CASES / VONNISSE

DEALING WITH DEATH ON THE ROADS

S v Nyathi 2005 2 SACR 273 (SCA)

1 Introduction

Some fifteen years ago, Beck CJ stated in a Transkeian culpable homicide case that the need to reflect the concerns of the community about the rate of fatal collisions on the roads by avoiding "undue leniency in punishing drivers who are negligent or reckless has never been greater" (*S v Mncunza* 1990 2 SACR 96 (Tk) 98c). It is submitted that nothing has changed in the interim and, if anything, these words resonate even more today in the context of the plague of death on this country's roads. Society expects the courts to protect innocent road-users by imposing appropriately severe sentences, including imprisonment, on offenders who drive grossly negligently or recklessly (*S v Birkenfield* 2000 1 SACR 325 (SCA) par [9]). In the case of *S v Nyathi*, the Supreme Court of Appeal was presented with the opportunity to address these concerns.

2 Facts

The appellant was involved in a collision on the national road between Cathcart and Stutterheim, resulting in the death of six persons. The sedan being driven by the appellant towards Cathcart, whilst engaging in an overtaking manoeuvre, collided with a minibus taxi being driven towards Stutterheim, causing the minibus taxi to overturn. As a result the appellant was charged with six counts of culpable homicide (in the alternative, with reckless or negligent driving, and as a further alternative, driving under the influence of intoxicating liquor). The trial court, the regional court, found the appellant guilty of culpable homicide, and sentenced him to five years' imprisonment, of which two years' imprisonment were suspended for five years. Furthermore, the appellant's driver's licence was suspended for four years. The appellant's appeal to the Eastern Cape division of the High Court was unsuccessful, but permission was granted to the appellant to appeal to the Supreme Court of Appeal (SCA) against the conviction and sentence.

3 Judgment

The primary issue relating to the correctness of the conviction was the validity of the finding of the judicial officer in the trial court to the effect that the collision occurred on the appellant's incorrect side of the road. In the face of the police evidence that the appellant had indicated the point of collision on his incorrect side of the road, which was borne out by the physical evidence at the scene (par [3]-[5]), the appellant contended that the point of collision he had indicated was in fact on his correct side of the road (par [6]). The conspiracy theory raised by the appellant that he had been falsely implicated by means of both physical evidence and perjured eyewitness testimony had been rejected by the trial court (par [7]). The SCA (per Conradie JA), taking into account the eyewitness testimony of three passengers in the minibus taxi, found the evidence presented by the State to be utterly compelling: "the sedan that collided with the minibus, in attempting an overtaking manoeuvre, suddenly appeared from behind another vehicle and drove into the bus on the latter's correct side of the road" (par [8]). The appeal against the conviction was thus dismissed (par [9]).

The appeal against sentence was unsuccessful in the court *a quo*, the High Court holding that there had been no material misdirection vitiating the sentence. Conradie JA upheld this view, noting that the sentence was not so severe that no reasonable court would have imposed it (par [10]). The fact that the collision occurred on a blind rise, where overtaking is prohibited by a double barrier line, and where forward visibility was restricted, emphasised the appellant's culpability:

> "The fact that the appellant did overtake proclaims grave negligence on his part. Overtaking on a barrier line, and especially on a double barrier line where a motorist should realise that his inability to observe approaching traffic is compounded by the inability of traffic in the opposite direction to see him is probably the most inexcusably dangerous thing a road user can do" (par [11]).

Conradie JA noted further that with the possible exception of an intoxicated driver who ventures onto the wrong side of the road in similar circumstances – where his alcohol-induced inability to avoid a collision may perhaps make such conduct more blameworthy – there can be no more dangerous form of road-related conduct. Even where a red traffic light is deliberately ignored, vehicles or pedestrians lawfully crossing the intersection have at least an opportunity to gauge the possible actions of the offending motorist, and so possibly avoid harm (par [12]).

