

Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>



**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO:	CA&R 7/2018
DATE HEARD:	7 MAY 2018
DATE DELIVERED:	18 MAY 2018

In the matter between:

MATTHYS, RUSSEL

Appellant

and

THE STATE

Respondent

Coram: Williams ADJP et Olivier J

JUDGMENT

Olivier J:

- [1.] The appellant, Mr Russel Matthys, stood trial in the Magistrates' Court in Upington on charges of culpable homicide, alternatively a contravention of

section 63(1)¹ of the **National Road Traffic Act**² (Count 1) and a contravention of the provisions of subsections (a), (b) and (d) of section 61(1) of the Act (Count 2)³. The appellant pleaded not guilty to all charges and gave no plea explanation. He was convicted on both count 1 (on the main charge of culpable homicide) and count 2. The convictions were taken together for purposes of sentence and the appellant was sentenced to 8 years imprisonment. The appellant was subsequently granted leave to appeal against both convictions and the sentence.

[2.] The following aspects were either common cause or never seriously in dispute:

- 2.1 On Friday to Saturday 27 to 28 February 2010, at around midnight to 01:00, Mr J R McDonald was the driver of an Uno motor vehicle that was travelling from Brandvlei in the direction of Kenhardt.
- 2.2 The surface of the road was tarred and the distance between Brandvlei and Kenhardt was approximately 140km. The passengers in the Uno were Mrs M M McDonald (the wife of Mr McDonald), his daughter Ms Sue McDonald and his sons Mr Keenan McDonald and Mr Wendell McDonald. For the sake of convenience I will in what follows refer to Mr McDonald's children by their names.
- 2.3 That same night the appellant was the driver of a maroon coloured Toyota Corolla motor vehicle. His brother, Mr André Matthys was a passenger in the Toyota. According to both of them their brother, Mr Xenopher Matthys was also a passenger in the vehicle. The appellant's version was that there were no other passengers in the vehicle, while on

¹ Reckless or negligent driving

² 93 of 1996

³ Subsections (a), (b) and (d) of section 61(1) of the Act pertain to, respectively and in the event that a vehicle "is involved in or contributes to any accident in which any person is killed or injured or suffers damage in respect of any property, including a vehicle ...", the failure to immediately stop such vehicle, the failure to ascertain the nature and extent of any injury sustained by any person and the failure to ascertain the nature and extent of any damage sustained.

the evidence of Mr McDonald and Sue there were four or five persons in the Toyota.

2.4 Somewhere between Brandvlei and Kenhardt, and in the dark of night, the Toyota caught up with the Uno and for some distance thereafter the two vehicles overtook one another repeatedly. Why that happened, and exactly how, were in dispute and will be reverted to.

2.5 Approximately 10 km from Kenhardt the Uno left the road and overturned. The wife of Mr McDonald sustained fatal injuries, and both Mr McDonald and his daughter Sue sustained very serious injuries.

2.6 Whether the appellant had at that stage brought the Toyota to a standstill at all, is in dispute. According to the appellant he did not, and instead drove to Kenhardt, where he made a report, to which I will in due course revert, at the police station. The evidence of Keenan was that the Toyota did indeed stop at the scene where the Uno left the road and overturned, that the occupants of the Toyota then shouted remarks at them, that the Toyota then reversed and then took off in the direction of Kenhardt, with its tyres spinning on the surface of the road. What is common cause, however, is that the appellant did not take any steps to "*ascertain the nature and extent of any injury*" that may have been sustained by the occupants of the Uno or to "*ascertain the nature and extent of any damage sustained*" by that vehicle.

2.7 At the time of these events there were no other vehicles on that road, or at least in proximity of the Uno and the Toyota.

[3.] The main issues were the following:

3.1 On the evidence of Mr McDonald, Sue and Keenan the appellant had intimidated and terrorised them by repeatedly driving up to the Uno from behind with flashing headlights, then overtaking it and then slowing down - and even braking, to such an extent that Mr McDonald had no other choice but to overtake the Toyota. The appellant's version, on the other hand, was that there had been nothing intimidating or reckless about the way that he overtook the Uno, that he had never braked or slowed down to the extent described by the State witnesses and that the repeated overtaking of each other by the two vehicles had actually taken place on the basis of a tacit agreement between the two drivers that they would drive "*in tandem*" in order to keep one another awake.

3.2 What exactly had eventually led to the Uno leaving the road and overturning was also in dispute. The case for the prosecution, as set out in count 1, was that the appellant had caused the accident by causing his vehicle to collide with the Uno. The appellant's version, on the other hand, was that his vehicle had never made contact with the Uno and that the Uno had left the road when Mr McDonald was busy overtaking the Toyota and apparently lost control of the Uno.

