CASE NO.: CA 134/2005

HARRY SIMON vs THE STATE

2007 JULY 9

PARKER, J; MANYARARA, AJ

Criminal law -

Culpable homicide – Appellant's motor vehicle colliding with another motor vehicle resulting in death of three occupants of that other motor vehicle – Appellant convicted of culpable homicide – Magnitude of tragedy not to obscure true nature of culpability being negligent driving – Negligent driving – what amounts to – Factors taken into account in arriving at appropriate sentence – Four years' imprisonment, one-half of it suspended, imposed by lower court appropriate in all the circumstances – State's appeal against sentence and the appellant's appeal against conviction and sentence dismissed.

REPORTABLE **CASE NO. CA 34/2005**

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HARRY SIMON
APPELLANT

and

THE STATE
RESPONDENT

Coram: **PARKER, J; MANYARARA, A.J.**

Heard on: **2007 May 21-22**

Delivered on: **2007 July 9**

APPEAL JUDGMENT:

PARKER, J; MANYARARA, A J:

Introduction

[1] The appellant appeared in the Regional Court at Walvis Bay on one count of culpable homicide, with two alternative charges of reckless and/or negligent driving and inconsiderate driving, and a second count of exceeding the speed limit. He pleaded not guilty.

[2] The court found that there was a duplication of charges in the count of exceeding the speed limit and negligent driving and the trial proceeded in respect of the charge of culpable homicide only. The appellant was convicted on this charge and sentenced to four years' imprisonment of which two years are suspended. He appealed against the conviction and sentence and the State also appealed against the sentence as too lenient. An application to amend the notice of appeal by adding further grounds of appeal was subsequently filed, accompanied by an application for condonation of the late filing of the additional grounds. Ms Rakow for the State did not oppose the application, condonation was granted and the hearing on the merits proceeded.

[3] The appellant has appealed against both the conviction and sentence, and the State against sentence. For the sake of neatness and completeness, this judgment deals with both the appeal by the State and the appeal by the appellant.

The Offence

[4] The particulars of the offence were that upon or about 21 November 2002 at or near the main road between Walvis Bay and Swakopmund at or near Langstrand the accused did unlawfully and negligently kill Ibe de Winter, Frederic de Winter and Michelle De Clerk by driving his vehicle and colliding with the deceaseds' Nissan vehicle.

[5] The particulars of negligence were enumerated as -

- travelling at a speed which was excessive in the circumstances;
- failing to keep a proper lookout in the circumstances;
- failing to stop or act reasonably when an accident or collision seemed imminent; and
- travelling on the wrong side of the road.

[6] The relevant portion of the appellant's statement in terms of section 115(1) of the Criminal Procedure Act 51 of 1977 outlined his defence as follows:

> *"The sole cause of the collision was the wrongful, unlawful and negligent driving of the driver of the said Nissan vehicle who encroached, drove unexpectedly and suddenly into the lane wherein I drove, occasioning the collision."*

[7] It will be seen that the defence defined the issues to be proved by the State as –

(a) Whether the appellant drove negligently and, through his manner of driving, caused the deaths of the deceased; or

(b) Whether the vehicle in which the deceased were traveling suddenly encroached into the appellant's path and, faced with the sudden emergency, the appellant had no opportunity of stopping or otherwise avoiding the collision.

The Law

[8] The elements of culpable homicide are set out in *S v Burger* 1975 (4) SA 877 (A), the head note, as follows:

> "(i) *Culpable homicide is the unlawful, negligent causing of the death of a human being.*
>
> *(ii) Basically there must be some conduct on the part of the accused involving* ***dolus*** *(such as an assault), or* ***culpa*** *(such as an operation by a surgeon without due care, or the driving of a motor vehicle without keeping a proper look-out).*
>
> *(iii) Such conduct must cause the death of the deceased.*

*(iv) In addition there must be **culpa** in the sense that the accused ought reasonably to have foreseen the possibility of death resulting from such conduct. This is because culpable homicide is the unlawful, **negligent** causing of the death of a human being.*

*(v) It follows from the foregoing that causation of death, even as the result of an unlawful act which is criminally punishable, is not of itself sufficient to constitute the crime of culpable homicide. To disregard the additional requisite of the reasonably foreseeable possibility of resultant death, would be to re-instate the doctrine of **versari in re illicita.***

*(vi) If an accused does foresee – as distinct from ought to have foreseen – the possibility of such resultant death and persists in his conduct with indifference to fatal consequence (or if he actually intends to kill) the crime, would be that of murder. Having regard to the requirements of foresight and persistence, the dividing line between (a), murder with **dolus eventualis** and (b), **culpable homicide,** is sometimes rather thin."*

[9] In *S v Muhenje* 1995 NR 133 (HC) Frank J stated the law at 134F as follows:

"(I)t is exactly the negligence or recklessness in the driving of the vehicle which makes the killing unlawful, i.e. which constitutes an essential element of culpable homicide. The test relating to the negligence or recklessness where a vehicle is involved is exactly the same for culpable homicide or for negligent or reckless driving."

And in *Rex v Wells* 1949 (3) SA 88 (A) Centlivres JA defined negligence at 88 as follows:

*"The test as to whether a person was guilty of negligence in any given circumstances is the same in criminal as in civil proceedings, **viz.,** did that person exercise that standard of care and skill which would be observed by the reasonable man? See **Rex v Meiring** (1944, A.D. 41, at p 46) and **Rex v Swanepoel** (1945, A.D. 444, at p 448). It is therefore germane to the present enquiry to refer to civil as well as criminal cases.*

> *As pointed out by Watermeyer, C.J., in **Stride v Reddin** (1944, A.D. 162, at p 172) read with the passage quoted from the judgment of Innes, C.J., in **C**ape **Town Municipality v Paine** (1923, A.D. 207), the question whether in any given situation a reasonable man would have foreseen the possibility of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. See, too, **Cowan v Ballam** (1945, A.D. 81, at pp. 86, 94, 95).*

[10] It seems to us, therefore, that the first stage of the enquiry whether the appellant's conduct in this case is caught by the above principles is a consideration of the evidence of eyewitnesses, by which is meant the evidence of persons who witnessed the occurrence of the accident or were in the vicinity of the scene of the accident at the relevant time. This is also the submission of Mr Sisa Namandje representing the appellant.

