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Circulate to Judges:	YES / NO
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IN THE HIGH COURT OF SOUTH AFRICA **(Northern Cape Division, Kimberley)**

Case No: CA & R 118/14
Heard: 01/12/2014
Delivered: 20/03/2015

In the matter between:

BAZIL ELAND

Applicant

v

THE STATE

Respondent

Coram: Tlaletsi AJP et Phatshoane J

JUDGMENT ON APPEAL

Tlaletsi AJP

[1] The appellant appeared in the Regional Court, Pofadder (before Mr View) on 29 August 2014 on three counts of culpable homicide. He pleaded guilty to the charges. He was found guilty. For purposes of sentence the three charges were taken together and he was sentenced to 7 years imprisonment two years of which were suspended for a period

of five years on condition that he is not found guilty on a charge of culpable homicide in which the negligent handling of a motor vehicle is an element of the offence committed during the period of suspension.

[2] The appellant is appealing against his sentence with leave of the court *a quo*. The grounds upon which the appellant is challenging his sentence are briefly that the Regional Magistrate erred by overemphasising the seriousness of the offence, interests of the community, paid little or no regard to the appellant's personal circumstances and further that he erred in not attaching sufficient weight to the reports prepared by the social worker and the probation officer, respectively.

[3] The factual matrix on which the appellant was convicted is contained in a handwritten statement prepared by the appellant's legal representative in terms of s 112(2) of the Criminal Procedure Act¹ which was admitted as Exhibit A at the trial. The contents were accepted by the respondent. He admitted that he wrongfully and negligently caused the death of the deceased women. As to how the motor collision

¹ Act 51 of 1977

happened the appellant stated that he was driving his Nissan Sentra G..... motor vehicle along the N14 road from Springbok, following a BMW motor vehicle. He set the motor vehicle into a low gear in order to overtake the said BMW motor vehicle. In the process he lost control of the motor vehicle and the two motor vehicles "rolled".

- [4] The appellant sustained head injuries and was admitted at a hospital where he stayed for a period of a month for treatment for these injuries. He was 29 years old, unmarried and had one minor child born on 05 September 2007. He is making a monthly contribution of R750.00 towards maintenance of the child. He passed grade 12. He studied for an audit qualification which he abandoned after 18 Months due to lack of funds. He was previously employed at ABSA Bank as a Teller. At the time of the trial, he was no longer employed having lost his employment because of his poor concentration capacity as a result of the motor collision and the deaths he has caused. The only previous conviction that the appellant had was the contravention of s 4(b) of the Drugs and Drug Trafficking Act², in that he was found in possession of dagga on 11 July 2009. The appellant was also paying a monthly instalment in the amount of R200-00 for the BMW

² Act, 140 of 1992,

repair costs. He had also approached the families of the deceased women to show his remorse and regret for the grief he had caused them. The two families had indicated that they had forgiven him.

[5] It was common course between the appellant and the respondent that the concentration of alcohol on a specimen of his blood was measured at 0.01 grams per 100 millilitres at the time of the collision. Furthermore, the report on the reconstruction of the accident prepared for the respondent indicated that the appellant's motor vehicle was travelling at the speed of about 112 km/h and the BMW at 108 km/h. The maximum speed limit on this stretch of the road is 120 km/h. There was no evidence concerning the condition of the two motor vehicles' mechanical braking systems.

[6] After the appellant's legal representative addressed the court *a quo* in mitigation of sentence, the respondent, (in an unusual manner)³, tendered the evidence of Mr B D Schmidt, the father of two of the deceased women. He indicated that he was also testifying on behalf of the family of the victim on their request. He testified that it was the feeling of the two

³ It is unusual because the practice is to allow all the parties to tender oral evidence first if they choose to do so and to deal with all the issues raised in their address at once thereby avoid piecemeal addresses.

families that since the appellant reached out to them and apologised for what he did, that he asked for forgiveness, and further that he acknowledged that he was the cause of the fatal collusion, it brought a lot of comfort and relieved them of the dark cloud that hung over their heads and the heavy burden that was on their shoulders. They indeed appreciated that what he did showed that he was man enough to accept his deeds. He mentioned further that although it was not for them to decide on the type of sentence to be imposed, they held the view that since he was a young man who had shown remorse, he deserved to be given another chance in life. He added that since he was already carrying the heavy burden on his conscience for life, that he had lost his employment and has a child to maintain, it would not be appropriate for him to receive a custodial sentence.

