IN THE KWAZULU-NATAL HIGH COURT OF PIETERMARITZBURG
IN THE REPUBLIC OF SOUTH AFRICA

APPEAL NO. AR 439/09

In the matter between:

ADRIAAN WILLEM STURM APPELLANT

and

THE STATE RESPONDENT

APPEAL JUDGMENT Delivered on 26 November 2009

SWAIN J

[1] The appellant appeals against his conviction of contravening Section 63 (1) of Act 93 of 1996, being the negligent driving of a motor vehicle on a public road.

[2] Negligence in this context is a failure to exercise in any given circumstances that degree of skill and care, which a reasonable and prudent man would exercise in those circumstances, and in this respect no distinction is drawn between civil and criminal law

R v Meiring
1927 AD 41

and

S v Shimbarta

1966 (1) SA 771 (N) at 775C

[3] The question whether in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case, upon a consideration of all the circumstances

Shimbarta's case *supra* at 775C

[4] The relevant facts of this matter are that the appellant collided head on with an oncoming vehicle, on his incorrect side of the road, whilst attempting to overtake a heavy vehicle.

[5] A great deal of time was devoted in the Court *a quo* to a cross-examination of the driver of the oncoming vehicle. It seems the object of this exercise was to show that the negligence of this driver was a cause of the collision, or that the collision could have been avoided altogether, if this driver had not driven his vehicle negligently in the circumstances.

[6] On appeal Mr. McIntosh, who appeared for the appellant, again devoted a great deal of attention in his heads of argument to various respects, in which he submitted that the finding of the Court *a quo* that the driver of the other vehicle was a reliable and satisfactory witness,

was flawed. He however submits that this witness nevertheless confirms that the appellant was overtaking a motor vehicle travelling in a northerly direction and that when the accident occurred, the appellant was in the emergency lane for the south bound traffic. In other words, the appellant was completely on the wrong side of the road.

[7] It is however clear that the prosecution does not have to establish that the negligence on the part of the appellant was the proximate and effective cause of the collision.

S v Moodley
1966 SA 248 (N) at 251 A - C

Although the Statute in question in Moodley's case provided as follows:

"Recklessly or negligently and thereby injures any person"

I consider that the rejection in that case of the proposition, that the prosecution has to establish that the cause of the accident was the negligence of the appellant and his alone, is nevertheless applicable to the Act in question in this case, because it is clear that the offence can be committed even though no accident occurred

R v Ellis
1959 (4) SA 497 (R) at 499 A – B

This is because "the danger can consist in risk of harm to a potential user of the road"

Ellis' case *supra* at 499 B

[8] It is however clear that

"Negligent driving must involve negligence in relation to other persons actually on the road or who might reasonably be expected to be on the road and not …….mere 'negligence in the air' "

S v Ephraim
1971 (4) SA 398 (RA) at 400 D

[9] It is in respect of this aspect of the enquiry that Mr. McIntosh, in argument before us, submitted that the veracity of the evidence of the driver of the other vehicle was relevant. This was in respect of the speed at which the other vehicle was travelling, which he submitted was excessive.

[10] Mr. McIntosh submitted that regard being had to the point where the accident occurred on the road near the bridge, the inference was inescapable that the other vehicle was travelling at an excessive speed, in order to have covered the distance of some five hundred metres from the blind curve to the bridge. He also submitted that the damage to the other vehicle, as well the driver's evidence that he wished to reach the Tote in order to see the last horse race, supported such an inference being drawn. In this regard however, the driver testified that he was not in a rush, because all his bets had already been placed on the Tote and it was immaterial to him whether he saw the last horse race or not.

[11] The main thrust of Mr. McIntosh's argument in this regard, was

that the issue of the speed of the other vehicle was of relevance in assessing whether a reasonable man in the position of the appellant, would have foreseen the possibility of harm to any approaching vehicle, in overtaking at the time and the place where the appellant did. In other words, the estimation by the appellant of the distance of clear road available to him, to safely undertake an overtaking manoeuvre, was based upon the reasonable assumption that approaching motorists would be travelling within the speed limit.

