CRI/A/34/88

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LEBOHANG MONAPHATHI Appellant

and

R E X

JUDGENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 14th day of July, 1989.

The appellant was convicted of negligent driving by the Subordinate Court of First Class of the district of Berea. He was sentenced to a fine of M50 or 3 months' imprisonment. He is obviously appealing against the conviction only because the sentence was ridiculously lenient.

His grounds of appeal are as follows:-

"1. The Court has ignored the cardinal feature of the Crown evidence that there was no consistence, no agreement in most vital aspects of the evidence.

2. The complainant and P.W. 2's demenour was such that they should not have been believed on any aspect of the case.

3. The complainant was the cause of the accudent in that he was intoxicated and confused by his own admission.

4. The evidence of the complainant is not consisten with a person who kept a proper look out and complainant was the cause of the accident.

5. The fact that the investigating officer did not disclose the spot where she pointed was the point of impact is not only irregular but amounts to that the Crown has not proved its case beyond a reasonable doubt."

The complainant testified that at about 11.00 p.m. on the 14th June, 1986 he was driving his car along the Main North 1 public road going to TY. He was accompanied by a lady whose name he has forgotten because he apparently gave her a lift when he found her near Lakeside Hotel. When he came to Lekokoaneng he saw another vehicle ahead of him travelling in the opposite direction. He was travelling at a speed of about 40 km. per hour because he was going up a slope. He observed that the vehicle coming down the slope was in a very high speed and was moving on the right side of the road, i.e. it was on the wrong side of the road and was coming straight towards him. He kept his side of the road and did nothing to avoid the accident till the two vehicles collided. Before the collision occurred the two drivers had both dimmed the headlights. On the following morning the drivers of the two vehicles went to the scene of the accident and showed the police two different points of impacts. The police officer who attended the scene of the

accident made a sketch plan of the scene of the accident and marked as X2 the point of impact pointed out by the complainant, and as X1 the point of impact pointed out by the appellant.

Under cross-examination the complainant changed his version that the other vehicle was coming straight towards his vehicle and that he did nothing to avoid the collision but said that the other vehicle was moving in zigzags as it approached him. He denied that he was drunk when the accident occurred.

Limakatso Letlatsa was a passenger in the complainant's car. She deposed that when they came to Lekokoaneng she saw an on-coming vehicle which was moving in zigzags. She made the remark to the complainant about the on-coming vehicle moving in zigzags but before he answered her there was a bang. She sustained some minor injuries as a result of the collision between the two vehicles. Before the collision their vehicle had kept its left side. She denied that she met the complainant at Lakeside Hotel, they actually met at China Garden Restaurant at about 8.00 p.m. She denied that the complainant was drunk that night. She aslo denies that the lights of the on-coming vehicle were dimmed.

Police Woman Mokhele attended the scene of the accident and made a sketch plan, Exhibit "A". Her evidence is to the effect that the complainant showed her a point of impact different from that shown by the accused. She did not believe both of them

and formed her own opinion as to what was the point of impact. She, however, did not mark her own point of impact on the sketch plan. If I may be allowed to disgress I must point out that when a pliceman attends a scene of a crime his own observations are of paramount importance and must appear in his sketch plan or report.

In most car accidents the debris which fall from the vehicles on impact give a rough idea of where the collision took place. It is the duty of the traffic policeman to mark on his sketch plan where he found the debris. The debris are objective factors which, taken together with other factors, help the court to come to its own conclusion concerning the point of impact. I do not agree with the learned magistrate that a policeman who attends a scene of accident should not form his own opinion, relying on objective factors as to where the point of impact is. It is not enough for him to mark what he is told by the two drivers who are already building their defences.

I shall now come back to the evidence of the defence. The appellant's version of what happened is that as he was coming down the slope at Lekokoaneng he saw another vehicle at the curve further down the slope. When he came near it he dimmed the headlights. At that time that vehicle moved to its incorrect side of the road; he flickered the headlights for a long time. He suddenly noticed that the other vehicle was already too near and that it would not be safe to move out of the road. He then switched

on bright lights and the compainant swerved to his correct side of the road but it was too late and a collision occurred. He says that when he saw the car of the complainant he was driving at a speed of between 80 and 90 km. per hour and that when the collision occurred he had reduced his speed to between 70 and 80 km per hour. The complainant swerved to his correct side when he (appellant) was bout 7 paces from him.

Under cross-examination the appellant admitted that before collision he never applied his brakes and that even if the compainant had not swerved to his correct side he (appellant) would still have collided with him because he was driving at a speed of between 70 km. and 80 km. per hour. He says that it was a misjudgment on his side that he could still pass despite the fact that the complainant was on the incorrect side.