[7] In response to questions by the court the witness testified that the two women were his only children. They were lovely and always friendly.

[8] The Regional Magistrate called Edna Irene Cloete, the mother of the other victim, who had been in Court. She testified that the deceased was 18 years old and a first year Financial

Management student at a Technicon. She has two children, a son and a daughter aged 35 and 33 years, respectively. She mentioned that the deceased was a lovely and very friendly child. When asked how she felt about her loss, she replied that it was still difficult for them, but also felt sorry for the appellant. She mentioned that what happened to him could have happened to their son as well and they would also have expected that he be forgiven. She testified that although she does not know the kind of person the appellant is, because he reached out to them and expressed his feelings and asked for forgiveness, he did not deserve harsh punishment. She described him as a person already living in a prison of his conscience and felt that he should not be imprisoned.

- [9] After the evidence of the two witnesses the respondent's representative addressed the court in regard to sentence. He indicated that he abided the request made by the victims' parents and agreed with the appellant's counsel that he deserved to be given a second chance and not be sentenced to direct imprisonment. In an unprecedented move, the Regional Magistrate requested the appellant to stand up and indicated that since he did not testify there were certain questions that he would like to ask him directly unless there was any objection or problems in doing so. The appellant's

representatives replied that he had no objection. After this response the Regional Magistrate addressed the appellant at length as follows:

"HOF: Goed so. Mnr Eland, dit is wat die ouers sê. Die Schmidt ouers sê vir my nee, hulle sal nie graag wil hê u moet tronk toe gaan nie en die Cloete moeder sê vir my nee, hulle wil nie graag hê nie want hulle het jou vergewe. Die vergiffenis wat u gaan soek het, die het u gekry, nê? Maar kom ek wees eerlik met jou, ek oorweeg om jou direck tronk toe te stuur om die volgende redes, kom ek sê vir u. Dit is deel van my hier in my kop in. Die rede is onder andere, hier was drie jong meisiekinders soos uself weet wat hulle lewens verloor het in die fleur van hulle jeug. Hulle was studente, klaar afgestudeer, 18, 19 and enetjie is 13 jaar oud. Een ouerpaar die hele kinders wat hulle het, die twee wat hulle het die het hulle verloor, al daardie aspekte omdat u nalatiglik was.

Dit blyk vir my te wees u het nie judgment gehad toe u die ander kar nader nie. Dit lyk my wat het hier gebeur, reg? Nou sê u nou vir my vandag, die wat hulle vir my sê dit is hulle gevoel. Dit hof moet aan die einde van die dag moet ek 'n gebalanseerde vonnis maak. Ek moet gaan kyk na u. Ek moet gaan kyk hoe voel die slagoffers se ouers. Ek moet gaan kyk hoe voel die gemeenskap daarbuite en dan moet ek gaan kyk wat is in belang van goeie regspleging.

So ek kan nie toelaat dat die ouers vir my kom voorskryf wat hier moet gedoen word nie en nog minder die gemeenskap. Dit moet 'n objektiewe vonnis wees en dit is waarom ek nou vir u ook 'n kans gee, want hulle het hulle sê kom sê. Mnr Conzalis het namens u ook gepraat. Die verslae het ook names u gepraat, maar u het nog niks vir my gesê nie en dit sit in my kop. Hoekom moet ek u nie tronk to stuur nie, meneer. Enige mens gaan nadat so iets gebeur dan sal hy mos nou geskok wees. Hy sal nou geskrik wees want hy besef nou, haai ek kan nou tronk toe gaan nou, verstaan u. Enige mens gaan daarna so voel want die reliteit is mos nou daar. Dan sien ek hier in die verslag van die maatskaplike verslae sê u blyk nie 'n persoon te wees wat wil in die tronk wees nie. Wil in die tronk sê nie vir my u moet nie gaan nie. Wie wil in die tronk wees om mee te begin, nè? So het ek nou vir u 'n goeie aanduiding gegee wat ek nou vir u vra. U het nou die kans om my toe te spreek en my te sê hoekom moet ek jou nie tronk toe stuur nie, u het drie jongmense se lewens weggevat. Conzalis gevra, dit is u keuse. As u voel u wil nie vir my antwoord nie, want u antwoord sommer nou van die bank af, dan is dit ook oukei, dit is u keuse, nè.