In explaining the factors to be taken into account in assessing cases where death has ensued as a result of a collision on the roads, the court cited (par [14]) the words of Corbett JA (as he then was) in *S v Nxumalo* (1982 3 SA 856 (A) 861H):

> "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 culpability or blameworthiness would be the extent of the accused's deviation from the norm 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."

Corbett JA had previously cited with approval passages from *R v Barnardo* (1960 3 SA 552 (A) 557D-E) and *S v Ngcobo* (1962 2 SA 333 (N) 336H-337A) to the same effect. In the light of these concerns, the court examined a number of pertinent judgments to demonstrate the application of these factors. It is proposed to briefly examine the relevant factors relating to sentencing, and then to reflect concisely upon those High Court and SCA judgments in the past 25 years which have specifically dealt with sentencing culpable homicide in the context of road traffic (incorporating those cases mentioned by the court in *S v Nyathi*).

4 Discussion

4 1 Some general principles

(i) Degree of negligence

The degree of an accused's culpability has always been regarded as a most important factor in the assessment of an appropriate sentence for culpable homicide (*S v Ngcobo supra* 336-337; *S v Van Niekerk* 1984 1 PH H87 (O)). Since the case of *R v Swanepoel* (1945 AD 444) it has generally been held that

> "in the absence of recklessness or some other high degree of negligence, an unsuspended sentence of imprisonment, without the option of a fine, should not be imposed on a first offender" (*R v Swanepoel supra* 448).

This *dictum* does not however embody an inflexible rule of law and may be departed from where appropriate (*R v Bredell* 1960 3 SA 558 (A) 560H; *S v Greyling* 1990 1 SACR 49 (A) 54g; and *S v Khoza* 1990 1 SACR 693 (T)). Conversely, even where an accused has been guilty of recklessness or a high degree of negligence the court is not bound to impose imprisonment (see *eg S v Grandin* 1970 2 SA 621 (T); and *S v Hougaard* 1972 3 SA 748 (A)). Personal factors, for example, his or her age, character, the extent to which the accused suffered (financially and otherwise) as a consequence of his or her wrongdoing, and other factors which render the offence morally less reprehensible may make an unsuspended period of imprisonment inappropriate (see *eg*, *S v Minnie* 1967 2 PH H344 (T)). Where possible, a sentence of community service may be imposed as a condition of suspension (*S v Louw* 1986 2 SA 236 (T); and *S v De Bruin* 1991 2 SACR 158 (W) 162b-c).

Before a court can find that an accused has been guilty of such recklessness or a high degree of negligence as to merit imprisonment it must carefully analyse the evidence and arrive at an accurate conclusion as to what occurred (see *R v Swanepoel supra* 449; *S v Boynton* 1966 2 PH O41 (N); and *S v Khoza supra*).

For an accused to be under the influence of intoxicating liquor at the time of a collision is regarded by the courts as an aggravating circumstance (*eg*, *S v Chretien* 1979 4 SA 871 (D) 878D), but there must be proof of impairment before intoxication is regarded as a factor causing death (*S v Jonas* 1985 1 PH H15 (SWA)).

(ii) Sanctity of human life

Although "no greater moral blameworthiness arises from the fact that the negligent act caused death", it is proper for the court, regard being had to the deterrent and retributive purposes of punishment, to emphasize "the sanctity of human life" and impose a more severe sentence than if the accused's negligence had not resulted in the loss of life (*R v Barnardo supra* 557D-E; and *S v Greyling supra* 56d). Although sight should not be lost of the fact that the accused's culpability is based on negligence, loss of life should be taken into account in sentencing

> "not so much for its purely punitive effect on the culprit, who may not deserve severe punishment, but for its deterrent effect in emphasising 'the sanctity of human life' and in warning motorists that negligence on the highways may well result in the death of innocent persons and in severe penalties being imposed upon those responsible therefore" (*S v Ngcobo supra* 337A-B).

