IN THE COURT OF APPEAL OF SWAZILAND

CRIMINAL APPEAL NO.73/96

In the matter between:

KRISHNA NAIDOO

VS

THE KING

CORAM : KOTZé J P

: SCHREEVER J A

: STEYN J A

FOR THE APPELLANT : IN PERSON

FOR THE CROWN : MR. D. WACHIRA

JUDGEMENT

Steyn J A:

The appellant in this matter was convicted on a charge of culpable homicide. The charge arose out of the deaths of five persons as a result of a motor accident which occurred on the Lavumisa/Big Bend Road on the 13th October 1995. He was sentenced to 5 years' imprisonment three years of which were suspended on certain conditions. He has noted an appeal both against his conviction and his sentence.

In my view, it is not necessary to detail the grounds on which the appeal was noted. They, in essence challenge the correctness of the verdict and contend that the sentence is "severely harsh" and "leaves a sense of shock."

It is also in my opinion not necessary to detail the evidence of how the collision occurred. Much of the material on which the conviction is based was in fact common cause. The police plan and

the expert's testimony as to the nature of the collision was largely unchallenged.

It is also a common cause that the heavy duty vehicle driven by the appellant that collided head-on with the vehicle in which the five deceased persons were travelling and that the point of impact was at best for the appellant in the centre of his incorrect side of the road. Prima facie therefore, the Crown had adduced evidence from which it could be inferred that negligence could be attributable to the appellant. There was also evidence that the appellant had travelled at a speed of 80km/h, which was 20km in excess of the speed limit operative in that section of the road.

The appellant sought to counter the prima facie evidence of negligence by testimony that the

vehicle driven by one of the deceased (i.e. the Jetta) had moved onto its incorrect side of the road compelling him (appellant) to try to avoid a collision by himself veering to his right and onto his incorrect side of the road. However, the Jetta returned to his correct side of the road at the last moment thus causing the accident to occur where it did. This version - if reasonably possibly be true - could indeed have exonerated the appellant from criminal liability for the deaths of the five persons concerned. However, appellant faced certain difficulties in this regard. First of all the damage to the vehicles is not consistent with the version deposed to by the appellant in the court below. If the accident had occurred in the manner alleged by him, one would have anticipated that the damage would have been on the left side of his vehicle and on the right side of the Jetta. There was expert evidence to the effect that this would have been the nature of the damage that one would have been expected if the accident occurred in the manner alleged by the appellant.

In the second place, appellant made a statement immediately after the accident in which he alleged that the accident had occurred on his correct side of the road. It is true that the appellant alleged in his evidence that he was in a state of shock at the time but it is an extraordinary statement to make if you know that the accident occurred in the circumstances which he subsequently described as being the way in which it in fact took place.

In the third place there is evidence of an independent witness, PW1, who travelled behind the appellant and observed that on three separate occasions the appellant had veered across to the right hand side of the road while driving in front of him. The appellant's version was to the effect

that on each of these three occasions there had been animals on the road which had obliged him to deviate from the lefthand side of the road to the righthand side of the road. This appears to us as it did to the court below to be highly improbable in view of the fact that the witness concerned was only some 200 metres behind the appellant. It is unlikely that he would not also have observed the animals concerned on all three occasions on which it was alleged that this caused the appellant to swerve to the right hand side of the road. This witness also deposed to the fact that the appellant was driving at a high speed and it confirms the independent evidence which can be deduced and the inferences that can be deduced from the length of skid marks of 44 metres at the point of the accident.

In the circumstances we are quite satisfied that the court a quo was right in rejecting the evidence of the appellant that the accident occurred as a result of a sudden emergency attributable to the negligence of the driver of the Jetta vehicle. It follows in our view that the conviction brought in by the court a quo was correct. We could find no misdirections in respect of the judgement of the court a quo in this respect and in our view the appeal against the conviction must be dismissed.

On the question of sentence I have indicated above what the sentence was. In the course of imposing the sentence the learned Judge a quo said the following:

"I have listened to your long, elaborate address in mitigation and I have taken into account all the material facts you have addressed me on."

Then he goes on to say:

"You are not in a position to pay even a nominal fine and if such fine were imposed you would apply to have it deferred and be paid in terms of instalments which in your particular case the court cannot grant."

When the matter came before us today and as a result of questioning by the President of the Court, it appeared that the appellant had been granted bail after serving six months of the

sentence in an amount of E2,000. Mr. Wachira who appeared for the Crown very fairly indicated to us that the Crown would not oppose the further suspension of the unserved portion of the appellant's sentence if he was ordered to pay a fine of E2,000.

My own view is that the sentence imposed in the court below in the circumstances in which it was

imposed was not so severe that one would normally have interfered. However, it seems to me as if the cowl a quo would have considered the imposition of a fine - at least in place of part of the unsuspended portion of the sentence - if it would have been possible for it to do so at the time. In view of the changed circumstances which now are obtain it follows that justice may well be best served by also suspending a further portion of the unserved portion of the appellant's sentence by imposing a fine of E2,000.

The sentence imposed by the court below read as follows:

"You will be sentenced to an effective five years' imprisonment and the court suspends three of the five years for a period of three years on condition that you are not during the period of suspension convicted of culpable homicide involving the contravention of Section 115(l)(a) of the ROAD TRAFFIC ACT committed during the period of suspension."

This sentence is amended to read as follows:

The appellant is further sentenced to the imposition of a fine of E2,000 rands.

The appellant is sentenced to five years' imprisonment of which 4 years and six months is suspended for a period of three years on condition that the appellant is not during the period of suspension convicted of culpable homicide involving the contravention of Section 115(l)(a) of the ROAD TRAFFIC ACT during the period of suspension."

The appeal against the conviction is dismissed and the sentence is amended to that set out above in this judgement.

J. H. STEYN J A

I agree:

G. P. C. KOTZé J P

I agree:

W. H. R. SCHRE1NER J A

Delivered on 21st April 1998.