CRI/A/41/88

IN THE HIGH COURT OF LESOTHO

In the Appeal of:-

LIKANO TSIU ..... Appellant

vs

R E X

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

The appellant was convicted of negligent driving and sentenced to pay a fine of M60-00 or to imprisonment for a period of two months. His driver's licence was suspended for six (6) months. He appealed against the conviction on the ground that the court a quo erred in finding that the accident occurred as a result of appellant's negligent driving.

The first Crown witness was one Thabo Khabo (P.W.1). He told the court that on the night of the 19th October, 1985 he and other five drivers were driving tractors along the Main North 1 public road at Lekokoaneng. One of the tractors had a puncture and

as a result of overturned and fell into a yard. All the tractors were parked on the left side of the road i.e. on the northern side outside the road. The tractors had their lights on. He put a warning sign (a triangle) behind the last tractor at a distance of about 53 paces from the tractor. He suggested to their employer who was travelling with them in a truck that they should go home and fetch a chain with which they could pull the tractor that had overturned.

They fetched the chain and parked the truck outside the road in such a way that its lights were facing towards the yard and not towards the on-coming traffic. P.W.1 says that as soon as he came out of the truck he saw an on-coming vehicle and remarked to his employer that its headlights were too bright. At that time it was about 400 to 500 yards away. As he started fastening the chain to the tractor one of the drivers of the tractors shouted at him and said he should ran away. Immediately after that a vehicle knocked him down. He fell into the yard next to the road. He denied that the truck was parked inside the road and that its bright lights were on.

The evidence of Mr. Khabo Moabi (P.W.2) is the same with that of P.W.1 on all material points of the case.

P.W.3 Sergeant Thamae testified that he arrived at the scene of the accident at about 10.00 p.m. He found accude's car, a truck and two tractors. He attempted to take measurements but failed to do so because the appellant was drunk and very violent.

He decided to guard the vehicles until the following morning when a sketch plan of the scene of the accident was made. It was handed in Court as Exhibit D. All the vehicles were outside the road. The point of impact is outside the road and was pointed out by both P.W.2 and the appellant as well as by P.W.1 when he returned from the hospital. He was shown a warning sign though he did not show it on Exhibit D. It was put on the tarred part of the road.

The appellant gave evidence in the court a quo and admitted that his vehicle collided with a tractor which was parked on the side of the road. He says that when I came to the Veterinary Clinic I saw the bright lights of an on-coming traffic. I was on my left side of the road. I showed him that his lights were too bright by deeming (sic) my lights for several times but there was no response whatsoever. He told the court that as he came closer to the on-coming vehicle he reduced his speed and to avoid an accident he moved to the extreme left side of the road. At that time his passenger warned him that there was an accident ahead of them and that if he could stop he must do so. The passenger said there was a person lying down. He saw that there was a tractor on the side of the vehicle that was on his lane. He had passed another tractor where a man was lying next to it and he decided to stop his vehicle between the vehicle and the tractor which was facing towards him. When he swerved to the left his vehicle hit the bumper of the vehicle and passed and collided with the tractor. He denies that there was any warning sign put on the tarmac.

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It was submitted that the truck was parked at a blind spot. This is not correct, the rise was over 50 metres from the scene of the accident. (See page 14 of the record). The evidence of Liphapang Malefetse (D.W.2) is the same with that of the appellant. He told the court that he drew the appellant's attention to the fact that there had been an accident because he had seen two tractors on the left side of the road and a man lying down. When they got near the vehicle with bright lights on their side he noticed that it was stationary and the appellant tried to avoid it but in vain.

Mr. Matsau, attorney for the appellant, submitted that if there was a warning sign at all on the road the appellant's car would have knocked it down or run it over. He submits further that the probability is that the truck had its bright lights on in order to provide enough light so that they could pull out the tractor. The truck had straddled the appellant's side of the road or it was soclose to the road and had its bright lights blinding the appellant, immediate reasonable reaction was to move out of the road and hence collision with the tractor and then with the truck.

There is evidence by Sergeant Thamae that when he arrived at the scene of the accident a warning sign was there and that he guarded the vehicles until the following morning when photcgraphs were taken. The photographs were handed in court as Exhibits A,B and C. Exhibit A shows the truck,part of appellant's car, a building and a warning sign on the tarmac. According to Exhibit A

the truck was not on the tarmac but on the gravel part of the road; it was facing towards a building and even if its lights were bright they could not have blinded a driver of an on-coming vehicle because they faced away from the road. Exhibit B shows the position of the truck, the appellant's car and the tractor taken from a different angle. It confirms appellant's evidence that in his confusion he veered to the far left between the truck and the tractor because he was under the wrong impression that the truck was going in the opposite direction.