(iii) Overtaking

Overtaking on a blind rise is usually cited as an example of gross negligence (see *eg*, *R v Bredell supra* 560F). However, since the right to overtake is enshrined in law (under the appropriate conditions in reg 298 of the National Road Traffic Regulations of 2000), where in the circumstances reasonable precautions are taken the driver should not be held responsible if they prove to be insufficient to prevent a collision. Thus an overtaking driver's negligence depends on whether at the time she was carrying out such a manoeuvre she could reasonably have believed that she had sufficient time and space to do so without any real risk to other road-users (see *S v Goehlar* 1965 1 PH O14 (E)). It has been suggested that in the case of a vehicle overtaking on a blind rise it is essential to establish the speed of the overtaking vehicle and of the vehicle overtaken; the size of each vehicle; the width of the road; the distance between the sides and/or the centre of the road and the vehicle overtaken; and the distance of the overtaking vehicle from the summit of the rise when the manoeuvre was or would have been completed (*S v Pula* 1972 4 SA 258 (NC) 259E-260A; and see Cooper *Motor Law* Vol I (1982) 510). Where an overtaking driver's area of vision is obscured, and she nevertheless proceeds with an attempt to overtake, she will be held to be grossly negligent (*R v Nthithe* 1958 1 PH H84 (T); *S v Viglione* 1964 2 PH O21 (N); and *S v Van Heerden* 1968 2 PH O58 (O)).

(iv) Conscious negligence and taking a conscious risk

In *S v Nyathi*, the court refers to the fact that the appellant took a "conscious decision" to act as he did (par [13]), and to his "conscious assumption of the risk of a devastating collision" (par [22]). Where it is proved that there was

subjective foresight of the possibility of death on the accused's part in circumstances where there was no reckless acceptance by him of the risk, but merely an unreasonable assumption either that he would be able to prevent death ensuing or that death would for some other reason not ensue, there is conscious negligence and there can likewise be no question of intent to murder (Middleton "Case note: *S v Dube* 1972 (4) SA 515 (W)" 1973 *THRHR* 181 183).

It is submitted that Middleton is correct when he states (Middleton 1973 *THRHR* 185) that in the average fatal collision case, even where it is shown that the accused realized he was taking a chance of killing others – for example, where he drives over a blind rise on the incorrect side of the road or overtakes in the face of oncoming traffic – there is conscious negligence on his part coupled with an unreasonable assumption either that he will be able to prevent death ensuing or that death for some other reason will not ensue. He cannot be convicted of murder unless it can be shown that he was prepared to face the consequences of a head-on collision himself. If, in such circumstances, he is driving a normal vehicle and is just as likely to kill himself as the occupants of the approaching vehicle the court would probably have difficulty in coming to the conclusion that he had in fact reconciled himself to the possibility of the collision occurring as this would imply he was prepared to commit suicide (Cooper 538). This difficulty, however, would not exist if for example it could be shown that the accused felt safe in the cab of an abnormally large vehicle or anticipated a collision with a pedestrian or pedal cyclist with little or no risk to his own safety (Cooper 538).

4 2 Cases - the past 25 years

The application of the above principles is made manifest through the case law. In *S v Parkin* (1981 1 PH H13 (O)) the accused had swerved into four young girls who were walking on the gravel next to the road, with fatal consequences. His blood alcohol concentration was 0,3g/100ml at the time of the collision. Although the court on appeal was prepared to allow the appeal in respect of the punishment imposed for driving under the influence of alcohol, as well as his licence cancellation, the four year prison sentence imposed upon the accused for the culpable homicide conviction was upheld. Later that year, the Appellate Division was not prepared to interfere with a sentence of two years imprisonment (of which one year was suspended for five years), along with a 12 month driver's licence suspension, in the case of *S v Skosana* (1981 2 PH H124 (A)). In this case the appellant had evidenced gross negligence by driving the wrong direction in a one-way thoroughfare, resulting in a collision, and the death of the passenger in the other vehicle.