[12] In order to properly assess the validity of this submission, it is necessary to examine the evidence of the appellant. The salient aspects are as follows

[12.1] The appellant knew the road very well, he had travelled it for quite a number of years almost every night.

[12.2] The accident happened at around 8 p.m. and the sun had gone down.

[12.3] He was following a double truck and had previously attempted to overtake it, before the road narrowed from two lanes to one.

[12.4] He estimated the length of the truck to be between twenty-seven to thirty metres.

[12.5] Because he knew the road well, he knew there was a stretch coming up that would give him sufficient time to overtake.

When he crossed the bridge he watched for oncoming traffic, did not see any and started overtaking.

[12.6] From where he started overtaking he could see up the road for about half a kilometre up to the bend.

[12.7] He did not see any lights when he started overtaking.

[12.8] When he was almost at the head of the actual combination of the truck, he suddenly saw lights approaching.

[12.9] He decided he had three options to try and avoid a collision. To accelerate and try to complete overtaking the truck, to break and pull in behind the truck on his correct side of the road, or turn into the emergency lane on the incorrect side of the road, slow down and stop there. The final option is what he chose to do.

[12.10] The approaching vehicle then collided with the front left hand side of his vehicle.

[13] In cross-examination the appellant gave the following evidence:

[13.1] There were no street lights on the road.

[13.2] After initially attempting to overtake the truck, he travelled for about two and a half kilometres behind it. When asked why he had not been able to overtake the truck at that stage, he said that he did not exactly know because

"Your mind is not really consciously doing that – my mind is usually somewhere else while I travel, while my sub-conscious is looking at what happens – so the obvious reason is that there was oncoming traffic, because I was continuously trying to overtake".

[13.3] The truck was travelling at about fifty kilometres per hour on the flat part of the road, but where he attempted to overtake the truck the road was slightly inclined.

[13.4] When he started overtaking he did the following:

"Well I floored the accelerator. It's a diesel, it doesn't go extremely fast, but it goes reasonably fast, so at that point I most likely travelled at about seventy or so – seventy – eighty. But that's a guess, I didn't look".

Later in his evidence he said:

"……. I was travelling in a diesel Prado and they don't accelerate very fast…."

[13.5] When the appellant was asked by the Court *a quo* why he overtook the truck which was thirty metres long, on an uphill in a vehicle which did not accelerate rapidly, knowing there was a possibility other vehicles could be approaching, he replied:

"Well, I've been travelling that road for a long time, and I know the situation and I knew what my car could do, and if there was indeed a person coming from the other side around the bound at the allowed speed I would have had enough time to overtake"

[13.6] When asked by the Court *a quo* whether he should have foreseen the possibility that there would be another vehicle coming in the opposite direction travelling at speed, the appellant replied:

"Well I can't deny that, but its obvious that if we would take all considerations continuously into account we would never overtake".

[13.7] He agreed that about four hundred metres from the point of impact the road opens into a dual road in his favour. When asked whether there was any particular reason why he didn't wait until then to overtake, he replied:

"No particular reason. I regret that I didn't".

[14] It is clear on the evidence that the visibility which the appellant says he had of five hundred metres, was limited by a blind curve at the end of the straight road he was travelling on.

[15] As regards the issue of whether a reasonable man would foresee the possibility of reckless or negligent conduct on the part of another motorist, the following dictum is apposite:

"….. where a certain class of unlawful conduct is not infrequent the reasonable man will bear that fact in mind and will allow for it."

