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Judgment No. S.C. 133/83
Crim. Appeal No. 206/83

KENNETH SAMKANGE v THE STATE

SUPREME COURT OF ZIMBABWE,
GEORGES, CJ, BECK JA & GUBBAY, JA,
HARARE, NOVEMBER 7 & DECEMBER 7, 1983.

A.P. de Bourbon, for the appellant
P.J. Batty, for the respondent

BECK JA: Arising from an accident near Beit Bridge the appellant was charged with culpable homicide, alternatively with reckless driving in contravention of s 44(1) of the Road Traffic Act 1976. He was acquitted on the alternative charge but was convicted on the main charge and was sentenced to a fine of $150 or one month's imprisonment with labour in default of payment. He was also suspended from driving for three months.
He has appealed against both conviction and sentence.

The accident occurred in the south-bound lane of the main road from Beit Bridge to the north. The deceased was driving his car south towards Beit

Bridge and the appellant was driving a large mechanical horse and trailer in the opposite direction. The car collided with the mechanical horse at a T-junction where the tarred road to the Beit Bridge industrial sites (known as the Jenta road) meets the main road.
The Jenta road meets the main road at right angles, and lies to the east of it, so it was on the deceased's left and on the appellant's right. Traffic emerging from the Jenta road onto the main road is governed by a "Give Way" sign at the intersection.

The appellant, who was on his way to the industrial sites, had started to turn slowly across the main road in order to enter the Jenta road on his right. As he was doing so he saw, for the first time, an oncoming car that was travelling fast. He applied his brakes and stopped, partially on the incorrect side of the road. The oncoming car braked heavily but nevertheless collided with the off-side front portion of the mechanical horse, fatally injuring the deceased.

To the north of the collision point the main road is straight and level and then bends gradually to the west. From the collision point the appellant could see along the road for 468 meters before the road was lost to view because of the bend. He did not, however, see the oncoming car until it was about 80 meters from him, according to an indication he made to the investigating officer immediately after the accident. Later at the trial, when an inspection-in-loco was held, the appellant stretched this distance to about 120 meters.

Even on the basis of this latter indication it follows that the appellant failed to see the oncoming car for 350 meters of its travel within his field of vision, a distance it would have taken the car approximately 12,5 seconds to cover at a speed of 100 kilometers per hour, which was the speed at which the deceased had constantly driven that morning according to his wife, who was a passenger in the car and whose evidence the magistrate accepted.

It was argued that the omission to see the oncoming car much earlier than he did was not negligent on the part of the appellant who had to concentrate on turning his large vehicle into the Jenta road. I find that an extraordinary submission. Photographs of the scene show that the Jenta road is itself a wide tar road, as one would expect a road like that to be which has to accommodate the kind of traffic that serves industrial sites. Its junction with the main road is generously constructed, the wide tarred surface of the Jenta road having been even more widely extended, like the broadening mouth of a funnel, to meet the tarred surface of the main road itself. Apart from the appellant's own vehicle, the deceased' oncoming car, and an Army vehicle in the Jenta road that had halted at the painted Give Way lines preparatory to entering the main road

when it was safe to do so, there was no other traffic to hamper the appellant or to distract his attention, and it cannot be seriously suggested that the turn itself was a difficult one for a large vehicle to negotiate.

I can find no reason why a reasonably prudent driver in the appellant's position should not have kept the road ahead of him under proper surveillance and I consider that it was clearly negligent of him to have averted his eyes completely from the road ahead for so long as 12 seconds, which is a very long time under the circumstances. He knew that oncoming vehicles could be expected on the open main road at speeds of 100 kilometers an hour, and the risk was obvious that around the bend less than half a kilometer ahead there might well be a fast oncoming car that would be much too close 12 seconds later to allow the appellant to execute a turn across the south-bound lane on his wrong side of the road with a vehicle as large as the horse and trailer.

(The horse and trailer together measured 15,7 meters in length). I have no doubt that it was the appellant's clear duty to have looked to his front again immediately before he commenced to turn across the south-bound half of the main road. Had he done so he would at once have seen that the deceased's car was far too close to allow him to turn in safety and he would have remained on his correct side of the road until the deceased had gone past.

The further submission on the appellant's behalf was that, if he was negligent in commencing to turn when he did, his negligence was not the proximate cause of the collision and of the deceased's death. It was argued that the deceased could have safely passed the horse and trailer and that it was his negligent failure to do so that was the proximate cause of the fatal collision.

There might have been merit in this argument if the situation revealed by the evidence had been that the appellant had brought his vehicle to a stop while the deceased was still far enough away to see . that the appellant had halted and that he could with safety reduce speed and pass by on what was left to him of the eastern half of the roadway. But that was far from being the situation. When the appellant first saw the deceased, and before the appellant

had yet reacted to what he saw and applied his brakes so as to stop his vehicle, the deceased was only about 120 meters (at best) from him, or, expressed in terms of time at 100 kilometers an hour, about four seconds away. It would have taken the appellant a second or two to react and to bring his turning vehicle to a halt by braking, so he could not have been stationary for more than about two seconds before the deceased collided with him. Clearly, it was not a case of the deceased having had a sufficient opportunity to see that a vehicle which had commenced to turn across his path had desisted from doing so and had left him enough time and room to moderate his speed and avail himself of the space that remained to pass by in safety.

There is no evidence to show that it should have been apparent to the deceased, before the appellant's vehicle actually started to turn across his line of travel, that it was going to do so, and was not going to wait for him to pass before commencing its turn. The appellant said that he engaged his turn indicator some distance back from his actual turning point, but that would not of itself have suggested to the deceased that the appellant would turn at an inopportune time, and until the deceased saw the appellant's vehicle actually start to turn he would not have thought that the situation was fraught with danger. That the deceased did react to the situation that the appellant created is clear, because visible brake marks extended northwards from the rear of his car after the collision for 11,5 metres. If the oncoming car was only 80 metres away just after the appellant had started his turn, as he first indicated, it may well be that the deceased was not negligent at all. Or it may be that the deceased's look-out was not all that it should have been and that he could have become aware a little sooner of what the appellant was doing; but on the appellant's own showing, even having regard to the later and more favourable indication that he made to the trial court, that stage could not have been more than a very few seconds before impact, and any negligence in the deceased's look-out would have been no more than a contributing factor to what happened. It was the appellant's negligence that created the danger and that continued to operate as the predominant factor in causing the collision with its fatal consequences.

In my view therefore the guilt of the appellant on the main charge was satisfactorily established and he was correctly convicted. The sentence imposed on him was by no means excessive in the circumstances and I would accordingly dismiss the appeal,

GEORGES CJ: I agree.

GUBBAY JA: I agree.

Granger & Archer, appellant's legal representatives.