ENGELBERT SHIKONGO versus THE STATE

CA 50/99

Gibson, J et Silungwe. J 1999/10/28

SENTENCE

CULPABLE HOMICIDE: arising from driving a motor vehicle - appellant convicted on own plea of guilty - first offender - determining appellant's degree of culpability or blameworthiness - three degrees of culpability distinguished - *Swan der Merwe* 1992(1) SACR 48 Nm at 51 b-i followed - expression "highly negligent" defined.

APPEAL CASE NO. CA 50/99

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ENGELBERT SHIKONGO

versus

THE STATE

CORAM: GIBSON, J. et SILUNGWE, J.

Heard on: 1999.10.18

Delivered on: 1999.10.28

JUDGMENT

SILUNGWE, J.: This is an appeal against sentence only. Following his trial, the appellant, aged 30 years, was convicted of culpable homicide by the Walvis Bay Magistrate's Court and sentenced to 4 years imprisonment, 2 of which were suspended for a period of 5 years on the usual conditions. Ms Van Niekerk appears for the appellant as an *amicus curiae* and Ms Wellmann of the Prosecutor General's Office represents the

State. The Court would like to thank Ms Van Niekerk for her appearance and both legal representatives for the professional assistance they have rendered in this matter.

The circumstances in which this matter arose are substantially not in dispute. During October 1998, the appellant was employed as a taxi driver. Sometime before lOhOO on the 5lh of that month, the appellant was operating a taxi along Hematiet Street, a public road,

within Kuisebmond Township in Walvis Bay. This is a busy street and, as houses on both sides are not fenced off, persons inclusive of children, may cross the street at any time. At the material time, the appellant was driving a little fast but within the prescribed speed limit of 60 kilometres per hour. There were a lot of dogs giving chase to the taxi and his attention was thus distracted resulting in his failure to maintain a proper look out and to exercise due care and attention on the road. Consequently, he struck a 4 year old girl known as Kristofina Angula in the middle of the road and killed her. A medical report revealed that the cause of death was due to head injuries sustained by the deceased. The cross examination of the appellant was concluded with the following question and answer:

"QUESTION: With hindsight, was there a possibility that you could have avoided the accident?

ANSWER: Yes, if my attention was not drawn by the dogs and if my brakes were not defective I would have seen the child earlier and I would have avoided the accident."

In convicting the appellant of culpable homicide, the learned magistrate found that the appellant was guilty of gross negligence. According to his reasons for sentence, this finding was based on the following:

1. there were no brake marks before the point of impact;
2. the taxi stopped 34 steps away from the point of impact which is an illustration of the speed at which the vehicle had been travelling;
3. on the accused's own admission, his attention had been distracted by the dogs otherwise he would have noticed the child (and avoided the accident);
4. the accused further conceded that the erven on that road had no fences around them and that it was a very busy road in the sense that a driver needs to be alert at all times for any adults, children and animals crossing the street at any point;
5. the accused conceded that he had driven fast although he was nevertheless within the speed limit of 60km/h; and that
6. the accused knew he had defective brakes and he used his handbrake to stop the vehicle.

Thereafter, the learned Magistrate drew the following conclusion:

"With the above-mentioned in mind I concluded that the accused had no proper look out in a busy street, his attention was not on the road, he drove a vehicle with defective brakes quite fast under the circumstances and that persuaded me that accused was grossly

negligent."

With regard to 2 above, there is no evidence to show either that the ground covered by the taxi after the impact was flat or at a decline; or that there was an inspection *in loco.* In the circumstances, not much weight should be attached to the learned magistrate's finding on the point.

The decisive issue in this appeal is whether the learned Magistrate erred in his finding that the appellant had been "grossly negligent." It is asserted by Ms Van Niekerk that, on the facts, her client was guilty of negligence only as opposed to gross negligence and that, on this basis alone, the appeal against sentence should succeed. But Ms Wellmann claims that the learned Magistrate made a correct finding and that the appeal should thus fail.

The question of punishment in cases of culpable homicide involving negligent motorists does arise again and again and salutary guidelines on the matter are not lacking. See, for example, *R. v Swanepoel* 1945 AD 444; *R v Bredell* 1960 (3) SA 558(AD) at 560 D-G; *S* v *Ngcobo* (2) SA 333 at 337 A-B; *S* v *Chretjen* 1979 (4) SA 871 (D); *S v Nxumalo* 1982 (3) SA 856 (AD) at 861 G-H; and, more significantly, *S* v *van cler Merwe* 1992 (1) SACR 48 Nmat51 b-i.

In *S v Nxumalo, supra,* the South African Appellate Division articulated the basic criterion concerning the determination of an appropriate sentence for a negligent motorist in these terms (per Corbett, JA, as he then was, at 861 G-H):

"It seems to me 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 norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence."