Beskuldigde: Dit is vir my moeilik om te sê ek weet nie so reg wat om te sê nie. Wat ek kan sê is ek is by die mense, hulle vind dit om, dink om my te vergewe.

HOF: Nie hulle dink nie, hulle het jou klaar vergewe, ja?

Beskuldigde: Volgens my sal ek my seker nooit kan vergewe wat gebeur het nie. Soos u sê dit was ... (tussenbei).

HOF: Ek kan nie hoor nie, meneer. Sê u: volgens my sal ek myself nie kan ooit vergewe vir wat gebeur het nie?

BESKULDIGDE: JA, JA.

HOF: So jy kan jouself nie vergewe vir dit wat jy aan hulle gedoen het nie, is dit was u sê.

BESKULDIGDE: Ja.

HOF: Is dit wat u sê. Ja?

BESKULDIGDE: Ek sê dit was nie eintlik my doel of ... (onduidelik) dat die ongeluk moes gebeur het nie.

HOF: Nee, u is skuldig bevind aan nalatighied, nè?

BESKULDIGDE: (Geen hoorbare antwoord).

HOF: Ons is klaar verby daardie aspekte. Dit gaan nou net oor hoe jou toekoms lyk en ek moet daardie besluit neem. Dit is hoekom ek jou `n kans gee, Mnr Eland. Ek gee jou `n kans want soos ek u sê dit sit in my kop in, dit sit ook in my kop om dit te doen. Dit is hoekom u kan uself nie vergewe nie, is daar iets anders wat u nog wil sê?

BESKULDIGDE: (Geen antwoord).” [Emphasis provided]

[10] The Regional Magistrate continued by asking the appellant whether he had received counselling as recommended by the social workers, whether he was employed, whether the appellant had siblings and whether he had any promise for prospective employment. Having obtained this information he continued thus:

HOF: So as die hof jou vandag tronk toe stuur dan sal ek nie jou werk kanse belemer nie, is dit reg?

BESKULDIGDE: (Geen antwoord)

HOF: As ek jou tronk toe stuur sal dit nie jou ma belemer nie, want sy werk en jou sustertjie en jou ma is saam, is ek reg?

BESKULDIGDE: (Geen antwoord)

HOF: En as ek jou tronk toe stuur dan kan jy berading in die tronk ook gaan kry want daar is beraders binne – in die tronk want u het nog nie een keer eens begin om te gaan hulp soek nie. Dit is die vrae wat ek nou vir u gevra het. Ek probeer nou kyk hoekom kan u nie gevangenis toe gaan nie. Al die goed wat ek u gevra het, as ek jou gevangenis toe stuur, dan sal dit jou glad nie benadeel nie, dit sal jou eerder bevoordeel. Verstaan u, Mnr Eland?

BESKULDIGDE: Ja.

HOF: Oukei” [Emphasis provided]

- [11] The Regional Magistrate asked the appellant whether he had anything to add to what has been said. He mentioned that he had a child to maintain and loans to pay. The Regional Magistrate remarked that he could not be cross-examined because he did not testify. His legal representative was given another opportunity to address the court and he reiterated his submission that the appellant not be sentenced to direct imprisonment.

[12] In addition to the reports compiled by the Social Worker on the impact of the offence on the appellant as well as the victims' families, the court *a quo* ordered and obtained a report by the Correctional Probation Officer. The recommendation by the Probation Officer was that the appellant be sentenced to correctional supervision in terms of section 276 (1) (i) of the Criminal Procedure Act. Direct imprisonment was recommended as a second option. The appellant's counsel was once more given an opportunity to address the court in mitigation of sentence and took this opportunity by addressing the court at length, pleading that the appellant not be sentenced to direct imprisonment.

