118/56

G.P.-S.117539—1954-5—5,000.

~~U.D.J 445.~~

118/56

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

(_____ DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

Virsingh Roopsingh

Appellant.

versus/teen

The Queen

Respondent.

Appellant's Attorney _____ *Respondent's Attorney* _____
Prokureur van Appellant *Prokureur van Respondent*

I Maneck Q.C

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

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

4.15 pm

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

VERSINGH ROOPSINGH .....
Appellant.

and

R E G I N A. .....
Respondemt.

C O R A M: Hoexter, Fagan, de Beer, de Villiers, JJ.A. et Hall, A.J.A.

H E A R D: 21st September, 1956. Delivered:-28/9/56.

J U D G M E N T.

HALL, A.J.A. :-

The appellant in this case was convicted by Selke, J. in the Durban and Coast Local Division of culpable homicide and sentenced to two and a half years' imprisonment with hard labour, in addition to which his motor driver's licence was cancelled and he was declared disqualified from holding or obtaining a driver's licence in future. He was granted leave by the learned judge to appeal to this court against the conviction and against the sentence by reason of its severity.

The appellant was charged with driving a

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motor truck in a reckless and negligent manner on the main road between Durban and Verulam and colliding with Mahomed Amod Dhooma, this causing his death. The evidence disclosed that the appellant was driving a motor truck belonging to his uncle from Durban to Verulam on the evening of the 12th November, 1954. At about 7.0 p.m., it being already dark, while the truck was ascending a rise in the road known as Katskop Hill, which is about a mile and a half on the Durban side of Verulam, it struck the deceased who was standing in close proximity to a stationary car into which he was pouring petrol. As the result of injuries received in this collision the deceased died.

For the Crown, evidence was given by John Frederick Paxman, who stated that, on the evening in question while driving from Durban to Verulam, he followed a truck for a distance of from four to five miles at a speed varying between 40 and 50 miles a hour. He was close behind the truck which, on occasions, was swerving from one side of the road to the other. On one occasion it went off the road completely on its incorrect side of the road. After that he closed on the vehicle and took its number. Shortly after that, while going up Katskop Hill, he noticed, in

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the lights of both vehicles, a car parked on the left hand side of the road between 175 and 200 yards ahead of his car. Both his car and the truck were then travelling at between 45 and 50 miles per hour. As he got within approximately 50 yards from the car he noticed someone standing to the rear of the right hand side of the car. Half of this person's body was projecting beyond the car into the road. He saw the truck collide with the right hand side of the parked car and the person who was standing at the back of the car was thrown onto the road. The truck drove on and he chased it, caught up with it, and shouted to the driver to stop, but the driver just carried on. He reversed back to the scene of the accident and found the deceased lying in the road. The appellant was the driver of the truck.

In cross-examination Paxman admitted that he might be wrong in his statement that the truck actually struck the stationary car, but said that it had appeared so to him for he thought that metal had struck metal. He also admitted that, as the truck swerved for the purpose of passing the car, he could not have seen the collision through it, but he maintained throughout that he saw the left hand side of the truck when it actually collided with the deceased and he saw

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the latter being thrown onto the road, as the truck was still moving towards the right of the stationary car. He never saw the petrol tin which the deceased had in his hand at the time.

Evidence was given by Dr. Brodie, the district surgeon for Inanda, the district in which Verulam is situated, who went to the scene of the accident and attended to the deceased. At about 8.35 that evening he examined the appellant in order to ascertain whether or not he was under the influence of liquor. He found that the latter had taken sufficient intoxicating liquor to have caused his faculties to be impaired at the time of the accident. When he asked the appellant whether he had in fact taken liquor he replied that he had had one beer at the Britannia Hotel in Durban.

One, Mahomedy, stated that at approximately 8.30 on 12th November, 1954 appellant came to him and told him that he was in trouble and wanted his help. The appellant was under the influence of liquor at the time. He told him that he had had an accident on Katskop Hill and that a European had knocked into his van and he showed him the damaged door handle on the truck.

From the evidence given by the police and

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a plan drawn up at the time, it appears that the width of the road at the spot where the accident took place is 34 feet. Of this 20 feet has a tarred surface with short, disconnected, white lines indicating its centre. The deceased's car was parked at a distance of two feet from the centre line leaving a distance of 12 feet between the left hand side of the car and the outer edge of the roadway. The deceased's body was found in the road 12 feet beyond the front of his car and an empty petrol tin, with a dent in it, was found two feet behind it. The distance between the right hand side of the car and the outer edge of the road on the right was 16 feet. ~~There were three people in the deceased's car at the time of~~ the accident, ~~but~~ none of them was called to give evidence nor was any explanation for ~~their~~ failure to do so placed on record. No point appears to have been raised in connection ~~with this circumstance.~~

Appellant was the only witness called for the defence. He stated that he did not see the stationary car until he was about 40 yards away from it and that he saw the deceased standing behind the car with a gallon tin in his hands. He swerved to the right to avoid the car and passed at a distance of about two feet from it. As he was passing

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it the deceased stumbled towards the centre of the road. He heard a noise like a tin falling or hitting his truck and he slowed down, but a car came abreast of him and the driver shouted at him and he then drove on. After he arrived at Verulam he found a dent in his truck and a bent door handle and he became frightened because he thought that the person behind the car had stumbled ~~onto~~ against his truck; he then went to a hotel and drank three double tots of cane spirit, one after the other, to give him courage. He then went to look for Mahomedy, told him that he was in trouble and asked him to help him. Just then the police van came down the street and he and Mahomedy walked towards it and he told Sergeant du Plessis that he wished to report an accident. The Sergeant took him to Dr. Brodie's surgery for examination.