3.3 Whether or not the appellant's vehicle had been involved in the accident, or had contributed to it, as envisaged in section 61(1) of the **National Road Traffic Act**, was obviously also in dispute.

[4.] It is trite that a court of appeal will not readily interfere with the credibility and factual findings of a trial court. This is because of "*the advantages enjoyed by the trial court which was steeped in the atmosphere of the trial and had the opportunity of observing the demeanour of witnesses*"⁴. What is of importance here is whether the court *a quo*, in evaluating the evidence, followed the

⁴ **Karrim v S** [2012] 2 All SA 125 (SCA) para [65]

approach enunciated as follows in paragraph [15] of the judgment in **S v Chabalala**⁵:

*“The trial court’s approach to the case was, however, holistic and in this it was undoubtedly right ... The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party ... was decisive but that can only be an *ex post facto* determination and a trial court ... should avoid the temptation to latch onto one (apparently) obviously aspect without assessing it in the context of the full picture presented in evidence...”*⁶.

[5.] I have already referred to the evidence of Mr McDonald and Sue about the circumstances surrounding the repeated overtaking. Their evidence was that the manner in which the appellant drove his vehicle caused the occupants of the Uno to be terrified and the atmosphere in that vehicle to be tense. They both testified that, at one stage, a passenger in the Toyota made hand gestures through an open window of the Toyota. Their evidence was furthermore that Mr McDonald had asked Wendell to phone the police and that he also requested that the registration number of the Toyota be taken down, which Sue did. Both of them testified that the Uno had left the road when the appellant caused his Toyota to collide or make contact with it at its left rear side.

5.1 There were differences in the evidence of Mr McDonald and his daughter regarding whether the appellant had applied the brakes of the Toyota, what the following distance between the Toyota and the Uno was when the Toyota was behind the Uno, whether the Toyota had at

⁵ 2003 (1) SACR 134 (SCA)

⁶ See also **“BS” and another v S** [2015] JOL 32613 (SCA) para [17]

one stage disappeared behind the Uno and had possibly stopped for a while, what exactly the nature of the hand gestures was, whether it was accompanied by shouting by the occupants of the Toyota, what precisely the position of the Uno was on the road when the Toyota made contact with it, whether the Toyota bumped or pushed the Uno, whether that happened more than once and where exactly on the Uno the point of impact or contact with the Toyota was.

- 5.2 There is no doubt that some of these inconsistencies were material. The court *a quo* in my view had proper regard to these “*shortcomings*”, but correctly viewed them as part of the whole of the evidence that was presented, as well as the probabilities. It must be kept in mind that “*Contradictions per se do not lead to the rejection of a witness' evidence., they may simply be indicative of an error. not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence*”⁷. It must also be kept in mind that Sue was a passenger and was sitting in the back of the Uno vehicle, on the left hand side of it. The vehicles were never stationary during these events. Everything occurred in the dark of night. In my view one would not necessarily have expected Sue to observe and experience everything exactly as Mr McDonald did, especially not if their vehicle was swerving to avoid being hit by the Toyota. In fact, Keenan did not even see the Toyota at the moment of the accident, while it is common cause that it was indeed right there. Also it must be kept in mind that all of these witnesses testified some five to six years after the incident.

⁷ **S v Mkhohle** 1990 (1) SACR 95 (A) at 98 f-g; See also **Deppe en ‘n Ander v S** [2013] JOL 31075 (SCA) para [15]

5.3 What is in my view of considerable importance is that both Sue and Keenan corroborated Mr McDonald on how all of them experienced the appellant's actions before the accident actually happened, about Mr McDonald's request that the police be contacted and about his request that the registration number of the Toyota be taken down.

[6.] Keenan did, as already mentioned, not see the Toyota at the moment that the accident occurred. This is, however, of no consequence at all, as it is common cause that the Toyota was present at the scene when the Uno left the road and overturned. It also appears that Keenan had been asleep until shortly before the Uno left the road and overturned, and the fact that he did not according to him feel the Toyota colliding or making contact with the Uno or pushing it off the road, must be seen in this light. If Keenan did not even see the Toyota, it is understandable that he may not have realised that it was forcing the Uno off the road. It must furthermore be kept in mind that, when regard is had to the contents of the police statement of this witness, he must have been only about 15 years old at the time of the events.