[13] In his reasons for sentence the Court *a quo* referred to the appellant's personal circumstances, the offence itself as well as the interests of the society. The court *a quo* was satisfied that the appellant was indeed remorseful and that he did not plead guilty because the State case against him was strong and as such he stood no chance but to plead guilty. The court *a quo* remarked further that:

"Gaan kyk ons na hierdie spesifiekte geval, sedert 8 Augustus, sedert die dat toe daar betoog is vir vonnis, was dit vir my alreeds moelik gewees op daardie stadium om u vonnis op te lê en dit is waarom ek vir u gesê het in Pofader, kom ek sê vir u ek oorweg ook dierkte gevangenisstraf. Dit was nie op daardie stadium gewees om vir u te sê ek het klaar daardie besluit geneem nie. Ek het toe nie 'n besluit geneem nie. Ek wou gehoor het wat sê u as beskuldigde vir my van die beskuldigdebank af as ek sekere vrae aan u vra. My rede daarvoor was, soos hulle sal sê, ek het gekyk of ek die magic words kan kry vanaf die beskuldigde self, nie vanaf sy prokureur nie, nie wat hy vir sy sê of wat die prokureur vir my kom sê nie, kom ek hoor dit uit sy mond uit self.

U het toe vir my die magic words gegee. Ek is baie jammer ek het 'n kind, ek wou dit nooit gehad het, het u gesê, daar moes nie 'n dood gewees het nie. Maar daardie berouvolnis van u het weer deurgeskemer uit die vrae wat ek aan u gestel het en dit is van die redes hoekom ek dan persone somtyds direk vra wat is sy gevoel."
[Emphasis provided]

- [14] The court *a quo* emphasised (repeatedly) that a motor vehicle is an extremely dangerous weapon that a person can handle and for that reason one requires to be tested before being licenced to handle it. That the manner in which the appellant handled *"this dangerous weapon is extremely aggravating*

because it resulted in the death of three people". He remarked that the sentence to be imposed should deter other people who handle "*dangerous weapons*" like motor vehicles from acting negligently; that it is not for other people, particularly the parents of the deceased as well as the social workers and correctional officers, to prescribe to the court what sentence to impose. He concluded that a non-custodial sentence will only cater for the appellant's personal circumstances and not cater for the seriousness of the offence and the interest of the community and that only a sentence of direct imprisonment would in the court *a quo's* view be fair and justifiable.

- [15] In this Court counsel for the appellant contended that the court *a quo* misdirected itself by overemphasising the seriousness of the offence as well as the interest of the community and failed to attach sufficient weight to the appellant's favourable personal circumstances and further that the sentence imposed is shockingly inappropriate, alternatively, is so unreasonable that a Court acting reasonably would not have imposed it and warrants interference by this Court.

[16] It is a trite principle of our law that an appellate Court is not free to interfere with a sentence imposed by a trial Court unless it is satisfied that the trial Court committed a material misdirection. The appellate Court may also in the absence of a material misdirection be justified to interfere with sentence if the disparity between the sentence of the trial Court and the sentence which the appellate Court would have imposed had it been the trial Court is so marked that it can be said to be shocking, startling or disturbingly inappropriate.⁴

[17] There is no doubt in my mind that culpable homicide is a serious offence. However, it is important to take into account the circumstances in which it was committed. In **S v Naidoo and others**⁵ the Supreme Court of Appeal (the SCA) recognised that culpable homicide may be committed across a wide spectrum of circumstances: that at one end is the case where a momentary lapse in concentration on the task at hand has a tragic result, like in this case where three lives have been lost; neither the lapse nor the failure to foresee the consequences thereof is deliberate. The SCA held that sentencing fairly and appropriately in such a case is one of the law's most difficult tasks because among others, balancing the

⁴ S v Malgas 2001 (1) SACR 469 (SCA) at 478C-H.

