184/55

184/55

G.P.-S.384–1932-3–10,000.

U.D.J. 445.

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.

Edward Mohlapu

Appellant.

versus

Regina.

Respondent.

Appellant's Attorney McIntyre HW. *Respondent's Attorney*
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate *Respondent's Advocate*
Advokaat van Appelant *Advokaat van Respondent*

Set down for hearing on:
Op die rol geplaas vir verhoor op:

Application granted as prayed.
(Fagan, JA.)
Registrar
17/10/55

Appeal set for Friday 9th March, 1956.
1, 2, 5, 8, 10

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

EDWARD ROBERSON .....Appellant.

versus

R E G I N A. ..... Respondent.

CORAM: Centlivres, C.J., Schreiner, Fagan, Steyn et Brink, JJ.A.

HEARD ON:- 9th March, 1956.

DELIVERED:

REASONS FOR J U D G M E N T.

BRINK, J.A. :- The appellant was convicted in a Regional Magistrate's Court at Port Elizabeth of: (1) culpable homicide; (2) failing to stop after an accident in contravention of section 45(6)(a), read with sections 45(1)(a), 6(b) and 7 of Ordinance 15 of 1938 (as amended); (3) failing to render assistance to the person injured in the accident in contravention of section 45(6)(a), read with sections 45(2) and 45(7) of that ordinance, and (4) failing to report the accident to the nearest Police Station in contravention of section 45(6)(c). He was sentenced on the first count to 12 months' imprisonment with compulsory labour of which nine months was suspended for 3

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years on condition that he does not drive a motor vehicle during that period, and one month's imprisonment with compulsory labour on each of the second and third counts, the sentences to run concurrently with that imposed on the first count, and to pay a fine of one pound or in default of payment, 10 days' imprisonment with compulsory labour on the fourth count. His driver's licence was suspended for three years. Appellant appealed unsuccessfully to the Eastern Districts Local Division, but obtained leave of that Division to appeal to this Court. At the hearing of the ~~appeal~~ matter the Court dismissed the appeal ~~and confirmed the convictions and sentences~~, intimating that its reasons would be given later. The following are the reasons:

The first count alleged that the appellant was guilty of culpable homicide in that he wrongfully and unlawfully drove a motor vehicle No. C.B. 3391 in a negligent manner as a result of which he collided with one Buddy Grobler causing him diverse injuries as a consequence of which he died. I shall refer to Buddy Grobler as "the deceased".

According to the evidence the deceased was a bus driver in the employment of the Port Elizabeth Tramways.

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On the 31st January, 1955 deceased was the driver of bus No. 79, and one Els the conductor. They worked on the Baakens Bridge to Hills Kraal route. At about 10.45 p.m. the bus which they were in charge of stopped at the Baakens Bridge terminus. According to the evidence of Els, the bus was parked completely off the road, alongside the river. The deceased alighted from the bus while Els remained seated on the back seat. Deceased then walked in the direction of South Union Street and when he arrived at the spot marked "X" on the plan he stood there facing East. This spot was 9 feet 10 inches "outside" the continuation of the Western kerb of the street and six feet from a small island (marked "F" on the plan) which was the Western extremity of the traversible portion of South Union Street as it passed the bus terminus. Adjoining "F" there is a bus shelter marked "C" on the plan. Near point "X" South Union Street on the deceased's right (South) narrows, as it traverses the Baakens River bridge, and on his left (North) Baakens Street leads off South Union Street at an angle in a North-westerly direction. A person travelling by vehicle from South along South Union Street, intending to proceed along Baakens Street would at some stage have to cross over the imaginary line made by continuation of the Western pavement of

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South Union Street. From "X" the deceased would have an uninterrupted view to his right along South Union Street to the South, from which direction he could see traffic approaching for a distance. At point "X" deceased was struck by a vehicle and catapulted for a distance of 66 feet to point "A/B". It was a clear, windless night and visibility was good. Deceased's cap was picked up at "D", a spot 27 feet from ~~XX~~ "x", almost directly in line with "X". Almost directly above "X" was a street light and there were also other lights which would have made the deceased clearly visible. When the deceased was picked up after the collision, he was seriously injured, and died from his injuries the same night.

Els in the course of his evidence said that after the arrival of the bus at the terminus, while he was still in the bus attending to his tickets, he heard a loud report "of something bumping; it was a loud noise". He looked through the back window and saw a Morris Minor and a Jeep station wagon careering up North Union Street. Although he first mentioned North Union Street as the street along which the vehicles referred to proceeded, he subsequently corrected himself and said it was Baakens Street. He indicated on the

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plan where the cars were when he first saw them as point "Z", and immediately thereafter at points "S" and "T", indicating roughly the direction in which they were travelling and the distance that separated them as they followed Baakens Street. As Els stepped out of the bus, a native, called Fredericks, made a report to him and guided him to the spot where the deceased was lying ("A/B").

Els said that there were no other vehicles at the time going in the direction taken by the two vehicles in question. The Morris car was travelling on the right and slightly in front of the Jeep station wagen, and, from the position in which the deceased must have been hit, it is more likely that he was hit by the Jeep. The following day Els identified a Jeep station wagon, C.B. 3391, as similar to the station wagon he had observed the previous evening. Els was cross-examined chiefly to show that his observation was at fault, and that he could not, from the position in which he was placed, see the two motor cars. In the course of the trial the Court held an inspection in loco.

In his reasons for judgment the magistrate says: "Els satisfied the court that he could have seen the vehicle passing along the street from the position in which he

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said he was standing when he saw the Jeep. At this inspection a bus was pulled up in the same position in which, according to Els, the bus was standing on the night in question.

Mrs. le Roux, who was the owner of the Jeep station wagon, stated in evidence that she employed the accused in her shop. On the night of 31st January, 1955 accused had the use of her Jeep. He fetched it at her house about 9 p.m. and did not return it that night. The left mudguard and the number plate were bent, but she was unable to say when it occurred since she had not noticed it before it was pointed out to her at the Police Station. She stated that it might have occurred before the accused took the Jeep out that evening.

