IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, GRAHAMSTOWN

C.A.&R. No.: 196/2013

Date Heard: 19 February 2014

Date Delivered: 24 February 2014

In the matter between:

**DUWANE JAGSON BRAMWELL** Appellant

and

**THE STATE** Respondent

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**JUDGMENT**

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**EKSTEEN J:**

[1] The appellant was convicted in the Magistrate's Court for Port Elizabeth on a charge of culpable homicide and was sentenced to undergo nine months correctional supervision coupled with various conditions and further to a fine of R10 000 (or ten months imprisonment) which was conditionally suspended for a period of four years. He appeals both against the conviction and the sentence imposed.

[2] The charge arises from a motor vehicle accident which occurred on17 April 2009 in S […]. One A.B. (the deceased), a [….] year old man died in the collision. The appellant was the driver of a motor vehicle and, after stopping at a traffic light,

pulled away in the direction of the city travelling in the extreme left hand lane of S [….]. At the scene of the collision S […]has three lanes in each direction. The deceased was a pedestrian and he crossed the road from the appellant's right hand side to the left hand side and came into collision with the vehicle driven by the appellant. He died on the scene as a result of the injuries which he sustained in the collision.

[3] The appellant contended at the trial that when he pulled away from the traffic light he noted in his rear-view mirror a dark coloured Volkswagen Polo approaching from behind in the lane directly to his right hand side. At approximately the same time he saw the deceased entering the road on the right hand side walking normally across the road. When the Polo vehicle was approximately alongside the vehicle of the appellant, he says, it came into collision with the deceased which caused the deceased to be thrown up into the air and to land against the windscreen of the appellant's vehicle.

[4] On the version advanced by the State witnesses, however, there was no other vehicle involved and the deceased crossed the road from the extreme right hand side over the first two lanes before coming into collision with the appellant's motor vehicle. The magistrate rejected the appellant's version as being not reasonably possibly true and accepted the general version advanced by the State.

[5] The first two witnesses called on behalf of the State were standing in the vicinity when they heard the impact. Upon turning around they saw the deceased being thrown up into the air and coming to land on the windscreen of the appellant's vehicle. They were unable to cast any light on the events leading up to the collision and the magistrate correctly held that their evidence does not assist. One Ruiners was thereafter called. He states that he saw the deceased walking across the road and crossing the first two lanes before coming into collision with the appellant's vehicle approximately on the white line prior to entering the third lane. He states that the deceased was walking and that he came into collision with the side of the fender of the appellant's vehicle before being lifted up into the air and he again came down on the appellant's vehicle. Ruiners' evidence relating to the movement of the deceased is very sketchy looking in detail. The witness Ruiners was of the opinion that there was nothing that the appellant was able to do to avoid the collision. The reasons for his opinion were, however, not explored in cross-examination.

[6] One Stander, a Warrant Officer in the South African Police stationed at the Motor Vehicle Collision Unit testified. He is trained as a motor vehicle inspector and he observed the appellant's vehicle after the collision. He prepared a report which was handed in setting out the damage which he found. The damage to the windscreen and to the fender immediately in front of the driver's door is not contentious. Further, however, Stander observed that the glass of the right hand front headlight was missing and he stated that he found glass debris compatible with such headlight in the vicinity of the area of the collision. Under cross-examination Stander ventured numerous opinions as to the manner in which the collision occurred and a mechanism which caused the deceased to be flung into the air. He

postulated that the appellant had struck the deceased in the vicinity of the front headlight which caused the headlight to be broken and the deceased to be thrown up into the air and to land on the windscreen of the appellant's vehicle. Photographs of the appellant's vehicle were also taken. They reveal no structural damage to the vehicle at all in the area of the front right headlight save that the glass of the headlight was missing. Stander confirms that the headlight was in perfect working order.

[7] As recorded earlier the magistrate rejected the appellant's version as being not reasonably possibly true. In doing so he stated:

> "Die enigste afleiding wat die hof kan maak in hierdie geval is dat die beskuldigde se voertuig wel die oorledene getref het en geen ander voertuig nie.
>
> … (N)ou hierdie man het by 'n robot gestop, hy het weggetrek, hy sien die oorledene in die pad. Hy sê dat hy spoed verminder maar ten spyte daarvan gaan stamp hy nog die oorledene daarso.
>
> Die hof bevind dat die enigste rede hoekom die beskuldigde daardie oorledene na (hy) hom gesien het en toe nie weer gesien het nie is dat hy nie behoorlik uitkyk gehou het nie en dat hy nie behoorlik gekyk het waar die oorledene is, hoe hierdie man oor die pad beweeg nie en dat hy derhalwe nalatig was."

[8] The magistrate, in reaching his conclusion, did not make any finding relating to the manner in which the deceased moved as he crossed the road or how he conducted himself. He simply proceeded to hold that the appellant was negligent in that he did not observe the manner in which the deceased crossed the road and that such negligence caused the accident.