⁵ 2003 (1) SACR 347 (SCA) at para 45 -46.

need for a sentence that, on the one hand , will not appear to rate the loss of life with all the attendant trauma to those to whom the deceased was near and dear as not too serious against, on the other, the need to calibrate the degree to which the accused's conduct deviated from the standard of care expected of a reasonable person and, if it is found to be slight, also to reflect that adequately in the sentence to be imposed, is inherently difficult. The outcome will not satisfy those close to the accused and those close to the deceased at the same time since the sentence would be perceived to be either too lenient or too harsh depending on the side one views it. That however, the SCA held, does not absolve the Court from its duty to strive as best as it can to achieve a proper balance between those objectives.

[18] At the other end of the culpable homicide spectrum, the SCA held, is the type of cases where the accused has deliberately assaulted the deceased but has not been convicted of murder because the State has failed to prove beyond reasonable doubt that death was actually foreseen as a reasonable possible consequence of the assault. In such a case *dolus* in the form of deliberate attack upon a person's bodily integrity which was intended to harm has resulted in the most

irremediable harm of all, namely, death. The SCA concluded thus:

"Few would quibble at the justness of substantial custodial sentences for that type of culpable homicide. But even within that class of cases there are distinctions to be drawn. Was a weapon used? How obviously potentially lethal was it? Was there provocation? How great was the negligence in failing to foresee that death might result?"

[19] In this case the Regional Magistrate was correct in taking into account the fact that the negligent driving of the motor vehicle resulted in the loss of three lives. However, the Regional Magistrate was also obliged to take into account what the Appellate Division authoritatively stated in **S v Nxumalo**:⁶

"It seems to me that in determining an appropriate sentence in such cases the basic criterion to which a court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability and blameworthiness would be the extent of the accused's

⁶ 1982 (3) SA 856 (AD) at 861G-862A: **S v Humphreys** 2013 (2) SACR 1 (SCA) para [22]

deviation from the norms of reasonable conduct in the circumstances and the foreseeability 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 consequence will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed. It is here that the deterrent purpose in sentencing comes to the fore. Nevertheless, this factor, though relevant and important, should not be overemphasised or be allowed to obscure the true nature and extent of the accused's culpability. As always in cases of sentencing, where different and sometimes warring factors come into play, it is necessary to strike a balance which will do justice to both the accused himself and the interest of the society."

- [20] It is important to note that the appellant's culpability which formed the factual matrix for his conviction should only be as contained in his statement in terms of sec 112 (2) of the Act as well as any clarification made by the appellant and/or his counsel on his behalf which were all accepted by the State before and up to the moment the court a quo arrived at the

verdict⁷. In that statement the appellant only stated that he tried to overtake the BMW motor vehicle. In the process he engaged his motor vehicle to a lower gear, lost control of it and collided with the BMW motor vehicle and both motor vehicles “rolled”. In response to questions by the Regional Magistrate his legal representative explained that in the process of passing the motor vehicle he lost control of his vehicle and it turned and collided with the BMW on the right rear side.

[21] The court *a quo* did not confine itself to the factual matrix which formed the basis for the conviction when considering the culpability of the appellant for the purpose of sentence. In its reasons for sentence the court *a quo* stated that it regarded the manner in which the crime was committed as extremely aggravating in that the appellant drove his motor vehicle so close to the back of the other motor vehicle and thereafter decided to overtake it; that he failed to keep a proper look-out and proper distance as he was taught and trained to do when he obtained his driver’s licence and as such killed people; that he overtook the BMW motor vehicle when it was inopportune to do so. All these factual details

⁷ **S v Khumalo** 2013 (1) SACR 96 (KZP), **S v Thole** 2012 (2) SACR 306 (FB); **S v Van der Merwe & others** 2011 (2) SACR 509 (FB). **Du Toit et al: Commentary on the Criminal Procedure Act**, vol 2 at p28-6A. [Service 52, 2014].

found to be aggravating were not part of the factual matrix upon which the appellant was convicted. In addition there was neither an admission by the appellant nor evidence tendered to suggest that it was inappropriate or dangerous for the appellant to overtake the BMW motor vehicle. By taking these matters as aggravating in the determination of sentence the Regional Magistrate committed a material misdirection which played a huge role in the determination of sentence that was ultimately imposed.