Sergeant O'Connell found this vehicle at 12.30 a.m. on the 1st February, 1955, at the Mount Road police barracks and noticed, inter alia, that the front number plate on the left hand side as well as the front upper portion of the left front mudguard was bent down towards the tyre. Sergeant O'Connell also states that after warning the accused in terms of the "Judges' rules" he admitted that he was the driver of the Jeep station wagon and that he had gone out to Humewood with the Jeep and had come back with it. O'Connell pointed out the damage to the Jeep to him and he told O'Connell

that he was unable to tell him how the jeep was damaged. It ~~is a notorious fact~~ was not disputed that one of the normal routes from Humewood into the city of Port Elizabeth is via South Union Street past the bus terminus referred to in the evidence.

The magistrate pointed out that the site of the damage i.e. on the left side of the jeep ~~was~~ was where one would have expected to find it if the jeep ~~was~~ had been involved in the collision. He says: "It will be observed that "X" is 6 feet in front of the island "F". It follows that a motor vehicle colliding with a person at "X" could only strike such a person "head on" or with the left side of the vehicle as it would be almost impossible to strike a person with the right side of the vehicle because in order to do so, the vehicle would have to mount and ride over the island with its left wheels."

On the evidence referred to the Crown established that the appellant had had in his possession at about 9 p.m. and again at 12.30 a.m. a jeep station wagon, and also that he had driven it to Humewoood and back, and, on his return journey he might well have traversed the road where the ~~accident~~ accident occurred, further, that the deceased was most likely hit by a jeep station wagon similar in appearance to that in

appellant's possession. In addition we have the facts that the station wagon was damaged ~~in the accused's possession when~~ where it would be likely to be damaged if it had collided with the deceased, and that appellant, though aware of the suggestion that the damage had been caused by the collision, offered no explanation of it or any denial that it had been caused in that way. The defence tendered no evidence and in the circumstances it seems to me that the Crown's evidence might well be regarded as showing that it is highly probable that it was the station wagon in appellant's possession that might on a journey to Humewood and back have hit the deceased. At all events it sufficiently establishes that if it was the jeep, appellant was the driver at the time of the collision. See: Van der Lith v. Rex, 1931 J.C. No. 67; Pather v. Rex, 1942 N.P.D. 247; Rex v. Koen, 1937 A.D. 211. But there was evidence in addition to that referred to above which, if accepted, clearly proves that it was the jeep, C.B. 3391, which collided with the deceased.

I refer to the evidence given by Michael Fredericks. He stated that he was waiting at the terminus for a bus to take him into town. When the bus arrived he entered it but then he got off again and stood at the corner of the bridge, at the back of the bus, talking to a friend. The deceased got

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out of the driver's seat and came round to the back of the bus where he spoke to the conductor, Els. From there he proceeded to the spot marked "X" on the plan, about one pace away from the island, and went to the bus shelter. He was standing not more than about 4½ paces from Fredericks. While Fredericks and a friend were conversing a small car approached fast on the route from Humewood to town. Following the small car was a jeep which was proceeding at a fast pace. He looked in its direction and saw the jeep hit the deceased, and throw him into the air so that he eventually came to rest against the lamp standard. He took the number of the jeep and it was C.B. 3391. The jeep slackened speed and then accelerated, driving off at great speed. The car and jeep then travelled along Baakens Street. Fredericks went to Els and accompanied him to where the deceased was lying. On the way there Els picked up deceased's cap at point "D" on the plan. The following day Fredericks pointed out to the police where he stood, where the deceased was standing when he was struck and where the deceased's cap was picked up.

Fredericks was subjected to a thorough cross-examination. His evidence was attacked mainly on two

grounds:- (i) that his evidence was not worthy of credence in as much as he admitted that he had several convictions for theft, and (ii) that he gave contradictory evidence as to the points from where he observed the accident.

The magistrate was fully aware of the precautions to be taken before accepting the evidence of an acknowledged criminal but held that merely because a person has a criminal record does not ipso facto render his evidence unworthy of credence. Cf. R. v. George and Another, 1953(1) S.A. 382. The magistrate says that Fredericks impressed him as an intelligent, reliable and truthful witness who had no motive to misrepresent any of the facts of the occurrence and he further pointed out that the evidence of this witness was corroborated by that of the conductor in all matters on which the latter was able to testify. This finding was attacked by the defence on the grounds that according to the draughtsman who had prepared the plan of the scene, Fredericks had indicated to him as the point "E" where he was standing a spot where the bus was standing. According to the plan the view from "E" to "X" was obscured by a bus shelter. At an inspection in loco Fredericks pointed out another spot, "U", near the end of the bridge where he had been standing. The magistrate held that

the draughtsman must have been mistaken and accepted Frederick's evidence as to where he was standing. There is evidence supporting this finding.

At the commencement of his evidence Fredericks stated that he was standing near the bridge. When asked in examination-in-chief a question suggesting that his view was obscured by the shelter his reply shows that he did not appreciate any such suggestion. When informed in cross-examination what the plan disclosed, he denied that the shelter was between him and the deceased. Moreover, his description of the position of the deceased as: "he was diagonally behind me", and of his own movement, in following the passage of the two vehicles, clearly show that he had been standing where he claimed he had. He reported at once to the conductor whose statement of how Fredericks approached him shows that he could not have been where the draughtsman placed his position at "E". That he was in the vicinity is clear, and it is highly unlikely that he would have claimed to the draughtsman that he was standing on the very spot where the bus was standing. It seems from his evidence that he was first standing next to the bus and then moved to a position "U" to talk to a friend. In my

view tha magistrate's conclusion on the question of the conflict is the correct one. The facts in this case strongly resemble those in the case R. v. Koen, 1937 A.D. 211.

The onus is on the Crown to establish that the ~~accused~~ appellant was negligent and that his negligence beyond reasonable doubt caused the death of the deceased. Adapting the words of de Villiers,J.A. in Koen's case, to the present there was first of all the outstanding fact that the accused's car in a well lit street collided with a pedestrian; a reasonable careful driver does not collide with a pedestrian in such circumstances.