The learned judge accepted Paxman's evidence. He found that the appellant was under the influence of liquor at the time of the accident and rejected his story that he drank three double tots of cane spirit at Verulam after the accident, giving as the principal reason for the rejection the fact that he had told Dr. Brodie an untruth in saying that ~~what~~ all he had had to drink was one beer prior to his leaving Durban. He did not accept the appellant's story that the

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deceased stumbled into his truck as he passed the stationary car and he stated that the appellant impressed him as being unreliable in several respects. He found that the appellant was negligent in attempting to pass a stationary vehicle, next to which a man was standing, at a speed of between 40 and 50 miles an hour and to leave a space of approximately two feet between his vehicle and the stationary one. As this negligence was in his opinion the cause of the accident and as the deceased had died in consequence of the injuries he then received, he convicted the appellant.

The first ground of appeal which Mr. Maisels, who appeared for the appellant, relied upon was that the learned Judge in the court below erred in his approach to the case in that he had - so to speak - descended into the arena and, as a result, his vision had been clouded by the dust of the conflict.

In support of this contention, he handed into court a detailed analysis of the questions which the witnesses had been asked during the whole course of the case. From this it appeared that 3,101 questions in all had been put to the witnesses and that, of these, the judge had asked 1,348, the prosecutor 924 and the defending counsel

829. The position which arose from the examination of the appellant was, counsel argued, still ~~xxxxx~~ more striking for of the 735 questions put to him, the judge had asked 426, the prosecutor 207 and the defending counsel 102.

In the case of Yuill v. Yuill which was a decision of the English Court of Appeal and is reported in 1945 Probate Division ~~pp.~~ 15, the following passage is to be found on ~~pg.~~ page 20 of the report:-

> "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue. That it is open to an appellate court to find that the view of the trial judge as to the demeanour of a witness was ill-founded has indeed

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been recognised by the House of Lords itself".

Mr. Maisels submitted that this was not the only undesirable feature of the learned judge's conduct of the case, for, from the very start of the appellant's examination-in-chief, he had interrupted counsel's examination of him by putting to him a series of continuous questions, which were really in the nature of vigorous cross-examination, and that these interruptions continued right throughout the examination-in-chief. Even while the appellant was being cross-examined, he continued, the learned judge took an active part in the cross-examination and afforded assistance to the Crown in attacking the reliability of his evidence.

Amongst the many passages to which Mr. Maisels referred the Court it is only necessary to mention three in order to make counsel's contentions clear. Just after the accused had been called and his Counsel had put to him a few introductory questions, the appellant stated that he had had a pint of beer at a hotel. The learned judge then intervened and the record discloses the following questions put to the appellant and the latter's answers to them:

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"By Selke, J.:

At what time did you stop there? - it could have been 6.30. When you say 'could have been' do you mean it could have been any time in the afternoon, or was it 6.30? - Yes, it was 6.30 p.m.
You mean you think it was probably about that time? - It was 6.30 p.m.
Why do you say 'could have been' if you know it was? Why do you say 'it could have been'? It was 6.30 p.m.

BY MR. MULLER:

How do you know the time was 6.30? - As I got out of the van I had a look at the time.

BY SELKE, J. :

Where did you look? - At my watch.

BY MR. MULLER :

Do you ordinarily wear a wrist watch? - Yes. Have you got it on now? - Yes (indicated).

BY SELKE, J. :

You remember you looked at your wrist watch and you say the time was 6.30? - Yes.

BY MR. MULLER :

What were you doing then? - I was just going into the Hotel.

BY SELKE, J. :

Why did you look at your watch then? - I just had a glance at it; there was nothing in particular that I had to see the time for.

It is funny that you remember looking

at it. Do you remember always when you glance at your watch? - No, not always.

Why do you remember this time? - That is just still in my memoty.

It just sticks in your memory? - Yes.

Why does it stick in your memory? - There is no particular reason for that."

At a later stage the learned judge interposed in the examination-in-chief to ask in reference to the deceased:

"Where was he: ~~aws~~ was he level with the car: did his body stick out from it, was his body in line with the car: was half the width of his body sticking out: don't you agree?" ---- No."

To all of which the appellant replied with the one word, "No".

At one stage of the examination-in-chief the learned judge's interrogation of the appellant occupied three pages of the record/and, in the course of it, the following appears from the record:-

(Learned Judge) "Do you not want to answer my question?"

(Appellant) "Yes I do want to answer it".

