

**IN THE COURT OF APPEAL OF BOTSWANA**  
**HELD AT LOBATSE**

**Criminal Appeal No. 9 of 1996**

**In the matter between:**

**MODISE SELEMOGWE**

**Appellant**

**vs.**

**THE STATE**

**Respondent**

**C. Dahanayake for the Appellant**

**K. B. Makgabenyane for the Respondent**

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**J U D G M E N T**

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**Coram: A. N. E. Amissah, J.P.**

**W. H. R. Schreiner, J.A.**

**G. G. Hoexter, J. A.**

**SCHREINER, JA:**

After the hearing of argument on behalf of the Appellant in this matter the Court dismissed the appeal stating that reasons would be given later. The reasons follow:

Section 49 (a) of the Road Traffic Act Cap. 69:01 of 1972 as substituted by Section 10 of the Road Traffic (Amendment) Act, 1993, provides:-

“49(1) Any person who causes the death of another person by the driving of a motor vehicle recklessly or at a speed or in a manner which is dangerous to other persons, having regard to all the circumstances of the case shall be guilty of an offence and shall be sentenced to a fine of not less than P5 000 or more than P10 000 or imprisonment for a term of not less than five years or more than 10 years or to both.”

The Appellant was found guilty and sentenced to five years imprisonment. He was also disqualified from driving or from holding or obtaining a driving licence for a period of three years

from the date of delivery of judgment. On appeal to the High Court the sentence of imprisonment was set aside and a fine of P5 000 substituted.

The evidence in the case discloses grossly reckless driving on the part of the driver of a 4 ton white truck. The truck entered an intersection controlled by traffic lights when the light was red against him. The truck was being driven at considerable speed. It collided in the intersection with a car driven by one Michael Mmutle which had entered the intersection with the traffic light green in its favour. The driver was killed. The accident occurred at about 9 pm on the 12th April 1994.

Counsel for the Appellant did not argue that the State had failed to prove the commission of the offence but that it had not established that the Appellant was the driver of the white truck. The evidence in this regard was given by Constable Monageng. He said that he was patrolling Gaborone at 9.45 p.m. when he received a report of the accident in question. He went to the scene and found two vehicles one of which was the white truck. He continues:

“The Toyota Dyna truck [the white truck] was driven by Modise Selemogwe. He introduced himself to me as the driver of the truck the other one was Michael Mmutle. At the scene of the accident, I only saw Modise Selemogwe. The other driver was taken to hospital.”

Cross-examined he said that he “did not see anyone driving the vehicles involved in the accident.”

This presumably means that he did not see who was the driver of the white truck at the time of the accident. It does not seem that the evidence concerning the statement to the police officer and its obvious meaning was challenged in any way.

Counsel for the Appellant sought to argue that the statement to Constable Monageng in which the Appellant said that he was the driver of the truck was not sufficiently clear to warrant a finding that the Appellant was the driver of the truck at the time of the accident. The statement was made some time later so that it was possible that other persons who were connected with the

truck and its owner could by then have come upon the scene. When he said that he was the driver of the truck the Appellant might well have been saying only that he was the usual driver of the truck.

This contention on behalf of the Appellant has no merit. The admission was made at the scene of the accident and it must have been obvious to the Appellant that the constable was not interested in identifying the usual driver of the truck but only the driver of the truck at the time of the accident. No cross-examination was directed towards showing that in the circumstances the statement volunteered by the Appellant could mean anything other than that the Appellant was the driver of the truck at the time of the accident.

In the circumstances the magistrate's findings were correct and the appeal was accordingly dismissed.

Delivered in open Court at Lobatse on the 19<sup>th</sup> day of July 1996

*W. H. R. Schreiner*  
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**W. H. R. SCHREINER**  
Judge of Appeal

I agree

*A. N. E. Amissh*  
.....  
**A. N. E. AMISSAH**  
Judge President

I agree

*G. G. Hoexter*  
.....  
**G. G. HOEXTER**  
Judge of Appeal