The body of the deceased was either carried along or projected forwards by the car for a distance of 22 yards. This fact seems to me to dispose of any doubt that might have existed as to the ~~accused's~~ appellant's negligence. If the ~~accused~~ appellant had been keeping a proper look out he must have seen the deceased ~~when~~ before he was projected forwards as a result of the impact, and the inference is well-nigh irresistable that he was not keeping a proper look out. There is, furthermore, evidence afforded by the ~~accused's~~ appellant's subsequent conduct. He did not stop after the collision. He slowed down for a short distance and then accelerated in order to get away from the scene of the

accident as quickly as he could. He at no time made any report to the police about the accident. All this evidence amounts, in my opinion, to ~~the~~ prima facie proof of the ~~accused's~~ appellant's guilt, calling for an answer from the ~~accused~~ appellant; and when the ~~accused~~ appellant failed to make any answer, the prima facie proof became sufficient to convince à reasonable man beyond reasonable doubt of his guilt. In my opinion the magistrate was justified in convicting the ~~accused~~ appellant of culpable homicide.

It was not disputed that ~~the accused~~ (if it was the appellant who drove the car) he failed to stop immediately after the accident, that he failed to render assistance to the injured person and that he failed to report the accident to the nearest police station. The Crown led evidence to prove that the ~~accused~~ appellant failed to comply with the provisions of the ordinance, alleged in counts 2, 3 and 4 and he was therefore rightly convicted on those counts.

Miss van den Heever, who appeared on behalf of the appellant, relied on a number of procedural irregularities which she contended were fatal to the Crown's case. The first submission was one which was raised for the first time in this Court. She referred to section 6 of Act 32 of 1944 which provides in sub-section (1): "Either of the official languages may be used at any stage of the proceedings in any

Court and the evidence shall be recorded in the language so used". According to the record the evidence of Fredericks and Mrs. le Roux was given in Afrikaans but was recorded in English. There is no evidence as to how this occurred. It happens ~~not infrequently~~ occasionally that a stenographer who is capable of taking down shorthand notes in both official languages, is not available and in order to save time a unilingual stenographer is employed with the consent of the parties and services of an interpreter obtained. It must be observed, however, that the section only deals with the recording of the evidence. It does not destroy the oral evidence which is given by the witness in court. Assuming, however, that it is an irregularity not to record the evidence in the language in which it is given, it is not per se a ground for setting aside the proceedings. The proviso to section 103(4) of Act 32 of 1944 provides that no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the court of appeal that a failure of justice has in fact resulted ~~from~~ therefrom. There is no evidence before the court which ~~leads~~ tends to show that there was any prejudice to the ~~accused~~ appellant in the procedure that was adopted. No

objection was made at any stage during the course of the trial and it is not alleged that the evidence of the witnesses recorded is less favourable to the appellant than the oral evidence was. In the absence of any evidence to show that the appellant was prejudiced thereby the contention put forward must be rejected.

The next point that was raised is based on an alleged refusal by the magistrate to order the holding of an inspection in loco. It appears from the record that at the conclusion of the Crown's case, counsel for the accused applied to the court to hold an inspection in loco for the purpose of carrying out certain tests in order to determine whether or not and from what distance a registration number is visible under conditions existing at night. At that stage the magistrate refused to accede to the request made by counsel. The magistrate in his reasons for judgment states "that the court did not refuse the appliaation, but intimated that whereas the defence might at a later stage in the proceedings have convinced the court of the necessity for the holding of an inspection in loco, one having already been held, counsel failed to satisfy the court of the necessity for the holding an inspection in loco at that stage." The magistrate referred to a judgment by Broome, J. in the case of R. v. Sewpaul,

1949(4) S.A. p. 978 to the effect that the main purpose of an inspection in loco is to enable the court to follow and apply the evidence. He is the person who must decide whether he will be assisted in his duty by holding an inspection or not. This is all a matter of the conduct of the proceedings in his own court which is a matter entirely in his own hands. If he thinks he can understand and appreciate the evidence without holding an inspection a higher court would be most reluctant to say that he was wrong. The magistrate states that it was conceivable that as the defence case proceeded the court might have found it necessary to hold a further inspection or to be present at a demonstration at night should the court be unable to understand the defence evidence and, on good cause being shown, as intimated to counsel for the defence, a further inspection would have been held. No further application was made for an inspection in loco. It is not at all clear that any useful purpose would have been served by holding a further inspection in loco, and this is not a case in which this court would interfere with the magistrate's exercise of his discretion.

Miss van den Heever also submitted that the sentences imposed by the magistrate were excessive. She contended that the magistrate had misdirected himself by taking

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into account a factor which was irrelevant, in stating: "there is a strong movement afoot in some parts of the country to give 18 year olds the vote". The magistrate in his reasons admits that he made a statement to the following effect: "18 'year olds are considered old enough to fight for their country 'and in some circles considered old enough to vote for their 'country". This was only another way of saying that 18 year olds can be regarded as responsible members of the community.

The case was a bad one.. The appellant was apparently driving at a great speed. He hit and caused the death of a fellow human being, under circumstances which point to great recklessness on his part. He did not go into the witness box to explain his actions nor to apprise the court of any mitigating circumstances. As has frequently been pointed out the question of punishment is pre-eminently a matter for the trial court to decide upon. In the present case it cannot be said that the magistrate did not exercise a judicial discretion in awarding punishment and this court is not prepared to interfere with the punishment which he assessed. Cf. Rex v. Ramanka, 1949(1) S.A. 417 at p. 419.

It was for these reasons that the court dismissed the appeal, and confirmed the convictions and sentences

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imposed.

R. P. Brink
29/7/58

Concurred:
[illegible]
P.W.S.
K.D.F.
L.C.S.

£2-11-0.

IN THE SUPREME COURT OF SOUTH AFRICA.

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CORAM: Centlivres, C.J. Schreiner, Fagan, Steyn et Brink, JJ.A.

HEARD ON:- 9th March, 1956.

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REASONS FOR J U D G M E N T.