The Evidence of Eye witnesses

[11] The State led evidence from four persons who were present at the scene of the accident. These were Melanie Moumiew and her mother Wilhemina Melani, Oneka Alcock and Bertus Coene.

[12] Melanie's evidence is that she was a passenger in the car driven by Wilhemina. When they approached the scene of the accident at Long Beach, the Nissan vehicle traveled just in front of them at a speed she described as 'slowly' approaching the T-junction where the accident happened. She was sending an SMS on her cell phone but as they turned left to enter the overtaking slipway she looked up and saw a vehicle approaching at a great speed, overtake a green vehicle in front of it and immediately thereafter she heard a crash. She said that the green vehicle had to move out of the way to let the speeding vehicle pass.

[13] Wilhemina gave evidence broadly to the same effect as Melanie. She added that as they were approaching the turn off to Langstrand the driver of the Nissan indicated that he was going to turn right to Langstrand and stopped at a slight angle at the T-junction and she passed the Nissan on its left side. She had not returned to the main road to Walvis Bay when she saw (car) lights pass her very fast and she heard the collision. Water splashed through the

back window of their vehicle as well as her window. After the collision, she saw a black vehicle standing in the sand and when she got to the vehicle she saw that it was Harry Simon, the appellant.

[14] Alcock, the passenger in Wilhemina's vehicle, also gave evidence broadly to the same effect as the above witnesses. Her evidence continued as follows:

> *"I saw the indicators of the vehicle, I saw the brake lights before the turn off, the bakkie was standing still and we passed by….I saw oncoming lights. We passed by and the car passed by speeding. The lights were very bright and it made me feel as if the car was coming to us, towards us…because it was so fast."*

[15] Bertus Coene said that he was a passenger in the Nissan and they were on their way to Langstrand. They stopped at the intersection in order to turn to Langstrand. They might have slightly turned but they stopped on their side of the road, i.e. in their lane. In the Nissan were four grown-up persons and three children. He could only remember clearly that he saw one set of (car) lights coming from the Walvis Bay direction and that is where his recollection stopped. He suffered total amnesia after the accident.

[16] Coene said that the Nissan was carrying two roof tents, a 20 litre water tank, a bit of gas weighing between 9 and 10 kg, a table and three chairs; also some luggage and photographic equipment of one of the deceased, Frederic. He estimated the weight of these things at a minimum of 300kg. There was also one spare wheel and "lots of fuel" in the Nissan.

[17] In our view, nothing relevant turns on the quantity or weight of the contents of the Nissan, save the 20 litre water tank because Melanie and Wilhemina spoke of water from the Nissan splashing onto their vehicle.

[18] The appellant did not testify or call any witnesses other than one expert whose evidence will be considered.

The Expert Evidence

[19] The first of the experts called by the State was Johannes Petrus Strydom, by profession a traffic accident analyst of about 27 years' experience, during which period he attended some 1755 traffic accidents and assisted in the reconstruction of 6324 accidents.

[20] He was instructed by Attorneys Wessels and Van Der Merve-Greef to re-construct the accident and his evidence may be summarized as follows:

[20.1] He testified that he visited the scene on 11 December 2003 and identified "the four most important factors" with regard to the analysis and reconstruction of traffic accidents. These were –

a) The final resting positions of the vehicles.

b) The damage to the vehicles, which shows the first contact areas of the vehicles when they collided.

c) The debris found at the scene; and

d) The marks on the road.

He added that it was not necessary to have all four or more of these points to carry out a reconstruction.

[20.2] The witness admitted that it is virtually impossible to pinpoint the exact point of impact – it could be a metre either side of the point identified. The little pieces of vehicle, plastic pieces, etc. which he found at the scene corresponded with and confirmed the police sketch plan indicating the final resting positions of the vehicles. He said that even if he did not have any of the witness statements his conclusions would have been the same

[20.3] It was also Strydom's opinion that the breakage of the cables which the Mercedes went through at the scene of the collision, as well as the force used to take the poles which had been there from the ground before coming to a stop in the sand, indicated

that the speed of the Mercedes was 180 km/h. This was much higher than the speed of 156km/h which he had calculated on the basis of the scratch marks where the police claimed was the place of the impact.

[20.4] Strydom examined the photographs of the vehicles and observed that the Nissan sustained severe damage concentrated to the left side of the vehicle and the left front tyre, with secondary damage all over the body of the vehicle. He observed that contact damage to the Mercedes was concentrated mostly to the right front and mid-centre of the vehicle. The right front area was displaced towards the rear of the vehicle; the right front tyre and rim had sustained severe collision damage and the right front corner of the vehicle was pushed back very far. According to the witness, this showed that the collision was not a straight line of impact but at some sort of angle, and there was no probability that the Nissan had started to turn when the collision occurred.

[20.5] Strydom concluded that the Mercedes must have been in the wrong lane and, in his opinion, the driver misjudged the distance he had to return to his correct lane.

[20.6] He added that when traveling from Walvis Bay to Swakopmund there is a little dip from where one can see the roofs of any vehicles at the intersection to Langstrand from a distance of about 200-220 metres.