[7.] I have already referred to the evidence of Keenan about the Toyota stopping at the scene of the accident, reversing and about the shouting of remarks. According to him the word "*varke*" (pigs) was shouted at them. Keenan was confronted with the fact that his police statement made no mention of this, and that his father and sister knew nothing about it.

7.1 The police statement comprises of barely two pages. Police statements are renowned for, *inter alia*, being incomplete and sketchy and for their lack of particularity and "*omissions from police statements, regarding aspects on which the witness expands in court*" will not without more be held against a witness⁸. In **S v Bruiners en 'n Ander**⁹ it was held that it

⁸ Compare **Meje and another v Mocumi** [2015] JOL 32802 (FB) para [6].

⁹ 1998 (2) SACR 432 (SECLD) at 437h - i

would be far-fetched to expect a police statement to include everything that the witness will later testify. In any event, the contents of Keenan's police statement can by no stretch of the imagination be said to be of such a nature as to not leave room for this evidence.

- 7.2 What is significant in this regard is the presence of the black marks that are visible on the surface of the road in especially photo 2 of exhibit "D". They are situated on the right side of the road in the direction of Kenhardt. It seems to have been common cause that those marks were caused by the tyres of a vehicle.
- 7.2 It was put to Mr K McDonald that the Uno had left the road where those marks are visible. This, however, would be irreconcilable with the position of point 'B' in the same photograph, which according to the key to the photographs is the place where the Uno had left the road. It would also be irreconcilable with the position of point 'C', where according to the key the Uno had first landed after having left the surface of the tarred road. The contents of the key were never in dispute and this would mean that the Uno could therefore not have been on the road, at the point where the skid marks are visible, before leaving the road and overturning.
- 7.3 The presence of the skid marks would, however, be completely consistent with the evidence of Keenan about the spinning of the tyres of the Toyota when it eventually left the scene. They may also have been caused by the Toyota drastically braking after the Uno had left the road, as surmised by Mr McDonald.
- 7.4 The fact that Mr McDonald and Sue were not aware of the Toyota stopping, or of the shouting of remarks and the spinning of its tyres when it took off again, must be seen in the light of the fact that both of

them were unconscious immediately after the accident. Mr McDonald was stuck in the vehicle, and Sue had been flung from it.

[8.] This brings me to the evidence of Sergeant S J Khantse, the last witness called by the prosecution. After having been informed of the accident he went to the scene. According to him Mr McDonald informed him that a maroon coloured Toyota had been involved in the accident and he was given the registration number of the vehicle. After having determined that the vehicle belonged to the appellant he was not able to find and inspect the Toyota during that Saturday or Sunday. It was in fact only on the Tuesday that he came across the vehicle, being driven by the appellant. Upon inspection he observed scratch marks on the right side of the Toyota. According to Sergeant Khantse the marks were consistent with the vehicle having brushed or scraped against another vehicle. Khantse, who was a colleague of the appellant and worked with him at the same police station, testified that he had seen the Toyota every day and that he had never before observed the scratch marks.

[9.] It was never disputed that the registration number of the appellant's vehicle had been taken down at the request of Mr McDonald, and that it had immediately after the accident, and in fact at the scene of the accident, been given to Sergeant Khantse on the basis that the Toyota had been "*involved*" in the incident. Why would that have happened on the appellant's version? It fits in perfectly, however, with the scenario painted by Mr McDonald and Sue, and even with Keenan's evidence about the events preceding the fatal accident and immediately thereafter.

[10.] It was put to Mr McDonald and his children that they had concocted a false version in order to protect Mr McDonald from being blamed by the family for the death of his wife. This makes absolutely no sense. How would the concocted story have protected Mr McDonald from the reproach of Sue and Keenan, and

even Wendell, all of whom would have known if Mr McDonald had in fact been responsible for their mother's death?

[11.] It was also put to them that the inconsistencies in their evidence indicated that their version was fabricated in order to substantiate a damages claim that had been instituted against the Road Accident Fund. It is in my view far-fetched that Mr McDonald and his two children (one of whom would have been very young at that stage) fabricated a completely false version, and indeed one who falsely implicated a completely innocent person, for this purpose. It is in any event not even clear on the evidence whether that claim had been instituted at the time when these witnesses deposed to their police statements. In any event, *"the contradictions in their evidence negate the suggestion. So far from supporting any theory of deliberate fabrication and thus a conspiracy between the eyewitnesses, the discrepancies in their evidence point rather to honest and independent observation and recollection"*¹⁰. If the three of them had decided to fabricate this version one would have expected Keenan to not only incriminate the appellant on the events before and after the accident, but also to say that he saw the Toyota at the time of the accident and that it bumped or pushed the Uno.

