

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

BALF KOELANE

V

R E X

J U D G M E N T

Delivered by the Hon. Acting Judge J.L. Kheola  
on the 15th day of June, 1984.

The Appellant was charged with contravening section 90(1) of Road Traffic Act No. 8 of 1981. It is alleged that on the 1st August, 1981 at Butha-Buthe public road the appellant wrongfully and unlawfully, recklessly or negligently drove motor vehicle O.G.B. 154 on the said public road and as a result the said motor vehicle collided with a pedestrian.

The appellant was found guilty of negligent driving and sentenced to a fine of M100 or 6 months' imprisonment in default of payment of the fine. His driver's licence was suspended for 1 year. Section 107(c) of the Road Traffic Act 1981 makes it quite clear that where the accused lodges an appeal against the conviction the endorsement or suspension of the driver's licence may be postponed. I was informed by Mr. Khauoe, counsel for the appellant, that in this case the suspension was put into force immediately. That was unfair but not illegal.

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The evidence by the Crown is that the Butha-Buthe public road passes between St. Cyprian Primary School and Butha-Buthe High School. According to the sketch plan the road runs from a north-easterly direction to South-Westerly direction. On the afternoon of the 2nd August, 1983 'Matau, a girl of about 6 years of age, was returning from St. Cyprian School accompanied by PW.1 Puseletso Motlane, PW.2 Stephen Adam and another small boy. They had to cross the road in a South-easterly direction. In order to cross the road they had to descend and ascend the banks on the sides of the road. When they came to the road 'Matau had remained behind. They crossed the road leaving her on the other side. While PW.1 was helping her young brother to climb up the bank on the other side of the road 'Matau started to cross the road. She did not look to her right and left before she started to cross the road, hence her failure to see that there was a vehicle speeding from her left side in a South-westerly direction. PW.2 shouted at her but it was too late, the vehicle collided with her immediately after crossing the centre line. At the point of impact the road is straight for a long distance and the appellant ought to have seen the children from a distance of about 40 to 50 paces away. The road at this point is about 10 paces wide and the point of impact was on the South-eastern half of the road. But it is not shown how far from the edge of the road.

The version of the appellant is that when he was about 36 paces from where the collision took place he saw

two groups of children, one on the left side of the road and the other on the right side. He realized that the children wanted to cross the road and that some had already crossed. At this time he was travelling at a speed of about 40 kilometres per hour. He was about 6 to 8 paces away from them when one of the children from the St. Cyprian school side ran into the road. He applied his brake at the same time he swerved to the far left in an attempt to avoid a collision, but unfortunately there was a heap of soil in the road which hindered him from swerving as far to the left as he intended. The child hit the rear part of his vehicle. The appellant said earlier in his statement that he hooted twice when he saw the two groups of children on both sides of the road. Under cross-examination the appellant said that when he saw the child run into the road he applied his brakes and slowed down but when he realized that he was still coming he accelerated in order to pass in front of the child. He admitted that if he had firmly applied the brakes the vehicle would have stopped before it came to the child.

The duty of a driver towards children was summarised by Lansdown, J., in R. v. Naidoo, 1932 N.P.D. 343 at p. 349 in these words :

"There is a duty upon a motorist, on seeing children in the road before him, to suppose the possibility that they may behave normal children are often wont to do, and may not show the mature intelligence and presence of mind of a reasonable adult. Consequently the motorist must contemplate that there may at the last moment be a stupid decision on the part of the children or some of them to

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change their position and that they may thus get into the line of his route. A motorist must therefore, when approaching children, have his car under such control as will enable him to pull up at short notice." (My underlining).

I entirely agree with the learned judge. In the present case the appellant failed to have his vehicle under such control that he would stop at once when the child ran into the road. In his judgment the learned magistrate said that when the appellant saw 'Matau enter the road, he did not make a definite decision either to stop completely or to accelerate in order to by-pass 'Matau. Instead he reduced speed next to stopping; as the child went further into the road the appellant decided to pass her but collided with her. The learned magistrate was of the opinion that had the appellant stopped immediately when he saw the child enter the road a collision would have been avoided. I entirely agree with him. By first deciding to slow down in order to allow the child to cross and then suddenly changing his mind and deciding to accelerate and pass in front of the child the appellant did not exercise that care expected of a careful driver. Mr. Khauoe contended that neither an error of judgment nor an unwise decision regarding a dangerous situation created by another's recklessness or negligence is necessarily criminal negligence. He referred me to the case of C.H. Choi v. Rex 1971 - 1973 L.L.R. 81. The facts of that case differ from the present case because (a) it was not a case involving a child; (b) it is not easy for a driver of a motor vehicle to estimate the speed of an oncoming car; (c) the oncoming  
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vehicle was travelling at a high speed in the circumstances and Mr. Choi could not be held to have been negligent because when he saw the vehicle about 126 metres away he thought he would have enough time to cross and turn into the road on the right of the junction. In other words, even a reasonably careful driver would have misjudged the speed at which the oncoming vehicle was travelling and would have thought that he had sufficient time to cross to the right.

In Steenkamp v Steyn 1944 A.D. it was held that for an error of judgment to constitute negligence it must be shown that it was one which a reasonably careful driver might commit. In the present case the appellant saw groups of children on both sides of the road from a distance of about 36 paces. He was under an obligation or he had to exercise special vigilance and care because in his own words the appellant says the children were exhibiting an intention to cross the road (R. v. Pillay 1951(2) P.H., 012). He had to keep his vehicle under such control that he would pull up at short notice (R. v. Naidoo, supra). The appellant failed to keep his vehicle under control and decided too late to pass in front of the child who was already running across the road. A reasonably careful driver would not have done such a thing.

The learned magistrate said the appellant did not keep a proper look out. I agree. If the appellant had kept a proper look out he would have seen the heap of soil

on the road which hindered him from swerving to the far left side of the road when he tried to avoid colliding with the child. A reasonably careful driver would have seen the heap of soil long before he tried to pass in front of the child. Keeping a proper look out does not mean that a driver should look only on the tarmac but it means that he must also scan the surroundings of the road ahead of him.

Mr. Khauoe submitted that it is trite law that a man who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger. He referred me to the cases of Boughcy v. Bredell 1904 T.S. 394 and Van Staden v. Stocks 1936 A.D. 18. With respect, I think Mr. Khauoe has lost sight of the fact that here we are dealing with a case involving a small child and that the appellant was expected to exercise special care when he approached the groups of children. The appellant has said that the children exhibited an intention to cross the road. In my view the act of the child who was knocked down by the vehicle created no sudden emergency because the appellant was aware that she would cross when he was 36 paces away from her, the child was not negligent in any way and her act was not the proximate cause of the collision.

For the reasons I have stated above the appeal on conviction and sentence is dismissed. The order

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suspending the appellant's driver's licence is set aside.

ACTING JUDGE.

15th June, 1984.

For the Appellant : Mr. Khaue

For the Crown . Mr. Peete.