BRINK, J.A.:- The appellant was convicted in a Regional Magistrate's Court at Port Elizabeth of: (1) culpable homicide; (2) failing to stop after an accident in contravention of section 45(6)(a), read with section 45(1)(a), 6(b) and 7 of Ordinance 15 of 1938 (as amended); (3) failing to render assistance to the person injured in the accident in contravention of section 45(6)(a), read with sections 45(2) and 45(7) of that Ordinance, and (4) failing to report the accident to the nearest Police station in contravention of section 45(6)(c). He was sentenced on the first count to 12 months imprisonment with compulsory labour of which nine months was suspended for 3

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years on condition that he does not drive a motor vehicle during that period, and one months imprisonment with compulsory labour on each of the second and third counts, the sentences to run concurrently with that imposed on the first count, and to pay a fine of one pound or in default of payment, 10 days imprisonment with compulsory labour on the fourth count. His driver's licence was suspended for three years. Appellant appealed unsuccessfully to the Eastern Districts Local Division, but obtained leave of that Division to appeal to this Court. At the hearing of the matter the Court dismissed the appeal intimating that its reasons would be given later. The following are the reasons:

The first count alleged that the appellant was guilty of culpable homicide in that he wrongfully and unlawfully drove a motor vehicle No. C.B. 3391 in a negligent manner as a result of which he collided with one Buddy Grobler causing him diverse injuries as a consequence of which he died. I shall refer to Buddy Grober as "the deceased".

According to the evidence the deceased was a bus driver in the employment of the Port Elizabeth Tramways.

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On the 31st January, 1955 deceased was the driver of bus No. 79, and one Els the conductor. They worked on the Baakens Bridge to Hills Kraal route. At about 10.45 p.m. the bus which they were in charge of stopped at the Baakens Bridge terminus. Accroding to the evidence of Els, the bus was parked completely off the road, alongside the river. The deceased alighted from the bus while Els remainèd seated on the back seat. Deceased then walked in the direction of South Union Street and when he arrived at thc spot marked "X" on the plan he stood there facing East. This spot was 9 feet 10 inches "outside" the continuation of the Western kerb of the street and six feet from a small island (marked "F" on the plan) which was the Western extremity of the traversible portion of Sout Union Street as it passed the bus terminus adjoining "F" there is a bus shelter marked "C" on the plan. Near point "X" South Union Street on the deceased's right (South) narrows, as it traverses the Baakens River Bridge, and on his left (North) Baakens Street leads off South Street at an angle in a North-westerly direction. A person travelling by vehicle from South along South Union Street/intending to proceed along Baakens Street woult at some stage have to cross over the imaginary line made by continuation of the Western pavement of

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South Union Street. From "x" the deceased would have an uninterrupted view to his right along South Union Street to the South, from which direction he could see traffic approaching for a distance. At point "X" deceased was struck by a vehicle and catapulted for a distance of 66 feet to point "A/B". It was a clear, windless night and visibility was good. Deceased's cap was picked up at "D", a spot 27 feet from "x", almost directly in line with "X". Almost directly above "X" was a street light and there were also other lights which would have made the deceased clearly visible. When the deceased was picked up after the collision, he was seriously injured, and died from his injuried the same night.

Els in the course of his evidence said that after the arrival of the bus at the terminus, while he was still in the buss attending to his tickets, he heard a loud report "of something bumping; it was a loud noise". He looked through the back window and saw a Morris Minor and a Jeep Station wagon careering up North Union Street. Although he first mentioned North Union Street as the street along which the vehicles referred to proceeded, he subsequently corrected himself and said it was Baakens Street. He indicated on the

plan where the cars were when he first saw them as point "F", and immediately thereafter at points "s" and "T", indicating roughly the direction in which they were travelling and the distance that separated them as they followed Baakens Street. As Els stepped out of the bus, a native, called Fredericks, made a report to him and guided him to the spot where the deceased was lying ("A/B").

Els said that there were no other vehicles at the time going in the direction taken by the two vehicles in question. The Morris Minor car was travelling on the right and slightly in from of the Jeep Station wagon, and, from the position in which the deceased must have been hit, it is more likely that he was hit by the Jeep. The following day Els identified a Jeep Station wagon, C.B.3391, as similar to the station wagon he had observed the previous evening. Els was cross-examined chiefly to show that his observation was at fault, and that he could not, from the position in which he was placed, see the two motor cars. In the course of the trial the Court held an inspection in loco.

In his reasons for judgment the magistrate says:"Els satisfied the court that he could have seen the vehicle passing along the street from the position in which he

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said he was standing when he saw the Jeep. At this inspection a bus was pulled up in the same position in which, according to Els, the bus was standing on the night in question.

Mrs. le Roux, who was the owner of the Jeep Station Wagon, sated in evidence that she employed the accused in her shop. On the night of 31st January, 1955 accused had the use of her Jeep. He fetched it at her house about 9 p.m. and did not return it that night. The left mudguard and the number plate were bent, but she was unable to say when it occurred since she had not noticed it before it was pointed out to her at the Police Station. She stated that it might have occurred before the accused took the Jeep out that evening.

Sergeant O'Connell found this vehicle at 12.30 a.m. on the 1st February, 1955, at the Mount Road police barracks and noticed, inter alia, that the fron number plate on the left hand side as well as the front upper portion of the left front mudguard was bent down towards the tyre. Sergeant O'Connell also states that after warning the accused in terms of the "Judge rules" he admitted the he was the driver of the Jeep station wagon and that he had gone out to Humewood with the Jeep and had come back with it. O'Connell pointed out the damage to the Jeep to him and he told O'Connel'

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that he was unable to tell him how the jeep was damaged. It was not disputed that one of the normal routes from Humewood intor the city Port Elizabeth is via South Union Street past the bus terminus referred to in the evidence.

The magistrate pointed out that the site of the damage i.e. on the left side of the Jeep was where one would have expected to find it if the Jeep had been involved in the collision. He says:"It will be observed that "X" is 6 feet in fron of the island "F". It follows that a motor vehicle colliding with a person at "X" could only strike such a person "head on" or with the left side of the vehicle as it would be almost impossible to strike a person with the right side of the vehicle because in order to do so, the vehicle would have to mount and ride over the island with its left wheels".

