



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Not Reportable**

Case no: A148/2025

Lower Court Case No: OSH 86/23

In the matter between:

**GARY SEPTEMBER**

Appellant

and

**THE STATE**

Respondent

**Coram:** Kusevitsky J et Njokweni AJ

**Heard:** 22 August 2025

**Reasons for Order:** 28 November 2025

**Summary:** Criminal law – appeal on sentence – culpable homicide – wife and children – ordinary negligence – sections 112, 276A and 276(1)(h) Criminal Procedure Act – misdirection – paying lip service to sentencing principles criticised – judicial compassion distinguished from weakness – appeal upheld – sentence set aside and replaced with antedated lesser sentence – appellant released from custody.

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## ORDER

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1. The Appeal against the sentence is upheld.
2. The Sentence imposed by the Magistrate's Court is set aside and replaced by the following order.
3. The Appellant is sentenced to a period of 12 months' imprisonment, wholly suspended for a period of three (3) years, on condition that the Appellant is not convicted of a similar offence during the suspension period.
4. The sentence is antedated to 26 April 2024.
5. The effect of this Order is that the Appellant is to be released immediately, having served his time.
6. This Order is to be sent directly to the Ladismith Correctional Centre from the date of this Order.

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## JUDGMENT

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### **Njokweni AJ (Kusevitsky J concurring)**

[1] This appeal concerns sentence only. It is an appeal against the eight-year direct imprisonment sentence imposed on the appellant by Magistrate Ms Moni in the Oudtshoorn Regional Court on 26 April 2024, following conviction on three counts of culpable homicide from a single motor vehicle accident. The appellant

sought leave to appeal from the magistrate, but it was denied. A petition to this Court followed, and leave to appeal was granted. The State does not oppose this appeal.

[2] After hearing the appeal on 22 August 2025, we determined that the immediate release of the appellant was in the interest of justice. The reasons for this decision are set out below.

## **FACTUAL BACKGROUND**

### **The incident**

[3] The following facts are common cause: The incident giving rise to the sentence occurred on 11 January 2018, some seven years ago. On the day in question, the appellant and his family (wife and children) went on an outing to some hot springs in Calitzdorp in the Western Cape, where they spent the day in a Toyota Hilux Bakkie ("Bakkie") driven by the appellant. On the drive back home from the hot springs, while the appellant was still driving the Bakkie, the vehicle left the road. The appellant was unable to correct its course, and the vehicle rolled over. Three passengers – the appellant's wife, her son, and the appellant's son – were fatally injured ("the deceased").

### **The charges**

[4] The appellant was arrested and charged with driving under the influence of alcohol, driving without a valid driver's licence, and three counts of culpable homicide. The State withdrew the charges relating to driving under the influence of alcohol and driving a motor vehicle without a valid driver's licence.

### **Guilty plea**

[5] In Court, the State only proceeded with three counts of culpable homicide. The appellant was legally represented, and he pleaded guilty to all three counts of culpable homicide. In his guilty plea statement, the appellant admitted all the essential elements of culpable homicide in respect of the said three counts. Notably, he pleaded that he drove the Bakkie at normal speed and whilst driving, he momentarily looked at his wife to have a conversation. As a result of that, the Bakkie veered off the road, overturned and rolled, resulting in the death of the deceased. He thus admitted an ordinary degree of negligence. He denied driving grossly negligently or recklessly or having been influenced by liquor. The State accepted the Plea, thus binding it to the factual ambit thereof.

### **The guilty verdict**

[6] The appellant was then found guilty on three counts of culpable homicide as pleaded. The state presented no previous convictions.

### **Pre-sentencing report**

[7] The defence requested the Court to order the State to obtain pre-sentencing reports from a probation officer, particularly to determine if correctional

supervision in terms of section 276(1)(h) of the Criminal Procedure Act<sup>1</sup> would be a suitable sentence for the appellant. Under Section 276A of the Criminal Procedure Act, the court has the discretion to call for such reports to ensure an informed sentencing decision. However, the magistrate refused to order the State to obtain a pre-sentencing report, stating as follows: “I know nothing about your clients’ personal circumstances, I cannot on my side if you are requesting... but on my side I cannot order ...,” [my emphasis]

[8] Mr Krouwkam, representing the appellant, convinced the magistrate that a pre-sentencing report would assist the Court in sentencing. The magistrate directed him to obtain the report, and the matter was postponed. The State later obtained a probation officer's report, and the defence called Ms Bonita Frans, the social worker who compiled it. Her evidence, findings, and recommendations are summarised below.

### Appellant's Background

[9] At the time of the report, the appellant was 39 years old. He left school to work and has been employed as a farm labourer, construction worker, and at Faircape Dairy. He was previously married with two children; the marriage ended due to personal differences and an age gap. In 2017, he married Estelle September, who had two sons from a previous relationship. Estelle and one of her sons died in the collision.

### Family and Relationships

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<sup>1</sup> Criminal Procedure Act, 51 of 1977.

[10] The appellant described his late wife as the love of his life and has struggled to accept her loss. He regarded Estelle's children as his own and maintained a positive relationship with his mother-in-law, Elizabeth Adams, who confirmed his commitment as a father and his good standing in the community and at work. Estelle's son, Donlan, is under the care of Elizabeth Adams. Donlan considers the appellant his father and does not blame him for the accident, stating he does not want the appellant punished.

#### Impact on the surviving minor child

[11] Donlan, who was six at the time of the accident, experienced significant loss and behavioural changes. He suffered nightmares, sought comfort by sleeping with his grandmother, and imagined his deceased older brother on his tenth birthday. Despite this trauma, Donlan viewed the appellant as an important source of support and continued to consider him his father.

#### Appellant's Remorse

[12] The appellant expressed remorse for the loss of his family members. He acknowledged consuming alcohol but denied any dependency.

#### Recommendation

[13] Ms Frans recommended that the appellant be sentenced in accordance with section 276(1)(h) of the Criminal Procedure Act, which provides for correctional supervision as an alternative to imprisonment.

### **Court a quo judgment on sentence**

[14] The magistrate held that the appellant acted with a high degree of negligence and recklessness, specifically by operating a vehicle without a valid driver's licence following the consumption of alcohol. She found:

a. consumption of liquor by the appellant before driving the vehicle goes to the core of the case (sic!) and was ‘an aggravating fact.

[15] The magistrate stated: 'Driving after consuming liquor is part of a pandemic facing society.' This reflects her view on the broader societal issue of alcohol and driving. However, it is important to assess whether this perspective improperly influenced the sentence, given that these charges were withdrawn and not part of the agreed-upon facts. In sentencing, the evidentiary threshold mandates that only proven facts be weighed as aggravating factors. Therefore, any considerations beyond the accepted plea, including withdrawn charges, should have no bearing on sentencing decisions. This ensures fair practice and upholds the integrity of judicial proceedings. A focus on established facts is essential in preventing undue prejudice against the accused and maintaining the fairness and objectivity expected within the judicial system.

[16] The court sentenced the appellant to eight years' direct imprisonment.

### **GROUND OF APPEAL**

[17] The appellant argues the following alleged errors led to the improper eight-year imprisonment sentence:

- (a) improper consideration of unproven allegations, such as alcohol consumption and driving without a valid license, as aggravating factors, despite these charges being withdrawn and not part of the agreed-upon facts.
- (b) refusal to accept a pre-sentencing correctional report limited the appellant's ability to advocate for alternative sentencing options, like a fine or correctional supervision.
- (c) failure to explore alternatives to direct imprisonment, such as a fine or correctional supervision under section 276(1)(h) of the Criminal Procedure Act.
- (d) mischaracterization of the degree of negligence as reckless, despite the appellant admitting to only ordinary negligence, which the State accepted.
- (e) Imposition of a sentence of direct imprisonment was influenced by inadmissible facts and a misunderstanding of negligence law.

### **ISSUES FOR DETERMINATION**

[18] The issues for determination on this appeal have crystallized to be whether:

- (a) the magistrate materially misdirected herself in sentencing the appellant to eight years' direct imprisonment; and/or
- (b) The sentence imposed is shockingly inappropriate.

### **LAW AND ANALYSIS**



### ***Did the magistrate misdirect herself?***

[19] It is crucial to note from the outset that in section 112<sup>2</sup> plea proceedings, no viva voce evidence is presented. This limitation emphasizes why any additions to the factual narrative by the magistrate are impermissible. It is trite that the Court is bound by the factual terms of the Plea, once it is accepted by the State. The magistrate may not prevent the prosecutor from accepting a plea or influence the factual basis upon which the prosecutor does so; for, until the process is completed, the case remains in the prosecutor's hands. Similarly, the magistrate may not question the prosecutor's exercise of his discretion to withdraw charges or to agree to the terms of a plea acceptable to the State.

[20] There is judicial precedent that supports the limited scope of a magistrate's intervention in such cases. For instance, in *S v Ngubane* 1992 (2) SACR 165 (T), it was established that a magistrate overstepping these boundaries constitutes misdirection and can result in a higher court altering the sentence. Furthermore, *S v Mathebula* 1990 (1) SA 757 (A) reinforces the principle that once a plea agreement is accepted, the confines of the magistrate's discretion become narrowly defined, prohibiting any imposition of facts not expressly agreed upon.

[21] The absence of a driver's licence was also a withdrawn charge and had been specifically denied by the appellant. The State accepted the denial. The magistrate's finding that driving without a valid driver's licence is an aggravating factor was an irregularity and material misdirection and a particularly prejudicial finding. This was wholly unsupported by evidence and suggested that the appellant lacked driving skills.

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<sup>2</sup> Section 112 of the CPA ("section 112").

### ***The importance of the degree of negligence***

[22] In his plea, the appellant established that he denied degrees of negligence beyond ‘ordinary negligence’, which was accepted by the State. According to proven uncontested facts, the appellant's admitted act of negligence was a momentary aversion of his eyes from the road to address his wife. However, the magistrate based her finding of ‘very negligent’ and ‘reckless’, which falls outside the parameters of the charges and the Plea. This fleeting and objectively innocuous act by the appellant has been addressed in our case law. Thus, in *R v Havenga* 1935 CPD (J/C 568/35), this Court held:

‘The worst point made against the accused is ... that he was looking towards, and talking to, his fellow passenger. But an expert motorist, such as this man was, could quite easily carry on a conversation, and even occasionally look at his passenger, without necessarily being negligent.’

[23] And in *Job v Reynolds* 1930 EDL 246:

‘[A witness stated] that the [bus] driver was looking round at the time to speak to the conductor. That alone clearly would be no affirmative proof of negligence. The man driving was on his proper side [of the road], and I do not find it imputed to him that he was driving at an improper pace.’

[24] In this case, the appellant’s lapse was momentary; there is no evidence he focused his attention on the passenger for an extended period. Even if he had, his negligence would have been slight or ordinary.<sup>3</sup> There is no indication of excessive speed or other culpable factors contributing to the accident. The Court’s finding of guilt was not based on speeding, erratic driving, or momentarily looking away, but

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<sup>3</sup> *Roos v Fischer* 1939 OPD 122; *Cooper v Armstrong* 1939 OPD 140.

rather on having consumed alcohol and being unlicensed, neither of which the State pursued. It should also be noted that maintaining a proper lookout does not require constant focus on the road, though this was not the Court's concern.

[25] In the circumstances, it is difficult to conceive how the magistrate could have found on the scant information before her (which she did not seek to expand through section 112 questioning) that the appellant's momentary lapse could constitute recklessness. In *S v Van Zyl* 1969 (1) SA 555 (A) at 560E, the Court, in passing, seemed to distinguish between a driver's momentary inattention (negligence) and inattention which was more than merely momentary, and which the Appellate Division described as 'gross negligence' or 'recklessness'. The appellation of recklessness is reserved by precedent for such matters as overtaking on a blind rise or a double barrier line in the face of oncoming traffic.

### ***Confusing negligence and consequence***

[26] The magistrate seemingly assessed the level of negligence according to the harm caused. Admittedly, this tragic event had huge consequences. But the degree of **negligence** could not be equated with its **consequence** and thereby be converted to recklessness. The law is accessible and clear: the *conduct that is punishable lies in the act of negligence, not in its consequences*. Appellant's *culpability* lies in his act of failing to keep a proper lookout, **not** in the grievous consequences. Thus, in *S v Ngcobo* 1962 (2) SA 333(N) at 336H Miller J (as he then was) said:

'I do not understand the learned Judges of Appeal to have meant or intended, however, that the magnitude of the tragedy resulting from negligence should ever be allowed to obscure the true nature of the accused's crime or culpability. Whatever the result of the negligent act or omission, the fact remains that what the accused person in such a case is guilty of is negligence – the

failure to take reasonable and proper care in given circumstances. His negligence may be slight and yet have the most calamitous consequences... I venture to suggest that the basic measure for determining fit punishment for a negligent motorist must be the degree of his culpability or blameworthiness.’ (Emphasis added.)

### ***The court a quo sentence analysed***

[27] It is evident that the magistrate sentenced the appellant based on the fatal consequences of his ordinary negligence. The loss of three close family members appeared to influence the decision to impose direct imprisonment.

[28] In *R v Mahametza* 1941 AD 83 at 86 (referred to with approval in *Van Zyl (supra)*), it was held as follows:

‘We do not disagree with the view that imprisonment is an appropriate punishment in cases of recklessness if by ‘recklessness’ is meant gross negligence or willful disregard of the rights of other road users, as, for example, in the case of numbers of accidents which are caused by the dangerous practice of ‘cutting in’ or driving round a blind corner on the wrong side of the road or passing another car on the crest of a hill’. (Emphasis added.)

[29] It is apparent that this is not such a case. The appellant’s negligence does not compare to the examples of recklessness cited by the learned Judge. Imposing eight years’ direct imprisonment without proper consideration of alternative sentences is disproportionate to the degree of fault. According to South Africa’s triad of sentencing principles in *S v Zinn* 1969 (2) SA 537 (A), the sentence must balance the crime, the offender, and the interests of society. Applying these principles highlights the excessiveness of the eight-year imprisonment term.

### ***A shocking sentence***

[30] The Court may set aside a sentence if it induces a sense of shock<sup>4</sup> or is clearly inappropriate.<sup>5</sup> In this case, the magistrate made several serious factual errors<sup>6</sup> and misdirections<sup>7</sup> and followed an incorrect approach<sup>8</sup>. Established judicial standards, as set out in *S v Malgas* 2001 (1) SACR 469 (SCA) and *S v Rabie* 1975 (4) SA 855 (A), provide that appellate courts should intervene when a sentence is shockingly inappropriate or manifestly unjust, supporting our decision to do so here.

## CONCLUSION

[31] It is trite that a Court of Appeal will not interfere with a sentence properly and reasonably imposed by a lower Court in the exercise of its discretionary powers, unless it considers the sentence to have been the result of material misdirection on the part of the magistrate, or shockingly inappropriate.

[32] A ‘trial Court should deal during its judgment with correctional supervision as a sentencing option so that it appears clearly that it was *truly considered* as such.’<sup>9</sup> The magistrate did not deal with the probation officer’s report at all but merely paid lip service by stating that she “did not turn a blind eye or a deaf ear” to its contents.

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<sup>4</sup> *S v Whitehead* 1971 (4) SA 613 (A) 618H.