(Learned Judge) "Why do you not answer it; you understand my question?"

(Appellant) "Yes".

/ Learned Judge ...../12.....

(Learned Judge) "Why don't you answer it: do you understand it?2

(Appellant) "No, I beg your pardon".

In R. v. Gilson and Cohen (29 Cr. App. R. Cases) at page 181 Wrottesley, J. said:-

> "We adhere to every word which is to be found in CAIN (1936) 25 Cr. App. R. 204. This passage is to be found on p. 205: .....'There is no reason why the Judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable in this case that, beginning in the way which I have described, the Judge should proceed, without giving much opportunity to counsel for the defence, to interpose, and long before the time had arrived for cross-examination, to cross-examine Chatt with some severity. The Court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner. It is obviously undesirable that the examination by his counsel of a witness who is himself accused should be constantly interrupted by cross-examination from the Bench'".

No ground of appeal ~~application for the reservation of a point of law~~ based upon the course which the learned judge

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pursued was made. Mr. Maisels, however, contended that as the learned judge had based his judgment principally upon the unfavourable impression which the demeanour of the appellant had made upon him and had, in consequence of that impression, rejected his evidence; the manner, therefore, in which he had attacked the veracity of the accused right throughout his examination should be taken into account when the value of his evidence came to be weighed up by this Court. It was quite impossible - he argued - for any witness to give a consistent and coherent account of an accident when he was being subjected to continuous interruption and contradiction by the presiding judge.

In my opinion, the unfavourable impression made by the accused upon the learned judge is not of such consequence that the decision of this court must necessarily depend upon it. There are other features of the case to which much more importance can be attached. I would just say, with respect, that in my opinion the passages quoted from the judgments in Yuill v. Yuill and R. v. Gilson & Cohen (supra) set out correctly the limits which a judge should observe in the conduct of proceedings over which he is -

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presiding. Had the appellant's demeanour been a factor of such vital importance that the decision of this ~~Court~~ appeal must necessarily have depended to any considerable extent upon it, the active part which the learned judge took in the proceedings and more especially the manner in which he dealt with the appellant while he was giving his evidence might have placed this Court in a position of considerable difficulty.

Appellant's counsel attacked the learned judge's finding that the evidence established that the appellant was under the influence of liquor when the accident occurred to an extent that caused him to drive negligently. He described this finding as one in which the learned judge had misdirected himself. In my opinion, there is no substance in this contention. Paxman, who drove behind the appellant for some four or five miles, was so impressed by the erratic manner in which he drove that he made a note of the number of the truck. When the appellant was asked by Dr. Brodie if he had taken any liquor recently, he replied that he had drunk only one beer that evening, an answer which was perfectly untrue. If he had drunk three double tots of cane spirit shortly before the examination, there would appear to be no

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reason why he should have concealed that fact from Dr. Brodie. In my opinion the learned judge's finding is fully justified.

Appellant's counsels's next contention was that Paxman's evidence was in many respects unreliable and that the judge had erred in accepting his version of the collision instead of that given by the appellant. The principal ground upon which he bases this contention is that Paxman stated that a "metal to metal" contact occurred between the two vehicles when they collided and that he was wrong by reason of the fact that no paint from either of the vehicles was found upon the other. Nor did Paxman see the tin from which the deceased was pouring petrol into the car. Paxman had therefore, he argued, a mere momentary glimpse of the deceased at the time of the impact and his observation was imperfect and indeed inaccurate when compared with that of the appellant. Here, too, it appears to me that counsels's contentions are not well-founded. The metal to metal contact may well have been the contact between the appellant's vehicles and the petrol tin which the deceased was holding. Paxman admitted that he might have been mistaken as to the two vehicles actually striking each other, but he said that that is what

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appeared to him to have happened and he could only testify to what seemed to him to be correct. He was in no wise shaken in cross-examination in regard to his statement that he saw the deceased standing behind the right hand side of the car immediately before the collision and that he saw him being flung to the ground by the appellant's truck. Again I see no reason for rejecting the learned judge's finding that Paxman's evidence was correct and afforded a true description of how the deceased came by the injuries which caused his death.

Appellant's counsel's next contention was based upon the fact that the post mortem examination disclosed that the deceased was possibly under the influence of liquor when he was injured because an appreciable quantity of alcohol was present in his blood. This, said Mr. Maisels, lent a considerable measure of probability to the appellant's story that the deceased stumbled into the path of his truck and so caused it to collide with him. If this is correct and, he contended, it is much more likely to be correct than the account given by Paxman, who caught a mere momentary glimpse of the deceased, it was the deceased's own action which led to his being struck down and that action took place

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at a stage when the appellant could no longer avoid him. The mere fact that the appellant had driven close to the deceased was in those circumstances not negligent - per Rex v. Grunes, 1950(4) S.A. 279 (N.).

