IN THE APPEAL COURT OF SWAZILAND

In the Appeal of APPEAL NO. 11/1981

MOSES GININDZA (Appellant)

vs.

REGEM (Respondent)

CORAM: MAISELS J.P.,

DENDY YOUNG J.A.

ISAACS J.A.

FOR CROWN: MR. KRUPAVARAM

FOR DEFENCE: MR. LUKHELE.

JUDGMENT

(Delivered on 26 Jan. 1981)

Dendy Young J.A.

The Appellant was convicted of the crime of Culpable Homicide and sentenced to a fine of E100 or 6 months imprisonment.

After argument the Appeal was dismissed by a Majority and the Court indicated that reasons would be filed later. The following are my reasons for taking the view that the appeal should succeed.

The charge arose out of a collision which occurred on the 24th July 1980 upon the Balegane and Mayiwane road in Mkhuzweni area, as a result of which a 16 year old girl Thandie Maseko was knocked down by a truck driven by Appellant. The girl sustained a broken neck and died instantly.

The Crown alleged negligent driving on the part of the Appellant in -

(1) travelling at an excessive speed and

(ii) failing to keep a proper look-out. The Appellant pleaded not guilty.

According to a sketch plan framed by the police the road which is a dirt road is 5 metres wide. The point of impact as pointed out by Appellant and the witness Linah Maseko was on the extreme right of the road facing the way the deceased girl was walking. Appellant's truck pulled up after the collision 63 paces further on.

The body of the deceased was thrown 5½ metres. At the point of the collision the road had a

down gradient with respect to Appellant's truck. The police were on scene at about 8.15 hours. It was already dark. The weather was clear. There were no brake marks.

The further evidence led by the Crown was first that of Henry Dlamini a motor mechanic who testified that he examined the truck after the accident. It was a big vehicle. The left side rear view mirror frame was bent and twisted and the mirror was cracked. Otherwise the truck was undamaged and road-worthy.

The girl Linah Maseko aged 15 said that on the day in question sometime between 5.30 and 6.00pm. she, together with two other girls, one being the deceased, were walking on the edge of the road on the right hand side, i.e. facing the on-coming traffic. There was no side walk. The girls were walking in single file with deceased infront. The witness noticed a motor vehicle with head lights burning, coming from the opposite direction. It was already dark. The girl said the truck was speeding but does not indicate how she judged the speed.

3

The road was straight at that point. At the same time a truck came from behind i.e. travelling on its correct side in the direction in which they were travelling. The two vehicles passed each other along-side the girls. Both were big trucks. That was the evidence for the Crown.
Appellant did not give evidence.

The learned trial Judge held that Appellant was impaled on the horns of a dilemma;

(i) either he was not keeping a proper look-out or

(ii) he was travelling too fast to control his vehicle properly.

The Judge considered that the Crown had established a prima facie case which called for an answer from the Appellant, In the absence of evidence from Appellant casting doubt upon legitimacy of the dilemma, the case for the Crown was proved.

With great respect, I can not share that view. In my opinion the collision itself did not produce any such dilemma. There is no dilemma. The simple question is whether there was prima facie evidence or a failure to keep a proper look-out or of excessive speed, causally related to the collision. The evidence must show that if Appellant had looked he must have seen the deceased in time to avoid her, had he been travelling at a proper speed. The issue boils down to whether, if the Appellant had been keeping a proper look-out, he must have seen the deceased in time to take the necessary avoiding action.

4

In my opinion it is impossible logically to say that the only inference which can be drawn from the evidence is that, had appellant looked, he must have seen deceased in time to avoid the collision.

It seems clear that Appellant did not see the deceased within braking time, otherwise he would have applied his brakes forcibly and so left braking marks on the road. The evidence does not in my view exclude the reasonable possibility that deceased was rendered invisible to the Appellant at the critical point of time. That conditions can render a pedestrian invisible to an approaching driver is well established.

We simply do not know in this case what the effect on visibility was of the clothing, the background, the lights of the passing truck going in the opposite direction, dust condition and so

forth, had on the visibility of the deceased to Appellant.

It seems to me that on the evidence available to the Crown, the only way negligence on the part of the Appellant could have been proved prima facie was to carry out some sort of test.

As, to my mind, there was no prima facie evidence of negligence at the conclusion of the Crown case, there was no obligation on the Appellant to give the explanation for the collision. No adverse inference can be drawn from his failure to testify: nemo cogit seipsum prodere.

A conviction for Culpable Homicide is a serious matter and the Crown must realise that a prosecution cannot be taken lightly.

5

It is for these reasons that I was in favour of allowing the Appeal; but as the majority of this court take a different view, the Appeal will of course be dismissed.

DENDY YOUNG A. J.