The trial court believed the Crown witnesses and came to the conclusion that the accident occurred outside the road and that the appellant was negligent.

Mr. Matsau submitted that there was no warning sign at all because if it was there appellant's vehicle would have knocked it down. It seems to me that what is probable is that as the warning sign on Exhibit A appears to have been very close to the edge of the tarmac, the appellant passed safely without running over it. At that stage he was already being blinded by the bright lights of what he thought was a vehicle moving towards him. But the truth of the matter is that the appellant was not blinded by any bright lights because they were facing away from the road. He saw the lights of the truck but because of his negligent conduct of not keeping a proper look-out he deciced to leave the road and to pass on the other side of the parked truck.

As proof of appellant's negligence he was even warned by his passenger that there was an accident. He did not see the two tractors

which were on the side of the road before he came to the truck. If he had been a reasonably careful dirver he would have seen the two tractors and the man lying down and would have realised that there was an accident and would have stopped before he collided with the truck and the tractor.

If the appellant's version were to be taken as true, he would still be found to have been guilty because ne was blinded by the bright lights of what he thought was a moving vehicle and he "dimmed his lights for several times but there was no response whatsoever". The question one may ask is: why did the appellant not stop other than cover some distance without seeing where he was going? I am of the opinion that a distance of 50 yards was long enough for him to have realized that it was dangerous for him to drive on while he hardly saw where he was going.

In S. v. van Deventer, 1963 (2) S.A. 475 (A.D.) at 483 Ogilvie Thompson, J.A. said:

> "Nor does it, in my view, avail appellant that the deceased was walking towards appellant's car and was, not on the edge of the tarmac, but 5ft. 6ins. into the roadway. Such considerations are, of course, very relevant in assessing negligence on the part of the deceased: but the present enquiry is primarily concerned with the negligence of appellant. Once he became blinded, appellant continued to drive into what was for him a totally unseen stretch of road upon which an obstruction, whether lighted or unlighted might well be present. No doubt the mathematical odds were considerably against such an obstruction being present in appellant's pathway precisely during the period when appellant was travelling blinded: but, in my judgment, a reasonably prudent driver would not, under the circumstances stated, have "taken a chance" the way appellant did. For the possibility of some obstruction being in appellant's path once he was blinded would, in my opinion not have been regarded by a reasonably prudent person as one so remote as not requiring to be guarded against. Having regard to the evidence in relation to this

> particular road at this particular time, and bearing in mind that appellant had been travelling for some distance with dipped lights, I am of opinion that appellant should have anticipated the possibility of some obstruction - including a pedestrian - being in his path and that, accordingly, he should, immediately he was blinded, have applied his brakes in order to minimise the danger resulting from his being rendered unable to see."

If the appellant had been suddenly blinded by bright lights, the court would have probably come to the conclusion that moving the vehicle out of the road was a reasonable thing to do. The appellant drove a distance of about 50 metres dazzled by the bright lights and not cleraly seeing where he was going. A reasonably careful driver would have stopped before he came to the truck. But as I said earlier in this judgment the evidence before the court proved beyond any reasonable doubt that the lights of the truck were facing away from the road and that the collision occurred outside the road.

At the trial a lot of time was spent on the question of whether or not P.W.1 was knocked down by the appellant's car and why no medical evidence as to the extent of his injuries was not led. I do not wish to decide that issue because the appellant was not charged with having knocked down P.W.1 .

Mr. Matsau submitted that the learned magistrate did not apply his mind to the legal principle pertaining to the proximate cause of an accident. The learned magistrate ought to have first held that the appellant had the opportunity to avoid the accident but appellant failed to do so through recklessness or negligence.

I agree that the learned magistrate did not give any reasons of judgement in the true sense. All what he did was to give a short summary of the evidence of all the witnesses and then came to an abrupt conclusion that "there is no reason why the court should not believe/accept the Crown witnesses' testimony." That in the end result the appellant is found to have been the proximate cause of the accident."

It is the duty of a magistrate to give reasons for his findings. In the present case the learned magistrate did not do so except by saying I believe the story of the Crown witnesses. I think he had to tell us why. He had to give careful consideration to appellant's version and show that it is not reasonably possibly true. Be that as it may, I have read the evidence and considered it and have come to the conclusion that the learned magistrate came to the right conclusion.

In the result the appeal is dismissed.

J.L. KHEOLA
JUDGE

14th July, 1989.

For the Appellant - Mr. Matsau
For the Crown - Mr. Qhomane.