[22] It is in my view not unreasonable for one to conclude that the court *a quo* did not exhibit a mind open to persuasion in the determination of an appropriate sentence. It is abundantly clear from the record, despite a remark by the regional magistrate that he had not yet decided on the type of sentence to be imposed when the court sat in Pofadder, that he had in fact already formed a view that the appellant had to undergo a term of direct imprisonment. He in fact called upon the appellant to give him reasons why he should not be sentenced to direct imprisonment. Although the Court is permitted to adopt an inquisitorial and active role in the process of gathering information or evidence for the purpose of determining an appropriate sentence, such role must be limited to procedures which are "*fair in terms of common-law*

rules and principles, statutory provisions and constitutional requirements".⁸ In this case the Regional Magistrate wrongly disregarded the right of the appellant and his counsel to present the mitigating factors as they deem appropriate. They had elected to conduct their case by addressing the court from the bar in mitigation of sentence. However, this approach did not go well with the Regional Magistrate who demanded that the appellant should respond directly to the questions he wanted to ask in order to get what he called the "*magic words*" from him personally. This conduct of the presiding officer seems to be a common occurrence because he says that this is his preferred manner of dealing with the accused persons during the sentencing proceedings. It is impermissible that a presiding officer be addressed by an accused who is legally represented. See: **S v Maasdorp**⁹. Such conduct in my view is a material irregularity on the part of the Regional Magistrate. It cannot be a justification to say that the appellant and his legal representative did not object. They were left with no option but to allow the Regional Magistrate to do what he wanted to do since the appellant was already alerted that he is facing a strong possibility of imprisonment.

⁸ See: Do Toit et al (supra) at p28-3; S v Mbhele 2008 (1) SACR 123 (N).

⁹ 2008(2) SACR 296 (NC) at 302 para [15].

[23] It is not a duty of a presiding officer to preach to the accused person during the course of the trial. This Court has on a previous occasion warned the Regional Magistrate to desist from this conduct. See generally **S v Thenga**.¹⁰

[24] The learned Regional Magistrate, in my view, overemphasised the seriousness of the offence by repeatedly remarking that three lives including that of what he referred to as “*’n laatlammetjie*” had been lost; that the appellant had an extremely dangerous weapon in his possession which he handled in an extremely negligent manner; that the sentence to be imposed should deter other people who handle extremely dangerous weapons like motor vehicles as the appellant had done; that the sentence should also deter the appellant and teach him not to handle the dangerous weapon as he did, in the future. His remark that he would not allow the public, the parents of the victims, the social workers as well as probation officers to prescribe to him, as a court, what type of sentences should be imposed is further support of the view that the learned Regional Magistrate did not exhibit a mind open to persuasion. It is correct that the reports are not binding and are mere recommendations to the Courts in the determination of an appropriate sentence. However, they

¹⁰ 2012(2) SACR 628 (NCK).

deserve to be accorded serious consideration and weight especially in that they are prepared by experts in their respective fields.

[25] It is a fundamental principle of our law that in the determination of an appropriate sentence a court should strive to strike a judicious counterbalance between the elements relevant to sentencing to ensure that one element is not unduly accentuated at the expense of, and to the exclusion of other elements. This judicious counterbalance should be evident in the proceedings, the reasoning process as well as the outcome of the sentencing proceedings. It should, in my view, be clear that the sentencing court did apply its mind and had not paid lip service to all the elements relevant to sentencing. The *ipse dixit* by the Magistrate that all these elements have been considered and taken into account without any justification for that remark being evident in the process adopted and in the outcome or the result, is in my view, not sufficient. The sentence arrived at should somehow show that factors relevant to sentence in a particular set of circumstances have indeed been taken into account.

[26] It seems that the Regional Magistrate approached the sentencing proceedings on the basis that direct imprisonment is a prescribed sentence in a case of culpable homicide which resulted in the death of three people. To this end he eliminated all other forms of punishment that could possibly be appropriate.

[27] Deterrence is an important factor to be taken into account in the determination of an appropriate sentence. However, it would also be unfair to destroy the accused on the altar of general deterrence and retribution in cases not deserving such treatment. The following authoritative view by the majority of the Court in **S v RO**¹¹ should always be taken into account:

"Nevertheless, in sentencing, individualisation, and not collective responsibility for the prevalence of serious crime, remains the court's primary focus. While there is no misplaced sympathy in dealing with offenders, one should never divorce determination of the appropriate punishment from the quality of the human material, nor the reasons for its frailty. Even here mercy can find a place in almost all cases."