However, in the case of *S v Rabbets* (1982 2 PH H109 (C)) the appellant was successful in his appeal against a sentence of 18 months imprisonment. The appellant, who was heavily intoxicated (his blood alcohol concentration was found to be 0,33g/100ml), attempted to overtake at high speed on a busy main road, and contrived to drive on the incorrect side of the road, in the process causing the death of a cyclist. It is notable that though the court (per Williamson J) found that the appellant was guilty of serious negligence,

he was not reckless. The court preferred to attribute the appellant's "misjudgment" to his excessive intake of alcohol, and consequently altered his sentence to a "heavy fine together with a prohibition against driving" (R800 or 12 months imprisonment, with a five year licence suspension and prohibition on driving on pain of a 12 month period of imprisonment, and the cancellation of his licence). This finding is open to question. It is certainly arguable that the act of driving whilst excessively intoxicated (where the intoxication inevitably affects driving ability) amounts to reckless conduct (see *R v Roopsingh* 1956 4 SA 509 (A)), and the appellant's moral blameworthiness is particularly evident in the light of his two prior convictions for driving under the influence of alcohol.

In *S v Van Riet* 1982 2 PH H132 (C), the Cape Supreme Court replaced an effective 18 month prison term with a fine and a conditionally suspended prison sentence, holding that the accused's negligence and degree of intoxication were not of a grave nature. Similarly, the Free State Supreme Court overturned a sentence of two years imprisonment (coupled with a four year period of licence suspension) in *S v Van Niekerk* (1984 1 PH H87 (O)). It was held that whilst the increase in fatalities on the roads was of concern, and required heavy sentences, it was necessary to assess the degree of negligence of the accused motorist in each case in determining sentence. The appellant's sentence was thus reduced accordingly (to a R500 fine, a six month suspended period of imprisonment, and a one year licence suspension).

The Appellate Division in *S v Nxumalo* (*supra*), though emphasising that the actual consequences of the accused's negligent conduct could not be disregarded, suspended 2½ years of the four year prison sentence imposed in the trial court. In *S v Jonas* (1985 1 PH H15 (SWA)) on the other hand, after a careful consideration of the factors relating to sentencing culpable homicide in road traffic cases, including reference to the cases of *R v Barnardo*, *S v Ngcobo* and *S v Nxumalo* which were also cited in *S v Nyathi*, the court confirmed the sentence of 18 months imprisonment, of which 12 months were conditionally suspended for three years. It was held that whilst loss of life was relevant, the moral blameworthiness of the accused's conduct is largely determined by the degree of negligence of his conduct. In this regard, the appellant's intoxication (a blood alcohol concentration of 0,18g/100ml) was held to be relevant, but not determinative, as a factor affecting sentence, in the absence of evidence that it impaired his faculties to the requisite extent. In contrast, the court in *S v Viljoen* (1989 3 SA 965 (T)) imposed a R750 fine or seven months imprisonment on the appellant, who had been convicted of both driving under the influence of alcohol and culpable homicide.

In the case of *S v Greyling* (*supra*), the appellant caused the death of four passengers of the bakkie which he was driving when he lost control of the vehicle whilst driving too fast around a bend. (This case was cited by the Supreme Court of Appeal in *S v Nyathi*.) The appellant, a first offender, was sentenced to five years imprisonment, half of which was conditionally suspended. (The judgment in *S v Nyathi* erroneously records the period suspended as one year (par [16]).) The Appellate Division in *S v Greyling*, making reference to the cases of *S v Barnardo* and *S v Ngcobo*, held that

direct imprisonment was an appropriate sentence in a case such as this, where the accused was guilty of recklessness or gross negligence (54g), and that the consequences of the appellant's negligence had to be taken into account (56f). In the event, taking into account the appellant's personal circumstances, the appellant's sentence was reduced to 12 months imprisonment.

