

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

CASE NO. AR 396/2010

In the matter between:

DAVID CHARLES VAN BILJON

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT Delivered on 17 September 2012

SWAIN J

[1] The appellant, with the leave of the Court *a quo*, appeals against his conviction on a charge of culpable homicide, for which he was sentenced to a term of imprisonment of three years in terms of Section 276 (1) (i) of Act 51 of 1977.

[2] The conviction arose out of a collision which occurred on 04 May 2008, between a motor vehicle with registration number NE 5850 driven by the appellant and a motor vehicle, with registration number

NE 10289, driven by Mark Weideman. The occurrence of the collision and that the said Mark Weideman (the deceased) died as a result of the injuries he sustained in the collision, was admitted by the appellant in terms of Section 220 of Act No. 51 of 1977.

[3] The sole issue for determination by the Court *a quo* was consequently whether the negligent driving of motor vehicle NE 5850 by the appellant, was a cause of the collision. A determination of this issue had to be carried out by the Court *a quo*, without the benefit of any direct evidence of how the accident occurred because the appellant, stated that he had no recollection of the accident, apparently caused by an injury sustained to his head and there were no eye witnesses to the collision.

[4] The Court *a quo* reached the conclusion it did based upon the evidence of Inspector Singh and Captain van Wyk, who both arrived on the scene after the collision. Based upon their observations of the positions of the vehicles after the collision, what they determined to be the point of the collision on the road surface, the presence of skid marks on the road surface, as well as what they determined to be tyre marks off the side of the road in the direction in which the vehicle driven by the appellant was travelling, they both formulated opinions as to how the accident had occurred. They concluded that the collision was caused by the vehicle driven by the appellant, travelling off the left-hand side of the road, whilst negotiating a curve in the road to the right, and in attempting to correct this the appellant lost control of the vehicle, causing it to travel across the road onto its incorrect

side of the road, where it collided with the vehicle driven by the deceased. On the basis of the length of the skid marks left on the road surface by the vehicle driven by the appellant, Inspector Singh concluded that the appellant had been driving in excess of the speed limit, which he said was sixty kilometres per hour.

[5] The legal representative of the appellant in the Court *a quo*, accepted that the skid marks which appeared on photos taken of the scene of the collision shortly after its occurrence, travelled from the left- hand side of the road, in the direction in which the appellant was travelling, were caused by the appellant's vehicle before the collision, and veered across to the right-hand side of the road, into the lane in which the deceased was travelling in the opposite direction. The appellant's legal representative submitted that the *crux* of the case however was a determination of the cause of the appellant's vehicle swerving, or skidding onto its incorrect side of the road. The Magistrate determined this issue by finding that

"The only inference to be drawn from these facts was that the accused drove his vehicle grossly negligently and that he drove too fast for the circumstances. He failed to control his motor vehicle and thereby took the life of Mark Alan Weideman".

[6] Ms van Jaarsveld, who appeared on behalf of the appellant, submitted in heads of argument that the Magistrate erred in placing reliance upon the opinions of Inspector Singh and Captain van Wyk, neither of whom were properly qualified experts in the field of accident reconstruction. In addition, she submitted that the Magistrate erred in

rejecting the explanation tendered by the defence as to what caused the appellant to swerve into his incorrect lane. This was that there was a pothole in the lane in which the deceased was travelling, shortly before the collision which caused the deceased to take evasive action by swerving into the appellant's lane. The appellant in turn took evasive action to avoid a collision with the deceased's vehicle, by swerving into the opposite lane, at which stage the deceased's vehicle had returned to its correct lane, resulting in the collision taking place on the appellant's incorrect side of the road. The Magistrate concluded that

"If anything is clear it is that the collision could not have taken place as suggested by the defence. What is suggested as a probability cannot even be a possibility".

[7] In addition to placing reliance upon the views of Inspector Singh and Captain van Wyk, the Magistrate also referred to the maxim *res ipsa loquitur* in the context that

"The defence suggests that the reliance on the factual inference of *res ipsa loquitur* cannot find application here as there might be too many factors present for that conclusion to be reached".

It is not clear from the Judgment however, whether the Magistrate applied the maxim in reaching the conclusion that he did. Be that as it may, it is clear that the maxim "gives rise to an inference, not a presumption of negligence. The Court is not compelled to draw the inference".