On the evidence referred to the Crown established that the appellant had had in his possession at about 9 p.m. and again at 12.30 a.m. a Jeep station wagon, and also that he had driven it to Humewood and back, and, on his return journey he might well have traversed the road where the accident occurred, further, that the deceased was most likely hit by a Jeep station wagon similar in appearance to that i

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appellant's possession. In addition we have the facts that the Jeep station wagon was damaged ~~in the accused's possession when~~ where it would be likely to be damaged if it had collided with the deceased, and that appellant, though aware of the suggestion that the damage had been caused by the collision, offered no explanation of it or any denial that it had been caused in that way. The defence tendered no evidence and in the circumstances it seems to me that the Crown's evidence might well be regarded as showing that it is highly ~~per~~ probable that it was the station wagon in appellant's possession that might on a journey to Humewood and back have hit the deceased. At all avents it sufficiently establishes that if it was the Jeep, appellant was the driver at the time of the collission. See van der lith v. Rex, 1931 J.C. No. 67; Pather v. Rex, 1942 N.P.D. 247; Rex v. ~~Koen~~ Koog, 1937 A.D. 211. But there was evidence in addition to that referred to above which, if accepted, clearly proves that it was the Jeep, C.B. 3391, which collided with the deceased.

I refer to the evidence given by Michael Fredericks. He stated that he was waiting at the terminus for a bus to take him into town. When the bus arrived he entered it but then he got off again and stood at the corner of the bridge, at the back of the bus, talking to a frien. The deceased got

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out of the driver's seat and came round to the back of the bus where he spoke to the conductor, Els. From there he proceeded to the spot marked "X" on the plan, about one pace away from the island, and went to the bus shelter. He was standing not more than about 4½ paces from Fredericks. While Fredericks and a friend/were conversing a small car approached fast on the route from Humewood to town. Following the small car was a Jeep which was proceeding at a fast pace. He looked in its direction and saw the Jeep hit the deceased, and throw him into the air so that he eventually came to rest/against the the lamp standard, He took thenumber of the Jeep and it was C.B. 3391. The Jeep slackened speed and then accelerated, driving off at great speed. The car and Jeep then travelled along Baakens Street. Fredericks went to Els and accompanied him to where the deceased was lying. On the way there Els picked up deceased's Cap at point "D" on the plan. The following day Fredericks pointed out to the police where he stood, where the deceased was standing when he was struck and where the deceased's cap was picked up.

Fredericks was subjected to a thorough cross-examination. His evidence was attacked mainly on two

/ grounds...../ 10.

grounds:- (i) that his evidence was not worthy of credence in as much as he admitted that he had several convictions for theft, and (ii) that he gave contradictory evidence as to the points from where he observed the accident.

The magistrate was fully aware of the precautions to be taken before accepting the evidence of an acknowledged criminal but held that merely because a person has a criminal record does not ipso facto render his evidence unworthy of credence. Cf. R. v. George and Another 1953(1) S.A. 382. The magistrate says that Fredericks impressed him as an intelligent, reliable and truthful witness who had no motive to misrepresent any of the facts of the occurrence and he further pointed out that the evidence of this witness was corroborated by that of the conductor in all matters on which the latter was able to testify. This finding was attacked by the defence on the grounds that according to the draughtsman who had prepared the plan of the scene, Fredericks had indicated to him as the point "E" where he was standing a spot where the bus was standing. According to the plan the view from "E" to "X" was obscured by a bus shelter. At an inspection in loco Fredericks pointed out another spot, "U", near the end of the bridge where he had been standing. The magistrate held that

the draughtsman must have been mistaken and accepted Frederick's evidence as to where he was standing. There is evidence supporting this finding.

At the commencement of his evidence Fredericks stated that he was standing near the bridge. When asked in examination-in-chief a question suggesting that his view was obscured by the shelter his reply shows that he did not appreciate any such suggestion. When informed in cross-examination what the plan disclosed, he denied that the shelter was between him and the deceased. Moreover, his description of the position of the deceased as: "he was diagonally behind me", and of his own movements, in following the passage of the two vehicles, clearly show that he had been standing where he claimed he had. He reported at once to the conductor whose statement of how Fredericks approached him shows that he could not have been where the draughtsman placed his position at "E". That he was in the vicinity is clear, and it is highly unlikely that he would have claimed to the draughtsman that he was standing on the very spot where the bus was standing. It seems from his evidence that he was first standing next to the bus and then moved to a position "U" to talk to a friend. In my

view the magistrate's conclusion on the question of the conflict is the correct one. The facts in this case strongly resemble those in the case R. v. Koen 1937 A.D. 211.

The onus is on the Crown to establish that the appellant was negligent and that his negligence beyond reasonable doubt caused the death of the deceased. Adapting the words of de Villiers, J.A. in Koen's case to the present, there was first of all the outstanding fact that the accused's car in a well lit street collied with a pedestrian; a reasonably careful driver does not collide with a pedestrian in such circumstances.

The body of the deceased was either carried along or projected forwards by the car for a distance of 22 yards. This fact seems to me to dispose of any doubt that might have existed as to the appellant's negligence. If the appellant had been keeping a proper look out he must have seen the deceased before he was projected forwards as a result of the impact, and the inference is well-nigh irresistable that he was not keeping a proper look out. There is, furthermore, evidence afforded by the appellant's subsequent conduct. He did not stop after the collision. He slowed down for a short distance and then accelerated in order to get away from the scene of the

accident as quickly as he could. He at no time made any report to the police about the accident. All this evidence amounts, in my opinion, to *prima facie* proof of the appellant's guilt, calling for an answer from the appellant; and when the appellant failed to make any answer, the *prima facie* proof became sufficient to convince a reasonable man beyond reasonable doubt of his guilt. In my opinion the magistrate was justified in convicting the appellant of culpable homicide.