I do not propose to analyse the evidence in any detail because the appellant has admitted facts which amount to negligence on his part. He has alleged that he saw complainant's vehicle coming towards him on the incorrect side he flickered his lights for a long time and realized that the complainant was not changing his course. He did not reduce his speed by applying his brakes. He did not swerve to the other side of the road but drove straight towards another vehicle until he collided with it. He says that the complainant took an evasive action too late. The question one may ask is why did the appellant not swerve to the extreme left side of the road or even drive out of the road altogether. I am of the opinion that he did not do so because he was driving at a very

speed and failed to apply his brakes. A reasonably careful driver would not have driven straight into an on-coming vehicle even if it were on the incorrect side of the road.

The point of impact pointed out by the appellant is exactly on the middle of the road. If the appellant had swerved to the extreme left side of the road at the same time that the complainant was swerving to his correct side of the road there would have been no collision. The appellant had the last chance to avoid the collision but he apparently thought that by sticking to his correct side of the road, while at the same time not reducing his speed or actually pulling up, he was acting like a reasonably careful driver. I do not agree with that. He was under an obligation to take reasonable steps to avoid the collission. He did not take any step and hoped that the complainant would return to his correct side of the road in time to avoid the collision.

Mr. Teele, counsel for the appellant, submitted that an error of judgment is not negligence. He referred to Cooper and Bamford: South African Motor Law at page 246 where the learned authors say:

> "An error of judgment must be distinguished from negligent conduct. Neither an error of judgment nor an unwise decision is necessarily proof of negligence 'unless accompanied by conduct which is in some degree blameworthy'."

I agree with that statement of the law. However, the facts of this case show that the appellant was negligent in that while he hoped that the complainant would return to his correct side of the

road, he failed to reduce his speed, he failed to move to the far left of the road or even out of the road altogether. I think the last two things amount to a conduct which is in some degree blameworthy and the appellant was, therefore, negligent.

I have come to the conclusion that the appellant was negligent on the assumption that his version is true that the complainant was travelling on the incorrect side of the road. The trial court found that the complainant was driving on his correct side of the road and that the point of impact was that pointed out by the complainant. On page 23 of the record there is an ambiguous statement by the trial court which reads, "on the 15th October, 1986 the court went to the scene of the crime in the presence of the Public Prosecutor, Attorney for the defence plus eight (8) other disinterested people, it observed that the point of impact was on the extreme right hand side when facing TY northwards which is complainant's side."

I say the statement is ambiguous because it does not say what it observed that convinced it that the point of impact pointed out by the complainant was the correct one. This Court has written many judgments warning magistrates that when they conduct an inspection in loco they must record in detail their observations on a piece of paper which shall be part of the record. The observations must be communicated to the parties as soon as the court resumes its sitting. By so doing the parties are given the chance to agree or to disagree with such observations. The latest such case is Molopo v. Rex, CRI/A/5/88 (unreported) dated the 13th June, 1988.

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In the instant case the learned magistrate has not recorded his observations anywhere but he used them in his reasons for judgment. This was an irregularity.

In his statement of facts found to have been proved (p. 24 of the record, paragraph 5) the learned magistrate states that he believed the complainant's pointing out of the point of impact during the inspection in loco. It seems that when he says that he observed that the point of impact was on the extreme right hand side when facing TY northwards which is complainant's side, he means that he believed the evidence of the complainant and formed his opinion. He could not have found anything at the scene of the collision because the accident occurred on the 14th June, 1986 and the inspection in loco was done on the 15th October, 1986. It is common cause that the surface of the road was covered with loose gravel on which skidmark and brakemarks could not remain for a long time.

The learned magistrate found that the complainant was driving on his correct side of the road when the accident occurred and that just before the collision appellant's vehicle was moving in zigzags and that he took no action to avoid a collision. I have no quarrel with those findings because the discrepancies pointed out by Mr. Teele in the evidence of the complainant and his lady passenger are very minor and understandable because it was at night. The observations of a passenger may, in some cases, not be as accurate as those of a driver of a vehicle whose duty it is to keep a proper lookout.

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One discrepancy is that the complainant said he met his woman passenger at Lakeside while she said they met at China Garden. It was submitted that "this shows P.W.1's disposition towards falsehood as being immense. I do not agree with that suggestion because the complainant is a foreigner in this country. He does not speak English but Swahili. It was not established for how long he had been in this country when the accident occurred. It may well be that he does not know Maseru well. Lying about the place where he picked up his passenger would not affect the case in any way.

I agree with the trial court that there was no evidence that the complainant was drunk on the night in question.

The complainant said that the appellant dimmed the light while his passenger said that he did not. This point could be important if any of the two drivers alleged that he was blinded by the bright lights of the other vehicle. The passenger may be wrong or mistaken because she said that the vehicle "changed its lights." I do not know what she meant by that.

I come to the conclusion that the irregularity committed by the learned magistrate regarding the inspection in loco did not result in failure of jsutice. (Section 8 (2) of the High Court Act 1978).

In the result the appeal is dismissed.

J.L. KHEOLA
JUDGE

14th July, 1989.

For Appellant - Mr. Teele
For Crown - Mr. Qhomane.