CRI/A/9/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

TLOTLISO QAHANE **APPELLANT**

and

REX **RESPONDENT**

JUDGEMENT

Delivered by the Honourable Mr Justice S. N. Peete
on the 28th July 2000

This is an appeal against the judgement of the Leribe Subordinate Court in which the learned Magistrate convicted the appellant on four counts of culpable homicide and sentenced him on each count to five years imprisonment - sentences being ordered to run concurrently.

I pointed it out **mero motu** to the Crown Counsel that the main counts of culpable homicide were rather inelegantly drafted because the negligence alleged seems to be in relation to the driving and not to the causing of death; for example count one reads:

> "COUNT 1
>
> That the said accused is charged with the crime of Culpable Homicide. In that upon or about the 10th day of September, 1994 and at along Main North I Public Road at Leribe Moreneng in the district of Leribe, the said accused drive motor vehicle X 2030, negligently and as a result did collide with another motor vehicle to wit C 0107, and a certain passenger therein sustained some injuries which caused her death. Passenger - Malepati Phalisa.
>
> ALTERNATIVELY
>
> That the said accused is charged with contravening section 90 (1) of Road Traffic Act 8/81 as amended.
>
> In that upon or about the 10th day of September, 1994 and along Main North I Public Road, at Leribe Moreneng in the district of Leribe, the said accused drive motor vehicle X 2030 recklessly or negligently and did collide with another motor vehicle to wit C 0107, and Malepati Phalisa sustained some injuries."

I seem to prefer the specimen indictment suggested by Milton - **South African Criminal Law and Procedure** (3rd Ed) page 400 which alleges that the accused did "unlawfully and negligent killed Y". **Mr Phoofolo** had no objection to the charge being amended at this stage on appeal since there is no material prejudice to the appellant (**Rex vs Moshesha** - 1974 -75 LLR 428; **Rex vs Shimba** 1955 (1) SA 331).

Mr Phoofolo however strenuously argued that there had been improper splitting of charges in that the appellant had been charged with four separate counts of culpable homicide (with alternative charges of negligent driving under section 90 (1) of the Road Traffic Act 1981) when in fact the four deaths had been caused by a single

actus reus and had occurred all but simultaneously, and he submits that the appellant was prejudiced by the multiple jeopardy. He cited the case of **S. vs Mampa** - 1985 (4) SA 633 where it was held in similar circumstances that the accused's conduct could not be separated into different acts and that he should have been charged with one count of culpable homicide in which reference was made to both deceased persons. This is the correct approach and the charges are therefore substituted with one charge with one conviction in respect of four deceased persons. (See generally - **R vs Moseme** 1936 A.D 52; **R vs Sabuyi** 1905 TS 170; **S. vs Ndou** 1971 (1) SA 668; **R vs Kuzwayo** - 1960 (1) SA 340; **S. vs Katz** 1959 (3) SA 408. I should point out that combining the charges into one, does not belittle the sanctity of human life because it is the act, and not its consequences, which establishes the criminal act. Different considerations apply in multiple murders where for example X poisons the whole village or explodes a bomb in a bus; in such cases he foresees and intends the death of each one of his victims even where his intent is **dolus indeterminatus (eventualis) R vs Bernado** - 1960 (3) SA 552.

> "Common experience shows that in cases of culpable homicide arising from negligent driving of a motor vehicle it is often fortuitous whether the resulting collision does or does not cause the death of one or mor persons. Whether one or two persons die as a result of the collision is not really connected with the degree of negligence of the blameworthy

state of mind of the accused, whereas in the murder of two persons the intent to kill is directed at the death of both. Negligence ranges in degree from slight inadvertence to recklessness which verges on **dolus,** but slight negligence may cause the death of several persons in a motor collision whereas gross negligence may result in the death of but one person. Whether a negligent act results in one death or several deaths bears no necessary proportion relationship to the fault or degree of fault of the accused.