¹¹ 2010 (2) SACR 248 (SCA) at para [41].

[28] Previous cases in which the courts have sentenced offenders for culpable homicide involving the driving of a motor vehicle vary according to the degree of culpability. Some have aggravating factors such as driving under the influence of alcohol, disobeying road traffic signs, overtaking contrary to the road markings and in dangerous circumstances, etc. Each case has been decided according to its unique circumstances. Having regard to such cases, I am of the view that the sentence imposed by the court *a quo* in casu is excessive to the extent that it induces a sense of shock and warrant interference by this Court.

[29] *In casu*, both counsel were in agreement that should this Court find in favour of interfering with the sentence of the court *a quo*, it is in as good a position to impose sentence as the trial court since all the material facts are fully before us. It would also serve no meaningful purpose to refer the matter back to the trial court for redetermination of sentence given the approach already adopted by that court. The following factors are relevant in the determination of an appropriate sentence;

Regarding the appellant:

- a) he is a first offender for this type of offence;
- b) he pleaded guilty which has been accepted as a true sign of remorse;
- c) he was not under the influence of alcohol at the time of the collision;
- d) there is no evidence that his negligence was gross as was the position in other cases. He lost control of his motor vehicle whilst in the process of overtaking another motor vehicle;
- e) he reached out to the families of the victims and they have forgiven him;
- f) he is a productive member of society who, given a chance, would discharge his obligations to his child;
- g) it is clear from the social worker and probation officers' reports that he is capable of being rehabilitated;
- h) there is no indication that he would repeat this type of offence;

The offence:

- a) the offence is serious in that three lives have been lost.
- b) it is prevalent in the Republic.
- c) Road accidents in general are straining in the economy of this country.
- d) there is no evidence that the traffic signs and rules were disregarded.

The interests of the society and the victims' families:

Although there is no evidence of public outcry about the appellants' negligent conduct and its consequences, it would be inappropriate not to conclude that his actions would not be countenanced by the society and that the society would expect from the Court to impose a sentence that reflects its rejection of the appellant's conduct. Failure to do so would result in loss of confidence in the judicial system. This incident, no doubt, had a devastating effect on the two families. The one family lost two of its only children, and the other lost a daughter. The two families had to go through a difficult time and understandably they will never forget what this incident caused them. They have however forgiven the appellant who has shown and expressed his remorse to them.

The magnitude of the tragedy resulting from negligence should not be allowed to obscure the true nature of a crime which is that of negligence.¹² The two families are at peace and have accepted what has happened and that nothing would undo what has happened to them. The other parent was even not prepared to testify on the sentence to be imposed and she only testified because she was called by the Regional Magistrate to testify.

[30] The court *a quo* was correct in taking the three counts of culpable homicide together for purposes of sentence. The same approach will be adopted in this Court. A report by the probation officer prepared in terms of sec 276 (1) (a) of the Act requested by the court *a quo* recommends as a first option a sentence of correctional supervision in terms of sec 276 (1) (i) of the Act and a sentence of direct imprisonment as an alternative sentence. In my view a sentence of correctional supervision in terms of sec 276(1)(i) would strike a balance between the appellant's personal circumstance, the interests of victims' families and the society and the seriousness of the offence.

¹² S V Naicker 1996 (2) SACR 557 (A).

[31] In the result the following order is made:

The appeal against sentence succeeds and the sentence imposed by the court *a quo* is set aside and replaced with the following sentence:

"The appellant is sentenced to three (3) years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977".

L P TLALETSI
ACTING JUDGE PRESIDENT
 High Court of South Africa
 Northern Cape Division

I concur.

V M PHATSHOANE
JUDGE
 High Court of South Africa
 Northern Cape Division

On behalf of the Applicant :

Adv. A. D Olivier

(Fletcher's Attorneys)

On behalf of the Respondent:

Adv. T Kelaotswe

(Director Public Prosecutions)