

IN THE HIGH COURT OF LESOTHO

C

In the Appeal of

KHOJANE NKHOLI MANTSOE Appellant

v

R E X

Respondent

J U D G M E N T

Delivered by the Hon. Mr Justice

B K. Molai on the 4th day of March, 1988

The appellant appeared before the Subordinate Court of Buthe-Buthe charged with two counts viz (1) culpable homicide or alternatively contravening section 90(1) of the Road Traffic Act No 8 of 1981 and (2) contravening section 88 (e) of the Road Traffic Act No 8 of 1981. The body of the charge sheet disclosed the following facts -

Count I "In that upon or about the 5th October, 1986 and at or near Ha Rampai in Leribe district within two miles from Butha-Buthe but where this court has jurisdiction, the said accused did wrongfully unlawfully and negligently knocked down a pedestrian with motor vehicle No C4875 and thus caused the death of the said Hlalele Rampai "

ALTERNATIVELY .

"In that upon or about the 5th October, 1986 and at or near Ha Rampai public road in Leribe district within two miles from

2/ Butha-Buthe .

Butha-Buthe but where this court has jurisdiction the said accused did wrongfully, unlawfully, recklessly or negligently, being a driver of motor vehicle No. C 4875 on the said public road did knock down a pedestrian with the said motor vehicle and thus caused the death of the said Hlalele Rampai."

Count II "In that upon or about the 5th October 1986 and at or near Ha Rampai public road the said accused did wrongfully, unlawfully fail to remain on the scene of the accident and thus contravene the said section "

Although he pleaded not guilty to both the main and the alternative charges under Count I, the appellant was found guilty as charged on the alternative charge. A sentence of M90 or 6 months imprisonment was imposed and an order suspending his driving licence for 6 months issued against the appellant.

On count II the appellant pleaded guilty. The provisions of S.240(1)(b) of the Criminal Procedure and Evidence Act 1981 were invoked. The appellant admitted as correct the facts, outlined by the public prosecutor, which facts became evidence. The trial court considered the evidence and returned a verdict of guilty as charged on count II. A sentence of M60 or 6 months imprisonment was imposed.

The appeal is only against the conviction on the alternative charge in count I and the order suspending the appellant's driving licence for 6 months.

The evidence of P W 2, Thabang Mafisa, was that on 5th October, 1986 Tjabolane Machenene and Hlalele Rampai, who is the deceased, called at his house from where they left late at night. The deceased and his companion were about to cross the Leribe/Butha-Buthe main road when P W 2 noticed a vehicle

3/ coming from . . .

coming from the direction of Butha-Buthe When P W 2 first saw it, the vehicle had its lights on and was travelling at a high speed It was about 20 paces from the spot where the deceased and his companion were about to cross the main road As it passed next to the deceased and his companion, P.W 2 heard the sound of a collision but the vehicle neither stopped nor reduced its speed Thereafter P W 2 noticed that there was only one person walking on the road. He immediately went to report the incident to his parents who did not, however, testify in this trial

The evidence of P W 1, Tjabolane Machenene, was slightly different According to him at about 7 p m and after leaving a certain house (Presumably that of P.W.2) in the village of Ha Rampai he and the deceased were walking on the Leribe/Butha-Buthe main road They were walking in the direction towards Butha-Buthe and the deceased was on his right hand side close to the white line in the middle of the road P W 1 then saw a vehicle coming from the direction of Butha-Buthe It had its lights on and was travelling at a high speed He and the deceased did not, however, walk out of the road As it passed next to them the vehicle knocked down the deceased According to him, P.W.1 raised an alarm and P W 2 came to the scene As he was too frightened P W 1 went home leaving the deceased on the road where he had been knocked down by the vehicle

It is to be observed that although P W 2 told the court that P W 1 and the deceased were about to cross the road when the accident occurred P W 1's evidence is that he and the deceased were walking along the road. It follows, therefore, that if it were true that P W.1 and the deceased were walking along the road in the direction towards

Butha-Buthe when the accident occurred, P.W.2's evidence cannot be correct that the collision happened as the deceased and P.W 1 were about to cross the road

Although P.W.1 told the court that when the deceased was knocked down by the vehicle he raised the alarm and P W 2 came to the scene, the latter does not seem to support him on this point. According to P W 2 when he heard the sound of collision and noticed that there was only one person on the road he apparently got the impression that the other person had been involved in a collision and so he went to his house and reported to his parents. At no time did P W 2 tell the court that he heard the alarm allegedly raised by P W 1 nor, indeed, did P W 2 say he went to the spot where the deceased had been involved in the road accident.

Be that as it may, it is significant to note that the appellant himself gave evidence on oath and told the court that on the night in question he was driving a coster - C 4875, along the Leribe/Butha-Buthe public road. His vehicle had the lights on and was travelling at the speed of 50 km an hour. When he came to Ha Rampai he noticed the deceased and P W 1 walking on the left side of the white centre line of the road as one travelled towards Butha-Buthe. As he was about to pass them he had the occasion to take off his eyes from the deceased and P W 1. He then heard a sound of something hitting his vehicle. He conceded that he neither stopped nor reduced the speed. Instead he drove his vehicle home. The appellant did not, therefore, deny that the deceased was knocked down by his vehicle C.4875. He, however, argued that as he was about to pass him on the road, the deceased suddenly

5/ walked into .

walked into the lane of the vehicle which then knocked him down. He submitted it was the deceased who was negligent and, therefore, the cause of the accident.