On similar facts (where the appellant, a first offender, had failed to negotiate a T-junction because of the speed at which he was traveling, causing the death of a passenger) the court in *S v Khoza* (*supra*) reduced a sentence of 12 months imprisonment imposed by the trial court to one of three months' imprisonment plus a further three months' imprisonment conditionally suspended for three years. The rationale for this punishment was that where negligence could be established, but not gross negligence or recklessness, the maximum sentence (that the magistrate could impose) was not appropriate. In comparison, in *S v Mncunza* (*supra*), the court confirmed the sentence of nine months imprisonment imposed on the appellant, a first offender, in the trial court. One of the factors which the court took into account was the fact that the appellant was driving a vehicle used for public transport, but in addition, the recklessness or gross negligence with which the appellant drove – whilst drinking alcohol, at high speed, and in a zigzag manner – were grounds for the imposition of direct imprisonment.

As noted in *S v Nyathi* (par [20]), the case of *S v De Bruin* (1991 2 SACR 158 (W)), where three persons were killed when the appellant recklessly (and having consumed alcohol) entered an intersection when the traffic light was red against him, appears to be the most severe custodial sentence imposed for culpable homicide. The sentence of four years' imprisonment imposed in the trial court was reduced to three years' imprisonment on appeal. Apart from the gross degree of negligence evidenced by the appellant, he had three previous convictions for alcohol-related driving offences, and was in flagrant disregard of a court-imposed prohibition on driving, subject to a suspended period of imprisonment of five months.

Whilst the appellant in the Namibian case of *S v Van der Merwe* (1991 2 SACR 505 (Nm)) was held (508f) to have acted with "a high degree of negligence … albeit falling short of recklessness", he was nevertheless sentenced to 18 months imprisonment. Despite being a first offender, the appellant was held (508e) to have acted in a "callous and mean" way when he struck a woman, formerly a passenger of his with whom he was having an argument, as he drove away from the scene of the argument and failed to stop to tend to her injuries. On appeal, a full bench of the Namibia High Court held that the sentence passed in the court *a quo* was more suited to a finding of recklessness (*S v Van der Merwe* 1992 1 SACR 48 (Nm) 52a). Given that the appellant had not been found to have acted recklessly, but rather with a high degree of negligence, his sentence was altered to nine months direct imprisonment, with a further nine months' imprisonment conditionally suspended (52c). The appellant's licence was also suspended for a year. The court expressly followed the approach to sentencing set out in the cases of *R v Barnardo*, *S v Ngcobo* and *S v Nxumalo* (50c-51d).

In *S v Sikhakhane* (1992 1 SACR 783 (N), cited in *S v Nyathi supra* par [19]), the appellant, the driver of a minibus taxi, was found guilty of culpable

homicide following an incident where he attempted to overtake a truck at high speed, in so doing crossing the solid barrier line in the middle of the road, and colliding with an oncoming car, killing two passengers, and injuring the driver of the car as well as a motor cyclist. The trial court sentenced the appellant to two years imprisonment. On appeal, it was held that the trial court's finding was correct, despite the fact that the appellant was a first offender, as the appellant's conduct was not merely negligent, but reckless (786d-e).