Moreover, he argued, the appellant could not under all the circumstances have anticipated that the deceased would make a sudden movement which took him right into the course which he, the appellant, was following in his effort to avoid the stationary car (Cf. Beech and Another v. Setzkorn and Another, 1928 C.P.D. 500). If then the deceased was the proximate cause of the accident and it was due to his own action that the appellant collided with him, as counsel maintained was clearly the case, the appellant was not guilty of culpable homicide even if the disaster had been preceded by some negligence on the appellant's part (R. v. Freeman, 1931 N.P.D. at page 464).

Mr. Maisels submitted, too, that the negligence of the deceased in parking the car very close to the centre of the road, when he had ample room to park off the tarred surface on his left hand side, with its lights off, and then standing behind the car where it was difficult

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to see him, were likewise negligent actions and that, even if the appellant drove close to this car under those circumstances he had taken the steps which any reasonable careful driver would have taken in passing a parked car on a main highway. As authority for this contention he referred to R. v. Heydenrich, 1942 T.P.D. 307 and to Manderson v. Century Insurance Co. Ltd., 1951(4) S.A. 533 (A). These cases are, however, in my opinion distinguishable from the present one in that, in each of them, the motorist who was compelled by the circumstances to pass an unlighted car standing near the centre of the road was prevented from avoiding it through the advent of a car coming from the opposite direction and thus barring his way. In this case there was ample room for the appellant to pass to the right of the parked car and the road was unobstructed.

The appellant admitted that he was driving at a speed of 40 miles an hour. He admitted that he only saw the stationary car when he was approximately 40 yards away from it and that, in swerving to avoid it, he passed within about two feet from it. The learned judge has found that his action in passing a stationary car at this

speed and driving very close to it was, under the circumstances, negligent. In passing sentence, he remarked that he had taken into the accused's favour the possibility that the deceased had stumbled into the way of the appellant's truck, but in his judgment he had already rejected the appellant's story that this actually occurred. It appears to me that, if the deceased made a sudden movement, or even stumbled, when he saw the appellant's truck bearing down upon him in such a way that he might well have thought that it was going to collide with him, his action was not a negligent one. The deceased was standing with his body projecting beyond the edge of his car into the roadway and the appellant states that he passed the car at a distance of about two feet. If the driver of a truck comes from behind a person standing in the road and swerves past within two feet of him at a speed of at least 40 miles an hour, it seems to me that he is threatening that person's safety. Directly the appellant saw the car it was his duty to slow down in order to enable him to pass it at a distance which a reasonable man would have regarded as sufficient to ensure that the deceased was not placed in jeopardy. The appellant was under the influence of liquor and for him, in that condition, to risk passing so close to the deceased without slowing down was in my opinion not only negligent but reckless.

The appellant stated that when he arrived at Verulam he discovered from the marks on his truck that he must have collided with the man at the rear of the stationary car and that he became frightened. He told Mohamedy that he was in trouble and asked for his help. Mohamedy said that he told him that an European had knocked into his van. ~~The appellant never suggested that a man had stumbled in front of his truck.~~ Sergeant du Plessis, to whom he reported the accident, was never asked if the appellant had told him ~~this story~~ that a man had stumbled against his truck and the accused ~~denied~~ did not say that he had done so. Mr. Maisels endeavoured to deduce from a single question put by the prosecuting counsel that he had told Sergeant du Plessis that this is what happened. But it does not

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not appear to me that it can fairly be deduced from the way in which this question was put that that inference is justified. ~~In any event, the appellant denied that he had told Sergeant du Plessis any such thing~~.

In view of the learned Judge's acceptance of Paxman's evidence as to the manner in which the accident happened and in view of the appellant's failure to tell that story either to his friend, Mohamedy, or to the Police when making his report, I am of the opinion, that the learned Judge was justified in rejecting it. He found that the proximate cause of the accident was the appellant's passing too close to the stationary car at the speed at which he was travelling and, in my opinion, there might well be added to those two factors a further one: i.e. that he only saw the parked car when he was about 40 yards away from it and at a time when it had become difficult to give it a wide berth, although it was actually visible in the lights of his truck for a much greater distance.

For these reasons I am of opinion that the learned Judge was correct in his finding that the appellant was guilty as charged.

The appellant was granted leave to appeal on the ground of the severity of the sentence as well as against

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the conviction and Mr. Maisels attacked the sentence, firstly, on the ground that the learned Judge had misdirected himself. In his judgment on the application for leave to appeal the learned Judge stated that, when he convicted the appellant, he had indicated that he regarded the fact that the appellant had driven when he was under the influence of liquor and that he had failed to stop after the accident as part of the circumstances under which the offence had been committed. He said, furthermore, that he had taken these two matters into account in weighing up the gravity of the offence and in deciding what punishment was the appropriate.

Counsel's submissions were as follows:-

As the Crown had charged the appellant with a particularised offence, it was not competent for the Court to travel outside the details set out in the indictment. The only issue between the Crown and the defence was: whether the appellant was negligent in his driving the truck and whether that negligence caused the death of Dhooma. As he was not charged with the statutory offences of driving under the influence of liquor and of failing to stop after the accident he could not be convicted of them and so they fell entirely outside the scope of the enquiry. The learned Judge had, therefore, no right to allow these factors to influence his decision

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as to what punishment should be inflicted.