The trial magistrate accepted the evidence of the appellant corroborated by that of P.W.1 that at the time he was knocked down by vehicle C.4875 the deceased was walking very close to the white centre line of the road. In doing so in the face of an oncoming vehicle the deceased was negligent I agree. A prudent person in the position of the deceased ought to have moved out of the road, particularly so if according to the evidence of P.W.1 and P.W.2, the vehicle was approaching at a high speed. Indeed, S.79(1) of the Road Traffic Act, 1981 specifically provides that a pedestrian on a public road which has no pavement or suitable verges for pedestrians shall walk as near as practicable to the edge of the road on his right hand side so as to face the oncoming traffic.

That was, however, not the end of the story. In his own testimony the appellant told the court that as his vehicle approached them he was aware of the deceased and P.W.1 on the road. Notwithstanding that, he, however, took off his eyes from the deceased and P.W.1 as he was about to pass them. He should not have done that. If, indeed, he were aware of P.W.1 and the deceased who was admittedly walking very close to the white centre line of the road the appellant ought not to have looked away from them. He had a duty to keep a watchful eye on them. Failure to do so rendered the appellant also negligent in his driving.

Assuming the correctness of Appellant's story that as he was about to pass them he had the occasion to take off his eyes from the deceased and P.W.1, I find his contention that the deceased suddenly walked into the lane of vehicle C.4875 unconvincing. If he had taken his eyes off P.W.1 and the deceased the appellant could not, at the same time, have seen the latter suddenly walking into the lane of vehicle C.4875.

P.W.4, L/Sgt Molapo, testified that on the night of 5th October, 1986 he was in his office at Butha-Buthe police station when he received a report as a result of which he proceeded to Ha Rampai. He found the body of the deceased lying on the Luibe/Butha-Buthe public road. He took the measurement after which he conveyed the dead body of the deceased to the mortuary. He then continued with investigations in the course of which he came across vehicle C.4875 which had damaged grill, bumper, bonnet and windscreen. He found that on 5th October, 1986 the driver of vehicle C.4875 had been the appellant. He subsequently met and interrogated the appellant who took him to the scene of accident and pointed out the point of impact. P.W.4 prepared the sketch plan which he handed in as Exhibit "A" at the trial.

P.W.3, Tsietso Rampai, testified that the deceased was his own son. On 6th October, 1986 he identified his dead body before the medical doctor who performed the post mortem examination.

It is significant to note that although he went to the scene of accident and found the dead body of the deceased lying on the road P.W.4 does not say whether or not he found anybody with the deceased. Nor does he say he examined the dead body for any injuries it might have sustained. He does not disclose how the body was conveyed to the mortuary and whether or not it sustained any injuries whilst it was being transported from Ha Rampai to the mortuary.

Although P.W.3 told the court that he had identified the body of the deceased before the medical doctor who performed the post mortem examination no medical doctor was called to testify at the trial.

7/ Indeed, no .....

indeed, no post mortem examination report was produced as exhibit in this case. The net result is that there is no evidence whatsoever indicating what injuries, if any, were sustained by the deceased.

In the absence of the medical evidence I take the view that the cause of death had not been conclusively established in this case. The fact that deceased was knocked down by the appellant's vehicle does not, in the circumstances of this case, establish with any certainty that the deceased died as a result. He may, for example, have been knocked down unconscious by the appellant's vehicle and whilst lying on the road unattended another vehicle not driven by the appellant came along and dealt him the fatal blow. In that eventuality, the appellant cannot be held responsible for the death of the deceased. In my view the trial court correctly did not find the appellant guilty on the main charge under Count I.

As regard the alternative charge on count I, I have already pointed out that the appellant did not keep a proper look out as he passed next to the deceased and P.W.1 on the road and was for that reason negligent. The fact that the deceased was also negligent does not, in my view, exonerate the appellant on the simple principle that two wrongs never make a right. Consequently I come to the conclusion that the appellant was correctly found guilty as charged on the alternative charge in Count I.

Finally, it is to be observed that the provisions of S.108 (1) (a) of the Road Traffic Act, 1981 are mandatory. Once it had convicted the Appellant of negligent driving under the alternative charge in Count I, the trial court was bound either to suspend or

8 / cancel .....

cancel his driving licence. It simply had no choice in the matter. Assuming the correctness of my decision that the appellant was rightly convicted of negligent driving under the alternative charge in Count I, it must be accepted that the appeal against the order suspending his driving licence has no merit.

From the foregoing, it is obvious that the view that I take is that this appeal ought not to succeed and it is accordingly dismissed.

B.K. MOLAI  
JUDGE

4th March, 1988.

For Appellant  
For Crown

Mr. G.N. Mofolo,  
Mr. Mokhobo.