IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A378/2013

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

2014/10/08 ....
DATE SIGNATURE

In the matter between:

KATLEGO M MAAROHANYE **First Appellant**

THEMBA TSHABALALA **Second Appellant**

AND

THE STATE **Respondent**

Heard: **11 June 2014**

Delivered: **8 October 2014**

Summary:

Appeal against murder conviction and sentence – Murder - Mens rea - Dolus eventualis - Motor vehicle accident - appellants racing with one another – both lost control and caused an accident – fatally injured 4 school children - 2 others maimed for life – trial court found there was influence of drugs – also that dolus eventualis was proven – convicted of murder and attempted murder – 25 years effective sentence imposed
On appeal – dolus eventualis discussed – influence of drugs finding irreconcilable with dolus eventualis – culpable homicide appropriate conviction – appeal upheld — Sentence of 10 years imposed.

JUDGMENT

THE COURT

Introduction:

[1] The appellants were convicted in the Regional Court, Protea[1] in Soweto (the Trial Court) on four counts of murder; two counts of attempted murder; a contravention of section 4(b) of the Drugs and Drug Trafficking Act[2] in that the appellants were in possession of a dependence producing substance after traces of cocaine were found in their urine; a contravention of section 65(1)(a)[3] of the National Road Traffic Act[4] in that they drove their vehicles whilst under the influence of drugs having a narcotic effect and lastly, of a contravention of regulation 317(2)[5] of the National Road Traffic Act in that they were involved in racing on a public road without the consent of the appropriate authorities. The appellants were acquitted on a charge of failing to stop after an accident in order to ascertain the nature and extent of injuries arising from the collision. They were legally represented throughout their trial.

[2] All the charges arise from a single incident which took place on 8 March 2010 in Mdlalose Street, Soweto. The appellants were respectively the drivers of their two Mini Cooper vehicles and whilst driving these vehicles in Mdlalose Street, they caused a collision which resulted in the death of four school children and in serious injuries to two others. These school children were all pedestrians on the road and on their way to their homes having finished with school business for the day.

[3] In charging the appellants the State alleged that they acted in furtherance of a common purpose to race against each other. This allegation brought the appellants within the ambit of

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[1] Before Regional Court Magistrate Mr B Nemavhidi
[2] Act No 140 of 1992
[3] This section provides- "(1) No person shall on a public road-
(a) drive a vehicle;
while under the influence of intoxicating liquor or a drug having a narcotic effect….."
[4] Act No 93 of 1996
[5] This section provides – "(2) No person shall organize or take part in any race or sport on a public road, unless the prior written consent of the MEC of the province concerned has been obtained or, where the race or sport will take place wholly within the area of jurisdiction of a local authority, the prior written consent of such local authority has been obtained…."

section 51(1) of The Criminal Law Amendment Act[6], which would have obliged the court to sentence the appellants, if convicted on these charges, to life imprisonment unless substantial and compelling circumstances existed which would have led to the imposition of a lesser sentence.

[4] The trial court found that the appellants were racing each other on the day of the collision. That court also found that on the day in question they were under a sense of euphoria and superiority which influenced them to drive their vehicles without due regard for the safety of other road users. The court further found that this sense of euphoria was induced by the intake of drugs by the appellants before they engaged in the race. The trial court went on to find that one of the appellants lost control of his vehicle and collided with the vehicle driven by the other appellant which resulted in the two vehicles getting out of control and veering off the road eventually ploughing into the school children who were walking on the pavement.

[5] The trial court convicted the appellants of all charges, save for the charge of failing to stop after an accident as stated above. The appellants were sentenced as follows:

1. The four murder counts were taken together for purposes of sentence and a sentence of imprisonment of twenty years was imposed in respect of these counts.
2. The two counts of attempted murder were also taken together for purposes of sentence and a sentence of four years imprisonment was imposed in respect of these charges.
3. A sentence of imprisonment of one year was imposed on each of the three charges of possession of a dependence producing drug, driving whilst under the influence of drugs having a narcotic effect and unlawful racing, but these were ordered to run concurrently.

