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G.P.-S.12136—1952-3—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

([illegible] Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

PETRUS JOHANNES STEENKAMP Appellant,

versus

[illegible] KARP Respondent.

Appellant's Attorney
Prokureur vir Appellant [illegible]

Respondent's Attorney
Prokureur vir Respondent [illegible]

Appellant's Advocate
Advokaat vir Appellant Kriegler

Respondent's Advocate
Advokaat vir Respondent [illegible]

Set down for hearing on
Op die rol geplaas vir verhoor op Thursday, 27 Okt, 1955.

(2, 4, [illegible], 10, 11.)

9.45 – 12.55
2.15 – 3.45

Appeal dismissed, with costs
(Reasons later)

[signature]
Regr.

Record.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

PETRUS JOHANNES STEENKAMP Appellant

and

JOE KARP Respondent

Heard:27th, October, 1955. Reasons handed in: 3 — 11 - 1955

Coram: Schreiner,Hoexter,Steyn,Brink et Hall, JJ.A.

J U D G M E N T

SCHREINER J.A. :- The appellant was the defendant in an action in the High Court of South West Africa arising out of a collision between his car and that of the plaintiff, now the respondent. The plaintiff - I shall keep to the old designations of the parties - recovered judgment for an agreed amount of damages, £1,100, and costs. The appeal was dismissed with costs, the reasons to be furnished later. They follow.

The accident happened during daylight on the 5th November 1953 on the Swakopmund - Walvis Bay road, a gravel road, which at that place is 30 feet wide and runs north and south. The plaintiff was driving from

north/.....

north to south in a Chevrolet car while the defendant was driving in the opposite direction in a Dodge car. A short distance - agreed by the parties at 35 to 55 yards - north of the point of collision there begins a dip in the otherwise level road; the slope on the northern side of the dip is gradual and on the southern side is steeper but becomes less steep about 18 yards from the top of the rise, thus creating something of a false crest. In the dip there is a double bend shaped like the letter S; the curves composing it are slight. The road to the north of the dip lies to the east of what would be the straight continuation of the road south of the dip. From 50 to 100 yards south of the crest forming the southern edge of the dip the road for about 200 yards beyond the crest, i.e. in the dip, is invisible; beyond that it is again visible. Proceeding from the north, once one has entered the dip the road south of the crest is invisible until one is about to reach or has reached the crest.

The defendant, as he approached the dip from the south, kept closely to the eastern - his incorrect - side of the road to avoid corrugations on the western side. He maintained that position on the road right up to the point of impact; after he saw the plaintiff's car

he had sufficient time to return to his correct side of the road.

While the course of the defendant's car was not in dispute that of the plaintiff's was. According to the findings of CLAASSEN J., who tried the case, it was travelling on the crown of the road, with its two right hand wheels just under two feet west of the middle line, until it was in process of going up the southern slope of the dip; then it moved further to the eastern - its correct - side of the road. Emerging over the crest while it was on that tack, the car was swung more pronouncedly eastwards shortly before the point of collision was reached, and was then wholly on its correct side of the road."

If that is the correct general ~~position~~ picture of the position the most natural inference would be that the defendant was negligent in respects that at least contributed to the accident. The duty of a driver in regard to the rule of the road in cases like this is well stated by GARDINER J.P. in Swart v. Albertyn (1935 C.P.D.71 at page 73) in the words, "Now I am not prepared to say that "mere travelling on the right-hand side of a country road is "negligence. Sometimes it is necessary, owing to the state

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"of the road. But a driver may only do this when his view "of the road in front of him is such that he can see a "vehicle approaching him in time to get to his left. He must "not drive on the wrong side, when there is a hidden danger, "and another vehicle may suddenly come into view, too late to "avoid an accident." Counsel for the defendant sought to meet the case against his client by submitting that, since he had sufficient space and time to return to his correct side before colliding with any vehicle that might come over the crest, he was not negligent in driving on his wrong side of the road as he did. In other words counsel ~~used~~ relied upon the existence of the opportunity to cross to his correct side of the road as proof that the defendant was not negligent merely in that, at that stage, he was on his wrong side - although in fact the opportunity was not used. But, assuming this analysis to be correct, despite the fact that according to the defendant he was only 80 to 100 yards from the crest when the plaintiff's car appeared over it, the inquiry is only pushed a stage further back - to the reasons why the defendant did not return to his correct side as soon as the plaintiff's car appeared. That was clearly his duty unless, owing to the position of the plaintiff's car on the road or to the way in

which/.....

which it was being driven, the defendant had reasonably grounds for believing that to return to his correct side would be the more dangerous course. That again could only be the position if it would have been evident to a reasonable man that the plaintiff was going to keep to the western - his incorrect-side of the road. (cf. Solomon v. Mussett and Bright Ltd. 1926 A.D. 427 at page 433).