The calamity of multiple deaths resulting from negligence such as careless driving is obviously greater than the calamity of a single death but the criminal blameworthiness of the accused is not therefore greater. The gravity of an accused's conduct in offences based on negligence cannot be judged by its actual consequences - **R vs Msimango** - 1950 (2) SA 205 - 209/10. It follows that to charge and convict an accused with one offence or several offences of culpable homicide arising from a single negligent act or omission according to the number of persons whose deaths were caused by the accused's negligence would be arbitrary and unrelated to his criminal blameworthiness. On these considerations a single negligent act such as failing to keep a proper look out while driving a motor car which results in a collision and deaths of one or more persons would seem to constitute in substance one offence."

In the circumstances the charge in the present case should read:-

"THAT: the accused is charged with the crime of culpable Homicide.

In that upon or about the 10th day of September 1999 and at or along the North Main I public road at the Leribe Moreneng in the district of Leribe, the accused unlawfully and negligently drive motor vehicle X 2030 and collide with another motor vehicle C 0107 and as a result negligently kill the following persons -

1. Malepati Phalisa
2. Clovis Mokhobalo Molapo
3. Lebohang Monoaqo
4. Joseph Mohanya

Alternatively

That the said accused is charged with contravening Section 90 (1) of the Road Traffic Act of 1981 (as amended).

> "In that upon or about the 10th day of September 1994 and along the Main North I at Leribe Moreneng in the district of Leribe, the said accused drove motor vehicle X 2030 recklessly or negligently and did as a result collide
>
> with motor vehicle C 0107 causing injuries to
> - Makopoka Lethunya
> - Makolana Lethunya
> - Khomoatsana Lebitsa."

Mr Phoofolo when arguing on the merits of the conviction submits that there was no evidence sufficient to support the verdict of culpable homicide. The evidence of the crown came from two witnesses. P.W.1 No. Sergeant Nthimo who attended the scene of the accident informed the court that upon arrival at the scene on the 10th September 1994 he found two vehicles that had been involved in a collision. Vehicle X 2030 which had been driven by the appellant was straddling the dotted central line on the high way and the combi C 0107 was off the road with extensive damages; the passengers injured or deceased, had already been conveyed to the hospital. It was common cause that the appellant was also not present at the scene when the police

officer took the measurements. He demarcated **X** [1] as being the point of impact because he found "signs of collision such as broken glasses and the mud." He says that when he showed this point tot he appellant on the following day, the appellant disagreed and instead pointed out a point - **X** [2] - as being the point where the collision occurred. This latter point is almost along the centre line while the police officer's mark is in the middle on the lane in which C 0107 was supposedly travelling. The police officer has indicated in his map that the appellant's vehicle X 2030 stood along the centre line five paces away from **X** [1]. According to the police officer vehicle C 0107 was damaged beyond repair while the vehicle X 2030 was damaged on the bonnet, radiator grill, windscreen front bumper, front head lamps indicator, right door and top.

It is quite clear that the issue of the point of collision was very controversial in this case it being the word of the police officer and that of the appellant. In my view, it is always important that where a police officer marks a point of impact in the absence of the accused, he should always mark the spot indelibly with a chalk or stone in order to show it to the accused when he comes to point out the spot later. Mud and broken glass in the middle of the tar road may not last long enough to be still present when the accused comes to the scene. The evidence as it stands is rather equivocal. P.W.2 merely says that "The point of impact happened at our lane." He observed this from where he was standing behind two front passengers and he says that as the coaster was slowing down the appellant's vehicle overtook it driving a high speed.

He denied that his combi was "fighting" over the lane with another taxi as they were approaching the appellant's vehicle.

In a case such as the present it was necessary that the learned magistrate **mero motu** or on application of the prosecutor to have gone on an inspection **in loco** to have the positions clarified. This was not done and the issue, important as it is, remains in doubt.

The appellant's version is to effect that as he was driving X 2030 a coaster in front was negotiating a curve and indicating to the left. He says it stopped and as he was overtaking it he saw a taxi followed by another taxi travelling in the opposite direction; and that when he was alongside the coaster the taxi C 0107 appeared and he tried to veer to the left but the collision then occurred.