A number of cases then followed where the courts sought to make use of correctional supervision in place of direct imprisonment where culpable homicide had been established. It was first used in the case of *S v Omar* (1993 2 SACR 5 (C), cited in *S v Nyathi supra* par [20]), where the car the appellant was driving crossed over onto the incorrect side of the road. The resulting collision with an oncoming vehicle caused the death of three occupants of the appellant's vehicle. The appellant was unable to explain how the collision occurred. The trial court imposed a sentence of two years' correctional supervision, in terms of section 276(1) of the Criminal Procedure Act 51 of 1977 (hereinafter "the Act"). The appeal to the Cape High Court was unsuccessful, with the court holding that the lengthy correctional supervision order was sufficient to meet the retributive and deterrent needs of society, while taking account of the appellant's personal circumstances (11a-c). Next, the Appellate Division in *S v Keulder* (1994 1 SACR 91 (A), cited in *S v Nyathi supra* par [16]) set aside the appellant's sentence of two years' imprisonment, remitting the matter to the trial court to consider the imposition of a sentence of correctional supervision. Given that the appellant had two previous convictions for alcohol-related driving offences, Conradie JA's piquant observation (in *S v Nyathi supra* par [16]) that the appellant's personal circumstances obviously weighed heavily with the appeal court is noteworthy. The appellant in *S v Cunningham* (1996 1 SACR 631 (A), cited in *S v Nyathi supra* par [17]), whose overtaking a stationary vehicle and proceeding on the incorrect side of the road, against a red traffic light, resulted in the death of one cyclist, and the injury of another, chose to appeal only his conviction. He was sentenced in the trial court to three years correctional supervision in terms of section 276(1)(h) of the Act. Similarly, in *Van Wyk v S* ([1997] 3 All SA 75 (E)) the appellant ignored a red traffic light, causing a collision which resulted in the death of a passenger in the other vehicle. The trial court convicted the appellant of culpable homicide, and sentenced him to 12 months correctional supervision. The appeal, which was unsuccessful, related only to the conviction.

In *S v Naicker* (1996 2 SACR 557 (A), cited in *S v Nyathi supra* par [17]), the appellant had been racing with another vehicle, and his negligent failure to keep a proper lookout resulted in him entering the left-hand lane (of the three lane freeway) at a time when it was unsafe to do so (560b-f). As a result he swerved into the middle lane to avoid a slow-moving tanker in the left-hand lane, colliding with a vehicle and setting in motion a course of events which culminated in the death of a person travelling in the opposite direction. The trial court sentenced the appellant to two years' imprisonment, but the Appellate Division held that the degree of negligence on the part of the appellant did not constitute recklessness or gross negligence (560i-j). Consequently the appellant's appeal against sentence succeeded, and the

matter was remitted to the trial court for consideration of a sentence of correctional supervision.

In *S v Birkenfield* (2000 1 SACR 325 (SCA), cited in *S v Nyathi supra* par [18]) the appellant rode his motor cycle at excessively high speed into an intersection, ignoring a stop sign. Both a pedestrian who was struck by the motor cycle, and the passenger on the motor cycle, died immediately at the scene. The trial court sentenced the appellant to five years imprisonment, subject to section 276(1)(i) of the Act (incorrectly cited as s 176(1)(i) in *S v Nyathi supra* par [18]), which was reduced on appeal by the Transvaal Provincial Division of the High Court to three years imprisonment, subject to the same condition. The further appeal to the SCA was unsuccessful, the court holding (par [11]) that the sentence (incorrectly cited as "five years" in *S v Nyathi supra* par [18]), though "substantial", was "within reasonable limits".

5 Conclusion

Despite the recent trend towards use of correctional supervision as a sentence for culpable homicide cases which occur on the roads, it is clear that in certain instances "it may be that the only way to remind drivers of their duty to use proper care is … to make more frequent use of the deterrent effect of prison sentences" (*S v Viljoen* 1971 3 SA 483 (A) 466F-G). It is submitted that the Supreme Court of Appeal in *S v Nyathi* has rightly emphasised the gravity of the problem of death arising out of serious misconduct on the roads, providing a useful indication of the pertininent sentencing factors which are applicable to this situation. Furthermore, the appellant's conscious assumption of the risk of harm occurring is correctly held to be a significant aggravating factor. As stated by Beck CJ in *S v Mncunza* (*supra* 98a-b), "the driver of a motor vehicle is in charge of an instrument that is as lethal as a firearm if it is not handled with proper care". It follows that our courts cannot afford to downplay the gravity of reckless or grossly negligent driving resulting in death. In this regard, the Supreme Court of Appeal in *S v Nyathi* has provided a useful precedent.

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg