

43/98

REPORTABLE

Case no : A 1077/96
245/97

**IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

In the matter between :

VICTOR KIBIDO

Appellant

and

THE STATE

Respondent

Coram : Olivier, Scott and Streicher JJA

Date of hearing : 22 May 1998

Date of delivery : 27 May 1998

JUDGMENT

OLIVIER JA

The appellant was convicted in the Athlone Magistrate's Court of contravening s 120(1) of the Road Traffic Act, 29 of 1989, ie reckless driving. He was sentenced to four years imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act, 51 of 1977, two years of which was suspended for five years on certain conditions. In addition his licence was suspended for a period of nine months as from July 1996. He appealed unsuccessfully against the sentence to the Cape High Court. The present appeal, which is against the sentence only, is before us with the leave of the court *a quo*.

The facts from which the charge arose were not placed in issue by the appellant and can be summarised as follows.

- (i) Between Somerset West and Cape Town, the N2 highway is intersected by Vanguard Drive, which connects Goodwood in the north and Mitchell's

Plain in the south. Vanguard Drive crosses the multiple lanes of the N2 highway by means of a traffic bridge. On both the southern and the northern ends of this traffic bridge are off-ramps connecting the N2 to Vanguard Drive. The off-ramps cross over Vanguard Drive at robot controlled intersections.

- (ii) In the early hours of 7 May 1995 Mr Beukes, accompanied by his wife, his daughter aged six, a cousin and his mother-in-law, was driving his car, a Toyota Corolla, along Vanguard Drive from Goodwood to Mitchell's Plain, ie from north to south. As he approached the said traffic bridge, the robots at the intersections on both ends of the bridge were in his favour, ie green. He proceeded across the bridge and entered the intersection at the southern side with the robot still in his favour.
- (iii) The appellant was the driver of a Mazda Kombi. He was accompanied by two passengers, Miss Pamela Dyira and Miss Nosipho Nqonji. He

approached the traffic bridge from the direction of Somerset West, took the southern off-ramp, and entered the southern intersection which had also been entered by Mr Beukes. A collision occurred between the two vehicles.

- (iv) The appellant entered the intersection at a high speed and with the robots against him, i.e. red.
- (v) The appellant was acting as a taxi-driver at the time. He had been driving at a high speed, ignoring speed humps in the road since leaving Kyayelitsha with the said two passengers. They protested in vain against his driving in this fashion. Miss Dyira once had to warn him against colliding with the rear of a vehicle travelling in front of the appellant's vehicle, and he only avoided a collision by an abrupt swerve past it.
- (vi) At one stage the appellant demanded that either of two passengers, who were seated at the back of the Kombi, should come and sit in the front passenger's seat. When they refused, he brought the Kombi to a stop,

apparently in a fit of pique. Miss Dyira persuaded Miss Nqonji to comply with the appellant's demand, and they then proceeded on their way.

- (vii) At one stage, Miss Dyira warned the appellant that he was driving too fast and asked him to be careful. His reply, in Miss Dyira's words (corroborated by Miss Nqonji) was that "... if he likes then he can cause a collision so that we can be killed." Miss Nqonji places this incident as immediately prior to the collision, ie as the Kombi was approaching the intersection. According to her he threatened to kill them.

- (viii) The appellant entered the off-ramp under discussion at a high speed. Despite the robot being red for the appellant, as confirmed by his passengers, he entered the intersection without reducing speed or braking. Miss Dyira saw that a car in Vanguard Drive (Mr Beukes's vehicle) had also entered the intersection and she screamed and drew the appellant's attention to the other car. He did not reply or endeavour to apply the brakes

of the Kombi.

- (ix) As a result of the collision, both vehicles were extensively damaged. The Toyota Corolla of Mr Beukes was written off and in spite of an insurance payment he suffered damage to the sum of R21 000. Mr Beukes and his passengers suffered various injuries. His wife lost consciousness and was removed to hospital by an ambulance. Miss Dyira sustained cuts on the right cheek and thumb, and was, at the time of the trial still suffering from a painful left shoulder and left knee. Miss Nqonji was yet more seriously injured. She lost consciousness as a result of head and leg injuries. At the time of the trial she still suffered from impaired vision. Because of this and the leg injuries she lost her job as a waitress and was, at the time of the trial, unemployed.
- (x) The appellant did not testify either on the merits or the sentence. He is a first offender and is 48 years old. His counsel informed the magistrate that

the appellant was a chauffeur with the Botswana Embassy, the father of four children of whom three were at school, and a responsible person. From the evidence of his two passengers it appears that he had never before driven in a reckless manner.

The magistrate, after a commendably full judgment, concluded that the appellant's recklessness was continuous and that it resulted in severe consequences to his passengers and to Mr Beukes and his passengers. He considered a sentence of direct imprisonment to be appropriate.

Before us it was argued that

- (a) the practical consequences of the sentences are very severe - *inter alia*, the appellant will have to serve at least four months imprisonment; after his release he will be under house arrest and will have to perform community service; he will probably lose his work, and his home and his family will lose his support and maintenance;

- (b) the magistrate committed a misdirection by over-emphasising the seriousness of the offence and under-emphasising the personal circumstances of the appellant and the interests of society; and
- (c) the sentence is excessive, severe and startlingly inappropriate;

On behalf of the respondent it was argued that the continuous reckless and dangerous behaviour of the appellant was a severely aggravating factor, particularly as it was accompanied by a disregard for the lives of others, an arrogant attitude that he could kill them if he wished, and the still more blameworthy expressed threat to kill his passengers.

It must be stated at the outset that the sentence imposed on the appellant is a severe one. But depending on the circumstances, direct imprisonment for the offence of reckless driving can be an appropriate sentence

“... if by ‘recklessness’ is meant gross negligence or a wilful 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." (Centlivres JA in *R v Mahametsa* 1941 AD 83 at 86. See also *S v Potgieter* 1991(2) SACR 135(A) at 138 b-f; *S v Ngcobo* 1990(2) SACR 213(T)).

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).

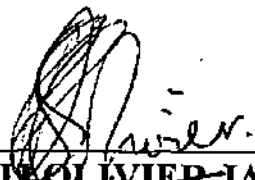
Furthermore, a mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably (see Trollip JA in *S v Pillay, supra*, at 535 E-G).

A close scrutiny of the magistrate's judgment on sentence shows that he took all the relevant factors pertaining to the circumstances under which the offence was committed and the appellant's personal circumstances fully and properly into account. In deciding on the appropriate sentence, he gave weight to all these factors. I am not convinced that he misdirected himself at all, nor that he did not properly or reasonably exercise his discretion. The personal circumstances of the appellant and the direct consequences of the sentence imposed can not and should not be allowed to outweigh the seriousness of the crime and the appellant's

callous disregard for the safety of others. He drove at an excessive speed; he ignored the protestations of his passengers; he deliberately disregarded a red robot, and he arrogantly threatened to kill his passengers by causing a collision - something in which he nearly succeeded.

For the same reasons, it can also not be said that the sentence is startlingly inappropriate. On the contrary, the sentence was a proper one. The criminal conduct in question was of a very serious nature. The sentence is clearly justified by the interests of a society that is faced with escalating carnage on the roads caused in large measure by people driving like the appellant with reckless arrogance.

The appeal is dismissed.


PJ OLIVIER JA

We concur :

Scott JA
Streicher JA