[6] Act No 105 of 1997

[6] The effect of the sentences imposed meant that the appellants were to serve an effective sentence of twenty-five years imprisonment. The appellants applied for leave to appeal against their convictions and sentences, but the trial court refused to grant them such leave which leave was granted by this court. The appeal served before three judges instead of two after the Judge President issued a directive that the appeal be heard by a full court.

[7] Counsel for the first appellant[7] conceded at the outset, that the trial court was correct when accepting the evidence of the state witnesses in preference to that of the two appellants. It was furthermore conceded, during argument by counsel that the first appellant had indeed been under the influence of drugs during the time of the incident. He argued nevertheless that the murder and attempted murder convictions as well as the other convictions and sentences should be set aside. He submitted that when applying the law to the facts, the appellants should have been convicted of culpable homicide and reckless/negligent driving in terms of the National Road Traffic Act. The argument in this regard was that the State had not proved *dolus* or intent to murder, but culpa. Regarding sentence it was submitted on behalf of appellant no. 1 that an appropriate sentence was that of 8 years for all the convictions as the convictions arise from the same incident. The attorney[8] representing the second appellant argued that the State had failed to prove the charges against his client beyond a reasonable doubt. He accordingly argued that all charges against the second appellant should have been dismissed and that the appeal against all the convictions and sentences imposed should be upheld.

The facts:

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[7] Mr Vermeulen

[8] Mr Sovithi

[8] On 8 March 2010 between 15h00 and 16h00, the appellants were both driving their respective Mini Cooper vehicles on Mdlalose Street in Protea North, Soweto. According to four eye witnesses the appellants were racing and drove recklessly at a high speed and drove in the line of travel of vehicles travelling towards them, that when the first appellant's vehicle collided with the vehicle of the second appellant, both vehicles went out of control, that the vehicles then mounted the pavement and ploughed into the group of six school children walking on the pavement. Two state witnesses observed the commencement of the race and one of them took a video clip of that part of the incident using a cellphone. The video clip was entered and accepted as evidence during the trial which the trial found, corroborated the eyewitness account of the incident.

[9] The evidence by an accident reconstruction expert and accident analyst confirmed that the two vehicles were driving at a high speed and that the collision between the vehicles was caused by over steering of the two motor vehicles by the two appellants. Evidence was also led that the urine samples of the appellants were taken and tested on the day of the collision and which was found to contain traces of the drug cocaine as well as alcohol in the case of appellant no. 2. These findings were corroborated by the Department of Health laboratory's analysis.

Discussion

[10] The trial court accepted the evidence of the eyewitnesses who testified that the vehicles driven by the appellants, the Mini Coopers, were, based on their observation, racing against each other. The trial court also accepted the cellphone video footage, taken by one of the eyewitnesses, which depicted the vehicles, starting from a stationery position and taking off at high speed and, at intervals, driving either parallel to each other or overtaking one another until they lost control and collided with the school children. The trial court further noted that the

appellants drove as they did in a built up area where the speed limit was 60 km and therefore far lower than the high speed they were driving, which the accident reconstruction expert[9] had measured to have been 105 and 109 km respectively.

[11] The trial court was, in our view correct to accept the eyewitness evidence adduced before it. It was further correct for that court to reject the versions of the appellants. The reasoning of the trial court which led it to convict the appellants is, briefly, that the appellants had consumed drugs before they engaged in their driving episode which led to the collision with the school children. The court in this regard also referred to the presence of alcohol in the blood sample of appellant two, who had in fact admitted to consuming alcohol earlier during the day in question. The trial court also accepted the evidence led by an expert called by the state that the drugs cocaine and codeine caused hyper excitability and some sense of power and superiority in the person who had consumed those drugs. This led the trial court to conclude, referring to the effect the drugs had on the appellants, that the drugs: "*...induced the accused to a euphoric state of mind thus causing them to take risks which they would not otherwise have taken and assumed that other road users would give them way or that they would be able to avoid colliding with oncoming traffic and other road users...*"

