In the passage referred to the Judge presiding is recorded as saying:

"He (the Appellant) is a person who is in charge of so many human lives, once he had proved himself to be unsuitable and that is, his personal circumstances pail (sic) into insignificance."

In his judgment (reconstructed from his notes) the learned Judge a quo says the following:

"The accused's personal circumstances and the fact that he has no previous convictions were minor

considerations in the assessment of the proper sentence to impose. The sentence had to reflect the public outrage for if the Court were seen to mete out an inadequate punishment confidence in the courts would be

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destroyed. His clean record however earned the accused's suspension of a greater portion of his sentence than might otherwise have been the case."

Counsel contented that these two statements taken together tended to show that the Court had allowed itself "to be overwhelmed by the magnitude of the consequences of the accident." In this manner so the argument went, the Court allowed this factor to "be overemphasised orto obscure the true nature and extent of the accused's culpability" (per Corbett JA in S V NXUMALO 1982(3) S.A. 856(A) p.862). See also S V NGCOBO 1962(2) S.A. 333 @336-337. In the latter judgment Miller J with reference to the dicta of RAMSBOTTOM JA in R V BREDELL 1960(3) S.A.558 @562-563, to which I will refer below, said the following:

"I do not understand the learned Judges of Appeal to have meant or intended however that the magnitude of the tragedy resulting from negligence should ever be allowed to obscure the true nature of the accused's crime or culpability."

Mr. Wachira for the Crown challenged the submission that the presiding Judge had misdirected himself in the manner alleged. He pointed to the fact that in the course of argument the Court had clearly indicated that it was concerned to determine the degree of the Appellant's culpability and blameworthiness. Indeed the learned Judge said that "even if nobody had been killed, even if one person had been killed," it would still require an examination of Appellant's conduct in order to determine the degree of his blameworthiness and culpability.

Counsel for the Crown also pointed to the fact that the Court itself was anxious to enquire into the Appellant's personal circumstances. The learned Judge himself asked counsel

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for the Appellant what Appellant's personal circumstances were, whether he was married and what his age was.

Having regard to the record as a whole, I am of the view that the court a quo did not err in its approach in determining the custodial sentence to be imposed upon the Appellant. Indeed the approach adopted by the Court below as to the decision to impose a custodial sentence and the content of that sentence, is in no way flawed by any misdirection.

The second challenge Mr. Kubheka directed at the sentence was that even if we were not at large to assess sentence afresh, we should intervene and impose a lesser penalty. His principal contention in this regard was that consistency of sentences for the offence of culpable homicide arising out of the driving of a motor vehicle would require this Court to interfere.

In this regard he referred us to Ngcobo's case and to Corbett JA's judgment in S V NXUMALO both of which are cited above. He also referred us to the judgment of Dunn AJ (as he then was) in HLATSHWAYO VS THE CROWN a judgment in the High Court of Swaziland (CRIMINAL CASE NO.37/87).

Before commenting on the sentences imposed in these and other cases it is trite that it seldom occurs that the facts of two cases are identical. It is possible to receive guidance from the principles which underpin the sentences imposed in similar cases. Indeed

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consistency is an important element of criminal justice. It ensures fairness as between offenders and enhances public confidence in criminal justice. However it would be futile to determine punishment based upon an approach which exclusively relies on precedent. Personal considerations will always play an important part in determining a just penalty.

I certainly agree with the dicta of Corbett JA and Miller J cited above. See also S V NAICKER 1996(2) S.A.C.R. 557(A). A court must be careful not to be blinded by the consequences of an offenders criminal act and so blinded refrain from looking and weighing the other relevant considerations.

However I also agree with the comments of Rams bottom J.A.. in Bredell's case referred to above where at Page 560 the learned Judge of Appeal says the following:

The question of punishment in cases of culpable homicide arising out of motor accidents is always a difficult one. The accused, as in the present case, is frequently a person of blameless character who has never before been convicted of any offence. Nevertheless, to be negligent in the handling of a motor car on the public roads is an offence, and if that negligence causes death a serious crime is committed. This Court has expressed opinions for the guidance of trial Judges as to the type of case in which imprisonment may properly be imposed. Thus in REX V. MAHAMETSA 1941 A.D. 83, CENTLIVRES, J.A., at p 86 said:

"We do not disagree with the view that imprisonment is an appropriate punishment in cases of recklessness, if by 'recklessness' is meant gross negligence or a wilful 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 fill."

In REX V SWANEPOEL, 1945 A.D. 444, DAVIS. A.J.A. quoted those remarks and continued:

"Inferentially, the case shows that, in the absence of recklessness or some other high degree of negligence, an unsuspended sentence of imprisonment, with the option of a fine, should not be imposed on a first offender."