It was not disputed that, if it was the appellant who drove the car, he failed to stop immediately after the accident, that he failed to render assistance to the injured person and that he failed to report the accident to the nearest police station. The Crown led evidence to prove that the appellant failed to comply with the provisions of the ordinance, alleged in counts 2, 3 and 4 and he was therefore rightly convicted on those counts.

Miss van den Heever, who appeared on behalf of the appellant, relied on a number of procedural irregularities which she contended were fatal to the Crown's case. The first submission was one which was raised for the first time in this Court. She referred to Section 6 of Act 32 of 1944 which provides in sub-section (1): "Either of the official languages may be used at any stage of the proceedings in any

Court and the evidence shall be recorded in the language so used". According to the record the evidence of Fredericks and Mrs. le Roux was given in Afrikaans but was recorded in English. There is no evidence as to how this occurred. It happens occasionally that a stenographer who is capable of taking down shorthand notes in both official languages, is not available and in order to save time a unilingual stenographer is employed with the consent of the parties and services of an interpreter obtained. It must be observed, however, that the section only deals with the recording of the evidence. It does not destroy the oral evidence which is given by the witness in court. Assuming, however, that it is an irregularity not to record the evidence in the language in which it is given, it is not per se a ground for setting aside the proceedings. The proviso to section 103(4) of Act 32 of 1944 provides that no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the court of appeal that a failure of justice has in fact resulted therefrom. Ther is no evidence before the court which tends to show that there was any prejudice to the appellant in the procedure that was adopted. No

objection was made at any stage during the course of the trial and it is not alleged that the evidence of the witnesses is less favourable to the appellant than the oral evidence was. In the absence of any evidence to show that the appellant was prejudiced thereby the contention put forward must be rejected.

The next point that was raised is based on an alleged refusal by the magistrate to order the holding of an inspection in loco. It appears from the record that at the conclusion of the Crown's case, counsel for the accused applied to the Court to hold an inspection in loco for the purpose of carrying out certain tests in order to determine whether or not and from what distance a registration number is visible under conditions existing at night. At that stage the magistrate refused to accede to the request made by counsel. The magistrate in his reasons for judgment states "that the court did not refuse the application, but intimated that whereas the defence might at a later stage in the proceedings have convinced the court of the necessity for the holding of an inspection in loco, one having already been held, counsel failed to satisfy the court of the necessity for the holding an inspection in loco at that stage." The magistrate referred to a judgment by Broome, J. in the case of R. v. Sewpaul,

1949(4) S.A. p. 978 to the effect that the main purpose of an inspection *in loco* is to enable the court to follow and apply the evidence. He is the person who must decide whether he will be assisted in his duty by holding an inspection or not. This is all a matter of the conduct of the proceedings in his own court which is a matter entirely in his own hands. If he thinks he can understand and appreciate the evidence without holding an inspection a higher court would be most reluctant to say that he was wrong. The magistrate states that it was conceivable that as the defence case proceeded the court might have found it necessary to hold a further inspection or to be present at a demonstration at night should the court be unable to understand the defence ebidence and, on good cause being shown, as intimated to counsel for the defence, a further inspection would have been held. No further application was made for an inspection *in loco*. It is not at all clear that any useful purpose would have been served by holding a further inspection *in loco*, and this is not a case in which this court would interfere with the magistrate's exercise of his discretion.

Miss van den Heever also submitted that the sentences imposed by the magistrate were excessive. She contended that the magistrate had misdirected himself by taking

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into account a factor which was irrelevant, in stating: "there is a strong movement afoot in some parts of the country to give 18 year olds the vote". The magistrate in his reasons admits that he made a statement to the following effect: "18 year olds are considered old enough to fight for their country and in some circles considered old enough to vote for their country." This was only another way of saying that 18 year olds can be regarded as responsible members of the community.

The case was a bad one. The appellant was apparently driving at a great speed. He hit and caused the death of a fellow human being, under circumstances which point to great recklessness on his part. He did not go into the witness box to explain his actions nor to the apprise the court of any mitigating circumstances. As has frequently been pointed out the question of punishment is pre-eminently a matter for the trial court to decide upon. In the present case it cannot be said that the magistrate did not exercise a judicial discretion in awarding punishment and this court is not prepared to interfere with the punishment which he assessed. Cf. Rex v. Ramanka, 1949(1) S.A. 417 at p. 419.

It was for these reasons that the court dismissed the appeal.

(Sgd.) C.P. Brink.
29/7/56

Concurred: Centlivres, C.J., Schreiner, Fagan et Steyn, JJA.

ANNEXURE "B"

IN THE SUPREME COURT OF SOUTH AFRICA.

(EASTERN DISTRICTS LOCAL DIVISION).

ROBERSON VERSUS REGINA.

CRIMINAL APPEAL. 66666

JUDGMENT DELIVERED ON 25TH JULY 1955.

JENNETT J.

The appellant was convicted by the Regional Magistrate at Port Elizabeth of culpable homicide, failing to stop after an accident in contravention of section 45(6)(a) read with sections 45(1)(a), 6(b) and 7 of Ordinance 15 of 1938, failing to render assistance to the person injured in the accident in contravention of section 45(6)(a) read with sections 45(2) and 45(7) of that Ordinance, and of failing to report the accident in contravention of section 45(6)(c) of the Ordinance referred to. He was sentenced to 12 months I.C.L., 9 months thereof being suspended, on the first count, one month I.C.L. on each of the second and third counts, the sentences to run concurrently with that imposed on the first count, and to pay a fine of £1 (or 10 days I.C.L.) on the fourth count. His driver's licence was suspended for three years.

According to the evidence the deceased was a bus driver At about 11 p.m. on the evening of 31 January, 1955, his bus arrived at the terminus and he alighted and went to stand in the street about 6 feet from a small "island" on the extreme left of the street. The weather was clear and windless, and he was plainly visible to anyone in that street. The deceased who stood facing the street had an unobstructed view along the street to his right for 470 feet and would likewise be visible to vehicles approaching from that side for the same distance.

While he was standing there he was hit by a passing vehicle and carried a distance of 60 to 70 feet. He died

as/....

as a result of injuries received.

