



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No. AR 52/23

In the matter between:

KHULEKANI KINGSLEY MPANZA

Appellant

and

THE STATE

Respondent

ORDER

On appeal from: The Magistrates Court for the district of Inanda held at Ntuzuma (Ms Mzimela sitting as court of first instance).

The following order shall issue:

1. The convictions in respect of counts 1, 2 and 3 by the court *a quo* are confirmed.
2. The appeal in respect of the sentences imposed pursuant to the said convictions is upheld and the sentences are set aside.
3. The matter is remitted to the court *a quo* for sentence before another presiding officer.

JUDGMENT

Singh J (Steyn ADJP concurring)

Introduction

[1] On the evening of 27 January 2019, there was a collision involving the appellant and a motor vehicle being driven by Mr Anthony Mayoni who was together with his wife and two minor children. At the relevant time, the appellant did not hold a drivers licence. It was common cause in the court *a quo* that the appellant had also abandoned the scene of the collision and did not report the collision to the police.

[2] The appellant was convicted of one count of reckless driving (Count 1), one count of driving without being in possession of a drivers licence (Count 2) and one count of failing to comply with the duties of a driver after a collision (Count 3). The appellant pleaded not guilty to all the counts and was convicted as charged on 5 October 2022. On 4 November 2022, he was sentenced as follows:

- (a) Count 1: 'A fine of R15 0000 or two (2) years imprisonment of which one (1) year is suspended for three (3) years on condition that the accused does not commit a similar offence during the period of suspension';
- (b) Count 2: 'A fine of up to R500 without suspension';
- (c) Count 3: 'Twelve (12) months direct imprisonment without the option of a fine'.

[3] The court *a quo* granted the appellant leave to appeal in respect of conviction and sentence. At the hearing of the appeal and in the heads of argument filed on behalf of the appellant, Mrs *Barnard* who appeared on behalf of the appellant submitted that the appeal was against the sentences in respect of counts 1 and 3 only. Accordingly, since the appeal is against the sentences only this judgment shall deal only with the court *a quo*'s conduct during the sentencing phase and the circumstances considered by the court regarding the appropriate sentences.

The evidence in the court *a quo*

[4] The appellant testified in mitigation of sentence. The court *a quo* received a correctional supervision report from Mr Hlengwa as well as a pre-sentencing report from a probation officer, Mr Gumede. Both Messrs Hlengwa and Gumede testified before the court *a quo*. Mr Mayoni testified in aggravation of sentence and the impact of the collision on his family and him. The court *a quo* also received the victim impact statement of his wife, Ms Mbatha.

[5] When the appeal was heard, the following submissions were made by Mrs Barnard:

- (a) the sentence imposed in count 1 was not competent for the following reasons:
 - (i) a portion of the fine of R15 000 also ought to have been suspended as a portion of the sentence of imprisonment was suspended;
 - (ii) if it was the intention of the court *a quo* to have a further one year imprisonment hanging over the head of the appellant, the sentence ought to have read as follows:
 'Fined R15 000.00 or two (2) years imprisonment in addition thereto one (1) year imprisonment which is suspended for a period of three (3) years on condition that the accused is not convicted of a contravention of section 63(1) of the National Road Traffic Act 93 of 1996 (reckless driving) committed during the period of suspension'.
 - (iii) It was further submitted that as it stands, the condition of suspension is too wide in that it does not specify that the conviction would trigger the suspended portion to come into operation as it merely refers to 'a similar offence'.
- (b) there was no need to impose a term of direct imprisonment in respect of count 3 and remove the appellant from society. Although the incident had tragic and far reaching consequences for the victims, the facts in the present matter are exactly what the legislature had in mind when s 276(1)(h) of the CPA was enacted, namely not to remove an offender from society;
- (c) the appellant was twenty nine years old at the time of the incident and a first offender who is gainfully employed. He already had an academic qualification and was reading for a further qualification. Both the probation officer and correction supervision officers' report took the said factors into account in recommending that the appellant met the criteria for correctional supervision in terms of s 276(1)(h) of the CPA.
- (d) the court *a quo* in its judgment failed to furnish any reasons for why it rejected the reports of the probation officer and the correction supervision officer. This was further so because the court *a quo* did not believe that the manner in which the appellant drove warranted a custodial sentence in count 1 in that the appellant was given the option of a fine yet imposed direct imprisonment in respect of count 3.