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It may be that the time has come when it is the duty of judicial officers to exercise greater severity in passing sentence in cases of negligent use of motor vehicles. A motor car is a most dangerous instrument if negligently handled, and it may be that the only way to remind drivers of their duty to use proper care is for magistrates and Judges to make more frequent use of the deterrent effect of prison sentences. The opinions to which I have referred are not rules of law which are binding on all courts and in proper cases they can be departed from. In the present case however there is no necessity to depart from what was said in those cases.

See also the judgment of FRIEDMAN J in s v. CHRETIEN 1979(4) S.A. 871(D) @.877-879, R V. BARNANDO 1960(3) S.A. 552 @557 D-E and S V. HOUGAARD 1972(3) 748(A) @758. I have had regard to the facts that were regarded as proved and the sentences imposed in these cases as well as the case of Hlatshwayo referred to above. Certainly none of them are identical in so far as the degree of culpability is concerned and the sentences imposed are not so disparate with the sentence imposed in this case as to offend against the principal of consistency and fairness as between offenders.

The Appellant's negligence - indeed his recklessness - was gross. As a bus driver he was entrusted with the safety of hundreds of passengers every day. Yet he saw fit to drive a vehicle transporting some 70 passengers when he had consumed sufficient alcohol to have some .20 grams per millilitre of alcohol in his blood. (According to the tables in Cooper Sehwar and Smith "Alcohol, Drugs and Road Traffic," this would be the equivalent of 8 metric tots (25ml) of spirits.) The facts indicate that he failed to turn up in time for his duties. Knowing that he had consumed a significant quantity of alcohol he nevertheless pursued the bus by car and succeeded in stopping it and taking control of the vehicle.

He proceeded to drive at a furious pace - some 100 - 120km/h - and in such

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a reckless manner, that a policeman who was on board implored him to slow down. Despite having an accident (albeit not of a serious nature but serious enough to have caused damage to another vehicle) he failed to stop to determine the extent of the damage or whether someone was injured and continued to drive recklessly, constantly overtaking vehicles on the way. The ultimate act of recklessness appears from the agreed facts, the relevant portion of which reads as follows:

"As he approached Nokwane Market junction there were two vehicles overtaking each other heading towards Manzini. Accused attempted to overtake the said vehicles whilst one was still in the process of overtaking the other.

There was on-coming vehicles from Manzini direction on their correct side of the road. Due to the speed he was driving at, as accused was on their lane, he swerved the bus to the left which caused the bus to go off the road. Accused then swerved the bus to the right, the bus lost control and it went off the road to the right hand side as one goes towards Manzini across the road where it overturned."

The plan of the accident indicates that the simultaneous overtaking of two vehicles travelling parallel with one another in the left-hand lane was executed at a point where there is an inter-section as well as a pedestrian crossing.

The consequences of the accident were horrendous, 14 people were killed outright, one died on the

way to hospital and 42 were seriously injured. The fact that the carnage which resulted from Appellant's conduct was so extensive is certainly a relevant consideration when determining punishment. Having due regard to Appellant's personal circumstances, the extra-curial consequences of his sentence and particularly that he had no previous convictions involving offences associated with the driving of a motor vehicle, it is my view that an effective sentence of 4 years' imprisonment is not so severe as to

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merit interference by this Court. The moral blameworthiness and culpability of the Appellant, the extensive consequences of his unlawful, reckless driving and the need to deter him and others from committing similar offences fully justified the imposition of a substantial period of imprisonment.

The two lesser offences under the Road Traffic Act were taken together for purposes of sentence with the sentence imposed on the main charge and the propriety of this approach has not been challenged. In our view the appeal against the sentence must fail and the convictions and sentences confirmed.

I come now to deal with the Order made in respect of Appellant's drivers licence. As stated above, the note on the file indicates that Appellant's licence was not cancelled but was suspended for five years.

Counsel for the Crown has conceded that we should accept this as a correct recording of the Court's Order. This appears to us to be a perfectly proper order to make in this case and we also confirm this Order.

It follows that the appeal is dismissed and the sentence as well as the order of suspension of Appellant's licence for 5 years are confirmed.

By consent it is also ordered that the period of imprisonment served by the Appellant

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prior to his release on bail should be deemed to have been served as part of the unsuspended portion of the sentence of imprisonment imposed upon him.

J.H. STEYN JA

I agree :

W. H. R. SCHREINER JA

I agree :

R.N. LEON JA

Delivered on this 29th day of September 1997.

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