[20.7] His opinion was that, assuming that the driver of the Mercedes was observing the speed limit of 80 km/h operating on this stretch of the road, he would have seen the vehicle turning to Langstrand and it would have taken him 69 metres to stop his vehicle 151 metres before the intersection. And if he were traveling at 80 km/h, by the time that the Mercedes reached the intersection the vehicle turning to Langstrand would have been out of the way and cleared the intersection for the Mercedes to pass safely.

[21] Wilma Badenhorst is an accident reconstruction expert, in which capacity she carries

out site inspections, compiles reports on how the collision occurred and gives evidence thereon in court. She was contacted by Dr Ludik of the National Forensic Science Institute of Namibia (NFISI) to do a reconstruction of the accident and she visited the scene during November 2003, accompanied by the investigating officer, Sgt Giovani Boffelli who had drawn the sketch plan produced in the trial.

[22] Her report on the damage to the two vehicles involved in the accident was essentially the same as Strydom's. Referring to photographs, all but one of which were taken by herself, some of the salient points she made may be enumerated as follows:

[22.1] Signs of ground contact or sand were visible on the right hand side of the Mercedes and the left hand side did not show any contact damage.

[22.2] The Nissan was a four wheel drive 3-litre hardbody double cab vehicle. It sustained severe contact damage to its left front. Various vehicle parts such as the bumper bar, engine parts, sheet metal and all parts in that area of the vehicle until the mid front section and the left front wheel were displaced far towards the back of the vehicle. A lot of "induced damage" was also visible to the roof, left hand side of the vehicle and the flap of the load bin which may have been caused by items on the rear of the load bin coming into contact with the inside of the flap.

[22.3] She explained that, at first contact, the force of one vehicle against another vehicle begins to crush parts of the vehicle in the direction of the thrust. Therefore, what one sees after a collision is damage which indicates the direction and extent of penetration at maximum engagement and the areas which have been in contact with each other.

[22.4] In order to get to first contact, one has to rotate the Nissan back relative to the Mercedes and that is why the angle between the two vehicles at first contact is not as large as the angle between them at maximum engagement.

[22.5] From first contact to the point of maximum engagement, the Nissan would have rotated clockwise relative to the Mercedes.

[22.6] There were four lanes at the scene. The most left hand lane of the northbound lanes and the most left hand lane of the southbound lanes were to be excluded as possibilities of where the collision occurred.

[22.7] By her calculation, the momentum of the Mercedes would have been much greater than that of the Nissan; the Mercedes had a velocity component in a northerly as well as westerly direction only and all the momentum and energy came from this vehicle; so the final resting position must then have been also in a generally northerly and westerly direction and the marks on the road surface corresponded with this scenario.

[22.8] According to what the witness described as “the law of conversion of momentum,” the total momentum which existed after the collision must have been present before the collision. By applying a mathematical formula too intricate to summarise, Badenhorst arrived at a speed of 159 km/h for the Mercedes, if the Nissan were stationary. If the Nissan was in motion, it also had a velocity component and then the speed of the Mercedes would have been greater.

[22.9] In Badehorst’s opinion, at maximum engagement, the right rear portion of the Mercedes was still in the south bound lane towards Walvis Bay and this was at maximum engagement - the point where some of the parts and undercarriage of the Mercedes came into contact with the road surface - but this was not the point of first contact.

[22.10] It was also Badenhorst’s opinion that the plea explanation by the appellant that the Nissan suddenly and unexpectedly encroached on the lane of the

oncoming Mercedes cannot be true because the angle between the vehicles was too small for that to have happened. She based her conclusion mainly on the physical evidence she observed, marks on the road surface, the damage to the vehicles, the final resting position of the Nissan where the engine oil soaked in and the distance the vehicle moved.

[23] The expert called by the defence was Rudolph Adriaan Opperman, a registered professional engineer with 16 years' experience in traffic safety. He conducted a site inspection as well as inspection of the vehicles on 2 February 2005, i.e. two years after the inspection commissioned on behalf of the State.

[24] Opperman's testimony may be summarized as follows:

[24.1] Like Strydom and Badenhorst he found that the Principal Direction Of Force (PDOF) on the Nissan must have been from the left front at an angle positioned in the vicinity of the vehicle's left front wheel.

[24.2] But, in his opinion, it was possible that the accident happened in the correct lane of travel of the Mercedes. He based his conclusion on the place at which the gouge marks were found, which, according to him, is one of the best indicators of the point of impact when two vehicles collide head on.

[24.3] Since the analysis of the damage to the two vehicles indicates that the PDOF to the Mercedes is at an angle from the right hand side of the Mercedes, it followed that the Nissan could not have been stationary at the time of the impact but must have been moving "from right to left" in front of the Mercedes.

[24.4] The probable speed of the Nissan when negotiating the turn could have been not less than 20 km/h when one looks at the damage and the PDOF.

[24.5] He found it a serious collision and that the damage was substantial, although he is of the opinion that the speed (of the Mercedes) is not as high has been calculated.

[24.6] He said that his "gut feeling" was that if the collision was with a car traveling at a speed of 80km/h the Nissan would not have been propelled for the distance of about 34m, therefore the speed "was probably more than 80."

[24.7] When he visited the scene, the marks were no longer on the road. He only relied on the police report and sketch plan, the photographs provided and information he received from the appellant. He talked to Mr E Helmel who was a passenger in the Mercedes on the same day that he visited the site.

Helmel was not called to testify.

The Issues

[25] Mr Sisa Namandje submitted in the first place that the magistrate's judgment is "vague" especially on the point of impact, the final resting positions of the vehicles and whether in arriving at the verdict he relied on the evidence of Strydom and Badenhorst.