The defendant's evidence certainly was to the effect that the plaintiff came over the crest on the extreme western edge of the road and continued to travel straight forward on his wrong side at a terrific speed until, just when the defendant thought that he had been passed by the plaintiff, the latter swung his car right across into the front of the defendant's car. On his impression of the plaintiff's conduct the defendant said that it would simply have been inviting a head-on collision for him to have returned to his correct side.

It may be assumed in the defendant's favour that if his version of the facts regarding the plaintiff's driving had been correct he, the defendant, would not have been relevantly negligent. But CLAASSEN J., pointing out that in his plea the defendant had said that the plaintiff drove in the middle of the road, and relying on the evidence

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of Constable van Heerden, rejected the defendant's version, and, as already indicated, held that at no relevant stage were the plaintiff's right wheels more than two feet west of the middle line of the road; from that position they swung, at first gradually and then more sharply, towards the eastern side of the road. The furthest that the learned judge was prepared to go in favour of the defendant was to concede, following upon observations at an inspection in loco, that the defendant might have gained a momentary impression, owing to the configuration of the road, that the direction of movement of a car coming over the crest was towards the western side of the road. But an impression of that kind, erroneous as it turned out to be, could not justify a driver in taking, without further confirmation, the very serious decision to continue on the wrong side of the road in the face of a rapidly approaching vehicle. The momentary impression, if it existed, was certainly heightened by the fact that the defendant was driving on the wrong side of the road.

If the facts were as found by the learned judge it would not be possible to question his conclusion that the defendant was negligent and that the plaintiff was not, i.e. that the accident was caused solely by the negligence of the defendant. Counsel for the defendant was accordingly constrained to belittle the effect of the plea and

to attack van Heerden's evidence. The latter visited the scene shortly after the accident in the company of the defendant and Head Constable Heese, who did not give evidence. Directed and assisted by Heese, van Heerden took measurements and made a plan. The latter is only a rough sketch showing in a general way the courses of the cars as evidenced by their tracks and their positions after the accident. But the measurements shown on the key are more important. They fix the point of impact at a spot 21 feet from the western side of the road or 9 feet from the eastern; presumably the marks on the road would not allow very great precision in fixing that point, but there is no reason to doubt that it was well on the eastern side of the middle line of the road. There were brakemarks of the defendant's car for 64 feet south of the point of impact; they travelled in a straight line all the way and the right hand wheels were 5 feet 6 inches from the eastern edge of the road. There were brakemarks of the plaintiff's car for 33 feet north of the point of impact; they were seen by van Heerden to curve back to the middle of the road, where he measured the distance of the right wheels from the western edge of the road and found it to be 13 feet 3 inches. Van Heerden's evidence was given more than a year after the accident and was not free

from/.....

from discrepancies. But CLAASSEN J. was satisfied that he was "an honest witness and completely ~~impartial~~ fair and im- "partial as between the two parties," and save in one par- ticular he accepted his evidence. That particular related to a distance of 64 feet given by van Heerden as the distance ~~between~~ and the place ~~from~~ the point of collision at which the plaintiff's car tracks first tended away from the middle line of the road towards the eastern side. The learned judge accepted van Heerden's evidence that before the plaintiff's car reached the crest it had started to move over towards the eastern side of the road. This finding was challenged by counsel for the defendant, who pointed to passages in van Heerden's evidence which, it was argued, were inconsistent with the finding. But there is no doubt that van Heerden at several places in his evidence stated quite definitely that in his recollection the plaintiff's tracks showed the eastward trend before the crest was reached and the brakes were applied, and, being satisfied of van Heerden's honesty, the learned judge was entitled to treat those passages as more correctly representing what he had intended to convey and what he remembered of the tracks than the other passages, which are less clear and might have been due to an incomplete understanding of the questions put to him.