<sup>5</sup> *S v Ivanisevic* 1967 (4) SA 572 (A) 575H).

<sup>6</sup> *S v Abrahams* 1974 (3) SA 660 (A).

<sup>7</sup> *S v Koekemoer* 1973 (1) SA 909 (N) 104.

<sup>8</sup> *R v Erasmus* 1951 (3) SA 535 (E).

<sup>9</sup> Du Toit et al Commentary on the Criminal Procedure Act under the rubric ‘s 276A’ convincingly contend this point.

[33] In her judgment refusing leave to appeal, the magistrate repeatedly stated: ‘the punishment must fit the crime’ and ‘three lives were lost’. This indicates she imposed punishment based on the consequences rather than the degree of culpability. The magistrate appeared focused on imprisonment, without fully considering the facts and applicable law. It is submitted that she did not consider alternatives to direct imprisonment.

[34] This conduct demonstrated a lack of a fair and balanced approach. It is submitted that this amounts to a serious irregularity<sup>10</sup> and a material misdirection. In *S v Smith* 1971 (4) SA 419 (T) 421H, Hiemstra J (Steyn J concurring) stated: ‘Especially where we are not concerned with dishonesty or violence, the imposition of imprisonment must be a matter of high exception. Where there is another way, it ought to be followed rather than to impose a sentence which disrupts family life and conceals industry behind walls.’<sup>11</sup>

[35] In imposing this sentence, the magistrate relied on inadmissible facts, failed to recognise the limits of her discretion under section 112, misunderstood the law of negligence, and disregarded pre-sentencing evidence.

[36] The magistrate was dealing with a first offender and a crime of negligence. In *S v R* 1993 (1) SACR 209 (A), the point was expressly made that a sentence of s 276(1)(h) may be imposed for any offence, including the most serious.

[37] In these circumstances, society expects judicial authority to be exercised judiciously and not arbitrarily. Objective compassion and empathy are not signs of

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<sup>10</sup> *S v Kotze* 1994 (2) SACR 214 (O).

<sup>11</sup> translated from original Afrikaans text borrowed from appellant’s heads of argument.

weakness; rather, showing mercy in deserving cases, as here, strengthens public confidence in the judiciary.

[38] This portion of the judgment raises concerns about the magistrate's understanding and application of legal principles in this case. It is important for judicial conduct to reflect both competence and adherence to legal standards.

[39] Lastly, I thank Counsel for the appellant for their comprehensive heads of argument, which were of considerable assistance and, in part, informed this judgment.

[40] To conclude, and as a result of the reasons discussed *supra*, I find that the magistrate materially misdirected herself by imposing a sentence of eight years' direct imprisonment, which is so shockingly inappropriate.

[41] Going forward, it is essential for magistrates in similar cases to engage thoroughly with sentencing principles, ensuring that punishment is proportionate to the crime and not solely its consequences. Reflective adherence to judicial guidelines will promote fairness and effectiveness in judicial proceedings.

[42] On 22 August 2025, we made the following order, which I consider just and equitable.

1. The Appeal against the sentence is upheld.
2. The Sentence imposed by the Magistrate's Court is set aside and replaced by the following order.

3. The Appellant is sentenced to a period of 12 months' imprisonment, wholly suspended for a period of three (3) years, on condition that the Appellant is not convicted of a similar offence during the suspension period.

4. The sentence is antedated to 26 April 2024.

5. The effect of this Order is that the Appellant is to be released immediately, having served his time.

6. This Order is to be sent directly to the Ladismith Correctional Centre from the date of this Order.

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**P NJOKWENI**

Acting Judge of the High Court

I agree and it is so ordered.

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**D S KUSEVITSKY**

Judge of the High Court

**Appearances**

For the appellant: Advocate John Van Der Berg

Instructed by: Krouwkams Attorneys

For the State: Advocate Susan M Galloway

Instructed by: Director of Public Prosecutions