[12.] The prosecution witnesses were also confronted with differences between their evidence and the contents of their police statements. I have already alluded to the danger of placing too much reliance on differences like these¹¹.

[13.] There were many discrepancies and inconsistencies in the evidence of the appellant:

13.1 In cross-examination of the McDonalds it was put to them that the reason why the appellant had decided to drive *"in tandem"* with the Uno was that, when the appellant initially caught up with the Uno from behind, the Uno was *"drifting"*, that the appellant was worried that the

¹⁰ **Morgan v S** [2009] 2 All SA 158 (SCA) para [21]

¹¹ Compare also **S v Bruiners en 'n Ander**, *supra* (footnote 8), at 437 g- 438 a; **S v Govender and Others** 2006 (1) SACR 322 (ECD) at 326

driver of the Uno could be sleepy and that he had therefore decided to drive “*in tandem*” to keep the driver of the Uno awake. This version would of course in itself raise the question why the appellant did not simply stop the Uno to find out why it was drifting. He was, after all, a police officer. The statement was in any event contradicted by the appellant in his evidence, when he not only made no mention of “*drifting*”, but in fact testified that the Uno had been driving normally and that the reason why he had decided to drive “*in tandem*” with the Uno was to keep both of them awake on the long stretch of road between Brandvlei and Kenhardt. When the appellant was confronted with what his attorney had put to the witnesses for the prosecution, he promptly changed his version and said that he could have been wrong in his evidence and that the Uno vehicle may indeed have drifted and that it could be that the Uno had travelled faster and slower, and “*heen en weer oor die pad*”.

- 13.2 In cross-examination of the prosecution witnesses it was put to them that the appellant had, whenever he wanted Mr McDonald to overtake him, merely slowed down. It was never put to any witness that the appellant had in fact applied the brakes of his vehicle, which would of course have fitted in perfectly with the version of Mr McDonald. In his evidence, however, the appellant conceded that he may have applied the brakes of his vehicle, but suggested that it would have been because there were wild animals on the road. This was clearly a new version, and was never put to Mr McDonald or any of the other prosecution witnesses.
- 13.4 As already indicated there would, on the appellant’s version, have been no reason at all for the occupants of the Uno vehicle to have been terrified, or for any of them to have seen the need to contact the police and to take down the registration number of the appellant’s vehicle.

- 13.5 The appellant's evidence regarding the accident itself was that he had caught up with the Uno from behind, after having stopped for a short while. According to him he then decided, when approaching the Uno from behind, that he was near enough to Kenhardt and that he would head home. His version was that he then overtook the Uno and headed home.

This would mean that the appellant's vehicle had at that stage been travelling at a faster speed than the Uno. On the appellant's version that the accident occurred while the Uno was in the process of overtaking his vehicle, it would necessarily mean that Mr McDonald had then, for some unknown reason and contrary to what the two of them had according to the appellant been doing before, increased the speed of the Uno, sufficiently to catch up with the Toyota and to be in a position to overtake it. Why would Mr McDonald have done that? It was also never in cross-examination put to Mr McDonald that he had at any stage attempted to overtake the appellant's vehicle without it having first slowed down.

- 13.6 It was never put to any of the prosecution witnesses in cross-examination that the Uno had made contact with the edge of the tarred road or the gravel shoulder of the road and had then "*zig-zagged*" across the road before leaving it. This is what the appellant testified he had observed. It was in fact put to Mr McDonald that the appellant does not know what had caused Mr McDonald to lose control of the Uno.

At a later stage in his evidence the appellant denied having actually seen the Uno leaving the road, but this is what he had on his own version told the police in Kenhardt when he went there to report the incident. It also

contradicted his earlier evidence that he had indeed observed the Uno leaving the road.

- 13.7 The appellant's version was that he did not stop when the Uno left the road (or at the very least when he suspected that it may have left the road) and that he instead drove to the police station in Kenhardt and reported the incident. It was put to the prosecution witnesses in cross-examination that the reason for this was that the appellant had no airtime on his cell phone and that he decided that it would in the circumstances be better to report the incident to the police.

This is, in my view, irreconcilable with the version that he had earlier been so concerned about the occupants of the Uno vehicle, and about the risk that its driver may fall asleep, that he had decided to inconvenience himself and to drive "*in tandem*" with them to avoid this. On the appellant's own version there were at least two passengers in his vehicle. According to him he did not know whether they had cell phones or airtime, but nothing prevented him from staying at the scene and sending them to the police station in his vehicle, or leaving them at the scene and driving to the police station himself.

