Reportable

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 561/98

In the matter between:

ALLEN DAVID BIRKENFIELD Appellant

and

THE STATE Respondent

CORAM : SCHUTZ, STREICHER JJA, MELUNSKY AJA

HEARD : 20 MARCH 2000

DELIVERED : 27 MARCH 2000

JUDGMENT

Criminal law - Culpable homicide arising out of traffic accident - Sentence - Subsequent facts generally excluded - Correctional supervision in terms of section 276(1)(i) of Criminal Procedure Act.

MELUNSKY AJA

MELUNSKY AJA:

[1] This is an appeal against the sentence imposed on the appellant pursuant to his conviction for culpable homicide in the Magistrate's Court, Kempton Park. The magistrate sentenced the appellant to five years' imprisonment subject to the provisions of s 276(1)(i) of the Criminal Procedure Act, 55 of 1977. The sentence was reduced to three years' imprisonment subject to the same provisions on appeal to the Transvaal Provincial Division of the High Court (Marais and Snyders JJ), which granted the appellant leave to appeal to this Court.

[2] The facts giving rise to the conviction can be stated briefly. The appellant drove a motor cycle from west to east in Olienhout Street, Kempton Park on the night of 12 May 1996. A young woman, Sally Clifford, was a passenger on the pillion seat. The appellant entered the intersection of Olienhout and Maroela Streets without stopping at a stop sign and collided with a pedestrian, Lesiba Malope, who

was in the intersection. The motor cycle proceeded beyond the intersection and the passenger fell onto the road. About seventy to eighty metres east of the intersection the motor cycle collided with a tree. As a result of the aforegoing the pedestrian and the passenger were killed outright, the appellant sustained serious injuries and the motor cycle was effectively destroyed.

[3] Olienhout Street is a straight road in a built-up area. The intersection with Maroela Street is well lit and the light of the motor cycle was on. It is not disputed that the appellant could and should have seen the pedestrian. It is also clear that had he stopped at the stop sign, as he was obliged to do, he would not have collided with Mr Malope. The evidence discloses, moreover, that the appellant travelled at a speed that was greatly excessive in the circumstances and that he had also failed to stop at an intersection immediately west of the Maroela Street crossing.

[4] It is not absolutely certain why Miss Clifford fell from the motor cycle but

it seems to be obvious that this was due either to the impact with the pedestrian or to the appellant's inability to control the vehicle properly immediately after the first collision. Miss Clifford was not wearing a helmet but there is no evidence which establishes that she would have survived had she worn some form of protective headgear.

[5] The appellant suffered from amnesia as a result of his injuries and had no recollection of driving the motor cycle on the night in question. There is no doubt, however, that he drove in a manner that was grossly negligent, if not reckless. This was also the view of the magistrate. At the trial it was suggested by the appellant and one of his witnesses that some fault in the motor cycle might have contributed to the collision and that this would reduce the degree of his culpability. The evidence in this regard was purely speculative and was unsupported by any facts. Although there was no onus on the appellant to prove the truth of an exculpatory theory, it is quite insufficient to put forward a conjectural hypothesis without

providing some factual basis therefore (cf. *R v Apter* 1941 OPD 161 at 178). The possibility of a mechanical defect as a contributory cause can, therefore, be ignored and was correctly not persisted in during argument in this Court.

[6] The appellant was twenty four years old when sentence was imposed in 1997. He was employed as a spray painter and was in a stable relationship with a woman. He has a previous conviction for driving under the influence of alcohol for which he received a non-custodial sentence in 1994. At the hearing of the appeal, application was made on the appellant's behalf for the admission of an affidavit which disclosed that since the imposition of sentence the appellant had married, that his wife was pregnant and that he had started his own spray painting business with thirteen people on the payroll. The general rule, as Corbett JA emphasised in *S v Immelman* 1978 (3) SA 726 (A) at 730H, is that a court of appeal must decide the question of sentence according to the facts in existence at the time when sentence was imposed and not according to new circumstances which come into existence

afterwards. This rule has been consistently applied - see *S v Marx* 1992 (2) SACR 567 (A) at 573i-574a. It is not necessary to decide whether there may be exceptions to the rule, as very little was said on the appellant's behalf in support of the contention that an exception should be made in this appeal. In any event, the new facts on which the appellant seems to rely would not, if admitted, make any difference to the outcome of the appeal.

