CRI/A/41/80

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

LUCAS KHUMBANE Appellant

v

REX Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on 30th December 1980

The appellant was convicted by a Class III magistrate of an offence contrary to s.124(1) of the Road Traffic and Transport Order 1970. He had pleaded not guilty.

Section 124(1) reads :-

"Any person who drives a verhicle on a public road recklessly or negligently shall be guilty of an offence".

The particulars of the offence state that on or about 26th July 1979 :

"along Leabua Highway Pitso Ground junction Maseru the said accused did recklessly or negligently drive a motor vehicle LA 3980 upon the said public road and as a result the said motor vehicle collided with another motor vehicle LA 7777".

Now these "particulars" are not adequate. They are simply a repetition of the statement of the offence. They did not convey to the appellant the case he was to meet. However there has been no objection to the charge and attorney for the appellant did not request the Crown to supply further or better particulars. It has been said that it is sufficient for the prosecutor to allege that the accused drove a vehicle upon a public road recklessly or negligently (R. v. Heinen 1927 EDL 460, R. v. Woest 1929 EDL 179, R. v. Verity Amm. 1934 TPD 416, R. v. Horne 1934 CPD 401) but in order to sustain the conviction

/on appeal

on appeal it is essential

(a) that sufficient evidence emerges at the trial to justify non interference with the verdict, i.e. that lack of particularity (not being initially objected to) had been cured and

(b) no prejudice had occurred to the accused person.

The magistrate thought that the appellant was not reckless but negligent.

What appears to have happened was that in July 1979, soon after traffic lights or robots were installed along a number of road junctions in Maseru Town, Sgt. Ntsele (PW1) was stationed near to the premises of the Department of Commerce and Industry along Leabua Jonathan Highway with the intersection of the road to and from Pitso Ground, to observe the flow of traffic. The Sgt. testified that he noticed that a vehicle driven by Ambassador Ntlhakana, coming from TY direction towards the circle, had overshot the robot when, as he says, it was red. He signalled Mr. Ntlhakana to stop and the latter allegedly did so. According to the sketch which the Sgt. produced Mr. Ntlhakana stopped between the two sets of traffic lights. The appellant, who was driving immediately behind Mr. Ntlhakana, bumped into Mr. Ntlhakana's rear. There was minor damage to the rear indicator lights of Mr. Ntlhakana's car and also to the appellant's front indicator lights. It is also stated on the form that the appellant's "door was affected".

Mr. Ntlhakana was not called as a witness and the only evidence for the Crown was the Sgt's. The appellant elected to give no evidence and the main argument on appeal was that the Sgt's evidence did not disclose in what way the appellant was negligent. The Sgt. merely said that the two vehicles bumped into each other and it was his opinion that the appellant was at fault. Subsection 3 of s.124 provides :

> "in considering whether an offence has been committed under subsection 1 the court shall have regard to the circumstances of the case, including but without prejudice to the generality of the forgoing, the nature, conditions and use of the public road upon which the offence is alleged to have been committed, the amount of traffic which at the time actually was or which reasonably could have been expected to be upon that road and the speed at and the manner in which the vehicle was driven".

The probabilities are that the main cause of this minor accident was a combination of apparently a sudden halt by

/Mr. Ntlhakana

Mr. Ntlhakana and a signal to halt by the Sgt. from the most awkward position imaginable to traffic following Mr. Ntlhakana and traffic moving in the opposite direction if there was any at the time. The first driver behind Mr. Ntlhakana (the appellant) is entitled to assume, particularly if the lights had changed in his favour, that he can proceed. The Sgt.'s own sketch does not reveal any negligence on appellant's part.

In the absence of the important evidence of Mr. Ntlhakana and in the absence of any details from the Sgt. about the conditions prevailing at the road junction at the time it is not possible to say that the offence of negligent driving has been proved unless the prosecution were able to bring it within the maxim res ipsa loquitor. But traffic lights change from red to amber to green and from green to amber to red. The Sgt. did not tell us that the appellant crossed when the robot was on red. The appellant's silence in this instance did not, in my view, clinch the case in favour of the Crown. Assuming the robot was wholly red and the appellant unlawfully disobeyed the signal it is difficult to see how he could have forseen the possibility of Mr. Ntlhakana, who allegedly overshot the robot when red no doubt in order to enable him to get through quickly, would suddenly stop in the middle of the intersection. In the absence of evidence aliunde the bumping, the appellant may have committed an error of judgment, but this does not always in Road Traffic law tantamount to negligence. (A useful discussion on this subject can be found in Cooper and Bamford South African Motor Law 1965 Ed. p.245 et seq. and cases cited in footnotes 8 - 19 at p. 245 and p. 246).

I would allow the appeal. The fine, (which I understand has been paid) should be refunded and also the appeal fees.

CHIEF JUSTICE
30th December, 1980

For Appellant : Adv. Monapathi
For Respondent: Miss Surtie