



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A238/2016

In the matter between:

MOAHLodi KAMOGelo MOTINYANE

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J et NAIDOO, J

HEARD ON: 15 MAY 2017

JUDGMENT BY: LEKALE, J

DELIVERED ON: 25 MAY 2017

SUMMARY: Criminal law: maxim or doctrine of *res ipsa loquitur* correctly applied through reasoning by inference. Exercise of constitutional right to silence in the face of facts from which an inference of negligence can be drawn as the only reasonable inference has adverse consequences.

Conviction for negligent driving and sentence confirmed where appellant failed to answer the case against him. The obligation of magistrates to comply with rule 67(5) of Magistrates' Court Rules by furnishing adequate reasons for impugned decisions for the benefit of the court of appeal emphasised.

- [1] On 21 November 2015 and along Modisenyane Street at Kgotsong in Bothaville the appellant, who held a learner's licence, was driving his uncle's vehicle, a red VW City Golf hatchback, without the latter's consent when a 14 year old girl suddenly entered the road from amongst vehicles parked partly on the road. In an attempt to avoid colliding with her the appellant crashed into the parked cars and eventually knocked the girl down. He subsequently appeared before the Bothaville Magistrate's Court charged with reckless or negligent driving.
- [2] On 30 August 2016 the appellant, who was legally represented, was convicted of negligent driving in contravention of section 63(1) of the National Road Traffic Act 93 of 1996 and sentenced to 6 months imprisonment or a fine of R3000 wholly and conditionally suspended. He feels aggrieved by the conviction and now approaches us on appeal against the same with leave of the trial court.
- [3] On returning the guilty verdict the court below found that the parties were *ad idem* that the cars were parked in such a manner that made it possible for vehicles in the position of the City Golf driven by the appellant to pass along the gravel road. The magistrate, further, found that it was common cause between the parties that the child emerged from the fence concealed by the

parked vehicles and when she did so she was already in the road. The trial court, furthermore, remarked that the appellant avoided the child but nevertheless knocked her down and the same applied to the vehicles which he also avoided in vain. In the magistrate's view there was evidentiary burden on the appellant to explain what he did when the child appeared. In conclusion the court below found that his failure to take the stand in the circumstances had adverse consequences for him according to case law.

- [4] The parties in the instant matter are in agreement that the appeal should succeed with Mr Tshabalala, for the appellant, contending, *inter alia*, to the effect that the child witness was not trustworthy in her evidence and did not know how she was bumped down while one other witness was evasive. Ms Moroka for the State, on her part, submits, *inter alia*, to the effect that the trial court erred in finding that the state had proved its case against the appellant beyond reasonable doubt regard being had to, *inter alia*, the fact that the child witness previously made an inconsistent statement to the police on a point material to the case against the appellant. In argument before us they, however, concede that the appellant drove at a high speed but maintain that the State failed to prove its case against him beyond reasonable doubt.
- [5] The factual basis for the conviction, as accepted and found by the court *a quo*, is apparent from the evidence of the appellant's uncle, who confirmed that his car was damaged and, further, speculated that the car probably failed to stop immediately when the appellant applied brakes because, when one applies brakes,

inclusive of handbrake, on a gravel road the car would skid and the person can lose control of the car. The court also based the oral conviction on the oral evidence of the child witness who, *inter alia*, testified that she was hit by a car driven by the appellant while shooting photographs at a party she was attending, that the tent erected for the party protruded into the street and cars were parked with their rear ends protruding into the gravel road. The conviction is, further, premised on the facts gathered collectively by the court and the parties during an inspection in *loco* which, *inter alia*, established how the cars affected were parked before the accident and that two cars could pass along the gravel road in question notwithstanding the fact that the cars were parked in such a manner. It was, further, not in dispute that the appellant was travelling from east to west with such cars parked on the left hand side of the road. The child conceded, under cross examination, that the appellant was confronted by a situation of sudden emergency and acted reasonably in the circumstances insofar as he tried to avoid colliding with her when she entered the road suddenly and, instead, collided first with a parked car after applying footbrakes and the handbrake before he bumped her. In response to judicial questioning she testified that children were going up and down in the street and the sun was still up when the collision occurred.

- [6] It is true, as correctly pointed out by the trial court, that an accused person exercises the constitutional right to remain silent at his own peril insofar as such election has consequences and failure to testify in the face of credible incriminating evidence may

be detrimental. (See **S v Boesak** 2001(1) SA 912 (CC) at *par* [24]).

- [7] It is, further, correct, as alluded to by the court below, that the facts in an appropriate case can lead to an inference of negligence being drawn therefrom through reasoning by inference expressed in the maxim *res ipsa loquitur* and, thus, saddle the accused person with evidentiary burden for purposes of setting the record straight by explaining his conduct. (See **R v Robertson** 1958 (1) SA 676 (A) and **R v Van Zyl** 1958 (1) PH O6 (O)).

- [8] It is, furthermore, true that in reasoning by inference in criminal matters, the cardinal rules of logic applicable are that the inference sought to be drawn should be consistent with all the facts proved and should be the only reasonable inference that can be drawn therefrom. (See **R v Blom** 1939 (AD) 188).