[26] He submitted in the second place that, in any event, the evidence of all three experts should be disregarded because it is hearsay based on information provided by persons who were not called to testify.

[27] Ms Rakow for the State did not want the evidence of the experts to be disregarded, arguing that the evidence was part of the account of the events under consideration.

[28] We are inclined to go along with Ms Rakow because an essential aspect of the experts' reports covers matters which they perceived with their own senses and drew inferences therefrom and, to that extent, their evidence cannot be regarded as hearsay.

[29] When the Court pressed Mr Sisa Namandje to explain his contention, he submitted that "there are parts (of the expert evidence) which are not hearsay" but these should also be disregarded. In his opinion, only the evidence of Giovanni Boffelli, the investigating officer, should have been accepted because he testified. He cited *AA Onderlinge Assurance-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A), a judgment reported in the Afrikaans language. The English head note states that the evidence of an experienced policeman is usually admitted as *prima facie* proof if the point of the collision is placed in issue. (Emphasis added).

[30] Speaking without the advantage of a translation of the whole judgment, our understanding of the head note is that the court has a discretion to accept such evidence if it considers that the evidence will be of assistance to the court in arriving at its decision on the point in issue. Therefore this case does not add anything to Mr Sisa Namandje's argument.

[31] Be that as it may, when the Court finally remarked that we were "running in circles," we understood Mr Sisa Namandje's ultimate submission to be that, in any event, any doubt should be resolved in favour of the appellant "if the circumstances and evidence is so entangled up (sic) and it is very difficult for the court although it has a suspicion that the appellant could have driven negligently."

[32] We propose to show in due course that the submission is an oversimplification of the issues.

[33] Regarding the rest of the evidence, Mr Sisa Namandje submitted that Melanie was a single witness and the cardinal principle is that a court should only rely on such evidence when the evidence is clear and satisfactory in every material respect within the totality of the evidence produced at the trial. (Section 208 of the Criminal Procedure Act 51 of 1977 read with *Rex v Mokoena* 1932 OPD 79).

[34] However, Mr Sisa Namandje proceeded to narrow his submission down to the issue of Melanie's evidence that, immediately before the collision, the appellant's vehicle overtook a green vehicle. He referred to the apparent contradiction between the statement she made to the police on 7 November 2002 and that of 16 June 2003 and argued that it was wrong for the magistrate to return "a finding of fact particularly on the fact that the appellant's vehicle overtook a green vehicle."

[35] The submission is unfounded. In our view, the material issue is certainly not the colour of the vehicle (if there was such a vehicle) which the appellant's vehicle allegedly overtook before colliding with the Nissan. Surely, the material issue must be whether there was a vehicle, whatever its colour. It was suggested that the area was lit and one could make out the colour of the vehicle in question but, in my view, the point is colourless and may be safely disregarded.

[36] What is also material is that Wilhemina testified to seeing "lights pass by me very fast and I heard an impact." Alcock said the same and so did Coene. The presence of a vehicle in front of the Mercedes is also implicit in Strydom's evidence that, before the collision, the Mercedes must have been in the wrong lane and "the driver misjudged his distance he had to return to his correct lane."

[37] Melanie was pressed in cross-examination to explain the conflict in the two statements she made to the police. Her explanation was that she made the first statement while she was labouring under the shock of the sight and sound of a crying baby and the dead or injured victims of the accident; that the shock had gone or reduced during her second visit and that was how she remembered details which she had omitted from her first statement.

[38] We believe that an answer given in cross examination is final and that puts the matter at an end.

[39] Therefore, while it is true that none of these other witnesses mentioned the colour of the vehicle in question, that alone is a discrepancy which is patently immaterial and inconsequential. See *Mokoena, supra*. The discrepancy cannot convert Melanie into a single witness on the presence of a vehicle when the evidence of two other witnesses riding with Melanie is also that there was some vehicle in front of them, which the appellant's vehicle overtook at great speed before colliding with the Nissan.

[40] We believe that the cautionary rule on single witnesses is applicable to the whole or a material portion of the witness' evidence. We have not come across application of the rule to an immaterial piece of evidence in a witness' testimony when the rest of the witness' testimony is clear and corroborated by other evidence led in the proceedings. Therefore, we reject Mr Sisa Namandje's submission as unmeritorious.

[41] Mr Sisa Namandje persisted in his submission that Melanie's evidence was "in large measure vague, inconsistent and contradictory in many material respects. She was just not sure of almost every aspect she testified on." He referred to her admission that, "after they overtook the (Nissan), she could not see what was going on behind her and could not confirm whether the (Nissan) was, after they passed it, stationary or moving (sic)."

[42] However, it was also Mr Sisa Namandje's submission, that Melanie said under cross - examination that the reason she came to conclude that the appellant's vehicle was not in its correct lane was because she felt that the vehicle was very close to their vehicle. We do not see any vagueness in that testimony but a serious attempt by a lay person under unrelenting cross-examination to describe how she came to the conclusion criticized by Mr Sisa Namandje.

The Regional Magistrate's Judgment

[43] As already stated, for the purpose of his judgment, the Regional Magistrate considered only the charge of culpable homicide whose elements have already been quoted from *S v Burger, supra*.

[44] After evaluating the evidence of Melanie, Wilhemina and Alcock, the magistrate found that the only conclusion he could come to is that immediately - being a second or so - before the impact the Nissan was stationary in its correct lane indicating its intention to turn off into the Langstrand road.

[45] Turning to the experts, the magistrate observed that some classes of experts are called by litigants in law suits to strengthen their point and their case. However, he said that he got the impression that Badenhorst who was called by the State was in fact "very conservative with her calculations, always calculating not to unnecessarily give the impression that the driver of the Mercedes was wrong."