- (e) the court *a quo* erred in relying on *S v Kibido*¹ to justify the imposition of a custodial sentence in count 3 as the aforesaid case related to a case of reckless driving. In any event, in *Kibido*, the court imposed a sentence in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 ('the CPA').

The State's submissions

[6] Mr *Singh* who appeared on behalf of the State conceded that the sentence in respect of count 1 was not competent and had to be set aside and amended.

[7] In respect of count 3, Mr *Singh* submitted in both oral and written submissions that the collision was not a minor traffic offence and that the victims sustained serious injuries. He further submitted that the appellant had driven without a drivers licence and at high speed when the collision occurred. A further aggravating factor was that he abandoned the collision without justification and attempted to conceal that he was the driver of the motor vehicle.

[8] Mr *Singh* conceded that the court *a quo*'s judgment did not reflect that the correctional supervision report was seriously considered and that the judgment did not stipulate any reasons for rejecting the correctional supervision as an appropriate sentencing option or why the reports in support of correctional supervision should be rejected.

The issues to be determined

- [9] The issues for determination of this appeal is as follows:
- (a) Whether the sentence in count 1 as it currently stands is competent;
 - (b) Whether the court *a quo* erred in imposing a sentence of twelve months direct imprisonment without the option of a fine in respect of count 3.

The general principles relating to sentence on appeal

[10] The court sitting on appeal must be satisfied and interfere with sentence only if the court *a quo*'s sentencing discretion was not exercised at all or improperly or unreasonably when imposing sentence. The fact that a sentence is disturbingly inappropriate or sufficiently disparate has been accepted as sufficient reason for the court of appeal to intervene.

¹ *S v Kibido* 1998 (2) SACR 213 (SCA).

[11] The court in *Kibido*² stated:

'Now, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account (see *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684 A-B; *S v Pillay* 1977 (4) SA 531 (A) at 535 A-B). A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (*S v Fazzie and Others* (*supra*) at 684 B-C; *S v Pillay* (*supra*) at 535 E)'

The sentences in counts 1 and 2

[12] It is a fundamental principle in our law that a court order must be effective and enforceable and it must be formulated in language that leaves no doubt as to what the order requires to be done. Not only must the order be couched in clear terms but its purpose has to be readily ascertainable from the language used. An accused person must be left in no doubt as to the conditions that governs his sentence.

[13] I am in agreement with the submissions made by the appellant, and the State has correctly conceded, that the sentence in count 1 has been framed too widely and warrants amendment. It is not clear from the sentence as to what the 'similar offence' that the appellant may not commit during the period of suspension is. Likewise, it is not clear as submitted by Mrs *Barnard* whether a payment of a portion of the fine was also suspended. In my view, the court *a quo* was misdirected when it failed to stipulate the conditions of the suspension unambiguously and clearly. This misdirection by the court *a quo* warrants interference by this court to set the sentence aside.

[14] Count 2 was not in issue despite the court *a quo* having granted leave to the appellant in respect of the sentence for count 2. A reading of the record on count 2 reflects however that the sentence imposed was 'a fine of up to R500.00 without suspension.'³ (my emphasis). Likewise, in my view this sentence is not clear as to precisely what amount is payable by the appellant and the sentence in respect of this count was also a misdirection.

² *S v Kibido* as above, 216 G – I.

³ Lines 6 to 7, record, page 301.