The conductor on the bus driven by deceased gave evidence that while he was still in the stationary bus he heard a loud noise "as of something bumping". He looked through the window and saw, proceeding away from the spot where deceased was found, a Jeep station wagon and a Morris car. He proceeded to the area and found the deceased lying against a lamp standard.

According to this witness there were no other vehicles in the area at the time going in the direction taken by them. The Morris car was travelling on the right and slightly in front of the Jeep station wagon, and from the position in which the deceased must have been when hit, he must have been hit by the station wagon, if he was hit by either of the two vehicles.

Next day the conductor identified a Jeep station wagon, CB 3391, as similar to the station wagon he had observed that evening.

A certain Mrs. Le Roux said in her evidence that she was the owner of station wagon CB 5391. Appellant was in her employ, and at about 9 p.m. on the evening in question he had taken that vehicle away from her home. He had not returned with it that night. At about 12.30 a.m. that vehicle had been examined by a police sergeant at the Police Barracks. He had found that the number plate on its left front had been damaged and dented and the left front mudguard had been bent down towards the tyre. He had asked Appellant if he was the driver of the station wagon and Appellant had replied that he was. The sergeant had then warned Appellant that they were investigating a hit-and-run accident and had asked him about the damage to the vehicle. The Appellant had stated

that/....

that he was the driver and that he had gone to Humewood and back. They had then proceeded to the vehicle and witness had pointed out the damage. Appellant had replied that he was unable to tell witness how the vehicle had received the damage.

Counsel for Appellant conceded that on one of the normal routes taken by persons returning from Humewood such persons would traverse the road and course taken by the Jeep station wagon and the Morris car seen by the conductor of the bus.

As the Magistrate pointed out, the site of the damage, namely on the left of the vehicle, was where one would have expected any damage arising as a result of the collision in the vehicle which hit the deceased. That is so because the deceased's position when he was hit must have been such that the vehicle which hit him must have hit him "head on" or with its left front or side, because if it hit him with its right side it must have mounted and traversed the "island" with its left wheels.

On the evidence referred to, the Crown established that Appellant had had in his possession at about 9 p.m., and again at 12.30 a.m., a Jeep station wagon. Also that he had driven it to Humewood and back, and on his return journey he might well have traversed the road where the accident occurred. Further, that the deceased was most likely hit by a station wagon similar in appearance to that in Appellant's possession. In addition, that the station wagon in Appellant's possession bore damage in an area where it would be likely to be damaged if it had collided with the deceased, and that Appellant, though aware of the suggestion that the damage had been caused by collision, offered no explanation of it or any denial that it had been caused in that way.

The defence tendered no evidence. In these circumstances it seems to me that this Crown evidence might well be

regarded/...

regarded as showing that it is highly probable that it was the station wagon in Appellant's possession at about 9 p.m., on a journey to Humewood and back, and at 12.30 a.m., that hit the deceased. At all events it sufficiently establishes that, if it was, Appellant was the driver at the time of the collision. See Van der Lith v Rex 1931 J.C. No. 67; Pather v Rex 1942 N.P.D. 247.

It is necessary to decide whether the evidence referred to adequately proved that it was the station wagon which collided with deceased because there was additional evidence to that effect.

There was in addition to the evidence referred to the evidence of one Fredericks. He stated that he had been standing alongside a bridge traversed by the road and ending about 50 or so feet from the point of impact, that he had observed the deceased standing before he was hit, that a Jeep station wagon, preceded by about 8 to 10 paces by a Morris car on its right, proceeded past him, and that the station wagon had hit the deceased and had thrown him into the lamp standard where he was found by the conductor. Witness had run towards the scene and had taken the number of the station wagon which he gave as CB 3391.

The Magistrate says he accepted the evidence of this witness who impressed him as intelligent, reliable and truthful. He points out that the evidence of this witness was corroborated by that of the conductor in all the matters on which the latter was able to testify.

On appeal this conclusion was attacked on two features. According to the draughtsman who had prepared a plan of the scene, Fredericks had indicated to him as the point where he was standing at the time of the collision a

spot where a bus was standing. The view from that spot was, according to the plan, apparently obscured from the point which Fredericks said was the point of impact, by a bus shelter. At an inspection in loco Fredericks pointed out another spot, near the end of the bridge where he had been standing. The Magistrate held that the draughtsman must have been mistaken and accepted Fredericks' evidence as to where he was standing.

There is a wealth of evidence supporting this finding. At the commencement of his evidence Fredericks stated that he was standing near the bridge. When asked in examination - in-chief a question suggesting that his view was obscured by the bus shelter, his reply shows that he did not appreciate any such suggestion. When informed in cross-examination what the plan disclosed he denied that the shelter was between him and deceased. Moreover, his description of the position of the deceased as - "he was diagonally behind me" - and of his own movement in following the passage of the two vehicles show clearly that he had been standing where he claimed he had been. He reported at once to the conductor whose statement of how Fredericks approached him shows that he could not have been where the draughtsman placed his position on the plan. That he was in the vicinity admits of no doubt, and it is highly unlikely that he would have claimed to the draughtsman that he had been standing on the very spot where the bus was standing.

It seems from his evidence that he was standing next to the bus and then moved to a position close to the bridge to talk to a friend. It may well be that because of that the draughtsman gained the wrong impression of Frederick's final position before the collision occurred.

In my view the Magistrate's conclusion on the question of the conflict is clearly a correct one.

Fredericks admitted that he had been previously convicted on more than one occasion of offences involving dishonesty. On these admissions the second ground of attack was founded. The Magistrate says he was fully aware of the precautions he had to take in weighing the evidence of Fredericks in the circumstances. There is no reason to disagree with the acceptance of the evidence of this witness. He had no motive for lying in this case. His criminal record does not ipso facto render his evidence unworthy of credence, c.f. Rex v George & Ano. 1953 (1) S.A. 382. Reliance was placed on Rex v Mokeuna 1932 O.P.D. 79, but that was a case in which the question of the sufficiency of the evidence of a single witness was under consideration. In such cases there is generally no means of testing such evidence. In the present case the conviction does not rest on the sole unsupported testimony of Fredericks. As indicated already there is a great deal of evidence by which his evidence can be tested. That other evidence supports his evidence strongly.