[12] The trial court, finalising its analysis of the factual evidence, regarding the manner of driving of the appellants stated – "*Overtaking on the face of oncoming traffic and speeding when there are school children on the road is not normal conduct or normal driving behavior.*" Relying on Rex v Spicer[10] the trial court rounded off this line of reasoning with the conclusion that the manner in which the appellants drove was consistent with the fact that they had taken

[9] Renier Balt
[10] 1945 AD 433

drugs. The trial court referred to a number of decided cases[11] and reasoned that - "*...a person can be convicted of murder if the commission of the unlawful act or the causing of the unlawful act is not his main aim, but if he subjectively foresees the possibility that in striving towards his main aim the unlawful act may be committed or the unlawful result may be caused and then reconciles himself to that possibility.*" The trial court went on to conclude that the only inference it could draw from the appellants' conduct was that "*...after consumption of drugs the accused engaged in the driving of their motor vehicles at high speed in pursuance of a race while encouraging each other, recklessly disregarding the rules of the road, subjectively foreseeing that they might cause the death or injuries to the pupils that were on the road and still persisted in their conduct despite such foresight.*" Based on this conclusion the trial court convicted the appellants as it did. The reasoning of the trial court in respect of the murder convictions is clearly based on its finding that intent in the form of *dolus eventaulis* had been proven. In arriving at this conclusion the trial court relied on a number of cases[12] where the driving of vehicles resulting in death and/or serious injury was at issue.

[13] The thrust of the appeal is that the court a quo erred in finding that *mens rea* in the form of *dolus eventualis* was established. The argument advanced in support of the attack on the trial court's conclusions is in essence that no inference of *dolus eventualis* could on any basis be drawn on the facts of this case.

[14] As a point of departure we point out that there is no debate in this appeal that we don't have to concern ourselves with *dolus directus*. The issue is whether the appellants were correctly convicted of murder based on the *dolus eventualis* form of intention. One of the early expositions of *dolus eventualis*, and in my opinion, appropriately apt with respect, is that by

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[11] *S v Motlhojoa* 1971 (1) 522 (W); *S v Dube* 1972 (4) SA 515 (W); *S v Qeqe*2012 (2) SACR 41 (ECG)) and S v Humphreys 2012 JDR 0276 (WCC) and Regina v John Swindall and James Osborn 2 CAR 811 (2) SACR 41 ECG

[12] Footnote 8 supra

Holmes JA in *S v De Bruyn & Another*[13] that: "*...dolus eventualis which is subjective foresight of the possibility, however remote, of death ensuing, and yet persisting in the act reckless of whether death ensues or not.*" In more recent times Shongwe JA[14] described *dolus eventualis* as: *"[9] A person acts with intention, in the form of dolus eventualis, if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may ensue, and he reconciles himself to this possibility"*

[15] The application of *dolus eventualis* in instances involving the driving of motor vehicles has been controversial judging by what we have seen in the law reports. Practice had always been to charge such drivers with reckless driving and culpable homicide. The matter before us is one of the cases in which the prosecution authorities decided to indict the appellants for murder based on *dolus eventualis.* It is perhaps understandable that the prosecution authorities would pursue this course when one considers the high number of fatalities on South African public roads that occur as a result of dangerous or reckless driving. We deem it prudent to focus our attention on the most recent decision in this line penned by the Supreme Court of Appeal ie *S v Humphreys*[15].