When confronted with this improbability in cross-examination the appellant testified that he had been shocked. This, in turn, would be completely inconsistent with his conduct, on his own version, after having reported the incident at the police station. According to him he then went on to spend time at a tavern with friends of his. Why would he not at least then have called his colleagues to find out what they had found at the scene?

- 13.8 As regards the report made by the appellant, he testified that he had told Const. Kgaje that the Uno had left the road. It was put to Sue,

however, that the appellant had been unsure whether an accident had in fact happened, and that he had told the police to go and look if an accident had in fact happened. To Mr McDonald it was put that the appellant had told the police that there was a possibility that an accident had taken place. The statement to Sue and this evidence of the appellant are inconsistent with what he had, according to him, reported.

On the appellant's evidence as a whole it is very clear that he at that stage knew very well that the Uno had left the road. He says that he was shocked by it. That is completely irreconcilable with a report to the effect that he does not really know whether an accident had occurred or not.

- 13.9 In cross-examination of Sergeant Khantse, the initial investigating officer, it was put to him that he had contacted the appellant two days after the incident and had then told him that photographs had to be taken of his vehicle by the Local Crime Record Centre (the "LCRC") of the police, that they however did not turn up, that the appellant then later made enquiries to find out when they were in fact coming and that, in response to his enquiries, Khantse told him that the LCRC was no longer going to take photographs of the vehicle.

Sergeant Khantse denied this version, and the evidence of the appellant was completely inconsistent with it. The appellant testified that Khantse and a police official by the name of Hendricks came to his house and said that they wanted to inspect his vehicle. According to him his vehicle was at his house at that stage. He testified that they then asked him to take the vehicle to the police station to be inspected. According to him he went there, but when he got there the two of them were not there. He testified that, when he left there, he came across them in the street. In

fact, the appellant's attorney blamed Khantse, in cross-examination, for not having gone to the appellant's house to find the vehicle.

[14.] The evidence of Captain Van Wyk, also a police official and also stationed in Kenhardt, like the appellant, was presented on his behalf. Not only was he a colleague of the appellant, and also his commanding officer, but he was indeed a cousin of the appellant.

14.1 According to Capt Van Wyk he had not been in Kenhardt on the particular Friday or the Saturday and had only returned to Kenhardt on the Sunday. He testified that he had visited the house of the appellant almost daily and that he had seen his vehicle on a daily basis.

14.2 The appellant's version was that the Toyota had a scratch mark on the left side, but that he had bought it that way and that Captain Van Wyk had been the previous owner of the Toyota. Van Wyk confirmed the presence of the mark on the left side of the Toyota, but was not prepared to say that there had not after the date of the incident also been scratch marks on the right side of the vehicle. He testified that he "believed" that he had seen the vehicle after the date of the incident, but that he had not looked at it specifically and was not able to dispute the evidence of Sergeant Khantse about the presence of scratch marks on the right side of the Toyota after the date of the incident.

[15.] The evidence of Mr André Matthys, the last defence witness, about the events of that night was also inconsistent with that of the appellant:

15.1 He described the occupants of the Toyota as "*Ek, my broer en Xenopher en die beskuldigde*", which would mean that there would have been four people in the Toyota. That would be consistent with the evidence of Sue to the effect that there were at least four people in the Toyota, and

possibly five. As already mentioned the appellant's version, on the other hand, was that there were only three people in the Toyota.

- 15.2 Mr Matthys testified that the Uno had travelled on the right side of the road, and in fact on the shoulder of the road, at the time when they first approached it from behind. From the photographs it is clear that the only shoulder that the road had, was in fact the gravel next to the tarred surface. Mr Matthys furthermore testified that he got the impression that the driver of the Uno was drunk, and that the appellant then enquired from the passengers in the Toyota whether they should not drive "*in tandem*" with the Uno. This is inconsistent with the evidence of the appellant that there was nothing wrong with the way in which the Uno was being driven at the time when he decided to assist the driver to stay awake. It is also inconsistent with the statements to Mr McDonald and Sue that the Uno had drifted across the road at that stage. It was never put to them that the Uno had ever at that stage been on the shoulder of the road.
- 15.3 Mr Matthys denied that the appellant had ever flashed the headlights of his vehicle before overtaking the Uno, which directly contradicted the appellant's version in this regard.
- 15.4 Mr Matthys testified that, after they had stopped and then again caught up with the Uno, the two vehicles had again overtaken each other about three or four times, before the Uno eventually left the road. This is inconsistent with the appellant's version that he, on that occasion, overtook the Uno only once and that the Uno had only once thereafter attempted to overtake him after that, when the accident happened.
- 15.5 Mr Matthys testified that he had, after the accident, suggested that they should stop and phone the police, but that the appellant had no airtime,

and that the battery of Xenopher's cellphone was flat. This is very difficult to reconcile with the appellant's version. Although he also said that he had no airtime, he went on to say that he does not know whether the others had cell phones with them, which is difficult to reconcile with a version which would suggest that there had in fact at that stage been a discussion amongst them about exactly this issue.