- [9] In our law a driver who “in a moment of crisis is confronted by the need to take safeguarding action must not be judged as though he had adequate time and opportunity to reflect and act with normal circumspection.” (See **Stolzenberg v Lurie** 1959(2) SA 67 (W) 74D-E).

- [10] A person faced with sudden emergency is treated differently insofar as allowance is made, on his part, for possible error of judgment. (See **Marine & Trade Insurance Co. Ltd v Mariamah & Ano.** 1978(3) SA 480 (A)).

- [11] In situations of sudden emergency “It is not every error of judgment which is excusable as amounting to negligence, but only one which a reasonably careful and skilled driver of a vehicle might commit. There can only be a moment of agony if the person whose conduct is in question had neither the time nor the opportunity to weigh the pros and cons of the situation in which he found himself.” (See Goode v SA Mutual Fire & General Insurance Co. Ltd 1979(4) SA 301(W) 307A).
- [12] The question in the instant matter is whether or not the State proved its case against the appellant beyond reasonable doubt in that the inference that he was negligent is consistent with the facts that served before the trial court. If so, whether or not such an inference is the only reasonable one that can be drawn from, *inter alia*, the facts that he crashed into parked vehicles and, in the process, collided with a girl who was visible and while he had room to manoeuvre given the findings of the *in loco* inspection that two cars could pass behind the parked vehicles.
- [13] Although the appellant closed his case without tendering any evidence, his version of sudden emergency, as put to the girl witness, was not disputed and was, in fact, conceded as reasonably possibly true insofar as the witness in question effectively confirmed the same as a true reflection of what transpired. His uncle, further, alluded in his evidence for the State to the possibility that the car could have skidded when he pulled the handbrake.

- [14] A perusal of the totality of evidence before the court below, however, reveals a *lacuna* in the appellant's admitted version insofar as it does not explain how he managed to hit the girl after colliding with parked vehicles. It is, further, not apparent *ex facie* the record how the appellant collided with three vehicles. According to the owner of one of the affected vehicles, one Ms Priscilla Tlhapi, her car was hit at the tow bar and tossed into the one next to it which, in turn, bumped the car parked next to it. She concluded, therefore, that the appellant was driving at a high speed.
- [15] In my view a prudent driver would have reduced speed as soon as he noticed the cars parked partly on the road and children moving up and down in the street. The condition of the road, being gravel road, was also such that a careful and reasonable driver would have been cautious in the circumstances of the instant matter and driven at such a speed that, when he applied brakes, the car would have stopped immediately. Even if the car would not have stopped instantly but skidded because of the nature of the road, one would reasonably expect it to have stopped when it hit Priscilla Tlhapi's car. A careful and reasonable driver travelling at a reasonable speed along a gravel road does not, in my opinion, collide with three cars and a pedestrian in a built-up area, where the speed limit is not more than 60km/hour, and in the clear late afternoon. The appellant had a case to answer and his failure to take the trial court into his confidence as to what happened has consequences for him. He must stand or fall by his election.

[16] We are, therefore, unable to agree with counsel on both sides that the conviction is not supported by the material properly before the trial court. The inference that the appellant was negligent in that he, at the very least, drove at an excessive speed in the circumstances of the present matter is consistent with the facts properly before the trial court and is, in our view, the only reasonable one to be drawn therefrom.

[17] The trial court appears to have been very economical with the reasons for his decision in convicting the appellant. He left it to the reader to glean same from the record. The judgment, as far as reasons are concerned, is so cryptic and terse that it, in effect, amounts to just saying “**the record speaks for itself.**” The importance of furnishing full reasons for appeal purposes can be appreciated from the fact that rule 67(5) of Magistrates’ Court Rules impels, in peremptory terms, a magistrate against whose decision an appeal is noted to furnish specified information, inclusive of facts found proven and reasons for impugned rulings, to the clerk of court within prescribed time period. Full or adequate reasons are necessary because:

“... when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants’ rights and an impediment to the appeal process.” (See **Strategic Liquor Services v Mvumbi NO & Others** 2010(2) SA 92 (CC) at *par* [15])

[18] In purported compliance with rule 67(5) of the said Rules the trial court referred to the impugned judgment declaring that he had

nothing further to add. In the foregoing regard the courts have also reiterated the importance of written reasons to the appeal process by pointing out that where there is doubt as to whether an *ex tempore* judgment is sufficiently to the point, the magistrate should make it his business to assist the appeal court by dealing specifically with the grounds of appeal. Failure by a magistrate to comply with the rule with regard to reasons may expose him to an order of costs *de bonis propriis* if he acted mala fide. (See **S v Vogel** 1979(3) SA 822 (N); **Williams v Eerste Addisionele Landdros** 1967(4) SA 61 (O) and **Regional Magistrate Du Preez v Walker** 1976(4) SA 849 (A)).

- [19] The learned magistrate is urged to take note of the provisions of Magistrates' Court Rule 67(5) and comply more fully therewith in future if his *ex tempore* judgment does not contain adequate reasons to assist the court on appeal.

ORDER

- [20] In consequence the appeal is dismissed.

- [21] The conviction and sentence are confirmed.

L.J. LEKALE, J

I concur

S. NAIDOO, J

On behalf of appellant: Mr. L Tshabalala
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On behalf of respondent: Adv. MMM Moroka
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