[16] Suffice to state however that the determination of *dolus eventualis* is, in essence, a subjective value judgment reliant on inferential reasoning and is based on what the person thought and not what he should have foreseen. The controversy regarding decisions involving drivers of motor vehicles is illustrative of the caution required in determining the distinction between *dolus* and *culpa*. In our view if foresight of any possibility, however remote, should suffice for *dolus eventualis*, that would set the threshold potentially lower than that for

[13] 1968 (4) SA 498 AD at 510

[14] In S v Makgatho 2013 (2) SACR 13 (SCA)

[15] 2013 (2) SACR 1 (SCA)

negligence – which requires the possibility to be reasonably foreseeable. The comment by Holmes JA in *S v De Bruyn & Another*[16] remains an important reminder regarding the distinction between objective foreseeability (culpa) and subjective foresight (*dolus eventualis*) that- *"The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The factum probanda is dolus not culpa. These two different concepts never coincide."*

[17] This brings us to the Humphrey's decision. In that decision, which is binding on this court, the Supreme Court of Appeal once again, considered the definition of *dolus eventualis*. The appellant, an experienced minibus driver who operated a school children transport service, was driving his minibus on the same route that he had used for ten years. The minibus he was driving was carrying fourteen children. On reaching a railway crossing, he joined a queue of vehicles which had stopped because the large red warning lights had started flashing, a clear warning sign that a train was approaching. There were, at this intersection, on both sides of the railway line, large stop signs as well as other traffic signs indicating a railway crossing. The crossing was, further, controlled by two booms, positioned on different sides of the railway line, so that it was possible to avoid them, even when they were down, by going onto the lane intended for oncoming traffic and then returning to the correct lane to pass the boom on the other side. And this is what the appellant attempted to do. He overtook the line of vehicles after the red lights had started flashing, and dodged the boom that had come down mere seconds after the lights had come on. Upon entering the intersection, the minibus was hit on

[16] Supra at 506

its left side by the train. Ten of the children died on the scene and the driver was charged with ten counts of murder in respect of each of the deceased.

[18] The trial court[17] correctly accepted, in our view that for a conviction of murder to be reached in that matter based on *dolus eventualis* the test was twofold: (a) did the accused subjectively foresee the possibility of the death of the victim ensuing from his conduct; and (b) did he reconcile himself with that possibility. The trial court concluded that the appellant had satisfied both conditions, that *dolus eventualis* had been established and convicted him of murder. The Supreme Court of Appeal reiterated the oft articulated test for *dolus eventualis* as follows – "*The test for dolus eventualis is twofold: (a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and (b) did he reconcile himself with that possibility...*". The Appeal Court however found that the first condition was satisfied but that the second was not and concluded that the appellant was not guilty of murder.

[19] When considering the reasoning of the Appeal Court, it is in our view, understandable why the finding by the trial court that both conditions were satisfied, leading to its conclusion that *dolus eventualis* had been proven was found to be incorrect by the Appeal Court. The Appeal Court found that the first condition of *dolus eventualis* had been established, as found by the trial court, (subjective foresight of death taking place), but in the Appeal Court's view, the second condition necessary to found *dolus eventualis* was lacking, on the facts, as the appellant had not reconciled himself with the foreseen possibility, in the words of the Appeal Court - *"he did not take that into the bargain"*. It is clear that the first element of *dolus eventualis* – subjective foresight of the possibility of death, as a result of his conduct, taking place – was present. Everything, then, turned on the second element. This element, said the

[17] Henny J

Appeal court, had been explained by Jansen JA in *S v Ngubane*[18], called the 'volitional element', which is present when the accused '"consents" to the consequences foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain"'.

[20] The question therefore is - did the appellant 'reconcile himself' to the foreseen consequences of his conduct? In the words of the Appeal court - the '*true enquiry under this rubric*', said the court, was '*whether the appellant took the consequences that he foresaw into the bargain; whether it [could] be inferred that it was immaterial to him whether those consequences would flow from his actions*'. Thus, '*if it [could] reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of dolus eventualis would not have been established*' (at [17]). On the facts, the Appeal court accepted that the latter inference was not only a reasonable one, but, indeed, the 'most probable one'. Two reasons were articulated in this regard for this conclusion. First, to reconcile himself to the death of the victims, he would have had to reconcile himself to the possibility of his own death, and there was no evidence to suggest this. He '*foresaw the possibility of the collision, but he thought it would not happen; he took a risk which he thought would not materialise*' (at [18]). Second, so the Appeal court reasoned, the evidence showed that the appellant had, previously, successfully performed the same manoeuvre in virtually the same circumstances and no collision took place. The inference was '*that, as a matter of probability, he thought he could do so again*' (at [19]). *Dolus eventualis* had, therefore, the court concluded, not been established. *Culpa* was however, clearly present, and the convictions of murder were replaced with those of culpable homicide.