[9] The magistrate appears to have held that the first impact with the deceased was on the front left headlamp of the appellant's vehicle. He placed reliance on the fact that the appellant was not in a position to explain how his front right headlamp came to be damaged and he recorded that the only person who testified about another vehicle which had collided with the deceased was the appellant. The magistrate could only come to this conclusion by a reliance on the evidence of Stander.

[10] There are two difficulties, in my view, with this approach. Firstly, the opinions ventured by Stander in this regard are in conflict with the evidence of Ruiners who testified that the first impact occurred on the side of the fender. The magistrate did not consider this evidence of Ruiner and did not reject it nor did he find it to be improbable. It is well established that where there is direct and credible evidence of what happened in a collision it must generally carry greater weight than the opinion of an expert, however, experienced he may be, seeking to reconstruct the event from his experience and scientific training. (See for example ***Motor Vehicle Assurance Fund v Kenny*** 1984 (4) SA 432 (E).) It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the court to his view. (Compare ***Mapota v Santam Versekeringsmaatskappy Beperk*** 1977 (4) SA 515 (A) at 527-8 and ***Madumise v Motorvoertuigassuransiefonds*** 1983 (4) SA 207 (O) at 209.) I think therefore that the magistrate misdirected himself in this regard.

[11] The second difficulty in respect of this finding is that the magistrate appeared to have considered Stander to be an expert in motor vehicle accident reconstruction. In his judgment he dismissed the argument on behalf of the defence that Stander was not an expert in this field. He held that Stander had attended so many motor vehicle collisions and had done so many motor vehicle investigations and reconstructions that the court could certainly regard him as an expert in the field. In this respect I think that the magistrate has clearly misdirected himself. There is no evidence that Stander has ever performed a motor vehicle accident reconstruction. He is a motor vehicle inspector qualified to inspect damage to a motor vehicle. He has neither the experience nor the scientific training to express opinions in respect of the mechanism by which motor vehicle accidents occurred and no attempt was made on behalf of the prosecution to qualify him as an expert in this field during evidence.

[12] Further, on the facts, the evidence does not seem to me to support the opinion of Stander. I have referred to the photographs taken of the appellant's vehicle and in particular of the front right headlamp and the absence of any structural damage whatsoever to the motor vehicle in the vicinity of the front right headlamp. The post-mortem report conducted on the deceased was handed in as evidence. It reveals no injuries of whatever nature to the legs of the deceased. In these circumstances I think that the objective real evidence which was available to the court is incompatible with the opinion of Stander which was accepted by the magistrate.

[13] In all the circumstances I think that the magistrate misdirected himself in respect of the evidence of how the accident happened. The evidence of Ruiners in respect of the first impact ought to have been accepted.

[14] I turn to the court's conclusion in respect of the appellant's guilt. For purposes hereof I shall accept, without making any finding in this regard, that the magistrate was justified in rejecting the version of the appellant. The matter falls then to be considered on the evidence of the State witnesses.

[15] Culpable homicide, of which the appellant was convicted, consists of unlawfully and negligently causing of the death of another person. The State will, of course, bear the onus of proving not only that the appellant was negligent but also that such negligence caused the death of the deceased.

[16] In ***Levy NO v Rondalia Assurance Corporation South Africa Limited*** 1971 (2) SA 598 (AD) at 600H Holmes JA held:

> "It is, of course, well settled, as counsel for the respondent stressed, that one does not draw inferences of negligence on a piecemeal approach of presumption and rebuttal. In particular, one should not isolate the mere fact that a motorist ran down a pedestrian in daylight, and draw therefrom a *prima facie* inference of negligence. The correct approach in deciding whether there is proof of negligence, is to consider the totality of the facts after both sides have closed their cases."

[17] In view of the magistrate's reasoning which I have quoted above, I think, that this cautionary note sounded by Holmes JA is particularly apposite in the present case.

[18] In ***Kruger v Coetzee*** 1966 (2) SA 428 (A) at 430E-F Holmes JA considered the concept of negligence. He stated:

> "For the purposes of liability *culpa* arises if -
> *(a)* a *diligens paterfamilias* in the position of the defendant -
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
> (ii) would take reasonable steps to guard against such occurrence; and
> *(b)* the defendant failed to take such steps."

[19] These comments, of course, were made in the context of civil litigation. The content of the test is no different in criminal law. In the circumstances for purposes of the present case what should be determined is whether the reasonable man in the position of the appellant would have foreseen the possibility of his conduct causing the death of the deceased and whether the reasonable person would have taken steps to avoid such consequence. In the event of both these questions being answered in the affirmative the question arises whether the appellant had deviated from the steps which the reasonable person would have taken. (*CJ Snyman* ***Criminal Law:*** 5th ed p. 152.)