[46] That remark seems to us to be an acknowledgement of the likely bias or interest of

certain expert witnesses suggested by Mr Sisa Namandje. It must therefore be assumed that the magistrate approached carefully all the expert evidence presented at the trial with this caveat in mind.

[47] The magistrate inspected the photographs produced in the trial and came to his conclusion that “even a layman” would come to the conclusion that the Mercedes was traveling very fast.

[48] It was not disputed that there is a double barrier line on the Walvis Bay side of the road for about 450 metres up to the scene of the crash, which prohibited overtaking and served to protect vehicles turning into Langstrand and that the speed limit on that stretch of the road was 80 km/h. In the result, the magistrate was of the view which he expressed as follows:

> *"…..logic dictates that, under all the circumstances, the vehicle driven by the appellant was driven 'in a total(ly) excessive speed' and that 160 km/h is by no means an unrealistic calculation or opinion of what the actual speed was."*

[49] Mr Sisa Namandje pursued his argument as follows:

> *"While it may be accepted that there were witnesses that may have witnessed some events seconds and/or minutes before the collision….in the final analysis, there were no eye witnesses called by the State who could have testified positively and credibly on the collision at the material time…..the Learned Magistrate merely preferred the evidence of the State's expert witnesses and adopted their conclusions without following the relevant approach in our law in assessing expert evidence and wrongly convicted the appellant when the evidence presented by the state was insufficient to prove the criminal allegations on the charge of culpable homicide beyond reasonable doubt as required....*
>
> *Even if the two state experts were correct that the probable point of impact*

> *was on the appellant's wrong side of the road, that in itself is not enough to prove beyond reasonable doubt that he was negligent."*

Mr Sisa Namandje cited *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (E), among the other authorities on the point.

[50] Ms Rakow did not seem to have any problem with *Kenny* or the rest of the authorities cited. Instead, she drew attention to a case which we believe puts *Kenny* in its proper perspective - *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E).

[51] Briefly, *Kenny* says that an expert's opinion can persuade the Court to the expert's view where direct evidence is unsatisfactory and *Menday* elaborates the point as follows:

> "*In essence the function of an expert witness is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable."*

In other words, these authorities are not contradictory; they actually complement each other.

[52] The special skills, training and experience of the experts who testified have been set out and the magistrate gave his reasons for preferring the opinions of Strydom and Badenhorst over Opperman's opinion.

[53] The magistrate said that he found the opinion of Opperman as to the point of impact "a bit forced" (we believe he meant "strained") as against the evidence of the four state witnesses who testified that the Nissan was standing in its correct lane "the very moment before the impact." Contrary to Opperman's opinion that the Nissan was negotiating a turn at a speed of "not less than 20 km/h," the magistrate concluded that if the Nissan had turned as suggested by Opperman, it would have ended in the lane of the vehicle that was coming out of Langstrand. That was the magistrate's finding, based on the opinions expressed by all three experts who testified.

[54] More importantly, that the magistrate was alive to the crisp issue to be decided is evident from his judgment, in which he opined as follows:

> *"The defence of the accused was clear. He was traveling in his (correct) driving lane when suddenly the other vehicle involved in the accident encroached and he had no opportunity under that sudden emergency circumstances to avoid the collision."*

[55] The cardinal principle of "proof beyond reasonable doubt" which Mr Sisa Namandje repeatedly urged this Court to go by was explained lucidly by Denning J (as he then was) in the learned Judge's celebrated judgment in *Miller v Minister of Pensions [1947] 2 All ER 372 at 373* as follows:

> "*It (the proof) need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."*
> (Emphasis added)

[56] Without wishing to derogate from the authority of the generality of the principles enunciated in *Rex v Dhlumayo and Another* 1948 (2) SA 677 (AD), on the principles which should guide an appellate court in an appeal purely on fact as a whole, we would single out the following at p 706 as the principles most applicable to the present appeal:

> *"8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.*
>
> *9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it…*

12. An appellate court should not seek anxiously to discover reasons adverse to the conclusion of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered."

[57] That the magistrate based his decision essentially on fact is evident from the relevant portion of his judgment, which we would quote *in extenso* to illustrate our point as follows:

"I accept especially her (Badenhorst's) conclusion and that of Strydom that the gouge marks cannot be regarded as the point of impact. I say so because of the speed of the Mercedes. That, to my mind, must have been also according to the Experts, in the vicinity of not less than 160kph. Even a layman can come to that conclusion having regard to the damage to the vehicles, both the vehicles and of course, the distance these vehicles proceeded after the impact. The Nissan vehicle was flung back for about 40 metres, that is a considerable distance. So too, did the Mercedes proceeded for another 35/34 metres, part of that was traversed in thick sand and I think logic calls on us to accept under those circumstances that the vehicle driven by the Accused was driven at a total excessive speed, 160kph is by no means an unrealistic calculation or opinion as to what actually the speed was. Driving under those circumstances, ignoring a double-barrier line, driving at a speed of 160kph during night time places not only the driver and the passengers of the Mercedes under extreme dangerous conditions but also any other road user".

[58] From our reading of the judgment, we would find as follows:

Frst, both counsel are agreed that the law is correctly stated in *S v Gouws* 1967(4) SA 527 (ECD) at 528 as follows:

"The prime function of an expert seems to me to be to guide the court to a

> *correct decision on questions falling within his specialised field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried." Per Kotze J.*

[59] We have not found any reason to doubt that the magistrate was aware that the function of the experts who testified before him was to indicate how, in their opinion, the accident happened and then draw his own conclusion from the totality of the evidence before him.

