CRI/A/65/86

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOLISANA MOHLOTSANE Appellant

vs

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JUDGMENT

Delivered by the honourable Acting Chief Justice Mr. Justice J.L. Kheola on the 27th day of October, 1986.

The appellant was charged before the Leribe subordinate court with the offence of culpable homicide in that upon or about the 10th day of August, 1985 and at Leabua Highway public road in the district fo Leribe the appellant negligently drove a motor vehicle with Registration Permit No. 039A-7472 and as a result collided with a pedestrian one Nthabiseng Mote who sustained some injuries which caused her death on the same day and did thereby negligently kill the said Nthabiseng Mote.

In the alternative he was charged with negligent or reckless driving in contravention of section 90 (1) of the Road Traffic Act No. 8 of 1981. He was convicted on the alternative count and sentences to a fine of M400.00 or twelve (12) months' imprisonment and his driver's licence was suspended for six (6) months. He now appeals against both conviction and sentence.

The appellant's grounds of appeal were as follows:

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1. That the learned magistrate erred in accepting the police sketch plan.

2. That the magistrate erred in finding that the appellant was driving at a very high speed.

3. That the magistrate erred to find that the appellant was not able to control the vehicle when he approached the bridge.

4. That the magistrate erred in finding that the appellant did not keep a proper look out.

5. That the sentence of M400.00 or twelve (12) months' imprisonment as well as the suspension of the appellant's driver's licence is too high under the circumstances.

On the 27th October, 1986 I allowed the appeal and indicated that my reasons would follow at a later stage. The following are the reasons.

Trooper Makhakhe is the police officer who attended the scene of the crime and drew a sketch plan of the scene of the accident. I have carefully examined the sketch plan and I do not agree with Mr. Snyman that the sketch plan is inaccurate. If Trooper Makhakhe was unable to point out the point of impact five months after the accident, it is not because the sketch plan is inaccurate but it was because he and the court did not know how to use it. There were four fixed objects or points from which the point of impact could be easily established even after several years as long as those objects were not removed. The objects were the western end of the railings of the bridge, a tree on the northern side of the road near the bridge, the northern end of the tarmac and the southern end. Trooper Makhakhe measured the

distances from three of the fixed points to the point of impact but failed to measure the distance from the tree to the point of impact. However, the point of impact could accurately be stablished by using the three fixed points.

According to the sketch plan the point of impact is ten (10) paces from the end of the bridge railings; it is three (3) paces from the northern edge of the tarmac and six (6) paces from the southern edge of the tarmac.

The evidence was that on the 10th August, 1985 the deceased was in the company of her mother ('Malisema), her grandmother ('Matsepo) and six (6) other children. The age of the deceased was eight (8) years but the ages of the other children were not disclosed. They were travelling on foot from Matukeng to Hlotse. They were walking, not on the tarmac, but on the southern side of the road. It is not clear how far from the tarmac they were. At same stage before they came to Hlotse bridge the grandmother crossed to the northern side of the road because there was a foot path along the road. The rest of the group remained on the other side of the road and continued walking towards the bridge from the west. The grandmother was not directly opposite the others but was slightly ahead of them on the other side of the road.

When the group approached the bridge the deceased suddenly ran across the road apparently intending to join her grandmother on the other side of the road. It is the grandmother's evidence that at that stage she had already crossed the bridge and the rest were behind. The deceased was knocked down and killed by the vehicle driven by the appellant which was travelling in an easterly direction. The collision took place on the

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left lane about 3 paces from the edge of the tarmac. None of the witnesses saw the vehicle as it approached the bridge. The mother's evidence was that she could not see the vehicle because she was attending to the younger sister of the deceased. Both witnesses i.e. the mother of the deceased and her grandmother were of the opinion that the appellant had no chance to avoid the accident because the child suddenly ran into the road.

The learned magistrate convicted the appellant on the ground that he travelled at a very high speed and failed to keep a proper look out as well as failing to keep his vehicle under control. He drew an inference that the vehicle was travelling at a high speed from the length of the brake marks before and after the impact. Before the point of impact the brake marks are 11 paces long and after the point of impact they are 22 paces long. The learned magistrate was of the opinion that the distance of 33 paces was too long and was proof that the vehicle was travelling at a high speed. With respect the learned magistrate is not correct. The length of the brake marks depends on a number of circumstances. The first one is the condition of tyres. If they were worn out and smooth the distance will be longer than in the case of new tyres.