Martindale v Woolfaardt
1940 AD 235 at 244

[16] Referring to this dictum with approval in the case of

Marine & Trade Insurance Co. Ltd. V Singh
1980 (1) SA 5 (A) at 9 E – H

the Appellate Division had the following to say:

*"*To this may be added that, at any time when unlawful conduct is actually seen, the reasonable man will, *a fortiori*, allow for that conduct. What has been said above, describes in broad terms the legal duty on any driver of a vehicle. It will always, however, depend on the particular circumstances of each case, and on prevailing views on transport and traffic requirements, whether in any particular case the unlawful conduct is to be regarded as reasonably foreseeable so as to require the reasonable man to allow for such conduct. It will also depend on the particular circumstances of each case whether or not the manner in which the required allowance has been made is sufficient for the purpose of discharging the duty imposed on the reasonable man. It really boils down to reasonable forseeability of the unlawful act and reasonable allowance on the part of the driver for such act."

[17] A consideration of the evidence of the appellant reveals that he attempted, at night, to overtake a thirty metre truck at a spot in the road where it commenced an incline, in a vehicle which did not accelerate very rapidly. He did this on the basis that if another vehicle approached from the opposite side around the bend, travelling at the "allowed" speed, he would have had enough time to safely overtake. The irresistible inference therefore is that the appellant must have foreseen the possibility that, if a vehicle travelled around the bend at a speed in excess of what was "allowed", he would not have been able to safely overtake when he did.

[18] In my view, regard being had to "prevailing views on transport and traffic requirements" and the propensity of a significant portion of road users to travel in excess of the permissible limit on our roads, it was reasonably foreseeable in the circumstances of this case that a motorist exceeding the speed limit could emerge around the blind

curve. That the appellant failed to make reasonable allowance for such an act is illustrated by his own evidence, namely that he was able to overtake safely, if any approaching vehicle adhered to the "allowed" speed.

[19] In the result, assuming in favour of the appellant (but without deciding the issue) that the oncoming vehicle was travelling at an excessive speed, the appellant acted negligently in overtaking at the time when and place where he did. This conclusion renders it unnecessary to consider the further submissions of Mr. McIntosh with regard to whether the appellant was negligent in choosing the option he did, when placed in the position he was by the approaching vehicle. This is for the simple reason that the cause of the appellant being placed in such a situation of emergency was as a result of his own conduct.

[20] The final argument of Mr. McIntosh was that because of the incompetence and inadequacy of the police investigation, evidence which could have assisted the appellant in his defence was not obtained. His particular concern was the absence of any measurements of the length of the skid marks left by the approaching vehicle, to assist the appellant in showing that it was travelling at an excessive speed. As a result of the assumption I have made in favour of the appellant, the appellant cannot be prejudiced by the absence of such evidence. In my view, there is no validity in the complaint, because the guilt of the appellant has been assessed on the basis of his own evidence.

[21] As regards the issue of the sentence imposed. The appellant was sentenced to a fine of fifteen thousand Rand or six months' imprisonment, of which half was suspended for three years. Mr. McIntosh submitted that in this regard the Magistrate misdirected himself in finding that the complainant was permanently disabled. He submitted that no reliable evidence was placed before the Court *a quo* in this regard, and no opportunity was given by the Court *a quo* for such evidence to be tested. In this regard the complainant stated that as a result of the injuries he sustained in the collision, he had to have a total left hip replacement and he had not walked properly since the accident, because his one leg was now one centimetre shorter than the other. He said the injury had affected his work and his social life, and he was no longer able to play the sports that he previously did.

[22] This evidence was never challenged by the accused. I therefore disagree that the Magistrate misdirected himself in this regard. In my view, the sentence imposed was entirely appropriate in all of the circumstances.

[23] I make the following order:

The appeal against conviction and sentence is dismissed.

_____ **I agree** _____

SWAIN J **MOKGOHLOA J**

Appearances/

Appearances:

For the Appellant	:	Mr. K.C. McIntosh
Instructed by	:	Shepstone & Wylie Durban
For the Respondent	:	Mr. A. Truter
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Date of Hearing of Appeal	:	24 November 2009
Date of Filing of Judgment	:	26 November 2009