As it is, the evidence of the crown relied on the account given by a single witness, namely P.W.2 and the crown's and appellant's versions are mutually destructive. In the case of **R vs Mohlerepe** - 1979 (1) LLR 148 **Mofokeng J** held that -

> "Where there are two mutual destructive versions presented to the court the test to be applied in such a situation is simply that the court must be satisfied on adequate grounds that the version it accepts is true and the other false; a court is not entitled to convict an accused person merely because his explanation is improbable. It will do so if beyond doubt the explanation is false; an accused person should not be convicted merely because he is a liar"

I have pointed out that the evidence on the point of impact is equivocal and I find that there are no adequate reasons to reject the X^2 as false beyond doubt.

On a charge of culpable homicide, the critical question always is whether a reasonable driver in the appellant's position ought to have foreseen the possibility that his driving might cause death; it must also be proved that the appellant's negligent driving was the proximate cause of the victim's death (**R. vs Lennett** - 1917 CPD 444 at 445. It has also been held however that it is competent for the court to convict the accused of negligent driving provided the evidence proves the elements of negligent driving in the alternative **R vs Ndwandwe** - 1976 (1) SA 323.

In this case it is not clear whether the deaths of the victims were the result of the negligent driving of the appellant or resulted from the contributory negligence of the driver of C 0107 or combination of both.

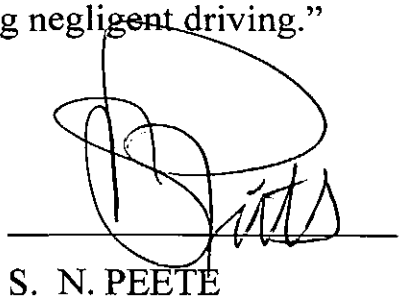
I am not satisfied that it can be said with all conviction that appellant's negligence (if proved) was the proximate cause of the victims' death. In **Maseretse vs R** - 1974 - 75 LLR 385 **Isaacs AJ** said that depending on the circumstances a driver may be guilty of negligent driving but he cannot be found guilty of culpable homicide unless it has been proved beyond reasonable doubt that his negligence was the proximate cause of the deceased's death. In my view, the verdict of culpable homicide was not supported by the evidence which I hold to be equivocal and inconclusive.

There matter does not end there. I however hold that the appellant was however negligent in overtaking the coaster without having assured himself that it was safe to do so and that overtaking could be achieved without endangering the oncoming traffic. He admits that the coaster was indicating to stop at a curve yet he overtook it without assuring himself that it was safe to do so without endangering the said oncoming traffic. He should have exercised care and should have slowed down before attempting to overtake the coaster more so because he had noticed an oncoming taxi. Whilst it cannot be said that his negligent overtaking was the proximate cause of the accident (**R vs Mhlongo** - 1948 (1) SA 1109) this is a case in which, in all probability the negligence of both drivers was so contemporaneous as to make it impossible to say either could have avoided the consequences of other's negligence and in which both could have contributed to the accident - **Swadling vs Cooper** - 1931 AC 10. The question whether the death of several victims was, beyond reasonable doubt the result of the sole negligence of the appellant or in combination with that of the driver of C0107 should be answered in the negative. This finding does not however totally exonerate the appellant from all criminal liability. The charge had an alternative under section 90 (1) of Road Traffic Act of 1981 and in my view, the appellant's negligent driving was sufficiently proven. I therefore set aside conviction of culpable homicide and substitute therefore conviction on the alternative charge of negligent driving.

Sentence:

Having thus altered the conviction, the court is at large to reconsider sentence. The appellant has no criminal record. Having considered all the circumstances of the case, I impose the following sentence -

"Three years imprisonment or M2,000.00 half of which is suspended for a period of three years on condition that the appellant is not during the said period convicted of an offence involving negligent driving."



S. N. PEETE

JUDGE

For Appellant: Mr Phoofolo

For Respondent: Mr Hoeane