At the conclusion of the Crown evidence the defence applied to the Magistrate for an inspection in loco to be held for the purpose of ascertaining at what distance a car number would be visible under the conditions prevailing at night. The application was made to enable the defence to fortify (presumably if the tests assisted it) its application for the discharge of the accused.

An inspection in loco in daylight had already been conducted and Fredericks and the other witnesses had been examined and cross-examined on it.

The Magistrate refused the application. He referred to the case of Rex v Sewpaul 1949 (4) S.A. 978 and 979

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and stated that he refused the application at that stage. He went on to indicate that at a later stage such an application might become essential. In his judgment he stated that he intimated to counsel for the defence that if there appeared later to be a need for such an inspection, it would be held.

An application for the discharge of the accused was made, and when it failed the case for the defence was closed. No further application was made for an inspection in loco.

On appeal it was contended that the Magistrate erred in refusing the application and that if the inspection had been held it might have demonstrated that Fredericks could not have seen the number of the station wagon as he claimed he had.

There was nothing in the evidence-in-chief or under cross-examination which indicated that there might be ground for the suggestion that Fredericks could not have seen the number of the station wagon involved in the accident. In fact, his claim that the station wagon involved had the number CB 3391, is strongly supported by evidence that I have already referred to.

For Appellant much reliance was placed on a passage in the judgment in Rex v Jessie Nkosi 1941 J.S. 113. Greenberg J.P. (as he then was) stated "It seems to me that where an inspection in loco is necessary to test whether a witness could see what he says he could see, it should be held....." That was a case where the Crown, on a charge of supplying skokiaan, relied on the evidence of a native constable that he saw through a space between a gate and a fence the accused pouring out the liquor. The constable was cross-examined as to whether he could see what he said he saw through that space.

The Magistrate refused to hold an inspection to test the accuracy of the constable's evidence and the court on review held that such refusal constituted an irregularity.

It is not clear from the report whether the case for the Crown depended wholly on the evidence of the constable. At all events there was the real possibility that there was an obstacle in the line of vision of the constable and a test was necessary.

No doubt, whenever an inspection in loco is necessary in order to ensure the accuracy of certain evidence, or to enable the court to follow the evidence, or to ensure a fair and adequate trial, a refusal to hold it is an irregularity. Every refusal to hold an inspection cannot be irregular. The decision whether or not to hold an inspection must lie with the presiding judicial officer. If from what is before him he should consider an inspection desirable in order to ensure a fair trial, his refusal to hold such inspection may well be irregular. If on the other hand there is nothing to suggest that an inspection is necessary or desirable he must be entitled to refuse to hold it.

Turning to the fact of the present case, it is clear that the Magistrate had seen the scene of the accident and from his inspection and the evidence before him had no reason to think that there was anything which obstructed Frederick's view of the station wagon or prevented his observing its number. Moreover, the other evidence strongly supported his evidence as to that station wagon. Any ground supporting the necessity or the desirability of an inspection to ensure a fair trial was entirely lacking. In these circumstances it seems to me that the refusal of the application was correct. By it he did not shut out the defence from showing that Fredericks could not have seen the number or that there were grounds for suspecting that he could not have done so.

After the inspection in loco the witnesses were recalled to speak to what they had pointed out. The Magistrate in adopting that course followed Rex v van der Merwe 1950 (4) S.A.L.R. at 20. On appeal it was argued that as he had failed to record his observations at the inspection in loco he had erred to the prejudice of the Appellant. Reliance was placed on the decision in Rex v Holland 1950 (3) S.A. 37(c).

In the present case the Magistrate did not rely on any features observed by him or pointed out to him by either side, which are not fully and fairly described in the evidence. In these circumstances his failure to record his observations, even if he should have, (which I seriously doubt) cannot possibly have caused prejudice.

As the guilt of the Appellant on the charges against him is clear and not contested on appeal, if it was proved that a vehicle driven by him had hit the deceased the convictions cannot be disturbed.

With regard to the sentence it was urged that the Magistrate had misdirected and should not have imposed a sentence of imprisonment without the option of a fine. According to the grounds of appeal he is said to have imported into his judgment a factor for which there is no authority in law in that he included in his remarks in passing sentence the following :- "There is a strong movement afoot in some parts of this country to give eighteen year olds the vote".

The Magistrate was dealing with an 18 year old person and with a submission that by reason of his age he should be dealt with more leniently than an older person. He pointed out that the Appellant had been conducting a business for Mrs. Le Roux, that eighteen year olds were in the Army, that they were considered by many as sufficiently responsible to

have the right to vote, and that therefore the fact that the Appellant was eighteen years old should not alone entitle him to be dealt with with excessive lenience. It seems to me that these were all factors which the Magistrate could properly consider in rejecting a plea that, without more, the Appellant's age entitled him to no more severe punishment than a fine.

In that view there was no misdirection by the Magistrate and the decision in Rex v Erasmus 1951 (3) S.A. 536(E), relied on by the Appellant, does not apply. I did not understand Mr. Wynne to contend that the sentences in that case should be a measure for the sentences in the present case. Such a submission would run counter to the principles applied by the Court in dealing with sentences on appeal or otherwise. In any event the facts in that case, not fully set out in the report because it was unnecessary, were quite different from the facts in the present case.

Finally it was argued that the sentences were unreasonably severe, having regard to the Appellant's age and an alleged lack of proof of that degree of negligence for which the Courts consider imprisonment without the option of a fine appropriate.

The factor of the Appellant's age was duly considered by the Magistrate. The offences of which he was convicted were serious. He hit and killed a man standing in the street and plainly visible to him, and that conduct merited imprisonment.

The appeal is dismissed and the convictions and sentences are confirmed.

(Sgd). A.G. JENNETT.

JUDGE OF THE SUPREME COURT.

I agree.

(Sgd). F.G. REYNOLDS.

JUDGE OF THE SUPREME COURT.