[60] Second, the magistrate carefully considered the evidence of the persons in the vicinity of the accident - Melanie, Wilhemina, Alcock and Coene – and found their evidence to be credible. In his view, these witnesses were well placed to witness how the accident happened and the fact that water from the Nissan splashed on their vehicle (which was not disputed) was a strong indication that they were not far from the point of impact as testified to by Strydom and Badenhorst.

[61] Third, the magistrate gave his reasons, which need not be recounted, for accepting the conclusion to which Strydom and Badenhorst came, that the point of impact was in the Nissan's correct lane and the Nissan was slightly turned. Melanie and Wilhemina also said that when they passed the Nissan was stationary and slightly turned. This was also the evidence of Coene.

[62] Fourth, Sgt Boffelli's photograph depicting the final resting position of the vehicles as the gouge marks on the road was not disputed but actually accepted by the defence expert. Boffelli saw some debris and oil slick or spill at this spot on the morning after the collision. He was not cross-examined about the spill and the point has only become an issue in the appeal, which is impermissible.

[63] Fifth, while it is correct that the magistrate preferred the evidence of the experts called by the State to that of the expert called by the defence on the probable speed of the Mercedes when it collided with the Nissan, the magistrate was also careful to point out that Opperman, the expert called by the defence, conceded under cross examination that the speed of the

Mercedes might have been up to 160 km/h.

[64] Sixth, we have been told (and it was not denied) that if the appellant had been traveling within the legal speed of 80 km/h on that stretch of the road (which he was not) he would not only have been able to see the lights of the Nissan approaching or standing at the Langstrand turn off from a distance of about 200 metres, he would have been able to stop his vehicle within a distance of 69 metres, with about 150 metres to spare before reaching the intersection. This was not controverted.

[65] Seventh, the magistrate referred to the experts' estimation of the stopping distances of a car traveling at various speeds and concluded that it was evident that at the speed of 160 km/h attributed to the appellant he would not have been able to "bring his vehicle to a standstill within seconds after he noticed some…obstacle or danger in his way." This estimation was not disputed.

[66] Eighth, by the unchallenged evidence led in the trial, the State satisfactorily disproved the appellant's defence that the Nissan suddenly encroached on the appellant's lane of travel and proved the elements of negligence constituting the offence of culpable homicide beyond reasonable doubt. See S *v Burger* and *S v Muhenje, supra.*

[67] Finally, while no onus rests on an accused to prove his innocence, he still has an evidential onus on a charge of negligent driving if he puts forward the defence that he acted in the face of a sudden emergency. In civil claims the defendant's failure to call the driver of a motor vehicle to testify may play an important, if not decisive, role in the determination of liability. (See *Galante v Dickinson 1950(2) SA 460 (A) at 465.)* We see no good reason why the underlying principle, referred to as the "*Galante rule"*, cannot apply with equal force in criminal proceedings. In this regard, the appellant did himself an immense disservice by making a bold assertion that he acted in the face of a sudden emergency and then electing not to testify or call the witnesses he had alleged would come and support his version. It was at his peril that the appellant adopted this course because it left it to the State to disprove his defence, which the State succeeded in doing beyond reasonable doubt as defined in *Miller's case, supra*. See *Ntsala and Others v Mutual and Federal Insurance Co. Ltd 1996(2) SA 184 (TPD) at 190F and S v Dhlumayo, supra, at 706.*

[68] In the result, we would hold that the magistrate had a firm basis for the verdict which he pronounced as follows:

> "*The question before the Court is whether the Accused acted in a reasonable way by driving in that fashion. To my mind, no reasonable person would have done such a thing...*

This was wilful disregard of not only the rules of the road but it was also a wilful disregard for other people's lives and property. Under these circumstances I'm convinced that the conclusion, that the final conclusion that the Court must come to is that the driver of the Mercedes, the Accused person, was solely responsible for this accident that caused the death(s) of three (3) persons. He is accordingly convicted of the crime of culpable homicide."

[69] Mr Sisa Namandje took issue with the use of the word "wilful" in the verdict but it is obvious that the term is not used as an element of the offence because the offence with which the appellant was charged is culpable homicide as defined by the authorities cited and it is that offence of which the magistrate convicted him. Therefore, nothing turns on the use of the term by the magistrate in pronouncing his verdict. See *S v Ngcobo* 1962 (2) SA 333 (NPD), a decision on sentence for culpable homicide which proceeds in part as follows:

> "*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 the circumstances."* At 336H.

[70] In sum, the magistrate believed that the Mercedes was traveling very fast and overtook another vehicle before it crashed into the Nissan. He found corroboration for Melanie's evidence in the evidence of Wilhemina, Alcock and Coene and support for the State version in the reports of the experts before the court.

[71] These are findings of fact with which this Court cannot interfere without offending the principles so clearly enunciated in *Dhlumayo, supra,* a step which the Regional Magistrate's judgment has not given this Court any valid reason to take. Therefore, the appeal against conviction is dismissed.

Sentence

[72] We now proceed to consider the appeals against sentence. As Mrs Rakow correctly submitted, the upshot of both appeals on sentence is that it is common cause that the learned

regional magistrate was wrong as far as the sentence was concerned. The appellant's contention is basically that the punishment imposed was severe; and the State's contention is that the sentence was lenient. Mrs Rakow and Mr. Namandje made helpful submissions in support of their contentions.

[73] The gravamen of Mrs Rakow's submission is that although the learned regional magistrate stressed the recklessness of the conduct of the appellant and his wanton disregard for the lives of other users of the road and the rules of the road, he gave the appellant a punishment of "two years effectively." Mrs Rakow compared the sentence with some penalties under the Road Traffic and Transport Act, 1999 (Act 22 of 1999) to show that the sentence that was imposed was lesser than the maximum penalties that persons convicted of minor traffic offences are liable to in terms of that Act.