[21] What we see is that the law, like life, is at times complicated and more nuanced than we would like it to be. *Dolus eventualis*, it seems, is not amenable to containment within a simple

[18] 1985 (3) SA 677 (A) at 685 A–H

formula, the facts of the matter have a lot to do with the ultimate conclusion at the end of the day. All we can say is that, the strongest case for *dolus eventualis* is likely to be found where there is foresight of a substantial possibility of causing the result in question; where the activity is part of an overtly dangerous and unlawful enterprise, and where the accused is uncaring about whether the victim lives or dies as a result of his conduct. On the other hand, the weakest case will tend to be where there is foresight of only a slight possibility of death; and where the accused strongly hopes that life will not be lost in consequence of his conduct, and has taken considerable care to ensure that the risk is eliminated[19]. It is, obviously, not easy to state with certainty precisely where the dividing point on this line will be, the facts of each case should provide the key. But, in Humphreys, at least, it is clear, as found by the Appeal Court that the requirements for *dolus eventualis* were not met: the accused was engaged in a dangerous activity and carried it out in a manner which was grossly negligent but a murder conviction could not be countenanced considering the facts in that matter. This is not to say that there can never be situations where fatal collisions involve *dolus eventualis. The Qeqe* decision in the Eastern Cape, which however never went on appeal, is one case where a murder conviction based on *dolus eventualis* was arrived. In Humphreys the reason for taking the risk was not callous indifference to human life but, rather, impatience and foolish impetuosity. Humphreys was not indifferent to the fate of his passengers but, based on previous conduct under similar circumstances, he was unrealistic in his assessment of the degree of risk on that occasion, hence the finding of *culpa*. Caution is appropriate that at all times one should be mindful that 'reckless' does not always imply *dolus eventualis*[20].

[22] I return to the matter at hand. In convicting the appellants of murder based on *dolus eventualis,* the trial court had also found that drugs had played a role in the conduct of the

[19] See for a General discussion, Criminal Justice Review – No. 1 of 2013 – *Dolus Eventualis* Revisited: State v Humphreys 2013 (2) SACR 1 (SCA)

[20] Jutas Review of South African Law - Jutas Quarterly Review of South African Law - Criminal Law – 2012 - July to September 2012 (3)

appellants. The trial court referred in this regard to the decision in *R v Spicer*[21] when convicting the appellants of the offence of contravening Section 65(1) (a)/(b) read with sections 1,33 - 35, 65(3), 65(4),65(1) and 65(9) of the National Road Traffic, Act i.e. driving a vehicle whilst under the influence of a drug having a narcotic effect. We discussed earlier[22] the finding by the trial court that the drugs consumed by the appellants had induced a sense of euphoria on them giving them a sense that they would not cause any collision and that other road users would make way for them. Though the appellants had denied that they had used drugs earlier during the day before the collision took place, the objective evidence led justified the finding of the trial court. This has also been conceded on behalf of appellant no 1 in this appeal. Whilst it is correct that the role of drugs was clearly established as well as the direct role this played in the conduct of the appellants, this in our view eliminates the conditions required for a finding of *dolus eventualis*. It is this court's view that the appellants' faculties were affected in the sense that their judgement was impaired thus inducing "an exuberant or over optimistic frame of mind which caused" them to take risks and drive as they did on the day in question. The finding of the trial court cannot be displaced that the appellants were clearly under the influence of drugs.