The sentence in count 3

[15] The record reflects that the court *a quo* approached the issue of sentence in respect of count 3 on the basis that the appellant was involved in violent conduct. The judgment states 'the violent conduct will be met with the full might of the law to ensure the full effect of justice being not only done but also be seen to be done.'⁴

[16] The court *a quo* also appeared to have approached the question of sentencing as if it was considering the applicability of a prescribed minimum sentence following the conviction of the appellant on count 3.⁵

[17] Despite going into detail, regarding the evidence which was heard of the victim, Mr Mayoni and considering the victim impact statement of Ms Mbatha, the court *a quo* did not evaluate the correctional supervision report nor did it state why it rejected the correctional supervision report. One would expect this approach to have been adopted more so, because the probation officer's report also supported a sentence in terms of s 276(1)(h) of the CPA.

[18] The Supreme Court of Appeal in *S v Samuels*⁶ in considering correctional supervision as a suitable sentence succinctly stated:

'With appropriate conditions, correctional supervision can be made a suitably severe sentence, even for persons convicted of serious offences.'

[19] The court in *S v Trichart*⁷ stated:

'It is important for the courts to take these reports seriously and to give rational, even if only brief, reasons for rejecting the recommendations contained therein. The probation officers who are officers of ever court established under the Magistrates' Court Act 32 of 1944, and who compile these reports, perform a valuable task, one that is of huge assistance to judicial officers.'

[20] It is clear that the court *a quo* approached the sentence in count 3 as if it was dealing with a sentence involving a count of negligence and/or reckless driving. The issue of negligence and/or recklessness would have arisen in count 1 and not in count

⁴ Lines 5 to 7, record, page 292.

⁵ Lines 24 to 25 to line 12, record, pages 298 to 300.

⁶ *S v Samuels* 2011 (1) SACR 9 (SCA), para 10

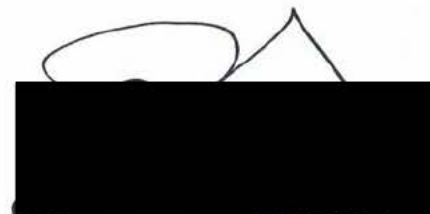
⁷ *S v Trichart* 2014 (2) SACR 245 (GJ), at 250.

3. For the court *a quo* to have considered the issue of negligence in count 3 would be tantamount to sentence the appellant for his conduct in count 1 twice. In my view, the court *a quo* did not seriously consider correctional supervision as an option. This was a clear misdirection by the court *a quo*. The court *a quo* erred in over emphasising the aggravating circumstances and did not fully apply its mind to the mitigating factors contained in the correctional supervision report and the personal circumstances of the appellant. At the very least, the court *a quo* ought to have considered the provisions of s 276(1)(i) of the CPA, but the judgment does not reflect that s 276(1)(i) was even considered. The sentence in count 3 must therefore be set aside.

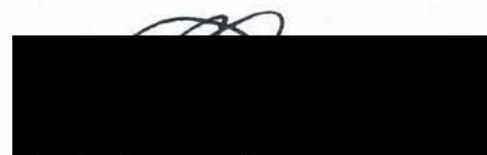
[21] I have given anxious consideration to what the appropriate approach is in the face of the sentences in respect of all three counts being set aside, and I am of the view that the answer lies in the provisions of s 275(1) of the CPA which provides for sentencing to be conducted by another judicial officer other than the judicial officer who convicted the accused or appellant as the case may be. The matter ought therefore to be remitted to the court *a quo* for the sentence to be reconsidered by a new judicial officer afresh.

[22] In the circumstances, I make the following order:

1. The conviction in respect of counts 1, 2 and 3 by the court *a quo* are confirmed.
2. The appeal in respect of the sentences imposed pursuant to the said convictions is upheld and the sentences are set aside.
3. The matter is remitted to the court *a quo* for sentence before another presiding officer.



SINGH, J



STEYN ADJP

CASE INFORMATION

Date of Hearing : 28 February 2025

Date of Judgment : 24 March 2025

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