Stacey v Kent

1995 (3) SA 344 (ECD) at 352 E – F

The test of liability is the same in both civil and criminal matters, being the standard of care and skill which would be observed by the reasonable man

R v Meiring
1927 AD 41 at 46

The standard of proof obviously differs in a criminal case and a civil case, bearing in mind that “one is dealing with a rebuttable inference and not a shifting of *onus*”

S v Mudoti
1986 (4) SA 278 (ZSC) at 279 J – 280 A

Once the State proves the occurrence giving rise to the inference of negligence on the part of the accused, the accused must give an explanation or lead evidence, which creates a reasonable possibility of innocence.

Stacey at 352 G

Mudoti at 280 A

“Mere theories or hypothetical suggestions will not avail the defendant, his explanation must have some substantial foundation in fact and the evidence produced must be sufficient to destroy the probability of negligence inferred to be present prior to the testimony adduced by him”.

Stacey at 352 H

[8] In this context the following *dictum* in

Stacey at 357 F – I

is apposite

“I would lastly refer to the case of *Marais v Caledonian Insurance Co. Ltd.* 1967 (4) SA 199 (E). In that case the plaintiff motorist, faced with an oncoming vehicle on its incorrect side of the road, applied brakes, with the result that he lost control of his vehicle, which skidded onto its incorrect side of the road. The oncoming vehicle had reverted to its correct side of the road and the collision occurred there. At 202D the following passage appears:

‘In considering whether the plaintiff’s explanation is sufficient to dispel the *prima facie* proof of negligence which exists against him by virtue of the fact that the collision occurred on his incorrect side of the road, it is necessary to consider the position of a driver who is approached by a vehicle on its incorrect side.’

On analysis this passage reflects that, notwithstanding that the plaintiff’s vehicle *skidded* onto the incorrect side of the road, there was *prima facie* proof of negligence against him arising out of the fact that the collision occurred on his incorrect side of the road, which circumstances required an explanation from him; in other words, an application of the *res ipsa loquitur* principle”.

[9] This *dictum* must be read in the context of the following passage in the unreported case of

Baigi v Potgieter
1939 TPD (J/C 70/39)

quoted in

Stacey at 356 G – J

with approval

“Now it seems to me that all skidding cases contain serious difficulties in apportioning blame, because the general proposition has been laid down more than once – and it seems a reasonable one – that skidding by itself is not evidence of negligence. Skidding can take place without negligence; but it requires and generally receives explanation from the circumstances in which it takes place. The plaintiff, where the skidding has affected the vehicle of the defendant, is often in a difficult position because it is not possible, as a rule, for him to fix precisely what the cause of the skid was, and that being so it is often difficult for him to show that the defendant was negligent in any one respect. In such circumstances the defendant may provide an explanation which leaves the evidence in a state of equilibrium, in which case the plaintiff will fail in his action. But if the circumstances lead to the inference that there was negligence in the conduct of the driver of the skidding car before the skid arose, or if after the skid came into existence the indications are that a prudent driver would, by the exercise of reasonable care, have avoided the collision by getting out of the skid or otherwise controlling his vehicle, then, of course, the plaintiff will succeed”.

In *Stacey*, the learned Judges concluded that the extract from the decision in *Baigi* was “apposite where the *res ipsa loquitur* rule is being applied” (at 357A) and added the following (at 357 I – 358 C)

“I would add that in my judgment there are no considerations of policy which could found an objection to an application of the *res ipsa loquitur* principle to a case where the evidence is that the defendant’s vehicle collided with the plaintiff’s vehicle on the latter’s correct side of the road as a result of the former vehicle skidding onto that side of the road, notwithstanding statements in the first-mentioned line of cases discussed above to the effect that skidding is not necessarily negligence. As was pointed out in *Baigi*’s case, a plaintiff will, as a rule, not be in a position to give positive evidence that the skid was due to the negligence of the defendant. The defendant, however, would ordinarily be in a

position to tender an explanation for the skid and, if he fails to do so, or to do so acceptably, an inference of negligence may properly be drawn. I do not consider that a distinction can properly be drawn between the case where a vehicle is driven onto the incorrect side of the road and where it skids into that position, provided, of course, that that is all that is known. If, for example, the plaintiff's evidence is that at the very spot where the defendant's vehicle skidded there was an unforeseeable pool of oil - as opposed to the situation where the road is patently slippery by reason of rain - and the probable inference is that it was that oil which caused the defendant's vehicle to skid, the matter could hardly be said to be one where *res ipsa loquitur*".