It appears to me that, when considering whether the driver of a motor vehicle was reckless or negligent and in assessing the degree to which he failed to regard the rights of other people, it is permissible to take into consideration all the circumstances leading up to, and following upon, those of his actions from which the recklessness or negligence can fairly be inferred. To drive a motor vehicle when the driver's faculties are impaired through his having consumed intoxicating liquor appears to me to be in itself a form of recklessness, for how often has experience not shown that the intoxicated driver is the harbinger of disaster, and even of death, for innocent users of the highway. It may well be said that this does not apply to failing to stop after an accident, but, in the present case, the accused himself admitted that he knew that he had struck a tin, which he had seen in the deceased's hands when he passed the stationary car, and he should have known that he might have struck the man who was holding it. It seems to me that his action in driving on is indicative of his indifference towards the safety of the deceased and that it displays an element of carelessness and of disregard for the rights of other people.

I am of opinion, therefore, that the learned Judge was right when he took these two factors into account for the purpose of determining the appellant's sentence.

Mr. Maisels contended that the appellant was found guilty of negligence only, as opposed to recklessness or gross negligence, and that the learned Judge had overlooked the principle laid down by Centlivres, J.A.(as he then was) in Rex v. Mahametsa (1941 A.D. at page 86)where he said:-

> "We do not disagree with the view that imprisonment is an appropriate punishment in cases of recklessness, if by "recklessness" is meant gross negligence or a wilful disregard of the rights of other road users", as for example in the case of numbers of accidents which are caused by the dangerous practice of "cutting in", or driving round a blind corner on t the wrong side of the road, or passing another car on the crest of a hill".

Although the appellant did none of these things, it seemsto me that a further instance of gross negligence might well be added to those described by the learned Judge and that is: driving, while under the influence of liquor at a speed of 40 miles an hour within some two feet of a stationary car, behind the right mudguard of which a man was standing.

The learned Judge actually stated that he regarded this conduct as being reckless or negligent and, from the general trend of his judgment, he appears to have considered that the appellant was grossly negligent, a finding

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for which he had, in my opinion, ample grounds.

Finally, Mr. Maisels' contended that the severity of the sentence showed a wrong exercise of the Judge's discretion and produces a sense of shock. People who drive motor trucks, recklessly, or even carelessly, are in a different position from the drivers of ordinary motor cars. It quite frequently happens that they inflict very serious, or even fatal, injuries upon others and that, owing to the weight and more solid construction of the vehicles they are driving, they themselves suffer no harm. When they drive under the influence of liquor the menace which they become to the travelling public is greatly increased. The sentence does not produce in me a sense of shock and I am of the opinion that the learned Judge exercised his discretion correctly in imposing it.

The appeal is therefore dismissed.

C.G. Hall
A.J.A.
28th Sept., 1956.

Concurred:
Hoexter, Fagan, de Beer et de Villiers, JJ.A.

Court resumes 30th November, 1955.

SELKE J: The Accused, who is an Indian man of the age of 28, is charged with culpable homicide, the allegation being that on 12th November 1954, at or near Katzkop Hill, Verulam, he drove a motor vehicle (a truck) No. NT.568, on a public road wrongfully and unlawfully and in a reckless or negligent manner, in consequence of which it collided with one Mahomed Amod Dhooma, an Indian man, thus causing him injuries from the effects of which he died.

The Accused has pleaded not guilty, and has been defended by Mr. Muller.

The main evidence for the Crown about the alleged offence and the circumstances in which it occurred was given by one John Frederick Paxman, who said he was the transport manager for the Natal Estates Limited, and that, at the time of this occurrence, he lived at Verulam. He described how, on the evening of a Friday in November 1954 - he was uncertain of the date - he was going home towards Verulam from the direction of Durban in his motor car and in the vicinity of the White House Hotel he came upon a ¾ or 1 ton truck which he followed along the road as far as the slope of Katzkop Hill, 1½ to 2 miles on the Durban side of Verulam. He said that he followed this truck for 4 or 5 miles and, while he did so, its speed varied from time to time between more than fifty miles an hour down to forty, and that he was about 30 feet behind it most of the way and had it under observation all the time in the light provided by his headlamps, which were on bright. He says that he did not try to pass the truck for two reasons; firstly because it was going as fast as he himself wished to go, and secondly because from time to time it swerved about the road from its correct to its incorrect side and, I gathered, he was a little afraid to attempt to pass. He said that once - at the entrance to Mount Edgecombe village - it

/swerved

swerved off the road completely on its incorrect side, but that it re-entered the road and went on. So impressed was Paxman by the way in which this truck was being driven, that, shortly after passing Mount Edgecombe village, he made a note of its number.

Mr. Paxman said that, as this truck and his own car - a Citroen - approached Katzkop Hill, he noticed, from a distance of between 100 and 200 yards, another vehicle parked on the left-hand side of the road. He was unable to say whereabouts the wheels of this vehicle were in precise relation to the left-hand edge of the tarmac, nor whether its lights were on or not. But he said that the truck and his car approached this vehicle at about 45 - 50 miles an hour, and that, as they drew nearer, he saw someone standing at the back of the vehicle on the right-hand side. He says that this person appeared to him to be standing in line with the body of the car and, when he first saw him, he (the witness) was about 50 yards away.