[7] The court *a quo* reduced the sentence imposed by the magistrate because it considered that he had failed to place sufficient weight on the rehabilitative aspect of punishment. In this court it was submitted that the court *a quo*, too, had failed to have sufficient regard to the rehabilitation of the appellant. This submission is not persuasive. Rehabilitation of the offender is only one of the factors that comes into play in the imposition of sentence. The court *a quo* was keenly aware of the need to have due regard to the appellant's rehabilitation and it properly took this factor into account. Indeed, this is precisely why the sentence was reduced.

[8] The substance of the argument advanced on the appellant's behalf was that the sentence imposed on the appellant was unduly harsh and that this court should impose a substantial fine coupled with a wholly suspended sentence of imprisonment. It is hardly necessary to point out that a court of appeal will interfere with a sentence on the grounds that it is excessive only if there is a striking disparity between the sentence imposed and a sentence which this court considers to be reasonable. In order to decide this issue it becomes necessary to weigh up the factors personal to the appellant, the nature and circumstances of the offence and the requirements of society. To the appellant's personal circumstances outlined above there may be added the serious injuries which he sustained and the permanent disablement arising therefrom which will operate as a constant reminder to him of the danger of driving in a grossly negligent manner. On the other hand, it may be noted that not only did the appellant plead not guilty but he persistently refused to accept that he was the driver of the motor cycle, despite the clear evidence which

established that he was. The submission that the appellant was genuinely remorseful should, in my view, be considered in the light of these facts.

[9] The offence was a serious one. The appellant clearly had no concern for the safety of his passenger and the pedestrian with whom he collided. He disregarded the elementary rules of the road and it was almost inevitable that his manner of driving would have tragic consequences. A measure of the appellant's careless, if not irresponsible, attitude to the driving of a motor cycle, which may properly be taken into account in this appeal, was the conveyance of a passenger who was not wearing a helmet. The loss of life that ensued may also be taken into account not for its punitive effect but for its deterrent effect and as a warning to motorists that negligent driving might result in severe penalties, especially when it causes the death of innocent persons (see *The State v Ngcobo* 1962 (2) SA 333 (N) at 337A-B; *S v Greyling* 1990 (1) SACR 49 (A) at 56d-e). Society, too, expects the courts to protect innocent users of the road by imposing appropriately severe sentences on

offenders who drive grossly negligently or recklessly. All of these factors point to the inevitable fact that imprisonment is a proper sentence, despite the fact that the appellant is a productive member of society.

[10] It was not argued on the appellant's behalf that the period of imprisonment was unduly lengthy. Nor could such a submission prevail. The period of three years was subject to the provisions of s 276(1)(i) of the Criminal Procedure Act. This provides for

> "imprisonment from which ... a person may be placed under correctional supervision in his discretion by the Commissioner [of Correctional Services]."

In the heads of argument filed on the appellant's behalf (by counsel who did not appear at the trial), it was submitted that the appellant's rights to be placed under correctional supervision were greatly curtailed. In this regard reference was made to the following obiter passage in *Roman v Williams NO* 1998 (1) SA 270 (C) at 283H-I:

> "It is important to note firstly that a convict who has been sentenced to imprisonment in terms of s 276(1)(i) of the CPA [the Criminal Procedure Act] has no statutory right to be placed under correctional supervision. He is not even entitled to apply for a hearing to this end. He has no more rights than any other prisoner has in regard to parole for instance."

It is not quite clear what was intended by the second and third sentences of the above-quoted passage. If it was intended to convey that the Commissioner is not obliged to consider placing the person concerned under correctional supervision it is clearly wrong for, if a court imposes a sentence in terms of s 276(1)(i), the Commissioner is obliged to consider whether or not to place the person under correctional supervision. This requires him to have regard to the relevant circumstances and to exercise a proper discretion. The appellant retains the right to call upon the Commissioner to exercise his discretion but it is not necessary, for present purposes, to decide what procedures the Commissioner needs to follow or whether a convicted person is entitled to be heard.

[11] The sentence imposed by the court *a quo* amounts to a substantial punishment. It involves imprisonment for a period, not exceeding three years, subject to the Commissioner's discretion to place the appellant under correctisonal supervision. During the period of correctional supervision the appellant's rights of movement and association will probably be restricted. However this may be, nothing was said by the attorney who represented the appellant at the appeal which persuades us that the sentence was excessive to such a degree that this Court should interfere. On the contrary the sentence is well within reasonable limits.

[12] It follows that the appeal should be dismissed.

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L S MELUNSKY
ACTING JUDGE OF APPEAL

Concur :

SCHUTZ JA
STREICHER JA