[20] I accept that upon seeing a pedestrian start to cross the road a reasonable motorists would foresee that he could cause the death of the pedestrian if he came into collision with him. The more pertinent question is what steps would a reasonable motorist take to guard against this result. Generally speaking a motorist is entitled to expect an adult person not to act recklessly. (Compare ***Parbhoo and Another v Shield Insurance Company Limited*** 1982 (1) SA 673 (A) at 677F.) For this reason it has been held that if a motorist proceeds on his way when he sees a pedestrian approaching his vehicle, he will indeed be negligent provided, and only provided, that such pedestrian appears to the motorist to be unaware of the approaching vehicle. The question is what is reasonably foreseeable by the motorist and to take precautions against it. Thus, for example, if he sees that the pedestrian looks in his direction, he can reasonably accept that the pedestrian will respect his right of way and allow him to pass before he crosses the street behind his vehicle. (See ***Senator Versekeringsmaatskappy v Lawrence*** 1982 (3) SA 136 (A).) Similarly, if a pedestrian proceeds to cross the road and hesitates briefly at the white line dividing lanes a motorist is entitled to interpret this as an indication that the pedestrian intends to respect the motorists right of way and to wait for the motor vehicle to pass. (See for example ***Van Rensburg en 'n Ander NO v AA Onderlinge Assuransie Assosiasie Bpk*** *1*977 (2) SA 933 (A).) The conduct of the pedestrian as he approaches the motorist's vehicle is therefore most material to the question of the steps which a reasonable motorist would have taken.

[21] The only witness on behalf of the State who has been able to cast any light at all on the events leading up to the collision is Ruiners. Ruiners states that the

appellant was driving at approximately 60 km/h. In respect of the progress of the deceased he states:

> "PROSECUTOR: Now is it correct Sir that what you observed, where was the deceased when he was hit?
> RUINERS: Die tyd toe hy mos oorkom by die eerste baan, hy gaan oor die tweede baan en daar het hulle hom raakgery.
> PROSECUTOR: So is it correct he hadn't entered the third lane yet? Is that correct?
> RUINERS: Nog nie.
> PROSECUTOR: Was he on the line or where was he Sir in the raod, can you elaborate?
> RUINERS: Dis nou die tyd wat hy nou loop (onduidelik) so bietjie na die wit lyn toe wat hy nou mos nou oorgaan en dis daar waar hulle hom stamp."

[22] There is no evidence as to whether the deceased looked in the direction of the approaching traffic, whether he stopped at the white lines dividing the lanes or whether he hesitated upon approaching the line. In brief, there is therefore no evidence produced by the State which would indicate that the appellant had deviated from those steps which the reasonable man would have taken. For this reason alone I think that the appeal must succeed.

[23] The magistrate is of course correct that on the version of the appellant himself he did not keep the deceased under observation as he crossed the road. This does not necessarily mean that the appellant negligently caused the death of the deceased. In order to determine whether an act or omission, is a factual cause of the death of the deceased all the relevant facts and circumstances should be investigated and one has to decide with the aid of one's knowledge and experience

whether the death of the deceased flows from the appellant's conduct. In the present case, as recorded earlier, there is no evidence as to how the deceased conducted himself in crossing the road save that he walked, apparently at a normal speed. The evidence does not disclose what the appellant would have seen had he in fact kept a proper look-out. The deceased was an adult man and the appellant would be entitled to assume that he would not recklessly walk into the side of his vehicle. The impact occurred approximately on the white line dividing the lanes and, on the eye witness's account, with the right hand fender of the vehicle. Had the deceased looked in the direction of the vehicle prior to reaching the white line or hesitated momentarily thereby indicating to the appellant that he intended to respect his right of way there would, on the authorities to which I have referred above, be no duty on the appellant to take steps to avoid a collision. To expect of a motorist to take precautionary steps in such circumstances, I think, would be placing too great a burden on a motorist. (Compare ***Senator Versekeringsmaatskappy v Lawrence*** *supra.)*

[24] The difficulty for the State in this matter is that it has no evidence at its disposal in respect of the manner in which the deceased conducted himself and the appellant is unable to assist because he did not keep the deceased under observation. Whilst the appellant may have been negligent not to have kept the deceased under observation it cannot be said that such negligence was a factual cause of the death of the deceased. The magistrate failed to consider the causal link between the said negligence and the occurrence of the accident. In these circumstances I think that the appeal must succeed.

[25] In the result , the appeal succeeds and the conviction and sentence imposed are set aside.

**J W EKSTEEN**

**JUDGE OF THE HIGH COURT**

DUNYWA AJ:

I agree.

**M S DUNYWA**

**ACTING JUDGE OF THE HIGH COURT**

*Appearance:*

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| *For Appellant:* | Adv C van Rooyen instructed by Leon Keyter Attorneys, Grahamstown |
| *For Respondent:* | Adv Packery instructed by the National Director of Public Prosecution, Grahamstown |