The witness went on to say that the truck, NT.568, collided with this person and with the parked car, and threw the man in front of the parked car. Mr. Paxman says that he heard the noise and is quite sure the two vehicles collided. The truck then carried on up the hill in the direction of Verulam, and he (Paxman) chased it and got alongside it and shouted to the driver, who, he says, shouted something back to him, but he could not hear what it was. Mr. Paxman then reversed back to the scene of the accident and found an Indian man lying in the road. He identified the Accused as the driver of the truck which had knocked down the Indian man.

The witness says he spoke to the injured man in English and the latter replied, but he could not understand what he said. He added that the Indian's clothing did not seem to be damaged but he did not notice his shoes - other evidence

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was that two shoes (said to belong to the Deceased) were picked up in the roadway many feet in the Verulam direction from the spot pointed out as the point of impact.

Mr. Paxman was cross-examined closely and at considerable length by Mr. Muller, with the object of shaking his testimony, but, in my opinion, Mr. Muller's assault failed of its purpose, for Mr. Paxman impressed me as being an observant, responsible and fair minded person, and there was nothing which occurred to me, notwithstanding the cross-examination, to be contradictory or inherently improbable in what he said. It is true that he was uncertain about a number of details, but these struck me as being minor matters of observation, and, when one reflects that, so far as appears, he had no interest in the truck or its driver, nor any grounds to expect that he would be an eye witness of a serious accident, there was no reason why many of the details of the journey between White House Hotel and Katzkop Hill should particularly impress themselves on his memory.

The main purport of Mr. Muller's criticism of Paxman's evidence was, as I understood it, a suggestion that Paxman, though possibly genuinely believing that he saw the things he said he saw, was in truth exaggerating little things that happened, and was stating as observed facts things which in reality he had not observed, but had merely inferred. Mr. Muller instanced in particular the alleged statement by Paxman that he saw a "metal to metal" collision between the two cars, and also that he saw the vehicle parked at the side of the road from so far away as he says, and kept it under observation more or less continuously right up to the moment of the accident.

As to the first of these remarks, I doubt whether, in saying he saw a "metal to metal" collision, Paxman intended to convey all Mr. Muller read into that expression. The evidence

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of the Accused himself was that the man who was standing to the rear of the stationary car had in his hands a one gallon petrol or oil tin, from which it seems almost certain he was engaged in pouring, or was about to pour, petrol into the stationary car.

The damage to the truck and to the car suggests that, even if the cars did not come into direct contact with each other, the damage was caused by some object which came into contact with each by being as it were rolled or jammed between them. The evidence seems to me to leave no reasonable doubt that that object was the body of the Deceased plus the gallon tin that he had in his hands at the time of the accident.

The Accused himself describes a noise which conveyed to him, so he says, that his vehicle had struck a metal object such as a tin. And as, on the Accused's own statement, he left about 2 feet between his own truck and the stationary car, it may well be, it seems to me, that Mr. Paxman heard the noise made by the tin, and possibly the mudguards of one or both of the vehicles, and seeing, as he says, the Deceased thrown forwards in front of the stationary car, genuinely believes that he saw the vehicles in actual contact with each other without the intervention of any human body. At all events, the impression that Paxman gave me was that he genuinely believed what he said he saw.

As regards the further criticism of Mr. Paxman's having seen the vehicle and the man standing behind it from a distance of between 100 and 200 paces or yards, Mr. Muller submitted that this was impossible, having regard to the tests made during the trial, which showed that the vehicle became visible for the first time (and then only part of it became visible) from a distance of 268 feet. But there are many considerations to be taken into account before one could say that one disbelieved this part of Paxman's evidence; for example, Paxman

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had, to assist his vision, not only the lights of the truck which was some distance in front of him, but the lights of his own car also; and further, the conditions on the night of the accident were different from those on the night of the test, for, on the night of the tests, there was a misty drizzle, whereas on the night of the accident, it was a clear night. In addition, the evidence of Paxman as to the distance away at which he first saw the parked car represents no more than his recollection of something that happened at a time when he had no reason, so far as appears, to make a special note of what he saw.

Mr. Muller also queried the possibility of Paxman seeing the stationary vehicle and a standing man more or less continuously round one side of the truck or the other, as Paxman indicated he did see it. But, here again, it seems to me to be a matter of impression merely, and it is obvious that the further behind the truck Paxman's car was, the less the truck would tend to block Paxman's view towards his front.

On the whole, I find Mr. Paxman's evidence very impressive.