The second one is whether the brakes were working properly on all the four wheels. If only the brakes of the rear wheels worked properly the brake marks will be long. Without expert evidence as to the condition of the brake system as a whole the learned magistrate was not justified to make any inference adverse to the appellant from the distance of the brake marks. So his finding that the vehicle was travelling at a high speed must not be allowed to stand. See Cooper and Randford: South African Mother Law, 1st. edition, page 791-799.

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The courts have laid down that a high standard of care is necessary on the part of motorists when children of tender years are upon the road (Naidoo v. Rex, 1932 N.P.D. 343, Rex v. Mitchley, 1939 E.D.L. 225). It is absolutely important that the ages of the children who were on or at the side of the road when the motorist approached them should be disclosed. The special degree of care expected of a motorist rises according to the ages of the children, the younger the children are the more care he is expected to exercise. In the present case the deceased was eight (8) years old. She was not walking alone but was in a group of five children and two adults excluding her grandmother who was already on the other side of the road. We know that one child was her younger sister. The other children could be of any age under eighteen (18) years of age because that is the definition of a child in the Children's Protection Act 1980.

The position of the deceased in the group should also have been clearly stated; was she in the middle of the group, infront of them all or behind them? If she was behind them the appellant ought to have seen her and contemplated the possibility that she might behave in a stupid way and dash into the road. This was a very remote possibility because the grandmother of the deceased was not directly opposite the group but was about twelve (12) yards ahead of them and had already crossed the bridge. (See lines 14, 25-28 on page 7 of the record). The appellant could not reasonably have foreseen that the deceased would cross the road at that point in an attempt to join someone who was already on the other side of the bridge. In other words there was nothing to indicate that the grandmother was a member of the group from which the deceased suddenly dashed and tried to cross the road.

Although it was estimated that the grandmother was about twelve (12) paces ahead of them, I am of the opinion that she was much more than twelve paces. The width of Hlotse bridge is more than double twleve paces, in addition to that the collision took place about ten (10) paces from the bridge.

The duties of a driver when approaching children was accurately stated by Selke, J. in R. v. Pillay, 1951 (2) P.H., 0.12 (N) when he said:

> ".... the drivers of vehicles, and especially of fast moving vehicles such as motor vehicles, should exercise especial vigilance and care when in the proximity of young children. But it is also the case that the exact degree of vigilance and care necessary depends on the particular circumstances. For example, there is, in my opinion, all the difference between the conduct which is required of the driver of a motor vehicle when he encounters young children in the roadway, or at the side of the road exhibiting an apparent intention to cross, or playing a game in the course of which they are running about, on the one hand, and on the other hand, where he drives along the road and children are standing quietly on the pavement or sidewalk, and are not showing any indication of attempting to cross or run into the road. The magistrate says that the duty of especial vigilance and care in the circumstances is absolute, and that an accused cannot be exonerated by merely saying that he could not avoid the accident, for this would be tantamount to saying that no accident involving children running into the road is avoidable. With respect, I am unable to agree with this reasoning. That there is always some degree of special vigilance and care where children are concerned may be acknowledged without question, but, as I said before, it seems to me that the extent of it must depend on the particular circumstances."

In the present case the group of children and adults were just walking alongside the road. They made no indication that they intended to cross the road. If they were just standing near the road, one would probably say that the appellant ought to have paid a particular attention to them and brought his vehicle under control in case one of them did a stupid thing.

The learned magistrate formed the opinion that the appellant failed to keep a proper look out but came to the conclusion that the appellant was

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guilty of negligent driving and not of culpable homicide. He based his finding on the ground that

> "The child has contributed to her death, and because of her negligence also it could not be said that the accused was the proximate cause of the deceased's death."

I do not agree with the finding that the appellant was in any way negligent in the driving of the vehicle. The Crown failed to prove the speed at which the vehicle was travelling just before the collision. The learned magistrate was not entitled to draw an inference from the length of the brake marks that the vehicle was travelling at a high speed.

For the reasons stated above I allowed the appeal against both conviction and sentence.

J.L. KHEOLA
ACTING CHIEF JUSTICE.

5th January, 1987.

For Appellant - Mr. Snyman
For Crown - Miss Moruthoane.