[16.] Although there were inconsistencies in the evidence presented by the prosecution, the court *a quo* adopted the correct approach in considering them as a part of all of the evidence presented by both the prosecution and the appellant, including the probabilities and improbabilities in such evidence. In my view there is no basis upon which this court could interfere with the trial court's credibility findings in these circumstances.

[17.] This brings me to the appeal against the sentence. In **Packereysammy v S** the approach to be adopted by a court of appeal in this regard was restated as follows:

"Punishment is pre-eminently a matter for the discretion of the trial court. The court on appeal is not to erode such discretion; on appeal no general right exists to interfere with a sentence imposed by the trial court. It will only interfere if the discretion has not been judicially and properly exercised. This will be so only where the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate".¹²

[18.] The appeal against the sentence is based on just one ground, viz that the issue of retribution, the interests of the community and the seriousness of the offences were over-emphasised at the expense of the appellant's personal circumstances. The only argument advanced on behalf of the appellant before us was that the seriousness of the offences had been over-emphasised and the favourable personal circumstances of the appellant under-emphasised, and that the sentence imposed is shockingly inappropriate.

¹² [2003] JOL 12156 (SCA) para [5]

- [19.] The appellant's personal circumstances are reasonably favourable and were taken into account by the court *a quo*. The appellant is, at the age of 38 years, a first offender. He is a member of the South African Police Services, holds the rank of Constable and earns a salary of R15 000.00 per month. It is common cause that a custodial sentence will lead to the loss of the appellant's employment.
- [20.] Although the appellant is not married he has a 6 year old child, towards the maintenance of whom he contributes a monthly amount of R1 000.00. He lives with his parents, and to this end he pays an amount of R1 500.00 per month to them. He also contributes to other financial expenses of his parents, for example by paying their policy premiums.
- [21.] The child's mother is also employed fulltime, and works shifts. When she is at work, the child stays with the appellant and his parents.
- [22.] The appellant is also actively involved in church activities, more specifically the church choir, and he also helps out at a school after working hours.
- [23.] The court *a quo* was quite correct to regard the inordinate delay in the prosecution of the appellant as a mitigating factor. The crimes were committed in February 2010. The appellant appeared in court for the first time approximately 4 and half years later, on 5 September 2014. There is no explanation for this.
- [24.] The trial itself began on 24 March 2015 and the evidence was concluded on 26 May 2016, when the matter was postponed for approximately 2 months for argument. While this postponement is perhaps understandable, it is completely unacceptable that the magistrate only delivered judgment between 8 and 9 months later (after three postponements).

- [25.] After evidence had been presented on sentence, and the matter had then been postponed for about a month for argument on sentence, the magistrate did not after having heard argument proceed to sentence the appellant, but instead postponed the matter for another approximately 1 month to consider sentence.
- [26.] The end result is that the appellant was only sentenced in August 2017, almost 3 years after first appearing in court and about 6 and a half years after the incident. The undisputed evidence of Mr R F Newman, a social worker, was that the appellant had told him that the criminal trial caused him to feel emotionally drained and to have nightmares.
- [27.] There can be no doubt that the possibility of being charged, and later the reality of facing charges that could result in his imprisonment, must have caused the appellant considerable "*mental anguish*" and that the exceptionally long delay would have exacerbated this, and this most certainly constitutes a mitigating factor¹³.
- [28.] As already mentioned, it is clear from the judgment on sentence that the court *a quo* did indeed take the delay in the prosecution into account as a mitigating factor, and it has not been argued on behalf of the appellant that, on the available information, insufficient weight was attached to this issue.
- [29.] This brings me to the offences of which the appellant has been convicted. Counsel for the appellant, Mr Van Heerden, in submitting that the seriousness of particularly the offence of culpable homicide was over-emphasised, made reference to **S v Naicker**¹⁴ and **S Nyathi**¹⁵. In the latter of these two cases sentences in matters like these over a period of 10 years before that judgment were considered and compared.