The accused's version was that this truck, which belongs to an uncle of his who has a shop and a farm in the neighbourhood of Chaka's Kraal, was a comparatively new vehicle, and that he, (the Accused) had taken it to Durban on that day to have it serviced. He said that he spent practically the whole day in Durban, most of it at the garage which was servicing the vehicle, but that he had, during the day, had a cup of tea with an aunt and had also drunk a glass of water. He says that, on the way back, he had stopped at a hotel in Durban called the Britannia Hotel, and, there, had had a pint of beer. After drinking that, he set off in the truck for Chaka's Kraal, and it was when he got to Katzkop Hill that this accident occurred. He denies that he drove in any unusual way, or

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swerved about the road, though he did not dispute travelling at between 40 and 50 miles an hour. He says that, after rounding the bend at the bottom of Katzkop Hill, he noticed, standing at the side of the road, a stationary vehicle without lights, and he said he pulled to the right to pass it, and that, when he had done so, he was on the left side towards the centre of the road - there is evidence that at this place the tarmac road is 20 feet wide. He said that the car was about 40 yards away when he first saw it, and he saw the car and the man standing behind it at the same time. His evidence is that the man had a gallon tin in his hand, and that, as his, (the Accused's), truck passed the stationary car, the man with the tin stumbled forward towards the centre of the road, in the direction in which he had been facing.

Originally, I understood the Accused to convey that he first noticed this stumbling when the man was practically opposite the door of the cab of the truck, but, when it was pointed out to him that there were dents on the truck immediately at the back of the left head-lamp - which was some considerable distance in front of the middle of the door of the cab - he seemed disposed to say that it all happened very quickly and the man might have stumbled before the cab door was opposite to him. Anyhow, the Accused says that he heard a noise which suggested to him that the tin had come in contact with his truck, and that he passed the stationary car and began to slow up with a view to stopping in order to see what had made the noise. He says he thought the man might have dropped the tin on the ground or on to the truck, or that the truck might have hit the tin. But he says he changed his intention to stop when Mr. Paxman overtook him and, travelling alongside, shouted to him. I gather he did not know Paxman, and he says he did not know what Paxman was telling him, or trying to tell him, because he could not hear

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what Paxman was saying, possibly because the window of the truck was not open between them. But he acknowledged that he made no serious effort to find out what Paxman wanted, and he accelerated again and continued his journey because, so he said in the witness box, he was frightened to stop in case he might be attacked on the road.

The Accused's further story is that he went straight to Verulam, and, there, to an hotel, where he had three double tots of cane spirit in quick succession, after which he went to look for an acquaintance, Mr. Mahomedy, first of all at the the latter's house and, then, in one of the streets, and, having found him, his intention was to persuade Mahomedy to go with him to the police to report. He says that up to the time he got out of his truck at the hotel in Verulam where he had the three double tots of cane spirit, he had not supposed that he had become involved in anything except a minor accident, but that, when he got out, he noticed a dent in the door of the cab, and he also noticed that the handle of the door had been twisted round, and he at once came to the conclusion that his truck had come into contact with the body of the person who had stumbled into his car, and that the accident was a serious one; hence, according to him now, his resort to the bottle, because he says he became very much afraid.

At all events, the evidence is that the Accused found Mahomedy not long after he had left the hotel, and he reported to Mahomedy, and asked him to go with him to the police.

Mahomedy's evidence was that, when the Accused first approached him, he said to him "Mr. Mahomedy I am in trouble and I want you to help me". Mahomedy says he asked Accused what the trouble was, and the Accused told him that he had had an accident on Katzkop Hill; that a European had knocked into his truck, and that he wanted to report the matter to the police. He impressed Mahomedy as being under the influence of

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liquor, and Mahomedy, having looked at certain of the damage to the truck, said it seemed to him to be not a serious affair and that he thought the Accused should go home. However, Mahomedy says, the Accused insisted that it was serious, and, so, they set off to go to the police station together, but on the way they met Sergeant du Plessis, to whom they reported.

That is Mahomedy's evidence and, in the main, it is to the same effect as the evidence of the Accused himself, although their evidence does not altogether coincide as to what the Accused said to Mahomedy.

It is clear, however, that the Accused was taken very soon after that to the surgery of Dr. Brodie, the District Surgeon, by whom he was tested for being under alcoholic influence. Dr. Brodie's evidence is to the effect that the Accused, by reason of his consumption of alcohol, would have been unfit to drive a motor vehicle at 7.45 - that is the time at which the Doctor understood the accident had happened. It is clear that the Accused gave Dr. Brodie to understand that the only alcoholic drink he had had at any relevant time was a pint of beer before he left Durban, namely at the Britannia Hotel in Umgeni Road. Dr. Brodie said he regarded that as an obvious under-statement.

If the story Accused now tells of having three quick double tots of cane spirit on reaching Verulam is true, then he lied to Dr. Brodie, and, from his general answers, and the impression he gave to Dr. Brodie, it is apparent that he realised perfectly well that the purpose of Dr. Brodie's examination was to test whether he was under the influence of alcohol. To my mind, it is sheer nonsense for him to suggest that, with that knowledge, he deliberately told a lie to the Doctor and then went on submitting himself to an examination for intoxication. Moreover, the impression that the Doctor seems to have gained - certainly his evidence

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conveyed this to me - was that, when he saw the Accused and tested him, the Accused was in the process of sobering up. Now that, surely, could not have been his condition had he shortly before the examination consumed three double tots of cane spirit.