[74] For instance, Mrs Rakow submitted, in terms of s. 80 (1), read with s. 106 (6), the maximum penalty for reckless driving is a fine of N$8,000.00 or two years' imprisonment or both, and for negligent driving N$4,000.00 or one year's imprisonment or both. And in terms of s. 78 (1), read with, s. 106 (2), the maximum penalty for a motorist involved in an accident who fails to stop immediately, ascertain the nature and extent of any injury sustained by any person, render any assistance, or report the accident within 24 hours is N$12,000.00 or three years' imprisonment or both. In our view, the comparison, with respect, is rather unfair. Those are maximum penalties: a court may impose a sentence that is far less than the maximum penalty in a particular case. She also submitted that at times persons convicted of culpable homicide not arising from negligent driving have received up to six years'

imprisonment. That may be so; again, on the facts and depending upon the circumstances of the particular case, lesser punishments have been meted out to such offenders.

[76] Mrs Rakow buttressed her submission with authorities, which we have consulted. She stressed the case of *Hans Wilbard Hauwanga v The State* (Case No.: CA 72/06 (HC) (Unreported)) to persuade the Court that the sentence imposed in the present case was inappropriate. In *Hauwanga* the accused person was convicted of culpable homicide arising from his "highly negligent" driving and sentenced to four years' imprisonment, of which two years were suspended for five years on condition that he was not convicted of an offence involving the negligent driving of a motor vehicle, committed during the period of suspension. In that case the accused pleaded guilty. But, according to Mrs Rakow, in the present case the appellant's conduct was found to be reckless and he did not plead guilty; neither did he show remorse.

[78] With the greatest deference, we fail to see how the *Van der Merwe* (*S v Van der Merwe* 1994 NR 379 at 383D-E) categorization of culpability into "reckless actions", "highly negligent actions", and "negligent actions" relied on by the Court in *Hauwanga* comes into the equation in the present case. In my view, in motor vehicle collisions the major forms of culpability are "recklessness" or "negligence" (see e.g. s.80 (1) of the Road Traffic and Transport Act, 1999 (Act 22 of 1999); and in the present case the appellant's culpability is negligence. It seems to us that to rely on whether the appellant's conduct amounts to a "reckless action", "highly negligent action" or "negligent action" for purposes of sentencing is, with the greatest respect, highly artificial. Indeed, "recklessness" and "gross negligence" ("highly negligent") may be used synonymously. (*Rex v Mahametsa* 1941 AD 83 at 86) Besides, the accused person's negligence may be slight and yet wreak calamitous consequences, or it may be gross and yet be almost providentially harmless in the result. (S *v Ngcobo* 1962 (2) SA 333 (N) at 336H-337A) In such a case, any attempt to attach the *Van der Merwe* labels will not only be absurd but impracticable.

[79] In our opinion, the extent of the tragedy resulting from the negligence of the appellant should not be allowed to obscure the true nature of the crime with which he has been charged, culpable homicide. Thus,

whatever the result of the negligent act, the fact remains that what the appellant was charged with and convicted was culpable homicide, which in relation to the fatal collision, is the *negligent* killing of the three occupants of the Nissan: it is the failure to exercise that care and skill in the circumstances, which would be observed by a reasonable motorist. (See *R v Wells* 1949 (3) SA 83.) It follows that in our opinion the sentence must be for culpable homicide arising from *negligent* driving, not "reckless" or "highly negligent" driving.

[80] The substance of Mr. Namandje's submission is that the magistrate's judgment on sentence contained certain errors and misdirections, which justify interference by this Court. In this connection, Mr. Namandje raised six points in support of his contention. He submitted that the learned regional magistrate failed to take into account adequately the personal circumstances of the appellant. We agree with Mrs. Rakow that the learned regional magistrate did consider the personal circumstances of the appellant that were placed before him: those that he did not consider were not raised in the court below. We, therefore, do not think there is any merit in Mr. Namandje's submission.

[81] Mr. Namandje submitted further that the learned regional magistrate over-emphasized the seriousness of the offence and the interest of society. It cannot be gainsaid that in cases of sentencing, where different and competing factors jostle for treatment, it is necessary to strike a balance which will do justice to both the accused person and the interests of society. In our view, in the present case, the learned regional magistrate did consider the personal circumstances of the appellant and balanced them with the seriousness of the offence and came to the conclusion that those circumstances could not be compared to the loss of human life – three human lives.

[82] It has been held that if the consequence of the accused person's negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed. (*S v Nxumalo* 1982 (3) SA 856 at 861H) We also think it was within the discretion of the learned regional magistrate to take into account the seriousness of the offence and the fact that it was prevalent in the district of the court below. In *R v Motlagomang and Others* 1958 (1) SA 626 at 628G), Innes, CJ approved the principle in *R v Mapumulo and Others* 1920 AD 56 at 57 that the imposition of sentence was pre-eminently a matter for the discretion of the trial court, and it is that court which can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate court.

[83] Mr. Namandje also took issue with the learned regional magistrate's use of the adjective "wilful" to describe the conduct of the appellant when he was only charged with, and convicted of, culpable homicide. He submitted, therefore, that "the learned regional magistrate misdirected himself in sentencing the appellant on the basis that the appellant's conduct was wilful as opposed to negligent." Mrs Rakow's counter argument was that the appellant was charged with culpable homicide not murder, and he was found guilty of culpable homicide. So for her, the submission that the appellant was sentenced on the basis of a wilful conduct is not well founded. We think the word "wilful" was attractive to the learned regional magistrate because it appears in the case of *Mahametsa, supra*, which he referred to in his judgment. The use of the word may be unfortunate but we are not persuaded that the learned regional magistrate sentenced the appellant on the basis that he committed the offence with *dolus*.