And in *S* v *van tier Merwe, supra,* it was stated by a Full Bench of this Court at 51 f-I (per Frank, J., with whom Strydom, JP, as he then was, and Muller, AJ, concurred).

"[I]t seems to me one can distinguish three degrees of culpability ie.

7. reckless actions;
8. highly negligent actions; and
9. negligent actions.

Where death is caused by one of the aforesaid actions pursuant to the use of a motor vehicle, it would appear that in general a distinction is made with regard to sentencing as follows:

(a) in the case of reckless driving a direct sentence of imprisonment coupled with a suspension or cancellation of the driver's license would be appropriate (see *S v Chretien* 1979 (4) SA 871 (D);

10. in the case of negligent driving an unsuspended sentence of imprisonment without the option of a fine should not be imposed on a first offender (see *R v Bredell (supra* at 560) where *R* v *Swanepoel* 1945 A-D 444 is quoted;

11. in the case of highly negligent driving it would therefore follow that the sentence should be somewhere between a totally suspended sentence and a direct and totally unsuspended sentence."

It seems obvious to me that the expression "highly negligent" means "grossly negligent."

For the avoidance of doubt, it is necessary to stress that the degree of an accused's negligence is merely a factor to be taken into account when considering what appropriate sentence to impose in a culpable homicide case arising from the driving of a motor vehicle. Otherwise, the crime of culpable homicide is not characterized by degrees of negligence since the slightest deviation from the standard of a reasonable person suffices to attract criminal liability.

In the matter under consideration, it is evident on the facts that the predominant cause of the accident was the fact that the appellant's attention was distracted by the dogs and, consequently, when he noticed the deceased, it was too late to avoid stricking and killing her. It would appear that the appellant was endeavouring to avoid the dogs which were pursuing his vehicle. This finds support in the testimony of Isak Veino, an eye witness, who was a passenger in the appellant's vehicle at the material time which reads:

"We drove down Hematiet Street. I can't recall whether there (sic) were people next to the street. Dogs were running after the vehicle. I was looking (sic) at these dogs. The vehicle was swerving and then I heard the vehicle (sic) bump against an object. I saw dust in the air. I got out of the vehicle. .. I saw a child lying in the road."

It is thus unlikely that the appellant's defective brakes impacted on the cause of the collision. This is confirmed by the learned Magistrate's findings that "There were no brakemarks before the point of impact"; that the sketch plan, exhibit E2, illustrated brakemarks up to the point at which the taxi came to a halt; and that the accused "used his handbrake to stop his vehicle." It is thus clear that the handbrake was applied after (not before) the event. This shows that the deceased's life could not have been spared even if the appellant's brakes had been in a proper working order since the focus of his attention had been upon the dogs. Ms van Niekerk contends that this "operates as a factor diminishing the degree of the appellant's negligence and that the learned magistrate erred in not taking this into consideration."

Whether conduct is negligent at all or grossly negligent must depend upon the circumstances of each case. Although courts are loath to define the expression "gross negligence" it seems to me that the expression denotes a high degree of negligence and imports an element of willful or reckless misconduct.

Applying the foregoing to the circumstances *in casu*, I have no difficulty in coming to the conclusion that the appellant's misconduct fell short of "gross negligence". In other words, he was guilty of negligence only. Had his attention not been distracted by the dogs, it is possible that the accident could have been avoided. There is nothing in his misconduct that suggests an element of willfulness or recklessness.

In the light of the conclusion I have reached, the learned Magistrate erred in his finding that the appellant was grossly negligent. It follows that that finding and the sentence that flowed from it must be set aside; this is in conformity with *S* v *van der Merwe (supra).*

The appellant's personal circumstances at the time that the initial sentence was passed were these: he was a first offender; although he was single, he had 7 children with different mothers for whom he paid maintenance though not under a court order; and he was unemployed, having lost his job as a result of this matter.

As the appellant, a first offender, is now adjudged guilty of negligent driving, an unsuspended sentence of imprisonment without the option of a fine should not have been imposed, pursuant to the guideline in *S v van der Merwe (supra).*

However, as the appellant has now been serving his direct prison sentence at least since November 26, 1998, to impose a fine upon him can only have the effect of enhancing his sentence and such a course of action would be counter productive. This being the state of affairs, 1 make the following order:

12. the appeal against the sentence of 4 years is allowed with the result that that sentence is set aside;

13. in substitution therefor, the appellant is sentenced to 10 months imprisonment effective from the date on which his initial sentence was passed. This means that if the appellant is not serving any other sentence, he should be entitled to his immediate release from prison.

ON BEHALF OF THE APPELLANT Instructed by: **MS VAN NIEKERK Amicus Curiae**

ON BEHALF OF THE RESPONDENT Instructed by: **MS VVELLMANN Prosecutor-General**