[23] It is our view that the drug induced state of mind of the appellants had a direct bearing on how the trial court was to assess the evidence in determining whether *dolus eventualis* had been established. The fact of the matter is that the finding by the trial court that the effect of the drugs on the appellants was to induce a sense of euphoria in them and which led them to believe that they would not cause any collision and that other road users would make way for them, should have left the trial court with substantial doubt regarding an appreciation and, importantly a reconciliation, by the appellants of the consequences of their driving conduct causing death or serious injury. It is our view that on the facts of this matter this state of mind

[21] Supra footnote 10
[22] in paragraph [10]

is completely at variance with that required to establish an appreciation of the consequences of one's conduct and further reconciling one to such consequences taking place. Therefore whilst the trial court was clearly justified in concluding that that the appellants had used drugs before they embarked with the driving leading to the collision with the school children, that court erred in concluding that *dolus eventualis* had been established on the facts found by it to have been proven.

[24] The inescapable fact is that once the trial court made the finding about the effect of drugs on the faculties of the appellants i.e. that they became bold as a result thereof, which bravado made them think they would not cause a collision, *dolus* in any form, especially *dolus eventualis* had become eliminated from the equation. In this context there can be no suggestion that the appellants had the foresight that their escapade could result in death and serious injury to pedestrians and reconciled themselves with that eventuality. Their mental makeup must therefore have been the opposite of causing death or injury, their disposition was that no collision, let alone life threatening, would take place. There being no foresight of the possibility of a collision causing death or serious injury coupled with reconciliation with that eventuality and proceeding with it despite that reconciliation, ineluctably leads to the conclusion that there can be no *dolus eventualis*. Clearly both conditions necessary for *dolus eventualis* were absent. This is the conclusion that should have been arrived at by the trial court and the result is that the murder and attempted murder convictions cannot stand.

[25] The state's argument that the facts of this matter are similar to those in S v Qeqe[23] is misplaced. One clear distinguishing feature in the two cases is that in Qeqe the accused had consciously mounted a pavement in an attempt to evade arrest whilst in our matter the appellants had mounted the pavement as they had lost control of their vehicles. In any event it

[23] Supra footnote 7

is our view that the substantial distinction between these two cases is that there was neither evidence nor finding of drugs featuring in the Qeqe matter.

[26] In our view the evidence in this matter shows that instead of murder the appellants should have been convicted of culpable homicide for the deaths of the four school children. Clearly the murder and attempted murder convictions must be set aside. The correct convictions here should be culpable homicide instead of murder and, based on the approach of the Appeal Court in Humphreys, we simply set aside the attempted murder convictions without any alternative or replacement convictions. There is no offence like "attempted culpable homicide" in our law. The Appeal Court in Humphreys relied on the decision of *S v Naidoo*[24] for the determination that as in murder, multiple convictions for culpable homicide can be sustained even when they result from one act, or in this case, one accident. We are further of the view that it would amount to an unnecessary duplication were we to also substitute the attempted murder convictions with reckless and negligent driving in terms of section 63(2) of the National Road Traffic Act.

[27] Furthermore as we have two perpetrators in this matter it must be clarified that their liability is not based on the doctrine of common purpose. That doctrine, described in many writings and cases by our courts is to the effect that - "*The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime. Burchell and Milton 17 define the doctrine of common purpose in the following terms: Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within*

[24] 2003 (1) SACR 347 (SCA) at para 36

their common design. Liability arises from their 'common purpose' to commit the crime. "[25] Common purpose has no place in this matter for the simple reason that this is not a matter where dolus in any of its forms features, it being the condition precedent for common purpose. The appellants are guilty of culpable homicide for simply participating in driving conduct which caused the death of four school children and serious injury to two others. Their convictions are based on their individual culpability in the driving enterprise that caused the collision resulting in the deaths and injury. The conviction for driving under the influence of a drug having a narcotic effect, in terms of the Drugs and Drug Trafficking act should therefore be confirmed. All the other convictions are set aside as they amount to duplications as they arise from the same incident that gave rise to the culpable homicide convictions.

