

CRI/A/16/93

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

MOFEREFERE HLAISI

Appellant

and

THE CROWN

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 24th day of February, 1995.

This is an appeal against the judgment of the Subordinate Court of Mophale's Hoek which convicted the appellant on the alternative charge of reckless driving.

The appellant had appeared before the court charged with the crimes of Culpable Homicide and Contravention of Section 90 (1) of the Road Traffic Act, 1981 in the main and the alternative charges, respectively. The body of the charge sheet disclosed the following allegations:

Main charge: "In that upon or about 24th December, 1990 and at or near Maghena Public Road on the Main South I in Mophale's Hoek district the said

accused did unlawfully and negligently being the driver of the motor vehicle No. F1284 on the said Public road did collide with motor vehicle No. E 2591, and cause the death of the following people:

1. 'Masentle Mpopo
2. Motseki Mosepeli
3. Retselisitsoe Sefali
4. Sekoetli Tsietsi
5. Ratilo Manekeneke
6. 'Mamahlati Seloane
7. Timotia Makhoana
8. Molefi Moeketsi
9. Nthona Mosena
10. Nkhetheleng Semoli
11. Matseliso Lipholo."

Alternative Charge:

"In that upon or about the 24th day of December, 1990 and at or near Maqhena on Public road, Mohale's Hoek district, the said accused did unlawfully negligently or recklessly drive motor vehicle No. F1284 on the said public road and collide with Motor Vehicle No. E2591 and as a result cause the death of:-

1. 'Masentle Mpopo
2. Motseki Mosepeli
3. Molefi Moeketsi
4. Retselisitsoe Sefali
5. Sekoetli Tsietsi
6. Ratilo Manekeneke
7. 'Mamahlati Seloane
8. Timotia Makhoana
9. Nthona Mosena
10. Nkhetheleng Semoli
11. Mats'eliso lipholo

those were the passengers of Motor Vehicle No.-E.2591 and contravening the said law and also cause some injuries to:

1. 'Matsepang Beleme
2. 'Mathantse Taelé
3. Retselisitsoe Mareka
4. Makhabane Mofammere
5. 'Matumelo Chantsi
6. 'Manikie Nyekimane
7. 'Mathabang Molise".

When they were put to him, the appellant pleaded not guilty to both the main and the alternative charges. The plea of not guilty was accordingly entered. At the close of the trial, the appellant was, however, found guilty of reckless driving as charged in the alternative charge. A sentence of M2,000 or 3 years imprisonment was imposed by the trial court.

The appeal is based on a long list of grounds which may, however, be summed up in that the conviction was against evidence and the weight of evidence.

It is common cause from the evidence that on the early afternoon of the day in question, 24th December, 1990, the two vehicles viz. F1284 and E2591 were travelling in the opposite direction along the Main South I public road when they collided against each other at a place called Maqhena in the district of Mohale's Hoek. Consequently, eleven (II) of the passengers in vehicle E2591, which was a bus were killed whilst seven (7) other passengers suffered injuries.

As to how that unfortunate accident occurred, the trial court heard the evidence of P.W.3, Ts`epo Monki, who testified that he was, at the material time, the driver of the bus which was travelling from Mohale's Hoek to Mafeteng. There was no other vehicles behind, or in front of him.

However, when he approached a place called Maqhena, P.W.3 noticed three vehicles travelling towards him i.e. from the direction of Mafeteng to Mohale's Hoek. They were a car followed by a van and a truck. As they approached, the truck indicated intention to overtake the van and the car. It simultaneously swerved to its right hand side of the road. P.W.3 immediately flashed warning lights at the truck which swerved to its left. As it did so, the truck nearly collided with the van it had been overtaking and again swerved to its right hand side of the road.

In order to avoid collision with the truck P.W.3 swerved the bus to its extreme left hand side of the road and at the same time applied brakes. The truck, however, continued moving to its right hand side of the road until it collided with the bus which was already running outside the tar mark on its extreme left hand side of the road. After hitting the bus the truck capsized.

As a result of the accident P.W.3 fell over the stairs of the driver's door which opened in the process. He dropped to the ground. When he got up P.W.3 realised that he had sustained bleeding injuries on the head and the left knee. He was subsequently transported to Mohale's Hoek town where he made a report to the police. He was referred to the hospital which, however, treated him as an out-patient. P.W.3 specifically denied the suggestion that, at the time the accident occurred, the bus was driven by a certain Nkhetheleng who admittedly died in the accident and not by himself.