On/.....

On the view that the distance of 64 feet deposed to by van Heerden began on the slope before the crest was reached the learned judge naturally had difficulty in reconciling that distance with the agreement of the parties that the point of collision was 35 to 55 yards south of the crest; for a point 64 feet north of the point of collision would not be north of the crest and so could not be on the slope leading up to it from the dip. The learned judge's solution of this difficulty was that, despite his assertion to the contrary, van Heerden had mistakenly said 64 feet instead of 64 yards. Such confusions are not unknown in the evidence of honest witnesses though they are not lightly to be assumed. Since the distance of 35 yards agreed by the parties as the minimum distance between the crest and the collision cannot legitimately be modified, the conclusion is inevitable that van Heerden's distance of 64 feet ~~xxx~~ is wrong; it may be that by some trick of memory - the distance is not recorded on the key - he took the 64 feet from some other distance measured by him. But this difficulty did not lead this Court to the conclusion that the learned judge was wrong in accepting van Heerden's evidence that the plaintiff's tracks tended eastwards before the crest was reached and the brakes were applied.

This point has been dealt with at some length because it was the principal line of attack on van Heerden's evidence. But it is at least clear that when it came over the crest the plaintiff's car was no further to the west of the road than was indicated by the distance of 13 feet 3 inches measured by van Heerden. There is nothing but the defendant's rejected evidence to support the improbability that the plaintiff was west of the crown of the road when he came over the crest. It is unnecessary to deal in detail with the evidence of the plaintiff and his native employee, which accorded with that of van Heerden to this extent at least that their car was at no stage further to the west than the crown of the road.

The defendant's counsel questioned the finding of CLAASSEN J. that the cars collided nearly head-on, and supported his argument by reference to the damage that they suffered. The argument is without validity. The damage done was severe and was all in front, though not in the middle of the front portions of the cars. It would not be possible to infer with confidence from such evidence regarding the damage as was presented what the positions of the cars on the road were just before impact, but there can be no legitimate quarrel with the description of the collision as having been nearly head-on.

Counsel/.....

Counsel also based an argument upon the account recorded by the learned judge of a test made at the inspection in loco, where cars were put in different positions and inferences were drawn as to which driver should have been able to see some portion of the other's car first. CLAASSEN J. concluded that the defendant could have seen the plaintiff's car before the plaintiff could have seen the defendant's. That seems to be inherently probable, since as the plaintiff's car came to the top of the crest its bonnet or roof could, within the limits of the human eye's capacity, be seen from any point of the level road south of the crest, however far away, while the plaintiff would only be able to see the defendant's car when his line of vision ceased to be obstructed by the relatively nearby crest. It is, however, difficult to attach much importance to these calculations or to those by which it was sought to show exactly how far south of the dip the collision took place - a distance which was unfortunately not measured by Heese and van Heerden. Once it is accepted that the defendant was driving wholly on the wrong side of the road and that the plaintiff came over the rise certainly not further west than the crown of the road, and once it is further accepted that the defendant could safely have returned to his side of the road but failed to do so, such

failure/.....

failure was negligence and caused the accident. It would not assist the defendant if, as is not impossible despite the general acceptance at the trial of the contrary, the defendant in fact did not, whether on account of inattention or some other cause, have the opportunity which if he had been driving with reasonable care he would have had; for then that negligence on his part caused the accident. This Court agreed with CLAASSEN J. that no negligence on the part of the plaintiff was proved. Once the defendant's version is rejected it is difficult to conceive of any avoiding course of conduct which the plaintiff should have adopted but failed to adopt; if any could be thought of, the criticism would apparently be fully answered by the fact that there was an emergency created solely by the defendant's approaching too close to the dip on the wrong side of the road and at a high speed.

This Court was satisfied that the decision of CLAASSEN J. had not been shown to be wrong, and indeed that, judging from the record, it was clearly correct.

O.D. Schreiner 2.11.55

L.P. Brink 2.11.55

O.L. Hall 3.11.1955

I. C. Steyn "

Otto. "