[10] On the facts of this case which are common cause, the collision took place on the appellant's incorrect side of the road. It is also common cause that the appellant's vehicle left skid marks travelling from the appellant's correct side of the road, to the incorrect side of the road. It appears to have been common cause that these skid marks were caused by the application of the brakes of the appellant's vehicle. An inference of negligence on the part of the appellant consequently arises, namely that the appellant applied the brakes, lost control of his vehicle and skidded onto the incorrect of the road. The drawing of such an inference of negligence, does not depend for its validity upon the correctness of the views expressed by Inspector Singh and Captain van Wyk that there was evidence that the appellant had driven his vehicle off the left-hand side of the road before the collision. In my view, the photographic evidence placed before the Court *a quo*, in support of their views, does not do so. Inspector Singh reached his conclusion on the basis that the grass on the side of the road was "pressed down". He said it was not a skid mark because the grass would have been "torn off - torn out". He maintained that they were tyre marks and when asked whether they could have been

caused by another vehicle, or people walking, his reply was

“The trampled grass at the time of taking that photo was chosen because the grass was wet – not wet as in rain but it was damp and it was chosen because the grass at that point was freshly pressed down. And if people were walking there all the time, it would be much more worn out than what it was”.

He agree that the enlarged photos were not that clear, but maintained that the smaller photos were a bit clearer. Having carefully examined the photos relied upon by the witness, all that is evident is a depression in the grass, which could quite simply be a footpath. In fact, Captain van Wyk said he thought that this was a footpath. Captain van Wyk however maintained by reference to photo “B” that “you could clearly see that a vehicle’s tyres left the road there”. Having closely examined this photo, although there is some evidence of a tyre print in soil, between the grass verge and the tarmac, it is difficult to see how this imprint is sufficiently closely connected with the skid marks on the road surface, to state with any degree of assurance that it was left by the left hand wheels of the appellant’s vehicle. I accordingly disagree with the view of the Magistrate that there was no significant break in the line of the skid marks on the road and on the shoulder of the road.

The drawing of such an inference of negligence also does not depend for its validity upon the view of Inspector Singh that the appellant’s vehicle was travelling at an excessive speed. Inspector Singh was forced to concede when cross-examined that his estimate of the speed of the appellant’s vehicle, was based upon an incorrect estimation of the length of the skid marks. He conceded that one was left with no indication of the speed of the appellant’s vehicle. Captain van Wyk did not express any view on the speed of the appellant’s

vehicle. I accordingly also disagree with the view of the Magistrate that

“The opinion of Singh and van Wyk that the accused was driving at a high speed is a fair conclusion to be reached from the available evidence”.

I accordingly disagree with the further conclusion of the Magistrate that the evidence of Inspector Singh and Captain van Wyk, proved that the appellant drove his vehicle grossly negligently and too fast for the circumstances, based as such evidence was upon insufficient reliable evidence to prove that the appellant's vehicle was driven off the left hand side of the road and was travelling at an excessive speed.

[11] However, because of the inference of negligence which may be drawn on an application of the principle of *res ipsa loquitur* to the facts which are common cause, it was incumbent upon the appellant to lead evidence, or give an explanation which created a reasonable possibility of innocence. Central to the explanation advanced by the appellant, referred to above, was the presence of the pothole in the lane, in which the deceased was travelling. In this regard I agree with the conclusion of the Magistrate, that it was unclear on the evidence, whether the pothole was in existence at the time of the collision. In addition, it was also unclear on the evidence, whether it could have played any significant role in the deceased taking evasive action. The explanation offered by the appellant accordingly did not have any “substantial foundation in fact” and was insufficient to “destroy the probability of negligence inferred to be present”. The explanation advanced was accordingly no more than a theory, or hypothetical suggestion, as to

how the collision occurred. The fact that the inability of the appellant to offer any explanation in rebuttal of the *prima facie* case against him “was due to his amnesia, cannot assist him and the position is simply that he has not dispelled or neutralised the probability of negligence on his part”.