The evidence of P.W.3 that immediately before the accident took place the truck was overtaking and had therefore, moved from its correct lane into the correct lane of the bus was confirmed by Hlomelang Mohale, Thabang Mafojane and Mthemkholo Mochochoko who testified as P.W.4, P.W.5 and P.W.7, respectively, and told the court that they were following the truck at the time the accident occurred. They, therefore, witnessed how the accident happened.

'Makhabane Mofammere and 'Matumelo Khantsi who testified as P.W.1 and P.W.2, respectively, told the court that, on the day in question, they were passengers in the bus. When they came to Maqhena both P.W.1 and P.W.2 noticed the bus moving to its extreme

left hand side of the road.

According to P.W.1 she also noticed, at the same time, the truck which was travelling in the opposite direction moving to its extreme right hand side of the road before colliding with the bus. She lost consciousness and did not know what happened thereafter. The next thing she found herself in Mohale's Hoek hospital where her right leg had been amputated.

P.W.2 made no mention of the movement of the truck at the time she noticed the bus moving to its extreme left hand side of the road. She, however, testified that after she had noticed the bus moving to its left hand side, she apparently fainted, presumably as a result of the accident. It was only when she regained consciousness that P.W.2 realised that both the truck and the bus had overturned on the left side of the road as one travelled in the direction towards Mafeteng. Thereafter, she was transported to Mohale's Hoek hospital where she was admitted and discharged on the following day.

To the extent that the two vehicles collided on the left hand side of the road, as one travelled towards Mafeteng which side was, therefore, the correct side of the bus, the evidence of P.W.1 and

P.W.2 corroborated, in my opinion, that of P.W.3, P.W.4, P.W.5 and P.W.7.

P.W.9, Ishmael Mokhoabane, testified that, on the day in question, he was travelling in an Isuzu vehicle with registration numbers F1236 along the Main South I public road. He was travelling in the direction from Mafeteng to Mohale's Hoek. He was following a van, red in colour. A truck was coming behind him. When he was at a place called Maghena the truck, which was travelling fast, overtook him. It then indicated intention to overtake the red van, ahead of him. At that time the truck and the van went out of his view. Thereafter P.W.9 heard a loud noise from the direction in which the truck and the van had disappeared.

It was only when he came within its view that P.W.9 noticed that the truck had collided with a bus and the two vehicles had, in the process, overturned on the extreme right hand side of the road as one travelled in the direction from Mafeteng to Mohale's Hoek. P.W.9 was not, therefore, in a position to tell the court how the accident had happened.

According to him, P.W.9 stopped his vehicle, alighted and went to render assistance. P.W.3, whom he knew to be the driver of the bus, requested to be transported to Mohale's Hoek police station. P.W.9,

however, turned down the request and told P.W.3 to help the people who had been badly injured in the accident. It was only after many people had arrived at the scene of accident that he transported P.W.3 to Mohale's Hoek police station.

It is perhaps convenient to mention, at this juncture, that the evidence of P.W.2 and P.W.9 that as a result of the accident both the bus and the truck had overturned was denied by P.W.4, P.W.5 and P.W.7 who testified that only the truck, and not the bus, had overturned. As it will be shown in a moment, the evidence of P.W.4, P.W.5 and P.W.7 was confirmed in that regard by the police officers who came to the scene of accident shortly after the accident had happened. P.W.2 and P.W.9 were probably mistaken in their evidence that the bus had also overturned in the accident.

Sergeant Matoetoe and Lieutenant Mofolo testified as P.W.6 and P.W.8, respectively. They assured the court that on the day in question, 24th December, 1990, they were on duty at Mohale's Hoek police station. They confirmed that they received a report following which they proceeded to a place called Maghena along the Main South I public road in the district of Mohale's Hoek.

On arrival at Maqhena, P.W.6 and P.W.8 found a truck and a bus with registration numbers F1284 and E 2591, respectively, involved in a road accident. The two vehicles were on the left hand side of the road as one travelled in the direction from Mohales's hoek to Mafeteng. Only the truck and not the bus had, however, overturned in the accident. Some people had been killed whilst others sustained injuries in the accident. A number of people had already gathered at the scene of accident and were rendering help. The two police officers also assisted by transporting the casualties to Mohale's Hoek hospital where a medical doctor apparently afforded medical treatment and conducted post mortem examinations on the injured and the dead bodies of the deceased, respectively. The medical and the post mortem examination reports were, by consent, handed in from the bar as exhibits.