In all the circumstances, I do not believe the Accused's story that he drank three double tots of cane spirit immediately after reaching Verulam, and I strongly suspect that it was an after-thought and an invention, designed to explain the state in which the Doctor found him to be.

Now the evidence of Paxman, which I accept, conveys clearly that, in his opinion, the Accused drove the truck in an abnormal way, which Paxman described. Such conduct seems to me quite consistent with the Accused having been under the influence of alcohol. It also seems to me to constitute driving recklessly or negligently. Moreover, the Accused's own version of the manner in which he passed the stationary car, namely at a distance he estimates at about 2 feet, indicates that he was negligent in the respect that he did not allow sufficient space between his truck and the stationary car

In my opinion, it is, Prima facie, reckless or negligent to attempt, when driving at a speed of between 40 and 50 miles an hour, to pass a vehicle stationary at the side of the road with a man standing next to it, leaving no more than approximately 2 feet between the two vehicles.

It is true, as pointed out by Mr. Muller, that, although at the preparatory examination the Prosecution framed three charges against the Accused, namely (1) culpable homicide; (2) driving under the influence of intoxicating liquor; and (3) failing to stop after an accident, the Crown has now brought the charge of culpable homicide only, and, consequently, that the Accused is not in these proceedings on trial for either of the other two alleged offences. Nevertheless, in

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my opinion, if he did drive under the influence of intoxicating liquor, or did fail to stop after an accident, these things are circumstances properly to be taken into account by the Court in the endeavour to get a complete overall picture of the circumstances in which the alleged offence of culpable homicide was committed, and as throwing light on the mental attitude of the Accused.

As a witness, the Accused impressed me as not being reliable in several respects, and there are several parts of his testimony which appear to me to be so inherently improbable that I disbelieve them, while there are other aspects of his story which I do not believe.

I disbelieve the Accused's statement that he thought he had only run into, or come into contact with, a tin, and not with the man in whose hands it was, and I do not believe his story that, as he was passing the man at the side of the car, the latter stumbled into his truck opposite the door of the cab, for it would appear to be a version not given by Accused originally, and, in my opinion, it is obvious that the damage to the truck was caused by a collision with the body of the Deceased and the tin, and the marks on the truck show, I think beyond question, that it was the left front of the truck which came into contact with the Deceased and his tin.

It was sought by Mr. Muller, - who, in an able and thorough argument, said everything which could reasonably be said for his client - to show that the Deceased was under the influence of liquor when he received his fatal injuries. That may, or may not, have been so. But, even if it were, it does not excuse the Accused's own negligence in passing, at the speed at which he was travelling, so close to the stationary car. Nor, further, do I believe the Accused's statement that he refrained from stopping because he was frightened of being attacked. I am by no means satisfied that it was ever his

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intention to stop; but there is the evidence of Paxman that, after the accident, he appeared to slow up, so it is but fair to give the Accused the benefit of the doubt on the point. Even so, it is clear that he did not stop, and the reason he gave did not appeal to me as satisfactory, nor, apparently, did it appeal to Mr. Muller either, for he advanced a theory which differed from the reason given by the Accused himself. I am inclined to think that the real reason was different from both, namely that, when Paxman came alongside his truck and shouted to him, he realised there was a European on the scene and he became concerned lest his intoxicated condition should be discovered, and, so, he decided to go on. But there is no more certainty about that theory than about either of the other two.

Mr. Muller, in his argument, dealt with many aspects of the case which it is impossible to discuss in detail now, although I have, I hope, considered them all. For example, he sought to make much of a theory based upon the supposed times at which the various incidents were said to have occurred, associated with the rate at which alcohol is said to be eliminated from the human body. But, in the present instance, the necessary data are lacking in regard to both times and alcohol, for the times are uncertain and so are the quantities of alcohol consumed by the Accused. It seems to me, therefore, that no good purpose would be served by attempting an investigation along these lines. It is sufficient, I think, to say that, in my opinion, the evidence establishes beyond controversy that the Accused was under the influence of alcohol to an extent which tended to cause him to drive without due care.

Mr. Muller also emphasised that the collision with the Deceased may well have been due to the negligent conduct of the Deceased himself, particularly in the respects (a)

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that he allowed his car to stand on the roadway without lights and (b) that he was himself under the influence of liquor and actually stumbled in the way of the Accused's truck. As to the first of these two, it is, I think, established that the vehicle was standing unlit upon the roadway; but it was upon its correct side. I am not prepared to hold that allowing an unlit car to stand in the roadway is, in all circumstances, negligence. But assuming in the present instance that it was negligent of the Deceased to allow the car so to be there, and assuming that the Deceased was under the influence of alcohol, in my opinion these things, while they may have contributed to the accident, were not the effective cause of it. It seems to me that the effective cause was the negligent driving of the Accused. And, as it is not disputed that it was this accident which caused the injuries to the Deceased from which he died, it seems to me that the Crown has established against the Accused the charge of culpable homicide. Accordingly my verdict is one of guilty of that charge.