Stacey at 359 D – E

[12] Turning to the issue of sentence. The appellant was sentenced to three years’ imprisonment in terms of Section 276 (1) (i) of Act No. 51 of 1977. The effect of this sentence is that the appellant was sentenced to imprisonment, from which he could be placed under correctional supervision, in the discretion of the Commissioner. Before sentencing a report was compiled by a correctional officer in which it was recommended that the appellant be sentenced to a term of correctional supervision in terms of Section 276 (1) (h) of Act No. 51 of 1977.

[13] The Magistrate rejected this recommendation on the basis it was not a suitable sentence because

“The negligence involved and the accused’s current attitude will in this Court’s view, render the sentence ineffective”.

The Magistrate also concluded that

“The accused qualifies for correctional supervision in all aspects but one and that is that he from the Court’s vantage point does not accept responsibility. The difficulty encountered here is that the reformation of the accused cannot coincide with a denying attitude. Correctional supervision can easily be imposed for an

accused person who comes to court, plays open cards with the Court, admits his wrongdoing and apologises for his misconduct in appropriate cases. The accused unfortunately, has no recollection of the incident and the tell-tale signs of the collision doesn't persuade him that he is accountable".

The Magistrate also stated

"It is fair to conclude that the accused at this stage has only concentrated on his side of affairs and more than two years after the fact, has not faced up to the family of the deceased".

[14] The Magistrate having accepted that the appellant had no recall of the accident, it is difficult to see why the appellant should be subjected to imprisonment and not correctional supervision purely because in an attempt to explain the accident, he advanced an exculpatory theory of events, which was rejected. Having found that the Magistrate erred in relying upon the opinions of Inspector Singh and Captain van Wyk to prove the negligent conduct of the appellant and finding that an inference of negligent conduct on the part of the appellant was only justified on an application of the principle of *res ipsa loquitur*, to which the appellant had no satisfactory explanation of events to rebut this inference, the moral blameworthiness of the appellant for the collision is brought into sharper focus. The inability of the appellant to furnish an explanation for his conduct because of amnesia, albeit irrelevant to a determination of his legal liability, must however be considered when assessing his moral blameworthiness, for the purposes of sentence. One is left with uncertainty as to what caused the appellant to brake sharply and lose control of his vehicle. The moral blameworthiness of the appellant for the collision is accordingly not as clearly defined as his legal blameworthiness, such

that a term of direct imprisonment in my view, is not justified in all of these circumstances.

[15] I am accordingly satisfied that the Magistrate misdirected himself in concluding that the appellant was precluded from being sentenced to correctional supervision, simply because he did not “accept responsibility” for the collision.

[16] In my view the terms of correctional supervision suggested by the correctional officer are entirely appropriate and will find expression in the order I make.

I grant the following order:

a) The appeal against conviction is refused.

b) The appeal against the sentence imposed succeeds, the sentence imposed is set aside and replaced with the following sentence:

“The accused is sentenced to three years of correctional supervision in terms of Section 276 (1) (h) of Act No. 51 of 1977 on the following conditions:

(i) The accused is placed under house arrest for the duration of this sentence with due

consideration of his working hours, co-operation in general and other relevant circumstances.

(ii) The accused may not leave his residential or work address or magisterial district without prior approval except for the purposes of essential work or other reasons in the discretion of the Commissioner.

(iii) The accused is to perform a minimum of sixteen hours of free community service for each month of the sentence.

(iv) The accused is obliged to attend programmes to be identified by the Commissioner and which may be deemed necessary during the serving of his sentence.

(v) The accused must not make himself guilty of criminal or other misbehaviour.

(vi) The accused may not commit any further crime.

(vii) In terms of Section 52 of the Correctional Services Act No. 111 of 1998, the Commissioner may set any other condition, which is essential for the execution of the sentence of correctional

supervision.

(viii) The Commissioner shall ensure that the conditions are complied with and act in accordance with the provisions of Section 70 of the Correctional Services Act No. 111 of 1998 upon the violation of any of these conditions.

SWAIN J

I agree

GYANDA J

Appearances /...

Appearances

For the Appellant : Ms M. E. van Jaarsveld

Instructed by : Jordaan Geldenhuys Attorneys
Escort

For the Respondent : Mr. J. du Toit

Instructed by : Director of Public Prosecutions

Date of Hearing : 30 August 2012

Date of Filing of Judgment : 17 September 2012