¹³ See **S v Roberts** 2002 (2) SACR 522 (SCA) para [22]; Compare also **Michele and another v S** [2010] 1 All SA 446 (SCA) at 450 (Also reported as 2010 (1) SACR 131 (SCA)) and **Hendricks v S** [2010] 4 All SA 184 (SCA) para's [48] and [50]

¹⁴ 1996 (2) SACR 557 (A)

¹⁵ 2005 (2) SACR 273 (SCA)

[30.] In the **Naicker** case a sentence of 2 years imprisonment was set aside on appeal and the matter was remitted to the trial court for consideration of a sentence in terms of section 276(1)(h) of the **Criminal Procedure Act**¹⁶ (in other words correctional supervision without any imprisonment), after it was found that the appellant in that matter had not been grossly negligent in driving at a high speed, and failing to keep a proper lookout when he changed lanes and his vehicle collided with another, resulting in the death of a passenger in the vehicle driven by that appellant. What distinguishes the facts in the **Naicker** case from those in the present matter is that the appellant in that case had caused the accident by his failure to keep a proper lookout, and therefore through an omission. His driving at a high speed was not aimed at causing the accident. In the present matter the accident was not caused by a negligent failure to avoid the accident, but instead by a deliberate and reckless action, indeed aimed at causing the accident.

[31.] In the **Nyathi** case the appellant had been convicted on 6 counts of culpable homicide and was sentenced to 5 years imprisonment, of which 2 years were conditionally suspended. The appellant in that matter had overtaken another vehicle on a blind rise, resulting in a head-on collision between his vehicle and an oncoming minibus, and the deaths of 6 passengers in it. On appeal the conduct of that appellant was found to have been grossly negligent. Although there were more fatalities in the **Nyathi** case than in the present matter, the “*degree of ... culpability or blameworthiness*”¹⁷ of the appellant in the present matter is in my view far greater than that of the appellant in the **Nyathi** case. Once again the appellant in the **Nyathi** matter did not deliberately cause the accident. Instead it was found that there had on the part of that appellant been a “*conscious assumption of the risk of a devastating collision*”¹⁸.

¹⁶ 51 of 1977

¹⁷ **R v Barnardo** 1960 (3) SA 552 (A) at 557D – E; See also **S v Nxumalo** 1982 (3) SA 856 (AD) at 861A -

G

¹⁸ Para [22]

[32.] In cases like these *“the consequences of negligent wrongdoing are less important than the degree of blameworthiness of the wrongdoer, measured by the extent to which his conduct deviates from that of the reasonable man in the circumstances”*¹⁹ and the fact that the present appellant’s conduct resulted in only one death, and not in six deaths like was the case in **Nyathi**, is therefore not decisive.

[33.] Other cases of culpable homicide through reckless or negligent driving and in which sentences of direct imprisonment without the option of a fine were imposed or confirmed are:

33.1 **S v Birkenfield**²⁰ : Two people had died and a sentence of 5 years imprisonment in terms of section 276(1)(i) of the **Criminal Procedure Act** was imposed;

33.2 **S v Van der Merwe**²¹ : In this matter the accident, which resulted in the death of one person, was found to have been caused by a high degree of negligence, but not recklessness. The appellant had also failed to stop and to lend assistance. On appeal the sentence of 18 months imprisonment was altered to the extent that 9 months thereof were conditionally suspended;

33.3 **S v Sikhakhane**²² : The accident resulted in four deaths and imprisonment for a period of 2 years was imposed;

33.4 **S v Greyling**²³ : The particular accident resulted in four deaths and a period of 12 months direct imprisonment was imposed;

33.5 **S v Khoza**²⁴ : in this matter it was found that the accident, which had resulted in one death, was caused by ordinary negligence, and a

¹⁹ **Oelofse v S** [2002] JOL 9256 (EC) at p2

²⁰ 2000 (1) SACR 325 (SCA)

²¹ 1992 (1) SACR 48 (Nm)

²² 1992 (1) SACR 783 (N)

²³ 1990 (1) SACR 49 (A)

sentence of 3 months imprisonment, as well as a further 3 months imprisonment conditionally suspended, was imposed on appeal;

33.6 **S v Mncunza**²⁵ : The appellant in this matter had driven a public vehicle at a high speed, while drinking, and the accident resulted in one death. A sentence of 9 months imprisonment was confirmed on appeal;

33.7 **S v De Bruin**²⁶ : The vehicle driven by the appellant in this matter, after he had consumed alcohol, was involved in an accident which resulted in the deaths of three people. The appellant had three previous convictions of driving under the influence of alcohol or driving a vehicle while the level of alcohol in his blood was higher than permitted. A sentence of 3 years imprisonment was imposed on appeal;

33.8 **S v Ngcobo**²⁷ : In this matter the appellant was found to have been grossly negligent in causing the accident which had resulted in the deaths of four people and injuries to twenty four other people. On appeal the original sentence on 3 years imprisonment was altered to the extent that 1 year thereof was suspended conditionally; and

33.9 **Mapipa v S**²⁸ : A sentence of 4 years imprisonment, where one person had died and the driver had been under the influence of alcohol, was confirmed on appeal.