According to P.W.8, he and the appellant re-visited the scene of accident two days later. In the presence of the appellant he took the measurements and prepared a sketch plan which he handed in as exhibit and part of his evidence in the trial. The appellant was subsequently cautioned and charged as aforesaid by P.W.6.

In his defence, the appellant confirmed that in the afternoon of 24th December, 1990 he was driving

the truck F1284 along the Main South I public road and was travelling in the direction from Mafeteng to Mohale's hoek. As he approached the place called Maghena he was following a van. He then noticed the bus E2591 coming from the opposite direction i.e. from Mohale's Hoek towards Mafeteng. After crossing a culvert the bus travelled on its wrong side of the road. The van which was in front of his truck moved to its extreme left hand side of the road. In order to avoid collision with the on-coming bus, the appellant swerved his truck to its extreme right hand side of the road. However, the bus also swerved to its extreme left hand side of the road and in the process collided with the truck which was already running outside the tar mark on its extreme right hand side of the road. As a result of the accident only the truck overturned.

According to him when he got out of his truck the appellant heard many people screaming in the bus. He went there to render assistance. On arrival at the bus he noticed that the driver thereof was leaning on the steering wheel already dead. The driver's door of the bus could not open and a truck had to be used to pull it open.

In all material respects the evidence of the appellant was corroborated by D.W.2, Chabana Hlapisi,

who was his companion in the truck. However, in his testimony D.W.2 told the court that the accident occurred in the manner described by the appellant before the bus could cross, and not after it had crossed, the culvert.

It is significant to note that apart from the appellant and D.W.2 none of the witnesses who testified in the trial mentioned the existence of a culvert in the vicinity of the place where the accident occurred. According to the appellant and D.W.2 the accident took place on a bend. Although that was denied by both P.W.2 and P.W.3 who testified that the road where the accident occurred was straight, it may be mentioned that in their testimony P.W.6, P.W.7 and P.W.8 corroborated the evidence of the appellant and D.W.2. Indeed, the sketch plan which was admittedly prepared in the presence of the appellant and handed in as exhibit by P.W.8 showed that the place where the two vehicles had collided was a bend. No culvert of any sort was shown on the sketch plan.

Be that as it may, both the appellant and D.W.2 denied the evidence that immediately before the accident took place, the appellant's truck was overtaking in the face of an oncoming bus.

However, considering it in its entirety, the trial magistrate rejected as false the defence's denial and accepted as the truth the prosecution evidence that immediately before the accident took place the bus, which was travelling from the direction of Mohale's Hoek, moved to its extreme left hand side of the road in order to avoid collision with the appellant's truck which was overtaking as it approached from the opposite direction and was, therefore, moving on its wrong lane of the road.

Subsections (3) and (4) of Section 60 of the Road Traffic Act, 1981 provide, in part:

"(3) Before overtaking, every driver shall make sure that

- (a)
- (b)
- (c) the lane he is about to take is clear far enough ahead
- (d)

(4) A driver of a motor vehicle shall not overtake other traffic proceeding in the same direction on a public road when:

- (a)
- (b) on bends; or
- (c)

The prosecution evidence that, at the time the accident occurred, the bus was travelling on the

extreme left hand side of its correct lane of the road in order to avoid collision with the truck which was overtaking and, therefore, moving on its wrong lane of the road was confirmed by P.W.1, P.W.3 P.W.4, P.W.5 and P.W.7. Although the appellant and D.W.2 denied it, the evidence against their denial was, in my view, simply overwhelming. There was, therefore, nothing unreasonable in the trial magistrate finding, as she did, that the accident occurred on a bend as the truck was overtaking in the face of the oncoming bus which consequently moved to its extreme left hand side of the road in an attempt to avoid a collision.

On the authority of the above cited subsections of Section 60 of the Road Traffic Act, 1981 the trial magistrate found, and rightly so in my opinion, that the appellant who was admittedly the driver of the truck, was reckless in his driving. The trial magistrate considered the question of discrepancies in the evidence and came to the conclusion that whatever discrepancies existed were not of such a nature as would entitle the accused to an acquittal. I agree.

The appellant cannot, in the circumstances, be heard to say the conviction was against evidence and the weight of evidence. This, in my view, disposes of the grounds of appeal.

In the result, the appeal is dismissed.

B. K. MOLAI

JUDGE

24th February, 1995.

For Appellant : Mrs Kotelo

For Respondent: Mr. Ramafole.