[84] Under s. 304 (2) (c) (ii) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), this Court can confirm, alter or set aside the sentence imposed by the lower court; and under s. 309, it can increase the sentence or impose any other form of sentence in lieu of or in addition to such sentence. Thus, in the present appeal, this Court can increase the sentence, as prayed by the State; or it can reduce the sentence or alter it, as prayed by the appellant.

[85] But, we think, as Centlivres, JA counselled in *Mahametsa*, *supra* at 86, we should be slow in doing the bidding of either the State or the appellant, unless if there are exceptional circumstances, e.g. as where the interests of justice require it. And it is a settled rule of practice that punishment falls within the ambit of the discretion of the trial court: the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection. (*S v Tjiho*1991 NR 361 at 366; *S v Ndikwetepo and Others*1993 NR 319 at 322G.) Another test applied by an appellate court is whether the sentence is so manifestly excessive that it induces a sense of shock in the mind of the appellate court. (*S v Giannoulis*1975 (4) SA 867 at 868; *Ndikwetepo*, *supra*, at 322J-323C.) In deciding whether a sentence is manifestly excessive, this Court ought to be guided mainly by the sentence sanctioned by statute, if applicable, or sentences imposed by this Court in similar cases; of course, due regard being had to factual differences. (*S v Ndhlovu and Another* 1971 (1) SA 27 (RA) at 31B-C)

[86] It appears to us that in the present case in determining an appropriate sentence the Court must have regard to the degree of culpability or blameworthiness exhibited by the appellant in committing the "negligent act" for which he was convicted. And in doing so, the court ought to take into account the appellant's unreasonable conduct in the circumstances, foreseeability of the consequences of his negligence and the consequences of his negligent act. (S *v Nxumalo*, *supra* at 861G-H) Indeed, the community expects that a serious offence will be punished, but also expects at the same time that mitigating circumstances must be taken into account and the accused person's particular position deserves thorough consideration: that is sentencing according to the demands of our time. (*S v Van Rooyen and Another*1992 NR 165 at 188E-F, approving *S v Holder*1979 (2) SA 70 (A) at 72)

[87] As to the sentence itself, this is one of four years' imprisonment without the option of fine, two years of which were suspended for five years on the conditions referred to previously. In response to the appellant's amended notice of appeal, the learned regional magistrate stated that in his "opinion the sentence can be regarded as lenient and that a more severe punishment would be justified in the light of the appellant's wilful disregard of the

rules of the road." We have already commented on the learned regional magistrate's use of the word "wilful" in his judgment: as we have said, the appellant was charged and convicted of culpable homicide arising from negligent driving of a motor vehicle.

[88] Taking into account the evidence and the principles of law considered above, we do not think the sentence of direct imprisonment of four years is lenient for culpable homicide resulting from the negligent driving of a motor vehicle; neither does it induce in us a sense of shock as being harsh.

[89] In *S v Chretien* 1979 (4) SA 871 (D), the accused drove his motor vehicle into a group of persons who were gathered in the street and of whose presence he was aware. One person was killed and one was injured. The accused was sentenced to three-and-a-half years' imprisonment. In *S v Ngcobo, supra*, the accused person ploughed into a crowd with his motor vehicle, killing four people and injuring 24. A sentence of three years' imprisonment was reduced on appeal by the suspension of one year of the sentence on the usual conditions. And in *S v Van der Merwe, supra,* the accused person drove at speed, striking and killing the deceased whom he had just dropped off. The sentence of 18 months' imprisonment imposed by the Court *a quo* was altered to the extent that nine months were suspended for four years on the usual conditions.

[90] On suspended sentence this Court, in *S v Goroseb* 1990 NR 308 at 309H, accepted the principle enunciated in *Persadh v R* 1944 NPD 357, which has been adopted in a number of cases (e.g. *Angula Immanuel Kashamene v The State*Case No.: CA 42/2005 (HC) (Unreported)); we also adopt it because in our view it is sound. In *Persadh v R*, the learned magistrate had stated in the reasons for his decision that a fine or suspended sentence would not have punitive, reformative or deterrent effect. The Court rejected the learned magistrate's approach thus:

"*In the ordinary way it (suspended sentence) has two beneficial effects. It prevents the*

> *offender from going to gaol …. The second effect of a suspended sentence, to my mind, is a matter of very great importance. The man has the sentence hanging over him. If he behaves himself he will not have to serve it. On the other hand, if he does not behave himself, he will have to serve it. That there is a very deterrent effect cannot be doubted."* (*Persadh*, *supra*, at 358)

Of course, as we have said previously, every case ought to be adjudged on its own particular facts and circumstances.

[91] We, have taken into account the following aspects, namely, the principles and approaches referred to above and all the relevant factors, which in our view the learned regional magistrate also took into account, including the gravity of the offence, the calamitous consequences, the need to deter negligent driving on our public roads, the personal circumstances of the appellant and the general pattern of sentences imposed in similar cases. Having done so, we are of the opinion that we must not interfere with the sentence imposed by the lower court: the sentence is appropriate because it does justice to both the appellant and the interests of society.

[92] In the result, we make the following orders:

(1) The appellant's appeal against conviction and sentence is dismissed.

(2) The State's appeal against sentence is dismissed.

(3) The appellant's bail is revoked.

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PARKER, J **MANYARARA, AJ**

ON BEHALF OF THE APPELLANT: **MR. S NAMANDJE**

Instructed by: **Sisa Namandje & Company**

ON BEHALF OF HE STATE: **MRS E. RAKOW**

Instructed by: **The Office of the Prosecutor-General**