[34.] The offence of which the appellant has been convicted on count 2 is also a serious one. The maximum prescribed sentence for failing to stop and to ascertain the nature and extent of injuries and damage is 9 years imprisonment *"in the case of the death or serious injury to a person"*²⁹.

²⁴ 1990 (1) SACR 693 (T)

²⁵ 1990 (2) SACR 96 (Tk)

²⁶ 1991 (2) SACR 158 (W)

²⁷ 1962 (2) SA 333 (N)

²⁸ [2009] JOL 24219 (ECG)

²⁹ Section 89(4)(a) of the **National Road Traffic Act**

- [35.] Ms J Y Matthews, who was tasked with the preparation of a so-called supervision report, expressed the opinion that correctional supervision (presumably in terms of section 276(1)(h) of the **Criminal Procedure Act**) would be an appropriate sentence in this case. In cross-examination she had to concede, however, that this recommendation was based solely on the version of events given to her by the appellant, who had persisted in denying that he had in any way caused the accident.
- [36.] In my view the court *a quo* was correct in finding that a non-custodial sentence would not sufficiently reflect the seriousness of the offences in the present matter. Mr Van Heerden did not argue, in my view wisely so, that this finding was wrong. He suggested, however, that a sentence of 4 years imprisonment would have been appropriate in the circumstances.
- [37.] The sentence of 8 years imprisonment is undoubtedly, when compared with other matters in which direct imprisonment was imposed, a heavy sentence. The facts of the present matter are, however, in my view distinguishable and considerably more serious than those of any of those cases. Unlike even the appellant in the **Nyathi** matter, the appellant in the present matter did not merely assume the risk that the accident would happen. He deliberately caused the accident, and was grossly negligent as regards the consequences of such an accident.
- [38.] The court *a quo* in my view correctly took into account that the appellant was not an “ordinary person”, but indeed a police officer. Although it cannot be said that the appellant abused his position in committing these offences, it is indeed shocking that the person who had terrorised the McDonalds on that lonely stretch of road in the dark of night and who had eventually deliberately caused them to be involved in an accident which cost the life of their wife and mother, turned out to be an officer of the law³⁰.

³⁰ Compare **S v Strydom en ‘n Ander** 1994 (2) SACR 456 (W) at 465 d-h; **S v Von Molendorff** 1987 (1) SA 135 (TPD) at 171E-F

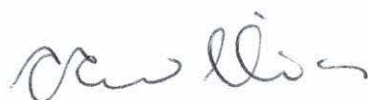
- [39.] It must also be kept in mind that the events lasted quite some time. In fact, if the appellant and his brother are to be believed he had at one stage pulled off the road and spent some time there before catching up with the Uno again. It is clear therefore that the appellant had ample time to reflect.
- [40.] It is also aggravating that the appellant never showed any remorse. After having made a report which on his own version did not in any way betray that he was responsible for the accident, he went to a tavern, where he spent some time with friends before going home to sleep. The next day he went about his business as if nothing had happened, and again drove to Brandvlei for some sport event.
- [41.] The sentence imposed by the court *a quo* is also to serve as punishment for not stopping to establish the nature and extent of injuries and damages which could have resulted from the accident. As already pointed out, this is in itself a serious offence.
- [42.] I am, in the light of all circumstances, not persuaded that the court *a quo* “exercised its sentencing discretion improperly or unreasonably”³¹.
- [43.] In the premises the following order is made:

**THE APPEAL IS DISMISSED IN RESPECT OF BOTH THE CONVICTIONS AND
THE SENTENCE AND THE CONVICTIONS AND SENTENCE ARE CONFIRMED.**


 C.J. OLIVIER
 JUDGE
 NORTHERN CAPE DIVISION

³¹ *Hewitt v S* [2016] JOL 36057 (SCA) ([2016] ZASCA 100) para’s [8] and [9]

I concur.



C C WILLIAMS
ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the Appellant:

ADV C F VAN HEERDEN
(Instructed by **Van Der Westhuizen Le Roux Inc, Kakamas**)

For the Respondent:

ADV K F ILANGA
(On behalf of **The Director of Public Prosecutions**)