Sentence

[28] In view of our decision to reverse the four murder convictions and replace them with four culpable homicide convictions we must now determine what appropriate sentence to impose on the appellants. We must strive for a sentence that is sufficiently balanced in recognizing the pain endured by the families of the deceased school children, the permanently damaged young lives of the two survivors, the youthfulness and potential for rehabilitation of the appellants as well as the need to address the scourge of the road carnage we see daily in our roads. This in a nutshell is the so-called Zinn-triad postulated in S v Zinn[26] that – "*It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society.*"

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[25] *S v Thebus and Another* 2003 (6) SA 505 (CC)
[26] 1969 (2) SA 537 AD at 540

[29] In *S v Nyathi*[27] the SCA was called upon to consider a sentence for culpable homicide arising from a motor vehicle accident. The trial court in that matter had convicted the appellant of six counts of culpable homicide and imposed five years imprisonment two of which were suspended on certain conditions. The accident had occurred after the appellant had overtaken another vehicle on a double barrier line, but whilst he was unable to observe oncoming traffic. A taxi was travelling in the opposite direction, and the appellant collided with it, resulting in the death of six of the taxi's occupants.

[30] Considering the facts in that matter the court emphasised that overtaking on a double barrier line, where a driver cannot see oncoming traffic, and oncoming traffic is unable to see him, '*is probably the most inexcusably dangerous thing a road user can do*' (at 277b). He continued, that it is difficult to find driving conduct that could be considered more dangerous, because it involves a '*conscious decision to execute a manoeuvre that involves a fearfully high risk*' (at 277e). The court further compared the sentence, with sentences for similar offences, considered by the Supreme Court of Appeal over the previous ten years and concluded that none of the cases considered were as serious as that one. The Appeal court confirmed the sentence imposed by the trial court and dismissed the appeal.

[31] In the unreported judgment of the Gauteng Division of the High Court[28] *S v S. Langa*, the accused was convicted of 5 counts of culpable homicide and one count of drunken driving and sentenced to 12 years for the culpable homicide count and 2 years for the drunken driving. The convictions arose from one accident.

[32] In our case both appellants were shown to have consciously taken drugs and then engaged in driving conduct of extremely reckless proportions which endangered other road

[27] 2005 (2) SACR 273 (SCA)
[28] Bam J Case No. 92/2012 (11 December 2013)

users. It is so that the timing of their escapade coincided with a period when the road was full of school children who had just left school. We therefore regard their conduct in very serious light. We must in the final analysis weigh and balance all the mitigating and aggravating facts to enable us to impose a balanced sentence. We align ourselves with the view expressed in *S v Swart*[29] that *"Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role."* In line with this we are of the view that in this instance the aggravating facts and the consequences of the crimes must be considered as more important than the appellants' interests. The retribution and deterrent elements of the sentence will have to be considered ahead of the appellants' interest if all the circumstances are considered. Our view is based on the social factors at play in this matter.

[33] The two appellants have both enjoyed a privileged upbringing and social status. They dabbled in drugs and engaged in a deliberate driving contest on a public road endangering other road users and pedestrians, because their lifestyles and social standing enabled them to do this. Their conduct cut short the lives of four innocent school children and completely confined two others to a life of care. The pain of the next of kin of the deceased as well as the permanent disabilities of the survivors coupled with the added burden to their families cannot be ignored. All these factors in our view amount to serious aggravation and deserve emphasis in the sentence we should impose.

[34] We must however still deal with the appellants as humans who have the potential for rehabilitation and to lead responsible lives. We therefore must to an extent mitigate the sentence we impose with mercy. See *S v Dodo*[30] where the following was stated: *"[38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the*

[29] 2004 (2) SACR 370 (SCA) on p 378 in para 12
[30] 2001(1) SACR 594 (CC) at p 614

present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end."

[35] We revert once more to higher authority as we consider the appropriate sentence here and we refer to S v Humphreys[31] due to the kindred nature of the convictions and circumstances in both cases. There the Appeal Court said – *"The general approach to sentence in matters of this kind was formulated with admirable clarity by Corbett JA in S v Nxumalo 1982 (3) SA 856 (A) at 861G – H when he said: 'It seems to me that in determining an appropriate sentence in such cases [i.e. cases of culpable homicide arising from traffic accidents] the basic criterion to which the Court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded. . ."*

[36] We take into account that four young lives were lost and two other young lives were detrimentally altered forever due to the callous actions of the appellants. The two school children who survived will never become self-supporting individuals, due to the severe head injuries they sustained. They will always require care. They were all using a public road as was their right and trusted that the appellants, as drivers of motor vehicles would obey the rules of the road and not imperil their lives. We take judicial notice of the carnage that takes

[31] Supra at paragraph 22

place on South African roads daily and especially. This carnage is caused in the main by drivers who abuse drugs and alcohol as the appellants did thus imperiling the lives of other road users.

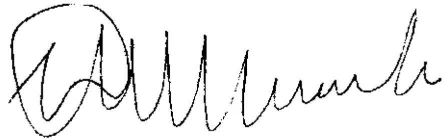
[37] The first appellant's personal circumstances are that at the time of the imposition of sentence he was 32 years old. He was a first offender. He is the father of a boy who was two and a half years old when the appellant was sentenced. The child resides with his mother. The first appellant is a gifted musician, who completed his major in Drama at the High School for Performing Arts, La Guardia, in the United States of America. He was the first person from South Africa who had obtained a scholarship to attend classes at this prestigious school. He is famous in South Africa as a musician. His income was R30, 000.00 to R40, 000.00 per month and he had fifteen people in the employ of his company. The second appellant was 28 years of age at the time of the imposition of sentence. He is the father of two children, aged seven years and two years respectively. He is in control of the family business and has six employees. The two appellants tried to apologize to the victims' family, but were informed by the state that they could only do so after sentencing.

[38] We have considered all the facts and have formed the view that the offences that the appellants have been convicted of are a serious nature and that the level of blameworthiness is high. In our view direct imprisonment is the only appropriate sentence to impose in this matter. In our view a sentence of ten years is appropriate but with an order that two years thereof be suspended on condition that the appellants are not convicted of similar offences within 5 years of these convictions. We however take cognizance of the fact that the appellants have been in custody since their conviction and were sentenced on 16 October 2012. We therefore order in terms of section 282 of the Criminal Procedure Act 52 of 1977, that the sentence of 10 years be antedated to 16 October 2012.

[39] In the circumstances the following order in respect of both appellants is granted:

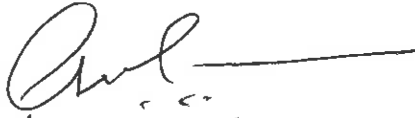
1. The appeal against the conviction for driving a motor vehicle whilst under the influence of a drug having a narcotic effect in terms of section 65 (1) (a) of the National Road Traffic Act, Act no 93 of 1996 is dismissed.
2. The appeals against the remaining seven (8) convictions and sentences imposed by the trial court are upheld.
3. The four (4) convictions of murder are set aside and replaced with four (4) convictions of culpable homicide.
4. The two (2) convictions of attempted murder are set aside.
5. The two (2) convictions in terms of Section 4 (b) of the Drugs and Drug Trafficking Act, Act No 140 of 1992 and in terms of Regulation 317 (2) read with 317 (1) (a) and (b) of the National Road Traffic Act are set aside.
6. The sentences imposed by the trial court are set aside and replaced with the following:

   "10 years imprisonment, two years of which are suspended on condition that the accused are not convicted of similar offences within 5 years of these convictions."
7. The sentence is antedated to 16 October 2012.



D MLAMBO
JUDGE PRESIDENT, GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA

GSS MALULEKE
JUDGE OF THE GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG



C PRETORIUS
JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

APPEARANCES

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REF: RC KRAUSE

Second appellants Representatives
SOVITI ATTORNEYS
REF: M SOVITI

The States Representatives
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JOHANNESBURG
REF: JAP2013/0391